

Israel – Hamas 2023 Symposium – The Question of Whether Gaza Is Occupied Territory

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On October 7, Hamas launched a brutal attack that killed more than 1,400 people and injured another 6,900 individuals, including at least 32 Americans. Hamas also took over 240 hostages in violation of the law of armed conflict (LOAC). After the recent pause in fighting, Israel indicates that 136 hostages still remain in Gaza. Even as fighting continues, the Biden Administration is beginning to plan for who will “run the territory once the shooting stops.”

In October, President Biden said it would be a mistake to “occupy Gaza again,” but administration officials now acknowledge that the best of many bad options may be to “return to direct Israeli occupation of the Gaza Strip.” Prime Minister [Benjamin Netanyahu](#) has said he will oppose the Palestinian Authority returning to power and wants to “build something different” when the war is over. He stated that Israel must have general control over the territory, including security, but that a newly created Palestinian entity would need to provide internal governance, not the Palestinian Authority.

These recent statements once again raise questions with respect to the status of the Gaza Strip as occupied territory. There is no consensus whether the proposed arrangement would result in a new occupation or whether Israel is already occupying Gaza. Unsatisfyingly, the answer depends upon whom you ask.

This post considers why occupation with respect to the Gaza Strip is such a contentious debate by considering: (1) when does an occupation occur under LOAC; (2) the components required for “effective control”; (3) the application of the “effective control” test to Gaza after 2005; (4) the “functional” approach to occupation in Gaza; and, (5) assuming there is no current occupation, does the current military operation mean that Israel is now occupying those areas.

When Does an Occupation Occur?

The key sources of treaty law regarding the existence of an occupation are the 1907 Hague IV Regulations and the Fourth Geneva Convention of 1949. Article 42 of the Hague Regulations defines 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.

The determination of whether an occupation exists, although not easy to make, is a question of fact. It does not rely on a subjective perception of the parties to the conflict, but rather an objective determination based on the *de facto* exercise of authority by the hostile armed forces.

Common Article 2 of the 1949 Geneva Conventions expanded the notion of occupation to include instances where an occupation exists when there was no armed resistance. Other provisions, specifically Part III, Section III of the Fourth Geneva Convention, contain prescriptions with respect to occupied territories. However, the International Court of Justice (ICJ) advisory opinion in the Wall proceedings and its judgment in the Armed Activities case exclusively relied on Article 42 of the Hague Regulations as the basis for determining the existence of an occupation.

Accordingly, under LOAC, territory is considered occupied whenever it comes under “the effective control of hostile foreign armed forces, even if the occupation meets no armed resistance and there is no fighting.”

The Effective Control Test

The effective control test consists of three main elements: (1) the physical presence of armed forces without the consent of the government in place at the time of the invasion; (2) the inability of the government in place to exercise its powers by virtue of the foreign forces’

presence; and (3) the foreign forces are in a position to exercise authority over the territory in lieu of the government. These components are still the subject of debate. For example, is the presence of *military* forces in occupied territory required? Does it require the actual assertion of authority or is it the ability to exert authority? Finally, must the occupying power exert exclusive authority over the territory in lieu of the displaced government?

Presence of Foreign Troops

The presence of foreign armed forces is considered a requirement for the establishment of an occupation. This means that there must be “boots on the ground.” As noted by Tristan Ferraro, the physical presence of the hostile army in occupied territory is presumed throughout the Hague Regulations and the Fourth Geneva Convention. This position was reconfirmed in two decisions by the European Court of Human Rights with respect to the Nagorno-Karabach region, finding that “physical presence of foreign forces is a sine qua non requirement, i.e., occupation is not conceivable without ‘boots on the ground.’”

However, some argue that once occupation has been established, the requirement for “boots on the ground” is lessened and effective control can still be maintained by other means without the permanent physical presence of troops. Yoram Dinstein concludes that an occupation is not contingent on maintaining troops throughout the occupied territory, but it still must control the important places. Interestingly, in the first edition of his book, Dinstein stated that the “presence of boots on the ground is required ‘in or near’” the occupied territory, suggesting that permanent physical presence was not required. However, in the second edition, Dinstein clarified that “the words ‘or near’ were not meant to exclude such presence altogether.” To avoid any confusion, he deleted that phrase.

Exercise of Authority by Foreign Forces

The effective control test also raises the question whether the State must exercise actual control or whether the mere ability to exert authority over the occupied territory suffices. In the Armed Activities case, the ICJ held that an occupation required the foreign forces to exercise actual authority, not merely being able to exercise authority. This holding has been roundly criticized as being too narrow an interpretation and does not reflect *lex lata*, which emphasizes the ability to exercise authority and not the actual authority. This is the position taken in the UK Manual of the Law of Armed Conflict, which states that it is enough if the “occupying power is in a position to substitute its own authority for that of the former government.”

The rationale for arguing that the test must be based on the ability to exercise authority over a specific area is that it would allow an occupier to refuse to assume its legal responsibilities in order to be viewed as not actually exerting authority. An occupying power could evade its responsibilities, fail to govern, and refrain from maintaining law and order or meeting the

basic needs of the population so as not to be seen as the occupying power. As one commentator suggested, this would create a gap in protection for the civilian population as well as a gap in governance.

Must an Occupier Exert Exclusive Authority?

There is also disagreement whether the occupying power must exercise exclusive authority over the occupied territory. One of the underlying principles of occupation law is that the occupying power must prevent the sovereign from exercising its governmental authority. Some argue that this means it must be the exclusive authority independent of the displaced sovereign. Accordingly, there cannot be any sharing of authority. This was the position that the U.S. Military Tribunal in Nuremberg took in the von List case.

Tristan Ferraro argues that *von List* does not reflect current law. He asserts that while the occupying power bears responsibility for the occupied territories, the law allows for a vertical sharing of authority as implied by some provisions of the Fourth Geneva Convention, which requires cooperation between the occupying power and national and local authorities. This vertical sharing authority was also addressed by the Israeli High Court of Justice in Tsemel v. Minister of Defense, which found:

If we were in a situation where a regular military administration has been installed, the military force would be free to decide in what measure it exercises its powers within the sphere of civil administration through its direct delegates and what areas of civil administration should be left in the hands of the authorities of the previous regime, be these local authorities or officials of the previous regime.

Occupation in Gaza After 2005

Israel asserts it disengaged from Gaza in 2005 and no longer exercises effective control over the Gaza Strip as a result of removing its military and civilian presence. However, it continues to control access along the Israeli border as well as all air space over Gaza. It does not permit the construction of any airports and requires prior approval for any aviation activity in Gaza. Although Israel allows some fishing, most maritime activity is also restricted. Egypt continues to control the border from its side.

The United States, as noted above, also considers that Israel no longer exercises effective control over Gaza. Many international legal scholars (e.g., Schmitt, Milanovic, Cuyckens, Pomson), military experts, and foreign policy experts assert that Israel no longer exercises effective control and therefore is not currently occupying Gaza. They cite to the fact that there are no longer military forces within Gaza and that Israel, while able to effect some control over Gaza, does not have the ability to assert effective control over the daily governance of the territory as required under the law.

As Professor Michael Schmitt noted in a previous [post](#), “reasonable minds differ” and there are certainly many that conclude Israel continues to occupy Gaza. This includes international organizations, such as the UN Independent International [Commission of Inquiry](#) on the Occupied Palestinian Territory, the [UN General Assembly](#), the [World Health Organization](#), and the [International Criminal Court](#). Certain non-governmental organizations, such as the [International Committee of the Red Cross \(ICRC\)](#), [Amnesty International](#) and [Human Rights Watch](#), also view Gaza as occupied territory. Just as there are many legal experts who have determined that Israel no longer exercises effective control of Gaza, there are many others who take a differing view (e.g., [Dannenbaum](#), [Ferraro](#), and [Dinstein](#)). These experts cite to the fact that even though Israel may no longer have “boots on the ground,” it still maintains effective control through the use of technology and other means. Dinstein also asserts that occupation still exists because Gaza and the West Bank must be viewed as a single entity and that Israel feels it is entitled to send its forces into Gaza on a unilateral basis at any time.

In my view, the more legally supportable position is that Israel has not occupied Gaza since its 2005 withdrawal as it no longer maintained military forces in the territory. Although Israel retains some control, this does not rise to the level of effective control as described above. Turning first to the military forces question, Israel removed those forces in 2005. Although Dinstein believes Gaza is still occupied, it is not because there are forces adjacent to Gaza but rather because he views Gaza and the West Bank as one inseparable entity. In his most recent edition of his [book](#) on belligerent occupation, he notes that “effective control allows for remote control in peripheral areas, the Occupying Power must establish a military presence – through the deployment of some ‘boots on the ground’ – in the occupied territory” (Dinstein, para. 140).

Further, effective control requires at least some degree of authority over the governance in Gaza. Since 2007, Hamas has controlled most of the governmental administration functions and is responsible for all public services, such as education, policing, sanitation, and hospitals. It is also clear that Hamas governs in a way that is not in Israel’s best interests. At best, it can be argued there might be concurrent control of the government in Gaza, but it fails to constitute the hierarchical control necessary for effective control. Finally, the sheer scale of the attack on October 7 as well as the heavy fighting in Gaza since clearly shows that Israel does not have effective control over Gaza.

Functional Approach to Occupation in Gaza

In 2006, Professor Aeyal Gross stated that he had an “epiphany” while attending a conference on occupation. He concluded that the binary nature of the question whether an occupation exists under Article 42 was “[transcendental nonsense](#).” This led him to look toward a functional approach to occupation. The functional approach can best be described as an alternative approach to trying to answer the binary question of whether territory is

formally occupied. Professor Gross suggests that there are two other questions that should be asked: “(1) what are the facts on the ground; and (2) whether obligations derived from occupation law *should* apply in these circumstances.”

The functional approach would allow for the continuance of specific protections offered by the law of occupation to people under the control of a foreign power in complex situations such as Gaza. As long as Israel exercises *some* control over the Gaza Strip, those advocating for this approach argue that the occupation has not ended. The particular obligations from the law of occupation that bind Israel would depend on the level of control exercised and whether it reaches the effective control threshold.

The ICRC has adopted this functional approach in its updated commentary to the Geneva Conventions, which states:

However, in some specific and exceptional cases – in particular when foreign forces withdraw from occupied territory (or parts thereof) while retaining key elements of authority or other important governmental functions that are typical of those usually taken on by an Occupying Power – the law of occupation might continue to apply within the territorial and functional limits of those competences.

Indeed, although the foreign forces are not physically present in the territory concerned, the authority they retain may still amount to effective control for the purposes of the law of occupation and entail the continued application of the relevant provisions (paras. 307-08).

It seems obvious that the “exceptional” situation addressed in the commentary is the Gaza Strip. Although the functional approach has practical implications and may be useful to counter attempts by States to exert control without assuming responsibility, it injects additional uncertainties into the law of occupation.

The binary approach to occupation law is not perfect (and some view it as outdated), yet accepting the functional approach creates new problems. Allowing a State to pick and choose the extent of its own obligations is more likely to erode civilian protections in occupied territory than enhance them. The binary approach through the effective control test ensures that all the obligations of the occupying power would apply. The functional approach overrides the effective control test contained in Article 42 of the Hague Regulations and places undue stress on the law of occupation. Establishing obligations based on the level of control would lessen, not enhance, legal certainty in this area.

Is there an Occupation Based on Israeli Forces’ Reentry into Gaza?

After the attack of October 7, Israel has reinserted its forces into Gaza to defeat Hamas. This raises the final question whether the Israel Defense Forces’ reentry into Gaza leads to an occupation. In my view, merely conducting military operations in Gaza is not sufficient to

establish an occupation. However, there are those who argue that during the combat phase of operations, the provisions of the Fourth Geneva Convention with respect to occupation would apply to protected persons.

Pictet Theory

Part III, Section III of the Fourth Geneva Convention supplements the Hague Regulations with respect to occupation. Article 2 of the former broadened the scope of application of the law of occupation to cases where an occupation meets no resistance. However, the Fourth Geneva Convention does not state when combat operations transition into an occupation. This raises the issue whether the transition from invasion to occupation follows Article 42 of the Hague Regulations or whether a separate, and different, test applies under the Fourth Geneva Convention.

In his commentary to the Fourth Geneva Convention, Dr. Jean Pictet argued that the term “occupation” in the Convention must be construed more broadly than Article 42 of the Hague Regulations. According to Pictet, the provisions on occupation in the Fourth Convention apply as soon as enemy forces exercise control over a person. Under this test, occupation would be based on control over persons rather than control over territory as required under the Hague Regulations. Pictet concludes:

There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.

Prior to the adoption of the Geneva Conventions, there was a clear distinction between occupation and invasion. It was generally accepted that the law of occupation would apply only after a minimum level of stability had been reached and the military force was able to exert effective control. This was affirmed by the International Criminal Tribunal for the former Yugoslavia in the *Naletilić* case.

Martin Zwanenburg, Michael Bothe, and Marco Sassoli in an excellent [article](#) debate whether the provisions of occupation law would apply only when the definition set out in Article 42 of the Hague Regulations is met or whether, based on the “Pictet theory,” there is no intermediate phase between invasion and occupation and certain provisions of occupation law already apply during an invasion.

I agree with Professor Zwanenburg who rejects the Pictet theory for four reasons. First, the wording of Article 4 to the Fourth Convention refers to persons who find themselves in the hands of an occupying power. This presupposes an occupation and occupation does not arise simply because a person finds themselves in the hands of a power. Second, determining whether an individual is a protected person “is conflated with the test for determining whether there is an occupation.” This is not supported by the provisions of the

Fourth Convention related to occupation. Third, there is nothing in the Geneva Conventions to suggest that the drafters intended to depart from the previously accepted notion of occupation in the Hague Regulations. Finally, this theory cannot be practically implemented. States are unlikely to fulfil the obligations of an occupying power until they have effective control over the territory. Most states are focused on military operations versus trying to figure out how to govern the territory.

In my view, the Pictet theory cannot be used to argue that the current combat operations in Gaza would amount to an occupation. Simply fighting in a territory does not rise to the level of an occupation. However, if Israel does stay and begins to exert its authority it will be occupying that area.

Conclusion

The question with respect to the status of occupation in the Gaza Strip is complex. Reasonable minds differ on whether the Gaza Strip is considered occupied territory. Although my conclusion is that since 2005, Israel is not occupying Gaza, many colleagues whom I respect have reached the opposite conclusion. Even though the question whether an occupation exists is framed as a binary choice of yes or no, the effective control test leaves much room for interpretation and disagreement. Attempts to move away from this binary choice, through the functional approach and the Pictet theory, though laudable in trying to ensure more protections for civilians caught up in an occupation, would cause less legal certainty on when and what obligations a party to the conflict would have in an occupation. As unsatisfying as it may be, the effective control test for determining when an occupation exists remains the most viable one.

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