IS THE GAZA STRIP OCCUPIED BY ISRAEL?

1. Israel withdrew its military and civilian presence from the Gaza Strip in 2005. On any objective basis, the Gaza Strip has not been occupied by Israel since then, at least until very recently. However, parts of this territory may now be occupied by Israel where Israeli forces have secured effective control on the ground.

2. As stated by the International Court of Justice in para 78 of its main Opinion in the (so-called) "Construction of a Wall" case:

   > *"under customary international law as reflected … in Article 42 of … [the 1907 Hague Regulations], territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised."*

3. The European Court of Human Rights similarly held in para 94 of its judgment in Sargsyan v Azerbajain

   > *"Article 42 of [the 1907 Hague Regulations] defines belligerent occupation as follows.*
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   > > *"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."*
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   > *Accordingly, occupation within the meaning of the 1907 Hague Regulations exists when a State exercises actual authority over the territory, or part of the territory, of an enemy State. The requirement of actual authority is widely considered to be synonymous to that of effective control.*
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   > *Military occupation is considered to exist in a territory, or part of a territory, if the following elements can be demonstrated: the presence of foreign troops, which are in a position to exercise effective control without the consent of the sovereign. According to widespread expert opinion physical presence of foreign troops is a sine qua non requirement of occupation, that is, occupation is not conceivable without "boots on the ground", therefore forces exercising naval or air control through a naval or air blockade do not suffice."*

4. The UK's Manual of the Law of Armed Conflict similarly states:

   > *"11.2 Territory is considered to be occupied when it is actually placed under the authority of external military forces. Occupation extends only to territory where that authority has been established and can in fact be exercised. …*
   >
   > *11.7 Occupation ceases as soon as the occupying power is driven out or evacuates the area. Occupation will also cease when effective control transfers to a different authority, such that the territory ceases to be under the authority of external military forces."*

These passages were not changed when Chapter 11 was last revised in August 2011.

5. UN Resolutions and many States described the Gaza Strip as still occupied by Israel, despite Israel's complete withdrawal of any military or civilian presence in 2005. However, this special treatment of Israel has been fundamentally inconsistent with

   (a) The concept of law as comprising rules that apply generally.

   (b) The obligations of an occupying power, for example under art. 55 of the 4th Geneva Convention to ensure food and medical supplies of the population. Israel has not been in a position to do this precisely because it has not been in effective control of the territory. If it had been in effective control, it would have been able to ensure, for example, that the 1 million litres of fuel stored in the Gaza Strip under the control of Hamas at 7 October 2023 would be used for the benefit of the population, including desalinating water from the sea and aquifer and generating electricity where needed for hospitals and other essential facilities.

6. Lord Verdirame KC (a leading professor and practitioner of international law) addressed the point in a recent speech in the UK House of Lords:

   "A further point that concerns the laws of war is also of particular relevance to the British Government's practice. It has already been mentioned that the Government have taken the view that Gaza remains under Israeli occupation, even though Israel pulled out in 2005. The traditional view until 2005 was that occupation required physical presence in the territory. That view is consistent with Article 42 of the Hague regulations of 1907, which states that a territory is occupied when it is actually placed under the authority of the occupying power. Again, it is also the view taken by the UK manual of the law of armed conflict, which reflects the UK's official legal position and states that occupation ceases as soon as the occupying power evacuates the area. The European Court of Human Rights, in its jurisprudence, has also adopted a similar approach to occupation. So I have always been rather baffled by the British Government's position on this issue, which, as far as I know, has not changed. Yes, it is true that Israel has exercised significant control over the airspace and in the maritime areas, but even as a matter of plain geography it takes two—Israel and Egypt —to control the land access points to Gaza.

   More fundamentally, it is Hamas that has been responsible for the government and administration of Gaza. I appreciate that this is a legal matter on which the Minister may not want to respond immediately but it is an important one, because the legal fiction that Israel was still the occupying power under the laws of armed conflict has been relentlessly exploited by Hamas to blame Israel for everything, while using the effective control that it has over the territory, the people and the resources to wage war."