

Close Control, Remote Control: The Legal Status of Gaza and the Functional Approach to Occupation

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This article considers the legal status of Gaza after the 2005 “disengagement” when Israel ended its permanent military presence in Gaza and evacuated its civilian settlements from the area. Following these developments, the Israeli High Court of Justice held that Israel no longer occupies Gaza. A few academics expressed the same opinion. On the other hand, other writers argue that Israel’s continued control of Gaza’s airways and waterways, most of the border crossings, and many other dimensions of life implies that Israel continues to be the occupying power in Gaza.

The article examines these two positions and points to the problem in the position according to which the Israeli occupation of Gaza ended, taking into account the control that Israel continues to exercise and the fact that many elements of the occupation that started in 1967 continue to exist. However, the article also points to the limits of the position according to which the occupation of Gaza continues in the same form as before 2005. In the absence of a permanent military presence on the ground, the Israeli army does not manage the daily lives of Gaza’s residents, even if it influences them significantly. Therefore, a functional approach is proposed, according to which the duties of an occupying army have to be applied in the contexts where Israel continues to apply power and control. Following Felix Cohen’s critique of conceptualism, the aim of this approach is to replace the binary-conceptualist approach to the question of the existence of occupation with a functional analysis of control.

The article discusses the ways in which Israel continues to exercise control in Gaza, and addresses the Israeli High Court of Justice judgments concerning the status of Gaza. It shows how neglecting the occupation paradigm in favor of other paradigms, such as analysis from the perspective of the laws which regulate belligerency, “siege” or “closure,” or addressing the issue only from the perspective of human rights law is inadequate. These forms of analysis lack the special structure of the law of occupation, which addresses situations where a state exercises control outside its recognized borders, and recognition of the special status of “protected persons” in an occupied territory. The article points out how a shift to “remote control” facilitates the argument that the relevant legal frameworks stem from the law concerning the conduct of hostilities rather than the law of occupation. This risks not only losing the special protections of the law of occupation, but also legitimizing the exercise of lethal power towards the residents of Gaza, which is legally equivalent to a foreign state against which a war is waged rather than a territory which, with its population, is under foreign control. This is a result of the shift from the paradigm of policing in an occupied territory to a belligerency paradigm.

The article points to how the dispute over Gaza’s legal status and the attempt to argue its status is *sui generis* part of a longer process whereby, even before

disengagement, and actually since after the 1967 occupation, Israel has described the status of the territories it occupied as *sui generis*. It is argued that the repeated attempts to mark the status of the territories as “unique” serve as a pretext to deny the application of the law of occupation, with manufactured indeterminacy being a central element of Israeli control.