

The (In)applicability of the Law of Occupation to the Gaza Strip

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This article seeks to establish the position that the State of Israel is not an “Occupying Power” in the Gaza Strip, and that therefore the Law of Belligerent Occupation creates no obligations for Israel vis-à-vis the Gaza Strip. This position is based on the generally accepted interpretation of the Law of Belligerent Occupation, as is clear from a broad examination of relevant international jurisprudence, as well as state military manuals and the views of scholars.

The authors detail the existing normative framework for examining the existence of occupation, with the “effective control” test at its center. As the authors demonstrate, the “effective control” test is traditionally divided into three cumulative criteria: the physical military presence of the occupying power in the territory (as the authors show, this is a condition *sine qua non* for establishing the existence of an occupation); the exercise of government authorities in the territory by the armed forces of the occupying power; and the inability of the previous sovereign to exercise government authorities in the territory.

The authors present the facts regarding the Gaza Strip in relation to each of these criteria, concluding that none of the criteria for the existence of effective control is fulfilled in the Gaza Strip: Israel has not had a permanent physical military presence in the Gaza Strip since 2005; it does not exercise governmental authority in the territory; and the Gaza Strip is in fact controlled by the Hamas terror organization, which exercises government, security and civil authorities over the civilian population.

This article also responds to the arguments of those who support the application of the Law of Belligerent Occupation to the circumstances of the Gaza Strip, whether through erroneous implementation of the traditional interpretation of the law, or through novel attempts to push its boundaries. Thus, the paper critiques the position of the Office of the Prosecutor of the International Criminal Court, which rests on an erroneous interpretation of international law and jurisprudence, and suffers as well from many methodological difficulties, such as ignoring certain elements of the “effective control” test or basing its evaluation of the legal status of the Gaza Strip on the decisions of political bodies.

The article also reviews two novel legal doctrines specially tailored to fit the circumstances of the specific case of the Gaza Strip – the “functional approach” and the “post-occupation obligations approach.” It demonstrates that these doctrines have no basis in *lex lata* and reflect, at best, the ambitions of their authors in relation to the development of *lex ferenda*. Moreover, these doctrines are riddled with legal difficulties, foremost among them the attempts to fundamentally change the Law of Belligerent Occupation (such as the abandonment of the “effective control” test) and the purposes therein.

The final section of the article shows that there are other legal frameworks – rooted in various fields of international law – which regulate the legal relationship between

the State of Israel and the Gaza Strip, while providing solutions to the challenges and difficulties stemming from the Hamas terrorist organization's rule in the Gaza Strip. These frameworks make redundant the development of novel doctrines which explicitly deviate from the common and generally accepted interpretation of the Law of Belligerent Occupation.