

*The Writing on the Wall: Rethinking the International Law of Occupation.* By Aeyal Gross. Cambridge: Cambridge University Press, 2017. Pp. x, 447. Index. doi:10.1017/ajil.2018.40

In this highly enriching book, Aeyal Gross, a professor of international law at Tel Aviv University and a leading expert in international humanitarian law (IHL) and international human rights law (IHRL), challenges and deconstructs the existing premises of the law of occupation. Gross uses a “functional” critique to analyze the issue of occupation from legal realist perspectives, using a contextual analysis to highlight the actual consequences and impact of legal rules on the lives of persons. The crux of his proposition is that the scope of the occupier’s obligations and responsibilities should be determined by the degree of power and control that it exercises functionally. Such a proposal goes beyond the common understanding that emphasizes effective territorial control when determining the obligation of an occupying power. It also transcends the fixation of the conceptual approach on the all-or-nothing, sovereignty-occupation binary (pp. 76–77, 126–29, 134–35, 210, 213–14, 224).

Gross contrasts his “functional and normative, control-based approach” to the “orthodox,” conceptual, and formalistic view of the law of occupation, which is built on a categorical divide along the sovereignty-occupation line. He argues that the latter approach has left deficiencies in both protections and accountability while remaining oblivious of the reality on the ground, such as in situations where occupation and sovereignty may be mixed (pp. 133–34). Emphasizing the need to transcend the “conceptual barrier” that dichotomizes sovereignty and occupation, Gross’s functional perspectives seek to ascertain how far the parameters of state accountability may be stretched under the law of occupation.

Several pivotal concepts run beneath his narratives as common threads: indeterminacy; sovereignty; “*sui-generization*” of occupation; and various forms of control that a modern belligerent power wields in lieu of territorial control

(what Gross calls a “control matrix”). In each of the chapters, Gross identifies built-in deficiencies in the orthodox approach to the law of occupation. His analyses reveal that such shortcomings are attributable to indeterminacy and discordance that inherently surround the structure of occupation, which is indissociably linked to the concept of sovereignty.

The book’s five chapters traverse the normative landscape relating to the structure of the law of occupation (what he characterizes as “*jus ad occupationem*”) and the substantive law governing the relationship between inhabitants and the occupying power (what he depicts as “*jus in occupationem*,” which encompasses components of IHL as complemented by IHRL). The chapters chart a lucid path through the complexities of many legal issues that are often steeped in political quandaries. Chapter 1 (“The Ends and Fictions of Occupation: Between Fact and Norm”) sets a pattern of his critique in relation to overarching issues, including the normative shift from conquest to occupation in historical terms, and persistent controversies over protracted occupation and the so-called “transformative occupation.” Weaving enlivened analyses of the case law into its thought-out narratives, Chapter 2 (“The Indeterminacy of Occupation: From Conceptualism to the Functional Approach”) explores at length core themes of this book: issues of indeterminacy deriving from the conceptual approach to the law of occupation; and how a functional approach helps ascertain a state’s responsibility under IHL. Chapter 3 (“Indeterminacy and Control in the Occupied Palestinian Territory”) delves into repercussions of indeterminacy on occupation policies and control mechanisms implemented in occupied Palestinian territories. Within this elaborate expository framework, Gross is sure-footed in applying a “functional” prism of probing to legal issues such as the status of the territories, Jewish settlements, the applicability of the Geneva Civilians Convention (Fourth Geneva Convention), the impact of the 1993 Oslo Accords, and the nature of the Israeli control over Gaza after disengagement (2005). In Chapter 4 (“The Construction of a

Wall Between The Hague and Jerusalem: Humanitarian Law or a Fata Morgana of Humanitarian Law”), the author compares in depth the decisions of the International Court of Justice (ICJ) and the Israeli High Court of Justice (HCJ), with special regard to the wall/security barrier. In Chapter 5 (“The Securitization of Human Rights: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?”), Gross’s critique turns to implications of what he calls the “securitization of human rights.” Readers may be gripped by his sustained challenge to the general thesis that IHRL can enhance effectiveness in safeguarding civilians under occupation. All of the chapters are unified by a common theme—revealing the inherent indeterminacy in the foundation of the law of occupation and highlighting the need to reconceptualize the legal framework of occupation from a functional perspective.

Scattered as they are, some pieces of evidence supporting Gross’s functional approach to identifying state responsibility can be found in the case law. One salient example was exposed in the *Aerial Bombardment* case, where the Ethiopia-Eritrea Claims Commission (EECC) considered Ethiopia’s responsibility for the civilians on the Western Front under Part III, Section III of the Fourth Geneva Convention. The EECC stated that “not all of the obligations” of this section would revolve around the Ethiopian armed force that was, while anticipating combat, present there only for a few days.<sup>1</sup> This can be read as suggesting that the accountability of a state may be determined by an assessment that takes into account changes in the degree of control. As noted by Gross, the *Aerial Bombardment* decision verged on recognizing the idea of “differentiated responsibility” of an occupying power based on the capacity and power it exercises, an idea that is already cognizable when

assessing the responsibility of non-state actors under IHRL (p. 76).<sup>2</sup>

Another virtue of Gross’s functional approach is to widen the scope of the responsibility of a state under the law of occupation to encompass the accountability for diverse forms of control that it exerts over the lives of a civilian population (and possibly, in this reviewer’s reading, even for their “reverberating effects”). According to his functional approach, a state’s obligations may extend beyond *territorial* control to cases where the form of control is over persons or, in some circumstances, even virtual.

As Gross suggests, delineating the (temporal) framework of occupation is not merely an epistemic question. Instead, this should be governed by “normative perspectives” (pp. 18–19, 34, 102, 250, 251–52). Yet, the very attempt to demarcate the scope of occupation itself may be contested, for instance during a transition from the phase of invasion to that of occupation. According to a formalist approach, the zone of invasion, which is governed by the paradigm of IHL on the conduct of hostilities, is set apart from the state of occupation, which is subject to another paradigm of IHL. As is well-known, the so-called “Pictet theory” focuses on control over persons—namely on the fact that a person has fallen into an adversary’s hands.<sup>3</sup> The International Criminal Tribunal for the former Yugoslavia in *Naletilić* followed this approach.<sup>4</sup> For this thesis, it does not matter that such control over persons takes place outside occupied territory, as in a battlefield. Gross argues that *Naletilić* reminds us of “the crisis of the law of occupation and the indeterminacy” as to when this body of law applies (pp. 107–08, 124). The fact that this thesis remains divided among experts demonstrates that the law of occupation suffers from

<sup>2</sup> Andrew Clapham, *Human Rights Obligations of Non-state Actors in Conflict Situations*, 88 INT’L REV. RED CROSS 491, 502 (2006).

<sup>3</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION OF 12 AUGUST 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, VOL. IV, at 45 (Jean Pictet ed., 1958).

<sup>4</sup> Prosecutor v. Naletilić, Case No. IT-98-34-T, Judgment, para. 220 (Mar. 31, 2003).

<sup>1</sup> Western Front, Aerial Bombardment, and Related Claims (Eri. v. Eth.), Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25, and 26, Partial Award, para. 27 (Eritrea Ethiopia Claims Comm’n Dec. 19, 2005).

discordance even as regards such a foundational question as the beginning of its application. Gross's nuanced approach represents an improvement over the traditional conceptual approach in that it ascertains the degree of state responsibility by reference to the degree of control. Pictet's theory is considered to bolster Gross's functional perspectives in underscoring the "substance of control and relationships" and "differentiating along both the legal and factual axes in ways that would ensure accountability" (p. 78).

As known, the gap between the conceptual approach and social reality has become apparent in Iraq after the adoption of UN Security Council Resolution 1546 (2004). Gross's functional approach bridges a gap between a school of thought that endorses the constitutive effect of Resolution 1546 in terminating occupation, and the fact that the interim government depended heavily on the multinational troops to maintain stability and security (pp. 102, 247).

Likewise, dissonance produced by the formal approach is telling as regards the legal status of the Gaza Strip after Israel's disengagement (2005), whose inhabitants are not citizens of any state. Gross's functional analysis criticizes the approach of the HCJ in *Al-Bassiouni*<sup>5</sup> for ignoring forms of control that are less than effective control. He suggests that Israel's continuing control of energy supply, food security, and maritime and aerial control reveals the "circularity" of the conceptual approach to occupation (pp. 211, 241). Again, Gross proposes that the residual obligations under the law of occupation should be evaluated along with the varying degree of control over territory that Israel as the former occupying power retains.

The unmistakable conclusion is that Gaza civilians are trapped in a tragic loophole (a sort of "normative dystopia") left by the formalist readings of the law of occupation, which presuppose the resumption of sovereignty. Gross argues that the regime of control wielded over the Gazan civilians epitomizes the "*sui generis*" of occupation (pp. 222–23, 246). Beneath his criticism that *Al-*

*Bassiouni* failed to take into account modalities of control that minimize friction with local inhabitants lies an implicit but insightful revelation: legal indeterminacy incentivizes an occupying power to switch to impersonalized forms of control that reduce contact with local population. Such "indirect or invisible occupation" over a foreign territory circumvents the state's positive obligations under the law of occupation.<sup>6</sup> Gross cogently criticizes that the HCJ's evasive approach has been followed in tandem with its "pick-and-choose" approach to the application of IHL (pp. 128, 130, 133, 172, 210–13, 253).

Indeterminacy over the relevance and weight of the law of occupation in relation to IHRL may be compounded by incongruence in judicial decisions. As regards Northern Cyprus, in its earlier judgments in *Loizidou* and *Cyprus v. Turkey*, the European Court of Human Rights (ECtHR) affirmed a continuing violation, above all, of the property rights (and the right to home) of displaced Greek Cypriots.<sup>7</sup> These decisions are in harmony with the property rights of civilians under the law of occupation. Yet, in its later admissibility decision in *Demopoulos*,<sup>8</sup> the ECtHR Grand Chamber held that the applicants had to pursue the procedure instituted by the "Turkish Republic of Northern Cyprus" (TRNC) to fulfill the requirement of exhausting local remedies. The ECtHR referred to the considerable passage of time since the Turkish invasion in 1974, favoring a pragmatic stance that deferred to "a solution on a political level."<sup>9</sup> While sanctioning the legality of the procedures established by the occupying power or its "agent," it failed to apply the law of occupation, much less to pronounce on the illegality of Turkish settlements under Article 49(6) of the Fourth Geneva

<sup>6</sup> See also EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 53 (2012).

<sup>7</sup> *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216, para. 64; *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, paras. 175, 189.

<sup>8</sup> *Demopoulos v. Turkey*, 2010-I Eur. Ct. H.R. 365.

<sup>9</sup> *Id.*, para. 85; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 16, para. 111 (June 21).

<sup>5</sup> HCJ 9132/07 *Al-Bassiouni v. Prime Minister of Israel*, Judgment (Jan. 30, 2008) (Isr.).

Convention. The result was that the court ended up confirming the hard facts (displacement of Greek and Turkish Cypriots, and settlements by Turkish mainlanders) that had accumulated in disregard of the law of occupation.<sup>10</sup> As noted by Gross (pp. 93, 95–96), to explain the incoherence of the ECtHR's approach to cases concerning Northern Cyprus, perhaps one may be resigned to Koskenniemi's somber diagnosis<sup>11</sup> of the argumentative structures of international law: the trajectory has fluctuated from the "utopian" approach shown in *Loizidou* to a more "apologetic" stance revealed in *Demopoulos*.

Further, in cases relating to the "Nagorno-Karabakh Republic," the ECtHR's clumsy understanding of the law of occupation has added haziness even to the positivist and conceptual approaches. In *Chiragov*, the ECtHR insisted that "occupation is not conceivable without 'boots on the ground.'"<sup>12</sup> This narrow reading deviates from a standard doctrine<sup>13</sup> and from the ICJ's approach in *Armed Activities*.<sup>14</sup> As Gross notes, the ECtHR's insistence on such a restrictive formula was a missed opportunity to suggest possibly expanding parameters of accountability under the law of occupation in harmony with the changing nature and form of control (p. 247).

Returning to the Israeli occupied territories, one of Gross's salient criticisms is that the HCJ has integrated a different variable into IHL's vertical appraisal process (meaning the process in which the occupying power owes obligations toward the occupied civilian population). He argues that the rights of Palestinian civilians

under IHL are undercut by the occupying power's added responsibility to take into account security considerations of Israeli settlers, which are couched in the robust language of IHRL. The introduction of such a horizontal dimension of clashes of rights has given rise to an analytical framework comprised of the triad relationships (the Israeli military authorities; the Palestinian civilian population; and the Jewish settlers) (pp. 167, 172, 176–77, 346–49, 369, 395). Convincingly, Gross explains how the tendency to blend human rights discourse with security arguments ("securitization of human rights") has resulted in eclipsing the rights of Palestinian civilians under IHL. The kernel of his argument is that a human rights discourse may risk overlooking the structural inequality that glaringly exists between the Palestinians, who have limited chance of success in their IHL-based petitions before the HCJ, and the Jewish settlers, who can benefit from the extraterritorial application of the whole stock of the Israeli law (pp. 318, 320, 326, 347–49, 360–63, 369–70, 390).<sup>15</sup>

Overall, Gross expresses concern that injecting IHRL into the occupation context has contributed to indeterminacy and dilution of the relative strength of IHL rules (pp. 93, 95, 377, 394–95). His critique is cogent in highlighting that the perceived bona fide nature of human rights discourse, and its tendency to be abstract and decontextualized structural and political issues of occupation, sidelines the "inherently undemocratic and rights-denying nature" of occupation (p. 390).

With special regard to the security barrier constructed on Palestine occupied territory, the HCJ in *Beit Sourik*<sup>16</sup> and *Mara'abe*<sup>17</sup> found that specific segments of the barrier did not satisfy the proportionality test under IHRL. These decisions are praiseworthy for having refuted the Israeli government's robust security rationales and ordered

<sup>10</sup> Compare YAËL RONEN, *TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW* 97 (2011).

<sup>11</sup> MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006).

<sup>12</sup> *Chiragov v. Armenia*, App. No. 13216/05, Judgment, para. 96 (Eur. Ct. H.R. June 16, 2015).

<sup>13</sup> See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 44 (2009) ("the Occupying Power must deploy 'boots' on the ground in or near the territory that is under occupation") (emphasis added).

<sup>14</sup> *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 ICJ Rep. 116, paras. 169, 172 (Dec. 19).

<sup>15</sup> See also SHARON WEILL, *THE ROLE OF NATIONAL COURTS IN APPLYING INTERNATIONAL HUMANITARIAN LAW* 46 (2014).

<sup>16</sup> HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel*, Judgment, paras. 44–85 (May 2, 2004) (Isr.).

<sup>17</sup> HCJ 7957/04 *Mara'abe v. Prime Minister of Israel*, Judgment, paras 110–16 (Sept. 15, 2005) (Isr.).

rerouting of the barrier. For Gross, however, even those progressive breakthroughs fail to confront a core structural issue: that the settlements were constructed under the authority of a military commander that, in his view, acted *ultra vires* in breach of the Israeli administrative law, the law of occupation, and the principle of self-determination. According to him, the refusal by the HCJ to treat settlements as the heart of the structural problem shows its “blindness to the bigger annexational project that is taking place under the guise of security” (pp. 310, 318, 320, 326).

The HCJ has unapologetically affirmed that the barrier has been erected to protect not only Israeli citizens and others from cross-Green Line attacks, but also the settlers in the occupied territories. It has held that “the military commander is authorized to construct a separation fence in the *area* for the purpose of defending the lives and safety of the Israeli settlers in the *area*.”<sup>18</sup> Gross contests the legality of the security barrier *overall* (and not merely the legality of segments thereof). His rationale lies in the macroscopic evaluation: the dubious linkage of the barrier to the enterprise of settlements in furtherance to *de facto* annexation; and the barrier’s excessive impact on the already desperate living conditions of the Palestinians under prolonged occupation (pp. 281, 296–97, 301, 306–07, 310, 313). This approach casts serious doubt on the Israeli government’s statement, confirmed by the HCJ, that the barrier was temporary and that its purpose was military-security, not political (in the sense of expanding settlement or annexation). On this score, Gross’s assessment converges on the ICJ’s approach in *Wall* that “looked at the forest, and not only at the trees” (pp. 307–08). This is a striking rebuke to *Mara’abe*, where the HCJ, presumably to fend off such a possible charge, held that “the Court shall not ignore the entire picture,” and that “its decision will always regard each segment as a part of a whole.”<sup>19</sup> Gross sides with the ICJ’s appreciation that “the construction of the wall and its associated regime

create a *fait accompli* on the ground that could well become permanent.”<sup>20</sup>

The most salient achievement of Gross’s book is to craft a new framework for the law of occupation based on functional analytical perspectives. This innovative book recurrently engages readers to go beyond the assumptions on which the conceptual approach to the law of occupation is built. In line with critiques by other progressive Israeli academics, the book’s critical analyses focus mostly on Israeli executive and judicial policies relating to the occupied Palestine territories. It is hoped that Gross’s insightful and refreshing analysis may positively influence future Israeli policies toward the settlements in a way that would allow for reconciliation and enduring peace between the Israelis and Palestinians, and for the self-determination of the latter.<sup>21</sup> From a global and academic context, the book serves as a valuable catalyst for reconceptualizing theories of state responsibility under the law of occupation based on divergent types of “control matrices.”

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<sup>20</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, para. 121 (July 9).

<sup>21</sup> Theodor Meron, *The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War*, 111 AJIL 357 (2017).

<sup>18</sup> *Id.*, para. 19 (emphasis in original).

<sup>19</sup> *Id.*, para. 74.