

# Reassessing the Legal status of Gaza

*by* Khin Maung Sein

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# REASSESSING THE LEGAL STATUS OF GAZA IN LIGHT OF THE ICJ'S RECENT PALESTINE ADVISORY OPINION

## ABSTRACT

Israel unilaterally declared in 2005 that they disengaged from Gaza and that the latter was no longer an occupied territory. Since then, the legal status of Gaza has become a contentious issue. The debate has resurfaced due to Israel's onslaught in Gaza that started after 7 October 2023. The situation has become worse due to a very recent controversial proposal of President Trump to assume control over Gaza and the relocation of its Palestinian residents to neighboring countries, as well as the Israeli military's plans for an extensive ground invasion to militarily occupy Gaza entirely. The paper is primarily doctrinal legal research, analyzing various interpretations of Article 42 of the Hague Regulations and the recent Palestine Advisory Opinion of the International Court of Justice on effective occupation. The paper finds that the Court rejects the requirement of boots on the ground and affirms the potential control approach, according to which Gaza is still an occupied territory. The Court also reaffirms the self-determination of Palestinians, including the people in Gaza. Despite whatever plans are in the minds of US and Israeli leaders regarding Gaza, Israel is legally bound to respect the right to self-determination of Palestinians and thus the two-state solution.

Keywords: Occupation of Gaza, ICJ's Palestine Advisory Opinion, Hague Regulations, actual control approach, potential control approach

## INTRODUCTION

Israeli armed forces occupied Palestine, inclusive of the Gaza Strip, the West Bank, and East Jerusalem, in 1967. In the Occupied Palestinian Territory (OPT), Israel extensively violated humanitarian and human rights law principles. In the 2004 Palestinian Wall Advisory Opinion, the International Court of Justice (ICJ) decided to respect the right of self-determination of Palestinians, to demolish the Wall, and to give reparation to them. Israel did not comply with the decision.

In 2005, Israel withdrew its armed forces from the Gaza Strip. Since then, a hot and deeply divided debate has started among States and commentators on the issue of whether Gaza is still an occupied territory. The definition of occupation has been interpreted in various ways, and commentators disagree on the facts. Concerning the interpretation of the law, many commentators rely on the traditional "Effective Control" test and argue to strictly apply the law of occupation as enshrined in Article 42 of the Hague Regulations.

On the other hand, many other commentators maintain that the existence or end of an occupation cannot be decided on the sole criterion of 'boots on the ground', but rather by looking at whether the occupier still maintains certain authority over the territory and its military can at any time take effective control. This is the extensive interpretation of Article 42, which combines the actual and potential control approaches.

The tragic Israeli military invasion and onslaught of Gaza started on October 7, 2023. At that time, the former Biden government made a statement that it opposed Israel's re-occupation of Gaza. Israel, however, announced that it intends to retain effective control of Gaza for an unlimited time (Parti, 2023).

The onslaught in the tiny enclave of Gaza underscores the magnitude of Israel's offensive. It is one of the most destructive military operations in recent history: in 11 months, 40,005 Palestinians were killed, 92,401 injured, and 1.9 million displaced (86% of the entire population)(Frankel, 2024). Regrettably, Israel did not accept any **decisions of the UN Security Council and the General Assembly** to cease fire or agree on an armistice, and ignored the ICJ's decision for interim measures.

Following over fourteen months of intense warfare, Israel and Hamas reached a ceasefire agreement on January 15, 2025. While this accord offers a glimmer of hope for peace, its implementation remains precarious, requiring coordination among the Israeli military, Hamas, the International Red Cross, international mediators, and an Israeli government facing internal divisions as hardline ministers voice their opposition (Lidman, 2025).

According to the **ce**fire agreement, Israeli forces would be stationed predominantly along the borders of Gaza with Israel and Egypt, maintaining a strategic presence on a key road dividing northern and southern Gaza. The ceasefire's first phase is expected to last six weeks, during which Hamas is set to release 33 hostages in exchange for nearly 2,000 Palestinian detainees held by Israel. Subsequent negotiations are planned to further stabilize the situation (Lidman, 2025).

Amid these developments, on February 4, 2025, the newly elected **US President Donald Trump** and Israeli Prime Minister Benjamin Netanyahu held a press conference at the White House. During the briefing, Trump put forth a controversial proposal in which the **United States** would assume control over Gaza, the relocation of its Palestinian residents to neighboring countries, and the transformation of the war-torn region into what he described as the "Riviera of the Middle East" (Harvey, 2025).

Trump's statement marks a dramatic shift from long-standing **US foreign policy**, which has historically endorsed a **two-state solution for Israel and Palestine**. He also did not dismiss the possibility of deploying American troops, asserting that the US would take whatever steps necessary regarding Gaza (Harvey, 2025).

Coinciding with Trump's declaration, the fragile ceasefire crumbled on March 18, 2025, when Israel unexpectedly launched airstrikes on Gaza, resulting in the deaths of hundreds of Palestinians. The motivations behind Israel's renewed military offensive are varied, though domestic political dynamics appear to be a significant factor. Hardline factions within the Israeli government have persistently opposed the ceasefire, advocating for the total displacement of Palestinians from Gaza and the re-establishment of Israeli settlements that were dismantled in 2005. With Netanyahu relying on these factions for political stability, their influence appears to have played a decisive role (Krever, 2025).

Compounding the crisis, reports indicate that <sup>11</sup> the Israeli military has drafted plans for an extensive ground invasion aimed at occupying Gaza entirely within the coming months and imposing military rule (Estrin, 2025). While the ceasefire agreement from January has not been officially nullified, the escalating military actions threaten to plunge the region back into full-scale war.

Additionally, Israel's security cabinet has approved a highly contentious proposal to encourage the mass emigration of Palestinians from Gaza. These actions suggest that Israel is working to align with the US president's vision of taking over Gaza while simultaneously appeasing the hardline factions within its government. Critics argue that any large-scale displacement of Palestinians <sup>13</sup> amid ongoing warfare would constitute ethnic cleansing, a violation of international law linked to war crimes and crimes against humanity (Karni, 2025).

Consequently, the question as to the legal status of the Gaza Strip has resurfaced. The debate again is whether the new Israeli arrangements on Gaza would amount to a renewed occupation of Gaza, or it is the intensification of the already existing occupation. What is crucial, however, is the accountability for Israel's serious violations of international humanitarian law (IHL) and international human rights law (IHRL) in Gaza.

The main objective of the present paper, therefore, is to reassess the legal status of Gaza after the so-called Israel's disengagement of 2005 and up to the present time, appraising the views of commentators from both sides of the spectrum and taking into consideration the recent ICJ's *Palestine Advisory Opinion*.

The methodology is primarily doctrinal legal research. As critical <sup>19</sup> analysis of the primary sources is an important aspect of the doctrinal approach, the paper analyzes Article 42 of the Hague Regulations, the commentary of the ICRC, and the findings of the (ICJ's *Palestine Advisory Opinion*, 2024), the decided cases, and the reports of the Independent Inquiry Commissions. Reliable secondary sources are also referred to.

After introducing the topic, the paper goes on with the background of the research, that is, the Six-Day War, the Israeli occupation of Palestinian territory, and the effect of the unilateral disengagement plan of 2005. The next section identifies the law applicable to occupation, namely, the interpretation of Article 42 <sup>21</sup> the Hague Regulations and an appraisal of the theoretical debate. After that, the paper analyzes the ICJ's *Palestine Advisory Opinion* in terms of the legal status of Gaza and the obligations of the occupying power. The paper then concludes with findings and recommendations.

#### LEGAL EFFECT OF GAZA DISENGAGEMENT

Palestine, inhabited mostly by Arab Palestinians, was part of the Ottoman Empire. After the First World War, Great Britain was given a mandate to administer Palestine by the League of Nations. The root cause of the Israeli-Palestinian conflict was the Balfour Declaration issued by the British government because it announced Palestine as a "national home for the Jewish people." In response to the Balfour Declaration, thousands and thousands of Jews migrated to Palestine. It created tensions between the two communities in Palestine and led to violent clashes (Origin and History, 2024).

<sup>22</sup> In 1947, a resolution was adopted by the UN General Assembly putting forward the “Partition Plan,” and urging to establish an Arab State and a Jewish State in Palestine (GA Res. 181, 1947). Arab Palestinians did not accept the plan because they thought that it was not fair and entirely reversed their idea of the state of Palestine.

In 1948, after Israel’s unilateral proclamation of independence, a war broke out. A Security Council resolution was adopted that fixed an armistice line known as the “Green Line” (SC Res. 62, 1948).

After the Six-Day War that broke out in 1967, Israel occupied all the Palestinian territories beyond the Green Line: the West Bank, the Gaza Strip, and East Jerusalem (Hamid, 2023). The Security Council unanimously adopted resolution 242 (1967) on 22 November 1967, affirming the illegality of acquiring territory by military means and urging Israel to withdraw from the occupied territories (SC Res. 242, 1967).

Since the end of the Six-Day War, the United Nations has consistently affirmed that Israel is the occupying power of the Occupied Palestinian Territory (OPT) that includes the West Bank, the Gaza Strip, and East Jerusalem (*Wall Advisory Opinion*, 2004). The ICJ first applied the term OPT in the 2004 *Wall Advisory Opinion*. In the 2024 *Palestine Advisory Opinion*, the ICJ officially approved that the term ‘Occupied Palestinian Territory (OPT)’ encompassed the West Bank, the Gaza Strip, and East Jerusalem and decided that it ‘constitutes, from a legal standpoint, a single territory unit (*Palestine Advisory Opinion*, 2024).’

The Israeli government announced in 2004 that there would be no more Israeli armed forces in Gaza by September 2005. This is known as the “*Gaza Disengagement Plan*.” The rationale behind the disengagement was to isolate Gaza and avoid international pressure on Israel to go ahead with the Israel-Palestine peace negotiations. Israel wanted to show the world that they were no longer occupying Gaza and that they had no obligations toward Gaza as occupying power under the IHL.

<sup>9</sup> This is the Israeli government’s official position and is reaffirmed by the Israeli judiciary. In 2008, the Supreme Court of Israel had to deal with a case challenging the legality of cutting the supply of electricity and fuel to Gaza. In *Gaber Al-Bassiouni v. Prime Minister*, rejecting Gaza as an occupied territory, the Court held:

“Since September 2005, Israel no longer has effective control over the events in the Gaza Strip...Israeli soldiers are not in the area on a permanent basis, nor are they managing affairs there....Nor does Israel have effective capability, in its present status, to enforce order and manage civilian life in the Gaza Strip.”

Apart from the Israeli government, many commentators also think that Gaza has not been an occupied territory since 2005 (Cuyckens, 2016; Samsan, 2010). They rely mainly on the traditional and strict interpretation of the definition of occupation, the essence of which is ‘boots on the ground’ or the physical military presence as the decisive criterion of the law of belligerent occupation. The 2005 decision of the ICJ in the *Armed Activities on the Territory of the Congo* case has come out as a booster for the traditional approach of boots on the ground.

On the other hand, Dugard, Special Rapporteur of the Human Rights Commission, found that: “The Disengagement Plan also provided that Israel would guard and monitor the external land perimeter of the Gaza Strip, continue to maintain exclusive authority in Gaza airspace, continue to exercise security activity in the sea off the coast of the Gaza Strip, and reserve the right to reenter Gaza at will (Dugard, 2008).”

In the same vein, Sanger checked the facts on the ground and affirmed: “Israel continues to control six of Gaza's seven land crossings, its maritime borders and airspace, and the movement of goods and persons in and out of the territory. Gaza is also dependent on Israel for water, electricity, telecommunications and other utilities, currency, issuing IDs, and permits to enter and leave the territory. Israel also has sole control of the Palestinian Population Registry, through which the Israeli Army regulates who is classified as a Palestinian and who is a Gazan or West Banker (Sanger, 2011).”

Due to this factual reality, the principal and subsidiary organs of the United Nations (GA Res. 63, 2008), international non-governmental organizations (Human Rights Watch, 2004), and a substantial number of eminent scholars (Dinstein, 2009; Aronson, 2005; Darcy, 2011; Jaber & Bentekas, 2023) believe that Gaza is still an occupied territory even after the disengagement.

This is the reason why the debate on the issue of whether Gaza is still occupied has become ongoing and tense to the extent that some commentators have looked for an alternative approach to justify the argument that Gaza is still an occupied territory. They have found the ‘functional approach’ as an exception to the general rule that foreign military presence is the decisive criterion for the effective control test (ICRC updated commentary, 2016).

Israel’s military onslaught in Gaza since 8 October 2023 has put forward the issue of Gaza again and raised the question of Israel’s obligations under IHL. In this tense situation, most commentators are eagerly waiting for the ICJ’s recent *Palestine Advisory Opinion*, with the hope that it may shed light on the ongoing debate.

The following section will deal with the doctrinal debate on interpreting the definition of occupation enshrined in Article 42 of the Hague Regulations, focusing on the actual and potential control approaches, and touching on the functional approach. The next section will appraise the recent advisory opinion of the ICJ concerning the issue of the legal status of Gaza in the context of the entire OPT.

## 20 INTERPRETING THE DEFINITION OF OCCUPATION

This section focuses on the definition of occupation and the effective control test, which lies at the heart of the notion of occupation. The section analyses the two approaches of effective control: the actual control and the potential control approaches. It also appraises the functional approach as an alternative way of resolving the novel and problematic cases of occupation.

The term occupation is defined in Article 42 of the 1907 Hague Regulations as follows:

“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*”(Convention IV Respecting the Laws and Customs of War on Land, 1907).

In its 2004 *Palistinian Wall* Advisory Opinion, and the 2005 decision on *Armed Activities*, the ICJ’s rulings on applying the law of occupation in the territories in question were entirely founded on Article 42 of the Hague Regulations. The same applies to the decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on questions relating to the law of occupation, for example, *Prosecutor v M. Naletilic’ and V Martinovic’*.

The above definition of occupation is, therefore, well established as the only legal basis to determine the existence of occupation. The requirements under Article 42 must be satisfied for the law of occupation to come into operation.

#### THE EFFECTIVE CONTROL TEST

Although the effective control test is “at the heart of the notion of occupation,” one cannot find the concept either in the Geneva Conventions or the 1907 Hague Regulations. It is a concept that has gradually developed in the legal discourse on the requirements for the existence of an occupation (ICRC Commentary, 2016). The common understanding is that the notion of effective control must conform to the text of Article 42 of the Hague Regulations. This is in harmony with the textual interpretation that “a treaty shall be interpreted ... in accordance with the ordinary meaning to be given to the terms of the treaty in their context...”, as enshrined in Article 31(1) of the Vienna Convention on the Law of Treaties, 1969

A careful perusal of the text of Article 42 demonstrates the fact that the first part of it encompasses the phrases “actually placed under the authority of the hostile army” and “such authority has been established”, referring to the “actual exercise of authority.” The second part uses the phrase “and can be exercised,” indicating the “potential exercise of such authority” (Benvenisti, 2024).

The text of Article 42 is, therefore, a combination of the two approaches to the effective control test, namely “the actual and the potential control.” Of the two approaches, the former postulates that the territory is occupied by establishing an actual exercise of authority over it, while the latter focuses on the ability of a foreign power to exercise its authority over it.

#### THE DEBATE ON THE INTERPRETATION OF THE EFFECTIVE CONTROL TEST

##### The Restrictive Interpretation

The restrictive interpretation of Article 42 suggests that the occupying power must maintain a physical military presence in the occupied territory, often described as the idea of ‘boots on the ground.’ In this context, the term ‘boot’ is generally understood to refer to ‘soldiers.’ This perspective holds that the law of occupation mandates the presence of soldiers on the ground who exercise ‘effective control’ over the occupied territory (Schmitt, 2024). The military presence must

be sustained for the entire duration of the occupation, not just at the outset but throughout the entire period. This interpretation is rooted entirely in the concept of ‘actual control’ and does not consider the possibility of ‘potential control.’

In the cases of *Sargsyan v. Azerbaijan* and *Chiragov and Others v. Armenia*, for example, the European Court of Human Rights (ECHR) stated that occupation, as defined by the 1907 Hague Regulations, occurs when a state exercises actual authority over all or part of an enemy’s territory. A fundamental requirement for such occupation is the physical presence of foreign troops—often referred to as the necessity of ‘boots on the ground’—without which the occupation cannot be established.

Although many commentators have supported the actual control test and accepted the physical Military presence as the basic requirement for an occupation (Arai-Takahashi, 2009), several other commentators embrace the potential control approach (Shany, 2005; Benvenisti, 2012).

Dinstein acknowledges that while effective control is typically ensured through the presence of military forces on the ground, an alternative theoretical argument emerged following World War II. With the increasing strategic significance of airpower, some scholars suggested that an occupying power’s authority might also be upheld by maintaining control over a foreign territory’s airspace (Dinstein, 2019).

Benvenisti argues that the nature of warfare has changed, the strategic value of local resources has decreased, and at the same time, foreign power tends to bear heavier obligations toward the local population in modern times and concludes that the ‘actual control’ test would, therefore, be more beneficial for the foreign power because it could argue that it has no responsibilities toward the local population under the IHL in the absence of the actual exercise of governmental authority (Benvenisti, 2015).

He concludes that “the potential control test is preferable because it can fill the sovereignty gap and ensure that the occupant is accountable to the occupied population” (Benvenisti, 2015). Since these are the main objectives of the law of occupation, the potential control test is in harmony with both the textual and the teleological interpretation of Article 42.

The two approaches are the two versions of interpreting the occupation’s definition under Article 42 of the Hague Regulation. Both are, therefore, qualified as valid interpretations. The only difference is that the actual control approach is strict and can create gaps in applying the law of occupation (difficult to apply in exceptional cases), whereas the potential control approach is more flexible and accommodating and can solve problems in novel situations.

#### The Extensive Interpretation

Shany notes that key judicial precedents and authoritative military manuals have provided a largely consistent framework for determining when an occupation begins. This framework focuses on the

<sup>6</sup> actual presence of occupying forces within the territory and their capacity to exercise effective governmental authority (Shany, 2005).

In the *Trial of Wilhelm List and Others (The Hostages Trial)*, the U.S. Military Tribunal in Nuremberg dismissed claims that certain areas of Greece and Yugoslavia were not occupied because they were under partisan control. Instead, the Tribunal stressed that occupation is defined by the occupier's ability to exert authority, even over regions it does not directly govern. The ruling stated:

“It is evident that the German Armed Forces retained control over Greece and Yugoslavia until their withdrawal in the fall of 1944. Although partisan groups managed to take control of some regions at different times, the Germans had the capability to reassert physical control over any area whenever they chose. The resistance forces' control was only temporary and did not negate the German forces' status as an occupying power.”

The dual requirement of actual and potential authority was formally established in the 1956 *U.S. Army Field Manual*. According to Section 355, an occupation<sup>6</sup> is defined by three key conditions: (a) an invasion, (b) the inability of the previous government to exercise its authority in the area, and (c) the effective replacement of the legitimate government's powers by those of the occupying military. However, Section 356 highlights that the occupier's control over the territory does not need to be constant or immediate. Instead, it is sufficient that the occupying force has the capability to deploy troops within a reasonable timeframe to assert its authority in the occupied region.

<sup>20</sup> The principle that occupation entails both a physical presence and the potential to govern the entire occupied territory has been reinforced in other major military manuals. For instance, the *United Kingdom Manual of Armed Conflicts* (2004) states that to determine whether an occupation exists, two criteria must be met: first, the previous government must be unable to publicly exercise its authority in the area, and second, the occupying power must be able to impose its own authority in place of the former government. Similarly, the *Canadian Joint Doctrine Manual: Law of Armed Conflict* upholds these same two conditions, mirroring the UK Manual's approach in defining a valid occupation.

<sup>6</sup> After citing with approval the two criteria set in the British Manual, the Israeli Supreme Court in the *Tsemel case* held that Israel was at the relevant time the occupying force in southern Lebanon, notwithstanding its omission to exercise most functions of government in the area.

<sup>1</sup> In *Naletilic*' case, the ICTY also accepts the capacity of the occupying power to send troops within a reasonable time as an alternative criterion for a valid occupation.

The argument for prioritizing potential control over actual control finds strong support in various policy considerations. This perspective discourages occupiers from neglecting their responsibility to govern the territories they occupy. If the standard were instead based solely on visible demonstrations of authority, occupiers might intentionally avoid maintaining law and order or providing essential governmental services. Such a scenario would leave the local population without any form of governmental protection, as their own government would be incapable of exercising authority, and the occupying force would deliberately evade responsibility.

Contrary to prevailing legal opinions and case law,<sup>13</sup> the International Court of Justice (ICJ), in its ruling on the *Armed Activities* case, appeared to affirm the ‘actual control’ test. The Court observed that “[it] 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.” In this case, the Court does not regard the mere ability to enforce authority as an occupation.

Judge Kooijmans, in his separate opinion in the *Armed Activities* case, criticized this approach, arguing that the requirement for an occupying force to fully replace the authority of the Congolese government was an unjustified restriction of the well-established criteria of belligerent occupation, as recognized in customary law since 1907.

In this case, the Court ruled that Uganda was not the occupying power in Congo, despite maintaining a military presence in certain areas, because its forces did not control other regions. At the same time, the Congolese government had also lost authority over these contested areas. Shany described this outcome as creating a problematic legal situation in which no international entity assumed responsibility for the human rights and basic welfare of the affected population (Shany 2005).

Similarly, Ferraro criticized the ICJ’s restrictive interpretation, arguing that it failed to reflect existing legal standards, which emphasize the capacity to exert authority rather than its actual implementation. He pointed out that a broader interpretation—one recognizing an occupier’s potential to exercise governmental control—aligns with post-World War II jurisprudence, various military manuals, and the dominant views in legal scholarship (Ferraro, 2012).

The appraisal of the recent *Palestinian Advisory Opinion* would, therefore, be of paramount importance to see whether the ICJ retains the actual control approach or follows the extensive reading of Article 42 by emphasizing the potential control approach, which is *lex lata*.

#### <sup>21</sup> AN ANALYSIS OF THE ICJ’S PALESTINE ADVISORY OPINION

On December 30, 2022, the UN General Assembly passed a resolution requesting an advisory opinion from the International Court of Justice (ICJ) in respect of the legal consequences that may arise from the ongoing violations by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, and from the policies and practices of Israel that affect the legal status of the occupation (GA Res. 77, 2022).

Subsequently, on January 17, 2023, the UN Secretary-General formally conveyed this request to the ICJ’s Registry. The Court rendered its historic advisory opinion on July 19, 2024, at a critical moment when Israel’s military operations in the Gaza Strip were at their peak.

At the outset, the Court emphasized that the application of international legal principles in a given territory depends on that territory’s recognized status under international law. Therefore, it first examined the legal standing of the Occupied Palestinian Territory (OPT). The General

Assembly's request specifically referred to "the Palestinian territory occupied since 1967," encompassing the West Bank, East Jerusalem, and the Gaza Strip. The Court affirmed that, from a legal perspective, the OPT constitutes a singular territorial entity whose unity, continuity, and integrity must be upheld. Consequently, all references to the OPT in this opinion pertain to this unified territorial unit (*Palestine Advisory Opinion*, para. 78).

The Court's main conclusions underscored that Gaza remains an inseparable component of the OPT, that Israel's extended occupation of the region constitutes a grave breach of international law, and that Israel must swiftly withdraw from the OPT. Additionally, the opinion addressed several unprecedented legal aspects. The Court also stressed that the United Nations and third-party States bear responsibilities in ensuring the implementation of its findings (*Palestine Advisory Opinion*, paras 265-83). In essence, this advisory opinion on Palestine ranks among the most significant rulings ever issued by the ICJ. This paper will particularly analyze the Court's stance on Gaza's legal status as an occupied territory.

#### THE LEGAL STATUS OF GAZA AND THE COURT'S OPINION

Reaffirming its 2004 *Wall Advisory Opinion*, the Court upheld that Article 42 of the Hague Regulations remains the definitive legal standard for determining whether a territory is under occupation. In its earlier ruling, the Court maintained that subsequent developments had not altered the occupied status of the West Bank and East Jerusalem or Israel's designation as the occupying Power. However, as the construction of the separation wall did not involve Gaza, the Court did not previously address Gaza's legal standing.

The Gaza Strip has been an integral part of the territory occupied by Israel since 1967. As the occupying Power, Israel exercised effective control over Gaza. Despite Israel's implementation of a disengagement plan, the situation on the ground continued to reflect Israel's authority over the region. Given the need for concrete evidence, the World Court examined official reports from UN Human Rights Council-mandated inquiry commissions. The first such report was submitted in 2015 by the Independent Commission of Inquiry, which affirms that:

"The facts since the 2005 disengagement, among them the continuous patrolling of the territorial sea adjacent to Gaza by the Israeli Navy and constant surveillance flights of IDF [Israeli Defense Forces] aircraft, in particular remotely piloted aircraft, demonstrate the continued exclusive control by Israel of Gaza's airspace and maritime areas.... Israel regulates the local monetary market, which is based on the Israeli currency and has controls on the customs duties. Under the Gaza Reconstruction Mechanism, Israel continues to exert a high degree of control over the construction industry in Gaza.... Israel also controls the Palestinian population registry" (Report of Independent Commission of Inquiry, 2015).

A second report, presented in 2022 by the Independent International Commission of Inquiry on the OPT, including East Jerusalem and Israel, reaffirmed that Israel retains control over Gaza's airspace, territorial waters, border crossings, civilian infrastructure—including water and electricity supply—and key governmental functions, such as the administration of the Palestinian population registry (Report of the Independent International Commission of Inquiry, 2022).

These are the facts on the ground that are reliable and probative. In consideration of these facts, the Court is of the view that:

“Israel remained capable of exercising, and continued to exercise, certain key elements of authority over the Gaza Strip, including control of the land, sea, and air borders, restrictions on movement of people and goods, collection of import and export taxes, and military control over the buffer zone, despite the withdrawal of its military presence in 2005. This is even more so since 7 October 2023” (*Palestine Advisory Opinion*, para. 93).

<sup>17</sup> Referring to Article 42 of the Hague Regulation, the Court emphasized that a territory is considered occupied when it falls under the authority of a hostile army. It underscored the significance of the effective control test in defining occupation, asserting that a State is deemed an occupier when it exerts effective control over a territory that does not belong to it (*Palestine Advisory Opinion*, para. 90).

<sup>13</sup> Regarding the effective control test, the Court did not specifically address the three key elements identified by Ferraro. However, in contrast to commentators who advocate the “boots on the ground” principle and prioritize physical military presence as the defining criterion for occupation, the Court ruled that occupation could still be confirmed even in the absence of military forces on the ground. The ruling of the court is in these words:

“Where a State has placed territory under its effective control, it might be in a position to maintain that control and to continue exercising its authority despite the absence of a physical military presence on the ground. Physical military presence in the occupied territory is not indispensable for the exercise by a State of effective control, as long as the State in question has the capacity to enforce its authority, including by making its physical presence felt within a reasonable time” (*Palestine Advisory Opinion*, para. 91).

To support this position, the Court first referred to the *USA v Wilhelm List and others* (commonly known as the *Hostages Trial*). Following Germany’s military invasion of Croatia in 1941, a puppet government was installed while Germany retained control through its military attaché. The Tribunal examined whether Croatia possessed sovereign independence from German military influence and concluded that it did not. It determined that occupation was not contingent upon the continuous physical presence of troops but rather on the control exercised by the occupying power, as troops could be redeployed at will.

<sup>2</sup> Additionally, the Court referenced *Prosecutor v Mladen Naletilic and Vinko Matinovic*, where the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) outlined a key factor in determining whether an occupying Power’s authority is established: the presence of a sufficient force or the ability to deploy troops within a reasonable timeframe to make the authority of the occupying power felt.”

The Court, therefore, asserts that:

“[F]or the purpose of determining whether a territory remains occupied under international law, the decisive criterion is not whether the occupying Power retains its physical military

presence in the territory at all times but rather whether its authority “*has been established and can be exercised.*” Where an occupying Power, having previously established its authority in the occupied territory, later withdraws its physical presence in part or in whole, it may still bear obligations under the law of occupation to the extent that it remains capable of exercising, and continues to exercise, elements of its authority in place of the local government” (*Palestine Advisory Opinion*, para. 92).

In the above ruling of the Court, the italicized phrase “*has been established and can be exercised*” is taken verbatim from the second part of Article 42 of the Hague Regulations. This ruling demonstrates that the Court in the 2024 *Palestine Advisory Opinion* reaffirmed the extensive interpretation of the effective control test, which is a combination of actual and potential control approaches, departing from the controversial opinion of the Court in its *Armed Activities case* that affirmed the actual control test as the exclusive criterion in determining the state of occupation.

Based on the legal analysis and factual considerations regarding the Gaza Strip, the Court determined that Israel’s withdrawal did not completely absolve it of its responsibilities under the law of occupation and that, instead, Israel’s obligations remain proportional to the extent of its effective control over Gaza (*Palestine Advisory Opinion*, para. 94).

#### ANALYSIS

The ICJ’s *Palestine Advisory Opinion* is a landmark and ground-breaking decision in many respects. The following is an analysis of important parts of the opinion that relate to the law on the existence of occupation and the legal status of Gaza.

The effect on the *Armed Activities case*

The *Armed Activities case* was decided in 2005. Many commentators were disappointed at that time as the judgment supported physical military presence as the requirement of belligerent occupation, departing from the existing State practice and case law. When the judgment was being prepared, the effects of the Gaza Disengagement Plan, 2005, might not have been seriously felt by the judges of the Court. In any case, due to the decision, the commentators were divided more on the issue of the legal status of Gaza. Many commentators and the ICRC tried to look for an alternative way of accommodating Gaza as an Occupied territory. They have found the functional approach as a solution. When the General Assembly applied to the ICJ for an advisory opinion on Palestine in 2023, many eyes were on the court, hoping that the court might clarify the law.

In the *Palestine Advisory Opinion 2024*, the Court casually refers to its own decision in the *Armed Activities case* 2005, by merely stating very generally that “A State therefore cannot be considered an occupying Power unless and until it has placed territory that is not its own under its effective control” (*Palestine Advisory Opinion*, para 91) These words are actually not in paragraph 173 of the *Armed Activities case*. The Court merely takes the general idea of ‘effective control’ from the *Armed Activities case*, without referring to the main ruling in that case that revives the actual control test. Immediately after generally referring to *Armed Activities case*, the Court goes on to pronounce its own ruling on the effective control test by asserting that “physical military presence in the occupied territory is not indispensable for the exercise by a State of effective

control, as long as the State in question has the capacity to enforce its authority, including by making its physical presence felt within a reasonable time” (*Palestine Advisory Opinion*, para. ).”

It is clear that the Court emphatically rejects the traditional requirement of ‘boots on the ground,’ and declares that without a military presence, there can be effective control. It thus a state of occupation. In other words, the Court implicitly abrogated the requirement of physical military presence of foreign forces at all times in occupied territory as laid down in the *Armed Activities* case. The *Palestine Advisory Opinion* 2024, therefore, is a landmark decision.

## The Legal Principle Applied by the Court

The Court refers to Article 42 of the Hague Regulations as the legal authority and relies on the second part of the Article, concerning whether the authority “has been established and can be exercised” (*Palestine Advisory Opinion*, para. 92). This opinion is primarily founded on the extensive interpretation of Article 42 and the application of the combination of the actual and potential control approaches of the effective control test.

The Court appears to favor the potential control approach, emphasizing that what matters is not the constant physical military presence of the occupying power, but rather its ability to assert authority, demonstrated by its capacity to project force and reestablish physical presence within a reasonable timeframe.

## The Legal Status of Gaza as an Occupied Territory

Judge Iwasawa criticized the court’s opinion by stating that the Court refrained from explicitly stating whether Gaza has continued to be ‘occupied’ under the law of occupation after 2005. However, due to the following grounds, there is no doubt that the Court considers Gaza as an occupied territory.

First, in its Advisory Opinion, the Court uses the term ‘effective control.’ This term can be interpreted as the continued existence of occupation.

Secondly, the approach applied by the Court is not functional, but a combination of the actual and potential control approaches of the effective control test. Israel’s effective control has already been established, and Gaza has been affirmed as occupied territory. This fulfills the requirement of the actual control approach. After the Disengagement Plan of 2005, Israel still has “the capacity to enforce its authority, including by making its physical presence felt within a reasonable time.” This fulfills the requirement of the potential control approach. Gaza, therefore, is still an occupied territory.

Thirdly, it is submitted that although the Court does not expressly state in its decision that Gaza is still occupied territory, it is implicit. In the context of the advisory opinion, the Court means that Gaza is still an occupied territory.

- (1) Paragraph 93 of the Court’s decision states that Israel has retained the ability to exercise, and has in fact exercised, key elements of authority over Gaza. This strongly suggests that Gaza continues to be under occupation.

- (2) Additionally, paragraph 262 affirms that the geographical scope of the General Assembly's inquiry covers the Palestinian territories occupied since 1967, including the West Bank, East Jerusalem, and Gaza. The Court maintains that these areas collectively form a unified territorial entity whose integrity and continuity must be upheld. Therefore, any references in the opinion to the Occupied Palestinian Territory pertain to this indivisible territorial unit. This legal recognition, echoed by the United Nations and the international community, reinforces the principle that Israel's unilateral Disengagement Plan does not alter Gaza's status. Consequently, Gaza remains an occupied territory alongside the West Bank and East Jerusalem.
- (3) Furthermore, in the matter of the legal obligations of Israel relating to the right of self-determination of the people of Palestine and cessation of the prolonged occupation, the Court asserts in Paragraph 262 of the Opinion that "this illegality relates to the entirety of the Palestinian territory occupied by Israel in 1967." Here again, the Court did not leave Gaza behind and took Gaza as an occupied territory in the same position as the West Bank and East Jerusalem.

#### FINDINGS

From the preceding analysis and discussions, the following are the findings:

- (1) In the *Palestine Advisory Opinion* 2024, the ICJ's decision is primarily founded on the extensive interpretation of Article 42 and the application of the combination of the actual and potential control approaches of the effective control test.
- (2) In its decision, the Court appears to reject the requirement at all times of physical military presence of foreign forces in occupied territory as laid down in the *Armed Activities* case. The recent opinion of the Court is, therefore, a landmark decision.
- (3) Although the Court does not expressly state in the advisory opinion that Gaza is still occupied territory, it is implicit. By reading the entire context of the opinion, it is clear that the Court treats Gaza as part of an inseparable single territorial unit and that Gaza remains an occupied territory together with the West Bank and East Jerusalem.
- (4) The UN General Assembly, the Human Rights Council, the UN Fact-Finding Mission to Gaza, the Independent Commission of Inquiry established by the Human Rights Commission, the Independent International Commission of Inquiry on the Occupied Palestinian Territory, the International Committee of the Red Cross (ICRC), International human rights NGOs, and an overwhelming majority of legal commentators, strongly believe that Gaza is still an occupied territory even after the 2005 disengagement plan.

#### CONCLUSION

Applying the restrictive interpretation of Article 42, some commentators argue that there must be boots on the ground, and without a physical military presence, there can be no occupation. This interpretation is too strict and appears not to comply with the textual interpretation, which is the general rule of interpretation under the Vienna Convention on the Law of Treaties. It does not consider the ordinary meaning of the term "can be exercised" in Article 42. It ignores the clear terms of the treaty.

The extensive interpretation of Article 42, which embraces both actual and potential control approaches, is in harmony with the general rule of treaty interpretation. International jurisprudence, influential Military Manuals, and several commentators, including Shany, accept the extensive interpretation of Article 42. However, on the facts, Shany contends that Israel does not possess the capacity to exert its authority over Gaza in a short time, and even under the extensive interpretation, Gaza is not occupied (Shany, 2005). However, it is a fact that Israel can exert its power and authority over Gaza in a short time due to the proximity of Gaza's location, Israel's sophisticated technological advances, and the superior quality of its air force and the enormous war machine, which is second to none in the contemporary world. These facts are proven in many instances of Israel's raids and attacks on Gaza.

In the recent Israel-Hamas conflict, for example, immediately after the Hamas-led attack on 7 October 2023, Israel's air force bombed the Gaza Strip. On 13 October, land forces started operations in Gaza. "Operation Swords of Iron", a full-scale invasion of Gaza, was launched on 27 October (Flower, 2023). Within a month, the major parts of the Gaza Strip were under the control and authority of Israel. It is a clear indication that Israel possesses the ability to exercise its authority over Gaza at any time at will.

<sup>5</sup> The ICJ, in its recent *Palestine Advisory Opinion*, follows the extensive interpretation of Article 42 and acknowledges Israel's effective control<sup>9</sup> over Gaza even after disengagement. Thanks to the landmark opinion of the Court, there is no doubt that Gaza is still an occupied territory. Israel's continued and prolonged occupation of the OPT (including Gaza), the failure to respect the right to self-determination of Palestinians (including people in Gaza), and the Alleged commission of war crimes and crimes against humanity against Palestinians (including people in Gaza) are clear violations of international law for which Israel is responsible. Israel is, therefore, responsible for making full reparation to the people of Palestine.

<sup>11</sup> The controversial proposal of President Trump to take control of the Gaza Strip and to evacuate Palestinians from Gaza to other countries, and Israel's reported plan to militarily occupy the entire Gaza Strip are blatant violations of international law and a total disregard of the legal rights of the Palestinian people.

As emphasized by the court in its Palestine Advisory Opinion, a resolution to the Israeli-Palestinian conflict can only be achieved through the realization of the Palestinian people's right to self-determination. This includes their right to establish an independent and sovereign State that coexists peacefully with Israel, with secure and internationally recognized borders for both nations (*Palestine Advisory Opinion*, para. 283).

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## CONFLICT OF INTEREST

The author declares that he has no conflict of interest in this study.

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