Beyond 'Boots on the Ground': Reinterpreting the Maintenance of Established Occupations

A Critical Assessment of the Requirement of 'Boots on the Ground' for the Maintenance of an Already Established Occupation

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Abstract

This doctrinal thesis critically examines the traditional understanding of the definition of occupation under international humanitarian law, which requires the physical presence of an occupying power's troops for a territory to be considered under its effective control and thus occupied. By analysing the preparatory work behind Article 42 Hague Regulations 1907, case law and contemporary state practices, this thesis demonstrates that the criteria for the establishment of occupation do not necessarily mirror those required for the maintenance of an occupation that has already been established. This study posits that the correct test for determining the maintenance of an already established occupation is the occupying power's continued *possession* of effective control and its retained *ability* to exercise authority over the occupied territory, to the exclusion of any rival power. Notably, this thesis demonstrates how these criteria can be met even without the occupying power having its 'boots on the ground' in the occupied territory. This interpretation allows the law of occupation to better address the legal challenges posed by modern occupations and account for more advanced methods of exerting control over foreign territory.

Keywords: occupation, effective control, 'boots on the ground', Article 42 HR 1907, IHL, indirect occupation, maintenance of occupation.

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1. Introduction

The law of occupation is a cornerstone of international humanitarian law and denotes 'the effective control of a power [...] over a territory to which that power has no sovereign title'.[1] Although the treaty provisions concerning the rights and obligations of the occupying power are seemingly comprehensive and have evolved over time, the fundamental rules determining the actual legal existence of an occupation are based on a definition adopted over a century ago, which has remained unchanged since.[2] This is surprising, as the existence of an occupation must first be legally determined before any substantive issues of occupation law can be addressed. In light of the vague wording of the definition of occupation as codified in the 1907 Hague Regulations, legal experts and international courts have had to make numerous efforts to interpret and clarify the definition. Over time, the notion of 'effective control' has evolved as a requirement for determining the existence of occupation.[3] Furthermore, it has been widely held that an occupying power must have its military forces physically present in the territory it occupies for it to have the required 'effective control' over that territory. It has been argued that this requirement, commonly referred to as having 'boots on the ground', should be understood as a *sine qua non*, an essential requirement, for occupation.[4]

However, emerging trends in state behavior have given rise to significant challenges facing the law of occupation. Today, occupant states are more frequently trying to deny their status as occupying power, claiming that the law of occupation is inapplicable to them despite their effective control of foreign territory.[5] The prohibition on the use of force within *jus ad bellum*, established with the creation of the United Nations, has contributed to bringing a pejorative connotation to the concept of occupation.[6] Consequenting from states'

[1] Eyal Benvenisti, *The International Law of Occupation* (2nd ed, Oxford 2012), 3. (hereinafter: Benvenisti)
[2] Michael Bothe, '"Effective control"—a situation triggering the application of the law of belligerent occupation', background document in Ferraro T (ed) 'Expert meeting: Occupation and Other Forms of Administration of Foreign Territory' [2012] International Committee of the Red Cross, 36 [hereinafter: Bothe].
[3] Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94(885) International Review of the Red Cross 133-163, 139 [hereinafter: Ferraro].
[4] See for example: Philip Spoerri, 'The Law of Occupation' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook on International Law in Armed Conflict* (Oxford University Press 2014), 189. [hereinafter: Spoerri]
[5] Tristan Ferraro (ed), Expert meeting: Occupation and Other Forms of Administration of Foreign Territory (ICRC 2012), 7. [hereinafter: Ferraro: Expert meeting]
[6] Spoerri (n4) 184; Natia Kalandarishvili-Mueller, *Occupation and Control in International Humanitarian Law* (Ist ed. Oxford: Routledge 2021), 1-2 [hereinafter: Kalandarishvili-Mueller]; Knut Dörmann, 'Foreword' in Tristan Ferraro (ed) Expert meeting: Occupation and Other Forms of Administration of Foreign Territory, International Committee of the Red Cross, 4-5 [hereinafter: Dörmann].

unwillingness to accept its status as occupying powers is the avoidance of fulfilling the obligations placed upon them by occupation law, resulting in occupied civilian populations left without protection.[7] Furthermore, since the drafting of the Hague Regulations 1907, the understanding of the means to maintain and exercise control over territory has evolved. Advancements in military technology have enabled alternative forms of control, and consequently, the possibility to exercise control of foreign territory from afar has raised new legal challenges facing the law of occupation.[8]

In response to complex contemporary cases of extraterritorial military interventions and control over foreign territory through alternative means, a significant debate has emerged questioning the traditional understanding of occupation and whether the requirement of 'boots on the ground' remains an essential prerequisite for an occupation to exist. The most salient example regards the debate on how to legally determine the situation in Gaza after the Israeli unilateral withdrawal of troops in 2005. Whereas is it argued by some that the fact that there is no longer any Israeli troops situated in the Gaza strip terminates the occupation, others argue that Israel still exercises a degree of control over the territory of Gaza, albeit through other means than having its 'boots on the ground' and that the occupation accordingly continued even after its withdrawal of troops.[9] Interestingly, in an advisory opinion, the International Court of Justice recently advanced the view that Gaza had remained under the effective control of Israel even after the withdrawal of troops in 2005.[10] However, the debate remains unsettled. More generally, commentators have been questioning the applicability and adequacy of the law of occupation in addressing non-traditional forms of occupation and the legal challenges they present.[11]

There is a current debate among experts and commentators whether the law of occupation necessarily requires the occupying power to actually *exercise* authority over the occupied territory for it to qualify as an occupation, or whether it may suffice that the occupying power

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[7] Ferraro: Expert meeting (n5) 4.
[8] Benvenisti (n1) 9-10; Ferraro (n3) 143.
[9] For some different views of the debate, see for example: Hanne Cuyckens, 'Is Israel Still an Occupying Power in Gaza?' [2016] Netherlands International Law Review (63); Yunus Emre Gül, 'Is The Requirement Of 'Boots On The Ground' Necessary Anymore For An Occupation?' [2021] *IBAD Journal of Social Sciences* (9); Gisha: Legal Center for Freedom of Movement, 'Disengaged Occupiers: The Legal Status of Gaza', Tel Aviv, January 2007 (Excerpts) *Journal of Palestine studies* 36(3) [hereinafter: Gisha (excerpts)]
[10] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) ICJ GL No 186 (19 July 2024) International Court of Justice (ICJ) paras 86-94.
[11] Dörmann (n6) 4-5.

possess the *ability* to exercise that authority.[12] Moreover, Dapo Akande has, without much further elaboration on the matter, raised the question whether 'the criteria for the establishment of occupation may not be the same as the criteria for the maintenance of occupation'.[13] This thesis aims to engage in this ongoing debate and conduct a deeper analysis of the idea of separating the establishment and maintenance of occupation.

1.1. Purpose and Research Question

This doctrinal thesis aims to contribute to the current debate on how to understand the law of occupation and analyse its adequacy in addressing the legal challenges arising from the changing nature of contemporary occupations. Clarifying how the law of occupation addresses non-traditional means to effectively control foreign territory is of critical importance since it directly affects the protection of civilians, which the law of occupation is intended to ensure. Correctly determining the existence of a state of occupation is essential, given that the responsibility of humanitarian protection is allocated thereafter. International law cannot allow occupying powers to avoid discharging its responsibilities under occupation law, by possessing effective control over foreign territory through non-traditional means outside of the scope recognized as occupation. Encompassing new ways to exercise effective control over foreign territory within the law of occupation is therefore of utmost importance in order to avoid gaps in humanitarian protection.

This thesis aims to lay out the foundations for an interpretation of the definition of occupation acknowledging that the requirements for the establishment of occupation may not be equivalent to the elements required for the maintenance of an already established occupation. Furthermore, this thesis will demonstrate that the requirement of having 'boots on the ground' should not be understood as a *sine qua non* requirement for the maintenance of an already established occupation, provided that the occupying power retains its ability to exclude rival power. The research question that this thesis will answer reads:

> *Does international humanitarian law require 'boots on the ground' for the maintenance of an occupation that has already been established?*

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[12] See for example: Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (online edn, Oxford Academic 2012) 44 [hereinafter: Akande]; Spoerri (n4) 191; Ferraro (n3) 143-147.
[13] Akande (n12) 48.

By addressing these issues, this thesis seeks to contribute to the broader discourse on the concept of occupation, offering insights valuable for the understanding of how to address non-traditional situations of occupation. The thesis will proceed by first introducing the legal framework of the law of occupation, discussing its definition as well as its subsidiary provisions and general principles. Additionally, the concepts of 'effective control' and 'boots on the ground' will be explained. With this background, the thesis will then analyse and determine the criterias for the *establishment* of an occupation, before proceeding to the *maintenance* of occupation. In this part of the analysis, the thesis will present an interpretation of the definition of occupation allowing for a distinction to be made between the establishment and the maintenance of an occupation. In the subsequent part, the analysis will try to outline the determinative elements for the maintenance of an already established occupation. That analysis will have its basis in recent developments in the understanding of contemporary occupations and the ways to possess control over foreign territory. The thesis will conclude by outlining what the criterias ought to be for determining the establishment of occupation and the maintenance of an occupation as two distinct notions.

2. Legal Framework

2.1. Definition of Occupation

The legal foundation for the law of occupation, categorising as a type of international armed conflict, is established in the laws of war, *jus in bello*, as outlined in the 1907 Hague Regulations, the Fourth Geneva Convention of 1949, the 1977 Additional Protocol I as well as in customary international law. The definition of occupation was initially adopted in the 1899 Hague Convention (IV) respecting the Laws and Customs of War on Land and was later revised in the Second Hague Conference in 1907.[14] No subsequent treaty has altered the definition of occupation provided in the Hague Regulations 1907, nor settled a new one. Thus, Article 42 of the 1907 Hague Regulations (hereinafter "HR 1907") remains the exclusive definition for determining the existence of an occupation, and it has gained recognition as customary international law.[15] It is affirmed in case law that the definition used

[14] Yoram Dinstein, *The International Law of Belligerent Occupation* (1st ed. Cambridge: Cambridge University Press 2009), 5 [hereinafter: Dinstein].
[15] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Merits) [2005] ICJ Report 168, para 172 [hereinafter: *Armed Activities* case, ICJ]; *Prosecutor v. Mladen Naletilić aka "Tuta", Vinko Martinović aka "Stela" (Judgement) ICTY-2003-IT-98-34-T (31 March 2003) International Criminal Tribunal for the former Yugoslavia (ICTY)* paras. 215-216 [hereinafter *Naletilić & Martinović*, ICTY]; Akande (n12) 44; Dinstein (n14) 5.

for determining the existence of an occupation is as outlined in Article 42 HR 1907.[16] Given this, Article 42 HR 1907 will provide the basis for the analysis in this thesis.

The only authentic text of the proceedings in the Hague Conferences in 1899 and 1907 as well as the regulations they resulted in is written in French. As a consequence, there exist several English translations of the Conventions, with slightly different wordings. The different translations will be discussed further on. However, for the purpose of this thesis, the translation provided by James Brown Scott appearing as part of both the 1899 and 1907 Hague Regulations, will be used primarily.[17] It is assumed that the different translations convey the same meaning and general idea. Nevertheless, it should be noted that only the authentic text in French is authoritative. The English translation of Article 42 HR 1907 used in this thesis reads as follows:

> '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.'[18]

The wording of Article 42 HR 1907 is relatively vague, in particular with regards to the word 'authority'. It does not specify what type of authority it refers to, nor the level of authority that is required for a territory to be considered occupied. These issues will be further elaborated upon in subsequent sections of this thesis.

2.2. Substantive Provisions and General Principles of the Law of Occupation

The subsequent article, Article 43 Hague Regulations 1907, further clarifies when the foreign power is actually in authority of a territory and thereby considered an occupying power for

[16] See for example: *Naletilić & Martinović*, ICTY (n15) paras. 215-216;
[17] James Brown Scott (Director), 'The Proceedings of the Hague Peace Conference 1899 - Translation of the Official Texts' (Oxford University Press 1920) 509 [hereinafter: Scott, Proceedings of 1899]
[18] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (Hague Regulations 1907), art 42. English translation found in Scott, Proceedings of 1899 (n17) 509. Authentic text of Article 42, as found in Convention (IV) concernant les Lois et Coutumes de la Guerre sur Terre et son Annexe: Règlement concernant les Lois et Coutumes de la Guerre sur Terre (adopté le 18 octobre 1907, entré en vigueur le 26 janvier 1910) 205 CTS 277, reads: *'Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie. L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.'* [hereinafter: Hague Regulations 1907, French version]

the purpose of the ensuing obligations. Article 43 HR 1907 reads: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall…'.[19] This article emphasises that the legitimate sovereign power must have lost its ordinary governmental authority, and that the foreign occupying power has in fact replaced that authority, creating two components of the definition of occupation. Furthermore, the words 'in fact' emphasises that the capacity of the occupant to exercise its authority must be a *de facto* capacity, and not derived from a legal authority.[20] Ultimately, determining the existence of a state of occupation must always rely exclusively on the prevailing facts.[21] Thus, any political statements or other subjective perceptions of the situation are of no relevance for the existence of an occupation.[22]

Occupation law rests on the principle of *effectiveness*, requiring the occupying power to be capable of enforcing the rights and duties conferred upon it by occupation law.[23] Those rights and obligations pertaining to the law of occupation were initially codified in Articles 43 through 56 of the 1907 Hague Regulations.[24] The law of occupation, and in particular the obligations related to humanitarian protection, was further expanded on in the Fourth Geneva Convention of 1949, in Articles 27-34 and 47-78.[25] It must be underscored that one of the main purposes with the law of occupation is to provide the vulnerable occupied civilian population with humanitarian protection.[26]

Common to the different treaty rules on the law of occupation are four general principles that serve as a shared rationale, outlined by Philip Spoerri.[27] Firstly, the sovereign title of the territory is not acquired by the occupying power and that foreign power is therefore not authorised to alter the status nor characteristics of the territory it occupies, conforming to the conservationist principle underlying the law of occupation.[28] This goes along with the second principle about the transitory character of the occupying power's right, emphasising its duty

[19] Hague Regulations 1907, art 43.
[20] Bothe (n2) 37-38.
[21] Ferraro (n3) 134.
[22] Ferraro: Expert Meeting (n5) 28.
[23] Ferraro (n3) 147.
[24] Hague Regulations 1907, art 42-56.
[25] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Arts 27-34 and 47-78 (Geneva Convention IV).
[26] Mikhail Orkin and Tristan Ferraro, 'IHL and occupied territory' (ICRC Humanitarian Law and Policy Blog, July 26 2022).
[27] Spoerri (n4) 185 and 197.
[28] Ibid.

to respect and maintain laws and normalcy in the occupied territory, unless absolutely prevented and in balancing with its own security needs.[29] Worth noting is that an occupation is by its nature deemed to be temporary. The ICTY Chamber has defined occupation 'as a transitional period following invasion and preceding the agreement on the cessation of the hostilities'.[30] Thus, there exists a tension of interests between the occupying power and the legitimate power who wants its interests preserved.[31] The occupying power must therefore not impose permanent changes on the occupied territory.[32] Furthermore, the aim of the restrictions of power imposed upon the occupying power is to ensure the civilian population in the occupied territory with a basic level of humanitarian protection. Therefore, the occupying power should always in its decisions and exercise of power balance its own military necessities and needs, with the needs and interest of the occupied civilian population, as pertained by the third principle.[33] Fourthly, the occupying power is not permitted to use its authority in advance of non-military interests of its own population or territory, nor to exploit the occupied territory's resources or inhabitants for its own benefit.[34]

3. Concepts of 'Effective Control' and 'Boots on the Ground'

Considering the vague wording of Article 42 HR 1907, it is necessary to identify the legal requirements for determining the establishment of a state of occupation as well as clarify its circumstances. For this purpose, the notion of 'effective control' is crucial. The term 'effective control' is not included in the wording of any treaty provisions within the law of occupation, rather it is a concept that has evolved over time among scholars and practitioners in the legal discourse about occupation, deriving from interpretations of Article 42 HR 1907.[35] The 'effective control' test consists of three cumulative elements that taken together is said to form the constituent conditions of occupation under IHL.[36] It is widely held that 'effective control' is a *conditio sine qua non,* an essential prerequisite, for belligerent occupation.[37] Ferraro defines the three criterias as such: '[1] the unconsented-to presence of foreign forces, [2] the foreign forces' ability to exercise authority over the territory concerned

[29] Spoerri (n4) 185.
[30] *Naletilić & Martinović*, ICTY (n15) para. 214.
[31] Marten Zwanenburg, 'The law of occupation revisited: The beginning of an occupation' (2007) 10 Yearbook of International Humanitarian Law, 109 [hereinafter: Zwanenburg].
[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ, 9 July 2004, para 121.
[33] Spoerri (n4) 185.
[34] Ibid, 186.
[35] Ferraro (n3) 139.
[36] Spoerri (n4) 188; Ferraro (n3) 143.
[37] Dinstein (n14) 43; Spoerri (n4) 189.

in lieu of the local sovereign, and [3] the related inability of the latter to exert its authority over the territory'.[38] The pertinence of the required physical presence of foreign forces in the occupied territory, known as having 'boots on the ground', is frequently debated.[39] However, the notion of 'boots on the ground' as a *sine qua non* requirement for occupation is reiterated in numerous cases before international courts.[40]

4. The Establishment of Occupation

The first point to examine is whether the *establishment* of occupation without the physical presence of ground troops is conceivable. As indicated by the inclusion of occupation law within the laws of war, belligerent occupation is inevitably linked to the notion of armed conflict, entailing the use of force. The general understanding of the concept assumes that belligerent occupation is sequenced on armed conflict, typically the hostile invasion of foreign territory. Nevertheless, it is also possible that occupation may, in itself, constitute evidence of an armed conflict even if it encounters no armed resistance.[41] This is stipulated in Common Article 2 (second paragraph) of the 1949 Geneva Conventions, stating that the Convention applies to 'all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'.[42] The German occupation of Denmark in 1940 remains the classical example of such occupation, established without the eruption of fighting.[43] However, even in the absence of armed resistance from the territory in question, the very nature of occupation rests on coercion and non-consensus as preconditions for its establishment. This is essential in distinguishing belligerent occupation from other forms of administration of territory based on an agreement or genuine consent, cases in which the law of occupation is not applicable.[44] The use of the wording 'hostile army' in Article 42 HR 1907 underscores this notion of non-consensus.[45] As

[38] Ferraro (n3) 142. Note that the three criterias may be formulated with different wordings by different legal scholars, however the content is assumed to be the same. For example, Spoerri (n4) does not include Ferraro's third element in his 'effective control' test, but it is implied in the wordings of his second element, being: 'the ability of the foreign forces to exert authority *in lieu* of the local government' (Spoerri (n4) 188),(emphasis added)
[39] See for example: Ferraro: Expert meeting (n5)
[40] See for example: *Chiragov and Others v. Armenia* (Judgement) (Merits) app. No. 13216/05, (16 June 2015) European Court of Human Rights [hereinafter: *Chiragov and Others,* ECtHR)
[41] Dinstein (n14) 32
[42] Geneva Convention IV 1949, art 6.
[43] Dinstein (n14) 32.
[44] Kalandarishvili-Mueller (n6) 29-32.
[45] Hague Regulations 1907, art 42.

affirmed by Dinstein, 'the authority of an Occupying Power is not derived from the will of the people'.[46] Thus, some form of coercive power is required for establishing occupation.

In the *Naletilić* case, the ICTY Chamber outlined guidelines in determining whether the occupying power's authority has been actually established, and held that the sovereign power's forces must 'have surrendered, been defeated or withdrawn'.[47] Furthermore, they stated that 'the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly'.[48] Establishing a new situation of belligerent occupation without the physical presence of troops therefore seems implausible. It is difficult to imagine a situation where a foreign power manages to coerce another sovereign power to hand over power solely from outside the borders of the territory in question. Without the tangible demonstration of the foreign power's actual authority over the specific territory, any claim to power becomes no more than just that.

Another argument consolidating the notion that 'boots on the ground' are required for the establishment of occupation derive from the principle of effectiveness underlying the law of occupation. In order for the occupying power to actually be capable of fulfilling the obligations placed upon it by IHL, it must have established its effective control over the territory. Including a foreign force's potential ability to project power from outside the 'occupied' territory in the test for determining the *establishment* of occupation would broaden the concept of occupation to the point rendering the allocation of responsibilities under the law of occupation meaningless.[49] Would the law of occupation allow the transfer of obligations from the sovereign power to a foreign power who never even *has obtained* the capacity to actually enforce those obligations, the law would be fruitless.[50] Moreover, a territory cannot simply be assumed occupied solely by virtue of another state's invasion or claim of power, allowing the sovereign power to be relieved of its responsibilities for its people even though it may still be capable of functioning publicly. This would in fact contradict the intrinsic purpose of the law of occupation mentioned above, being to protect the occupied civilian population.

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[46] Dinstein (n14) 35
[47] *Naletilić & Martinović*, ICTY (n15) para. 217.
[48] *Naletilić & Martinović*, ICTY (n15) para. 217
[49] Ferraro (n3) note 35
[50] Ferraro (n3) 147

For the desired effectiveness of the law of occupation, the test for determining the *establishment* of occupation must rest on clear and objective principles, based on the facts on the ground. It has been demonstrated that the effective control test, with 'boots on the ground' as a *sine qua non* requirement, is the correct test for determining the *establishment* of situations of occupation. This view that 'boots on the ground' are required for the establishment of occupation is supported by most experts that were consulted during an extensive project on occupation by the International Committee of the Red Cross.[51] Moreover, it must be acknowledged that the establishment of occupation requires the occupying power to *exercise* its effective control *in fact*, by actually deploying its 'boots on the ground' in the occupied territory, to the exclusion of any other power.

5. The Maintenance of Occupation

Having recognized that the *establishment* of occupation requires the occupying power to take effective control over a territory through the necessary physical presence of its army, we now proceed to investigate whether the physical presence of troops is a prerequisite also for the *maintenance* of an already established state of occupation.

5.1. Interpreting Article 42 Hague Regulations 1907

Not surprisingly, in light of the generally vague wording of the definition of occupation in Article 42 HR 1907, the article does not provide any explicit mentions about the maintenance of and possibly changing circumstances of an occupation. However, the second paragraph of Article 42 HR 1907 allows for a more nuanced interpretation of the definition of occupation that provides advantages with regards to the adaptability of the article to the complex situations of some contemporary occupations. The paragraph reads: 'The occupation extends only to the territory where such authority *has been established* and *can be exercised*'.[52] This paragraph creates two distinct but cumulative conditions for occupation. The words 'authority has been established' refers to the occupying power having *in fact* established its authority in the territory, whereas 'can be exercised' refers to the occupying power's *ability* to exercise that authority.[53] Hence, once an occupying power has in fact established its authority in a foreign territory, and the situation accordingly has been qualified as an occupation, the

[51] Ferraro: Expert meeting (n5) 17.
[52] Hague Regulations 1907, Art 42 (emphasis added).
[53] Dinstein (n14) 42.

definition does not necessarily demand the occupying power to continuously exercise its authority in the occupied territory for maintaining the occupation. Had that been the case, the wordings of the article ought to be *'is* exercised', as opposed to the present wordings '*can be* exercised'. Instead, it entails that as long as the occupying power continues to possess the capability to exercise the authority that it has already established in the territory, the occupation is accordingly also maintained.

This interpretation of Article 42 HR 1907, creating two distinct components for the establishment and maintenance of occupation, is further strengthened by looking at the authentic French text of the provision, as well as its different English translations. The second paragraph of the French original text of Article 42 HR 1907 reads: 'L'occupation ne s'étend qu'aux territoires où cette autorité *est établie* et *en mesure de s'exercer*'.[54] Apart from Scott´s translation of the article presented in the previous section, at least two more translations exist. The other translations of the second paragraph of Article 42 HR 1907 reads 'The occupation applies only to the territory where such authority *is established*, and *in a position to assert itself*'[55] and secondly 'The occupation extends only to the regions where this authority *is established* and *capable of being asserted*'.[56] Hence, the French words 'est établie' has been translated to *is* or *has been established* and the words 'en mesure de s'exercer' has been translated to *can be exercised, in a position to assert itself* and *capable of being asserted.* By looking at these different versions, it is clear that the interpretation is not the result of one unfortunate translation of the paragraph. Rather, it is prevalent in all four versions of Article 42 HR 1907 that the latter component of the second paragraph undeniably points to the *ability* to exercise authority, as opposed to the *actual* exercise of authority.

5.1.1. Interpretation Through the *Travaux Préparatoires*

This interpretation of Article 42 HR 1907 becomes all the more evident when looking at the *travaux préparatoires* of the Hague Conference of 1899, when the article was first adopted. With respect to the discussions during the 1899 Hague Conference concerning the minimum level of authority of the occupying power, it is stated by General den Beer Poortugael that 'When an authority has not power enough to maintain itself, it is not established and there is

[54] Hague Regulations 1907, French version (n18) Art 42 (Emphasis added).
[55] 'April, 1907', 1 American Journal of International Law Supplement 89 (Cambridge University Press 1907), 148 (Emphasis added).
[56] 'January and April, 1908', 2 American Journal of International Law Supplement 1 (Cambridge University Press 1908), 112 (Emphasis added).

no occupation'.[57] In the absence of reference to actual or exercised authority by General den Beer Poortugael, instead referring to the authority's ability to 'maintain itself', this sentence supports the view that the minimum level of authority required by the occupying power ought to be the *ability* to exercise authority and the *maintained* possession of authority.

It is clear from the proceedings of the 1899 Hague Conference that the shaping of Article 42 HR 1899 (and subsequently also HR 1907) was significantly influenced by the definition of occupation in two precursor documents, namely Article 1 of the 1874 Brussels Conference and Article 41 of the 1880 Oxford Manual.[58] The definition of occupation adopted at the 1899 Hague Conference clearly originated from the 1874 Brussels Conference and no changes were made in the wordings of the article.[59] It is clear from the proceedings of both the 1899 Hague Conference and the 1874 Brussels Conference that the delegates during the discussions did not manage to agree on the minimum level of authority required for the existence of an occupation.[60] However, the view that the physical presence of troops should be required appears to be dismissed by the Excellency of the Hague Conference. He considered the view requiring military presence '[...] only as a personal opinion of Mr. GILINSKY. As a matter of fact, it by no means appears from the proceedings of the Brussels Conference that it espoused the explanation cited.'.[61]

Furthermore, the definition of occupied territory written by the Institute of International law in its effort to codify the laws of war in the 1880 Oxford Manual, was commonly referred to in the discussion during the 1899 Hague Conference.[62] The definition as worded in Article 41 of the 1880 Oxford Manual reads: 'Territory is considered occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has actually ceased to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there. The limits within which this state of affairs exist determine the extent and duration of the occupation'.[63] The wording in the 1880 Oxford Manual influenced the

[57] Scott, Proceedings of 1899 (n17) 511.
[58] Scott, Proceedings of 1899 (n17) 509 and 510 respectively.
[59] Ibid, 512.
[60] Scott, Proceedings of 1899 (n17) 509-512; 'Actes de la Conférence de Bruxelles de 1874 sur le Projet dúne Convention Internationale Concernant la Guerre - Protocoles des Séances Plénières, Protocoles de la Commission Déléguée par la Conférence Annexes' (1874) (Libraire des Publications Législatives) 22-23.
[61] Scott, Proceedings of 1899 (n17) 510.
[62] Ibid, 510-511.
[63] 'The Manual on the Laws of War on Land', adopted by the Institut de Droit international at Oxford on 9 September 1880, Art 41, cited in Scott, Proceedings of 1899 (n17) 510.

discussions of the 1899 Hague Conference as a reflection of the established idea of occupation.[64] This definition clearly formulated two necessary elements for the existence of occupation, the first being negative and the second positive. Firstly, the legitimate power must have been effectively deprived of its capacity to exercise its ordinary authority, and secondly, the possession of this authority must have been supplanted by the occupying power. Importantly, this definition refers to the occupying power being 'alone *in a position* to maintain order', again highlighting the occupying power's *ability* to exercise authority, to the exclusion of the sovereign state's *actual* exercise of authority. Furthermore, reading Article 41 of the 1880 Oxford Manual strengthens the view that the establishment and maintenance of occupation should be assessed distinctly. It refers to the hostile invasion and the disposed power of the sovereign authority as two events that have already occurred in the establishment-phase, while the occupying power being 'alone in a position to maintain order'[65] is a continuous phase. It would not be impossible that those two phases could be assessed separately, creating two distinct notions with different compositions.

Although the definition of occupied territory in the 1880 Oxford Manual is not authoritative, it provides a helpful illustration of the meaning behind Article 42 HR 1907. Nothing in the proceedings of the 1899 Hague Conference suggest that the delegation opposed the ideas formulated in the 1880 Oxford Manual, rather they aimed at clarifying them.[66] Therefore, it is reasonable to interpret the successive articles with their common lack of reference to *actual* authority to indicate that the correct test for occupation ought to be the *ability* to exercise power.

Moreover, interpreting the word 'authority' to refer to the broadly recognised notion of 'effective control' as discussed above, this translates into that while it is true that the establishment of occupation require the *exercise* of 'effective control' as a matter of fact, the maintenance of occupation require only that the occupying power continuously *possesses* 'effective control' although not necessarily having to constantly exercise it. It could therefore be argued that, even though an occupying power unilaterally decides to withdraw its troops from the occupied territory, the occupation must not be said to be over solely as a result of that disengagement of troops. Arguably, as long as the occupying power retains the ability to

[64] Scott, Proceedings of 1899 (n17) 509-511.
[65] 'The Manual on the Laws of War on Land', adopted by the Institut de Droit international at Oxford on 9 September 1880, Art 41, cited in Scott, Proceedings of 1899 (n17) 510.
[66] Scott, Proceedings of 1899 (n17) 509-512.

deploy its troops in the occupied territory at its own discretion and with the means and methods of its own choosing, thereby still possessing effective control over the territory, the occupation remains.

Worth noting is that this argument would not suggest that once an occupying power has established its effective control over a territory, the state of occupation unconditionally endures even if the occupying power withdraws from the territory. This would provide the definition too extensive a scope, creating a gap between the capacities and the legal responsibilities of 'occupying power', thus failing to adhere to the principle of effectiveness underlying occupation law. The crucial and determinant factor must always be the occupying power's *possession* of effective control and unhampered *ability* to exercise this authority. The establishment of effective control must not only refer to the securing of positions for its troops, but does in many cases also entail some form of administration. These different ways of exercising authority will be discussed further on.

5.2. Means to Exercise Control

Opponents to the view, that the *ability* to exercise authority ought to be the correct test for determining the existence of an occupation, may argue that by allowing the concept of occupation to encompass also this lower degree of control (the *possession* of effective control and the *ability* to exercise it) one risks transferring obligations from the legitimate power to a foreign power not in the capacity to discharge those obligations. Such a situation would risk leaving the occupied civilian population in a protection gap, incompatible with the intended purpose of the law of occupation, being to protect the civilians. However, this view is too narrowly focused on military power as the only means to exercise control over a foreign territory, and lacks a comprehensive understanding of the different means by which authority over foreign territory can be exercised in the establishment and maintenance of occupation.

There are many ways by which an occupying power can possess effective control over a territory and maintain its ability to exercise its authority there, even without having its troops on the ground. In the *Case concerning Armed activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* from 2005, the effective administrative control of Uganda over regions in the DRC was considered. In order to determine the existence of the occupation, the court emphasised the need to consider whether Uganda had

effectively replaced the authority of the government of the DRC with its own authority.[67] For this purpose, the court reasoned that Ugandan forces had established effective control of the region by creating a new province where it had appointed a new governor as well as given the governor instructions on governance. It was concluded that this region was occupied by Uganda.[68]

Having this type of administrative control over the occupied territory is in compliance with the law of occupation. It may even be required in order for the occupying power to have the ability to fulfil its obligations towards the population and territory it controls. These obligations allocated to the occupying power stem from Article 43 HR 1907, and have been further developed in the 1949 IV Geneva Convention and the 1977 Additional Protocol I. Article 43 HR 1907 reads 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'.[69] As well as regarding Article 42 HR 1907, the authentic and authoritative version of Article 43 HR 1907 is in French. The English translation has been criticised for its wording 'public order and safety' as a translation to the authentic French version being 'l'ordre et *la vie publics*'[70], for the reason that the French text encompasses a much broader obligation than the English version, which instead should be rightly understood as 'public order and *civil life*'.[71] Restoring and ensuring civil life has been understood to require more than only basic protections and security. Rather, it is understood to refer also to social functions and other aspects constituting the ordinary life for the population within the territory.[72]

The fulfilment of Article 43 HR 1907 requires the occupying power to undertake the responsibilities inherent to governmental authority. This entails the engagement of different functions, or organs, of the occupying power, corresponding with the common three branches of any other government. It places obligations requiring acts of commission on the executive and the judicial branches, bearing responsibility for restoring and ensuring 'public order and safety' (or *civil life*) and obligations requiring acts of omission on the legislative branch,

[67] *Armed Activities*, ICJ (n15) para 173.
[68] Ibid, paras. 175-176.
[69] Hague Regulations 1907, Art 43.
[70] Hague Regulations 1907, French version (n18) Art 43.
[71] Benvenisti (n1) 10 & note 48; Dinstein (n14) 89.
[72] Ferraro: Expert meeting (n5) 57.

demanding it to respect 'the laws in force in the country'.[73] In order to fulfil the obligations set out in Article 43 HR 1907, it may be necessary for the occupying power to establish a provisional administration in the occupied territory.[74] Due to the governmental functions of such administrations, civilians are likely to be appointed. In combination with the sovereign power having been displaced, such an administration is an unambiguous indication that the authority of the occupying power is in fact established in the occupied territory.[75] Moreover, it is also a manifestation of the occupant's ability to exert its authority over the territory. Having established such an administration with the possession of authority, the argument that the occupying power would lose its authority once it withdraws its troops from the occupied territory is not compelling. If all other parts of the occupying power's established authority remains and the state no longer deem it necessary to have troops stationed within the territory, a unilateral withdrawal of troops cannot reasonably have such a drastic effect on the occupying power's possession of control over the occupied territory for the occupation to be terminated.

By having its possession of authority established, nothing prevents the occupying power to redeploy its troops whenever needed. It is accepted that the occupying power does not need to have its troops positioned in every square metre of the occupied territory.[76] The US Field Manual states, as quoted by Dinstein, that '[i]t is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district'.[77] This is also confirmed in the *Naletilić* case as a guideline for determining when the occupying power has actually established its authority in an occupied territory, with the wordings 'the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt'.[78] Whether the troops of the occupying power are stationed at certain locations inside the occupied territory or outside its borders should not matter if the occupying power in both cases retains its ability to send troops at a time and in a manner of its choosing, and thereby make its authority felt.

[73] Dinstein (n14) 90-91.
[74] Zwanenburg (n31) 110.
[75] Ibid.
[76] Dinstein (n14) 44.
[77] US Army Field Manual as cited in Dinstein (n14) 44.
[78] *Naletilić & Martinović*, ICTY (n15) para. 217.

The obligations in Article 43 HR 1907 are obligations of conduct, not of results, and the scope of the obligation is therefore limited with respect to the different circumstances such as the security and the resources available of the occupying power, as well as the needs of the occupied civilian population.[79] Nothing in the obligation to 'restore, and ensure, as far as possible, public order and safety' provisioned in Article 43 HR 1907, strictly requires the occupying power to concretely establish a military administration.[80] Importantly, had the provision required the occupying power to actually substantiate its obligations and exert authority in the occupied territory, this could provide for bad-faith interpretations of the provision. If the existence of occupation under Article 42 is provisioned on the actual exercise of authority, which is much linked to governmental functions, it would allow the occupying power to avoid its classification as an occupying power by simply not exercising the authority it is in possession of, and thereby refraining from discharging its obligations under the law of occupation. Such an interpretation could in the end incentivize the foreign power to deny the civilian population its basic needs and refrain from upholding public order, for the purpose of avoiding the bad reputation of being seen as an occupying power.[81]

Consequently, if the foreign power is the exclusive power with the ability to exercise authority over the territory, with the sovereign government having been displaced as required by the law of occupation, this approach risks leaving the civilian population deprived of its protection. In his separate opinion in the *Armed Activities* case, Judge Kooijmans noted that 'Occupants feel more and more inclined to make use of arrangements where authority is said to be exercised by transitional governments or rebel movements or where the occupant simply refrains from establishing an administrative system.'.[82] Thus, while recognizing the unwillingness of occupying powers to make the existence of its occupation manifest, the determinative factor cannot be the occupying power's ability to fulfil the *obligations* following having a territory under its occupation. Rather, the obligations in question are responsibilities that *follow* being an occupying power and not prerequisites determining the status of *being* an occupying power.

[79] Dinstein (n14) 91; Benvenisti (n1) 76.
[80] Zwanenburg (n31) 110.
[81] Ferraro: Expert meeting (n5) note 6.
[82] Judge Kooijmans, *Armed Activities on the Territory of the Congo, the Democratic Republic of the Congo v Uganda* (Separate Opinion of Judge Kooijmans) ICJ GL No 116 (19th December 2005) International Court of Justice (ICJ) 306-326, para 41 [hereinafter: Judge Kooijmans in *Armed Activities*].

5.2.1. The Example of Gaza

Since the start of its prolonged occupation of Palestinian territories, Israel has clearly established effective control and authority over the territory, as well as means to exercise this authority.[83] It was confirmed by the ICJ in 2004 that Israel had had a military governmental control of the Occupied Palestinian Territories and consequently the status of occupying power ever since the territories came under Israeli authority following the armed conflict between Israel and Jordan in 1967.[84] In 2004, Israel unilaterally decided to withdraw its troops from the Gaza strip, a part of the Occupied Palestinian Territories, arguing that this disengagement would absolve Israel of its status as occupying power and its ensuing responsibilities for the Palestinian people in the territory of Gaza.[85]

However, even after the implementation of the disengagement plan in 2005, Israel has undoubtedly retained much of its previously established control over the Gaza strip. Both the air space, territorial waters and the external borders of Gaza, fixed with a security fence set up by Israel, have remained effectively controlled by Israel.[86] This includes control of the border crossings and accordingly the movement of people and goods in and out of Gaza, entailing extensive travel restrictions for Palestinians and affecting the general life within the territory.[87] The border crossings have been largely restricted and even periodically closed by Israel, negatively impacting the employment, economy, foreign travel (including travels to the West Bank) as well as access to basic foodstuff in Gaza.[88] Furthermore, Israel has after its disengagement retained its control of the Palestinian population registry as well as the tax system and fiscal policy in Gaza, in turn also affecting the powers and capabilities of the Palestinian Authority (PA) to provide the population in Gaza with civilian services, by for example withholding tax incomes and salaries of PA employees.[89] Israel agreed to the creation of a Palestinian Authority (PA) in the Occupied Palestinian Territories and the transfer of authorities to the PA through a number of agreements, particularly the Interim

[83] The present analysis is confined to the situation in Gaza prior to the events on October 7 2023, and does not include the Hamas-led attack on Israel or the Israeli ground invasion of the strip following the attack.
[84] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n32) paras 73-78.
[85] Prime Minister's Office, 'Revised Disengagement Plan - Main Principles' (*Ministry of foreign affairs*, 6 June 2004) [hereinafter: The Disengagement Plan]
[86] The Disengagement Plan; UNHRC, 'Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, John Dugard,' (29th January 2007) UN Doc A/HRC/4/17-EN, 7 [hereinafter: Dugard]; Kalandarishvili-Mueller (n6) 112.
[87] Gisha (excerpts) (n9) 192-194; Kalandarishvili-Mueller (n6) 117.
[88] Dugard (n86) 10.
[89] Sari Bashi and Kenneth Mann, 'Disengaged Occupiers: The Legal Status of Gaza', Gisha: Legal Center for Freedom of Movement, January 2007, 50-58 [hereinafter: Bashi and Mann]

Accord concluded during the Oslo Peace Process already in 1995.[90] However, as demonstrated, Israel has retained control of vital aspects of the territorial management of Gaza. Notably, it is evident that Israel had established such firm control of Gaza during the occupation prior to its troop withdrawal in 2005 so that it is possible for Israel to retain its ability to exercise some degree of control over Gaza even without no longer having its troops physically present in the territory.

Furthermore, resulting from its control of the external borders of Gaza, Israel retains its ability to redeploy its troops in the territory at a moment and in a manner of its own choosing. Since its unilateral withdrawal in 2005, the Israeli armed forces has carried out several military operations within the Gaza strip, which has involved numerous military incursions combined with artillery shelling and missile attacks.[91] Consequently, Israel has the ability to, (as worded in relation to the *Naletilić* case) 'make its authority felt'[92] within the territory of Gaza without undue delay.[93] Thus, the established Israeli control of important governmental functions in Gaza, coupled with its ability to redeploy its troops in the territory when needed, amounts to a possession of control through the constant threat of use of force.

5.3. The Effect of Technological Developments on Remote Control

It is possible to maintain the ability to exercise control over foreign territory remotely, without keeping 'boots on the ground' in the occupied territory. In light of the rapid development of the means and methods used in warfare since the codification of the laws of war in the Hague Regulations and the subsequent treaties in humanitarian law, many argue that the application of the law must be adapted to the changing technologies of today's warfare in order to maintain its relevance.[94] Efforts to agree on new effective laws regulating the use of new weapons or technologies in warfare are unable to keep pace with the rapid technological developments.[95] Accordingly, it is also reasonable to assume that the traditional understanding of the means to establish and exercise effective control over foreign territory is not an exhaustive list of today's ways to exercise control.[96] It is important to remember that

[90] Bashi and Mann (n89) 30.
[91] Dugard (n86) 7-9.
[92] *Naletilić & Martinović*, ICTY (n15) para. 217.
[93] Kalandarishvili-Mueller (n6) 113.
[94] See for example: Dan Saxon, *International Humanitarian Law and the Changing Technology of War* (Martinus Nijhoff Publishers, 2013), 338 [hereinafter: Saxon];
[95] Saxon (n94) 17.
[96] ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (8–10 December 2015) ICRC Doc 32IC/15/11, 12. [hereinafter: ICRC, IHL Contemporary Challenges]

many of the laws, in particular the definition of occupation in the HR 1907, were codified over a century ago. Many aspects of society have changed since then, in particular technology and communication systems. In the Tallinn Manual on the International Law Applicable to Cyber Warfare, the group of experts discussed how an occupying power can employ cyber operations in order to help discharge the obligations deriving from its authority over territory, and to some extent also in the maintenance of the occupation.[97] This prospect was inconceivable at the time most treaties on the laws of war were written.

In order to avoid leaving civilian populations without any protection in situations of foreign effective control over territory by non-traditional means, the interpretation of the law of occupation must take into account the technological developments and the evolving methods of employing force. This is underlined already in the Martens Clause, emphasising the need to never leave civilians affected by armed conflicts (including belligerent occupations) deprived of protection, even in situations not directly covered by IHL treaties.[98] Additionally, in the advisory opinion issued by the ICJ on the legality of the threat or use of nuclear weapons, the court emphasized that the principles of humanitarian law must extend to encompass new methods of warfare enabled by military technological developments. Excluding such scenarios would, in the words of the court, be 'incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.'[99]

Thus, instead of directing attention solely to the means by which an occupying power exercises authority, one should also consider the occupying power's *extent* of authority.[100] This approach acknowledges the advancement of today's technology and the reduced dependence of having 'boots on the ground' for the maintenance of an already established occupation.[101] For example, it has been reported that Israel uses face recognition technologies

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[97] Michael N Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare* (1st edn, Cambridge University Press 2013), 239.
[98] Hague Regulations 1907, Preamble. The Martens Clause reads: '*Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience*.'
[99] Legality of the Threat or Use of Nuclear Weapons, (Advisory Opinion) ICJ GL No 95 (8 July 1996) International Court of Justice (ICJ), para 86.
[100] ICRC, IHL Contemporary Challenges (n96) 12.
[101] Bashi and Mann (n89) 69.

(FRT) in the Occupied Palestinian Territories. Through FRTs, Israel can maintain control over the movement of Palestinians at checkpoints and border crossings, and also in and out of different neighborhoods in the West Bank.[102] Moreover, the use of FRTs for 'police functions' has also been reported. Surveillance cameras at roads, settlements and other public areas purportedly allows Israel to remotely detect, track and facilitate the targeting of Palestinians suspects of being assailants.[103] Such technologies allow occupying powers to exert remote control over foreign territory in an 'invisible' manner, without necessarily having its 'boots on the ground' inside the occupied territory.[104]

Solely exercising control remotely through the use of technological developments may not amount to effective control alone. However, with the authority of occupying power already having been established inside the territory, it may contribute to the retained possession of authority and the maintenance of the occupation. Technological surveillance systems, such as FRTs, can enable the occupying power to efficiently identify and neutralize security threats and suppress resistance or protests with reduced effort and in minimal time.[105] Accompanied with having its authority already established, including for example control of the borders, this allows the occupying power to quickly make its authority felt in the territory. Furthermore, this use of technologies may also have an indirect deterring effect on those in opposition to the occupying power, as the fear of repercussion may contribute to individuals self-censoring.[106] Ignoring the ability to possess control remotely through the use of military technologies seems unreasonable as it contradicts the intrinsic purpose of the law of occupation and may even allow states to avoid responsibilities by having 'invisible' control.

5.4. Indirect Control

The traditional understanding of occupation has already developed into encompassing a situation not mentioned in the discussions about its definition during the conferences in Brussels nor Hague. It has become increasingly accepted that a situation can qualify as an occupation under international law even if the occupying power does not have its troops physically present in that territory, if the occupying power exerts control over an intermediary

[102] Rohan Talbot, 'Automating Occupation: International Humanitarian and Human Rights Law Implications of the Deployment of Facial Recognition Technologies in the Occupied Palestinian Territory', (2020) 102(914) International Review of the Red Cross 823-84, 829-830. [hereinafter: Talbot]
[103] Ibid, 830, 847.
[104] Ibid, 847.
[105] Ibid.
[106] Ibid.

(who is not the legitimate government) which in turn controls the territory.[107] In such situations, the level of control that the outside occupant state must exercise over the *de facto* local authority or armed group is reasoned to be *overall* control, provided that the latter has *effective* control over the territory in question.[108] More concretely, the occupant state should be part of the general planning, organisation and/or coordination of the operations by the local authority/armed group and provide it with financial and military support, however it must not control every specific action by the authority or group.[109]

Thus, even if the effective control over an occupied territory is exercised by an armed group or local authority and not by the foreign state itself, the status of occupying power is still carried by that state. Accordingly, the actions of the local authority or armed groups are attributable to the occupant state which therefore bears responsibility for possible violations of international law.[110] This reasoning follows Article 8 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) from 2001, which reads: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct.'[111] The responsibility could also be attributed to the state as the occupying power if the local authority or armed group in effective control of the occupied territory acts as *de facto* organs of the occupant state, according to Article 4 ARSIWA 2001.[112]

In the case of *Chiragov and Others v. Armenia* case before the ECtHR, the Armenian jurisdiction and responsibility for violations within the territories in and around the self proclaimed "Republic of Nagorno-Karabakh" ("NKR") was considered.[113] It was established that, consequenting from its previous military activities in the territories, Armenia continuously exercised effective control over the "NKR" through the local administrations in the territories.[114]

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[107] See for example: Kalandarishvili-Mueller (n6) 53; Ferraro: Expert Meeting (n5) 23; Akande (n12) 44-45.
[108] Ferraro Expert Meeting (n5) 23; Kalandarishvili-Mueller (n6) 61-65.
[109] Kalandarishvili-Mueller (n6) 87-88.
[110] Ibid, 88.
[111] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, (November 2001), Supplements No. 10, UN Doc A/56/10, Art 8.
[112] Ibid, Art 4.
[113] *Chiragov and Others*, ECtHR (n40) paras 28 and 152.
[114] Ibid, paras 172-176 and 186.

> '186. [...] Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the "NKR" and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention.'[115]

Although the ECtHR was devoted to consider the extraterritorial jurisdiction under human rights law for the purpose of the application of its own Convention, it is evident that the situation qualifies as an indirect occupation by Armenia. The court cited its earlier ruling in the case of *Catan and Others*, determining that a state has extraterritorial jurisdiction when 'as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory'.[116] Furthermore, with reference to the definition of occupation as worded under Article 42 HR 1907, the court recognized that 'The requirement of actual authority is widely considered to be synonymous to that of effective control'.[117] It was further confirmed in the partly dissenting opinion by Judge Hajiyev that the court recognized the existence of an Armenian indirect occupation of Nagorno-Karabakh and its surrounding region within Azerbaijan.[118]

The fact that the notion of occupation by proxy is so supported further speaks for the relevance of applying the test of *ability* to exercise authority for the maintenance of occupation, rather than focusing strictly on the *actual* exercise of authority. By adhering strictly to the test of actual and concrete exercise of authority, an occupying power could easily evade its obligations by installing a proxy group through which it can exert its authority instead.[119] Prima facie, this hypothetical situation may appear to suggest that the occupying power has withdrawn from the occupied territory and transferred its authority to a local government, relieving the foreign state from its title and the ensuing responsibilities as an occupying power. The occupation appears to have ended. However, as shown, the reality

[115] *Chiragov and Others*, ECtHR (n40) para 186.
[116] Ibid, para 168 citing *Catan and Others v. the Republic of Moldova and Russia* ([GC], nos. 43370/04 para 106.
[117] *Chiragov and Others*, ECtHR (n40) para 96.
[118] Judge Hajiyev 'Partly dissenting opinion of Judge Hajiyev' in *Chiragov and Others*, ECtHR (n40) page 92.
[119] Ferraro: Expert meeting (n5) 19.

may be that the occupying power continuously possesses effective control over the territory via this local proxy group. The occupying power thus retains its *ability* to exercise authority via these proxies. It reasonably also retains its ability to exercise authority through its *own* forces, since the proxy force under the control of the occupying power would not exert rival power against the controlling state. Such rival power may trigger retaliations from the occupying state towards the proxy, thus deterring the group from deciding to prevent the occupying power's troops from entering the occupied territory. Based on this hypothetical situation, using a test of *actual* exercise of authority, the law would fail to categorise such situations as occupation. As shown, international jurisprudence clearly establishes that these types of situations categorise as indirect occupation, making the law of occupation applicable.[120]

Therefore, the correct test for the maintenance of an already established occupation ought to be the *possession* of effective control and the retained *ability* to exercise authority by having the freedom of decision to re-deploy its 'boots on the ground' when needed, not the *actual* exercise of control nor the position of troops inside the occupied territory. Ultimately, this demonstrates how an occupying state can possess effective control over a foreign territory without having its own 'boots on the ground' present in the territory, and for that reason be categorised as an occupying power under international law.

5.5. Exclusion of Other Powers from Exercising Effective Rival Control

In his separate opinion in the *Armed Activities* case, considering the existence of an Ugandan occupation of the DRC, Judge Kooijmans discussed the maintenance of occupation. He argued that the relevant point to consider is not whether the occupying power is exercising its authority directly or via local forces or authorities, nor its number of troops present, but rather whether the occupying power maintains such control that it effectively *prevents the sovereign power from reestablishing its authority* in the territory.[121] Furthermore, Judge Kooijmans noted that 'As long as Uganda maintained its hold on these locations, it remained the effective authority and thus the occupying Power, until a new state of affairs developed'.[122]

[120] The possibility for indirect occupation is also confirmed in the case concerning *Armed Activities*, ICJ (n15) para 177.
[121] Judge Kooijmans in *Armed Activities* (n82) para 49.
[122] Ibid, para 50.

With the words 'these locations', he refers back to his earlier point that 'By occupying the nerve centres of governmental authority - which in the specific geographical circumstances were the airports and military bases - the UDPF [Uganda People's Defence Forces] effectively barred the DRC [Democratic Republic of the Congo] from exercising its authority over the territories concerned'.[123] Furthermore, the test for determining whether an occupation has terminated must rest on the substantial facts on the ground. Judge Kooijmans noted that a ceasefire agreement does not alone change the status of the occupying power, nor does a recognition of a reestablishment of the sovereign state's administration automatically. Rather, Kooijmans affirmed that the determinant fact is whether the occupying power is still in full and effective control over a territory.[124] In this case, the sovereign Congolese government recognised two rebel movements in control of parts of the Congolese territory as part of an integrated state structure. This, according to Judge Kooijmans, had an effect on the status of Uganda as an occupying power, but did not alter the situation in those areas where Uganda was still in full effective control.[125] He affirmed that the determinant factor is whether the occupying power still can be considered as having 'substituted itself for or replaced the authority of the territorial government'.[126]

This view confirms the two elements of occupation expressed in the 1880 Oxford Manual, the sovereign authority having lost its capability to exercise authority, accompanied by the occupying power's possession of that authority.[127] Hence, the ability to exclude any other power from exercising effective control over a territory could be a manifestation of the occupying power's possession of effective control. Whether this rival power is suppressed by the occupying power having its own 'boots on the ground', by the use of local proxy forces or by possessing the ability to redeploy its troops within the occupied territory when necessary, should not be a determinant factor. Insofar as the results are the effective exclusion of rival power, the means through which this is achieved should not matter for the purpose of determining who is in effective control of a territory. During the *Hostages* trials in Nuremberg, The US Military Tribunal stated that:

> 'It is clear that the German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the

[123] Judge Kooijmans in *Armed Activities* (n82) para 46.
[124] Ibid, para 50.
[125] Ibid, para 53-54.
[126] Ibid, para 54.
[127] Ibid, para 44; 'The Manual on the Laws of War on Land', adopted by the Institut de Droit international at Oxford on 9 September 1880, Art 41, cited in Scott, Proceedings of 1899 (n17) 510.

> partisans were able to control sections of these countries at various times, it is established that *the Germans could at any time they desired assume physical control* of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant.'.[128]

This ruling supports the approach that having the *ability* to exercise control over an already established occupied territory and effectively restrain rival power is sufficient for maintaining effective control over the territory. Furthermore, it is stated that the occupying power need not exercise exclusive control over the territory at all times, only that it retains its ability to suppress the resistance forces and assume its authority at any time it wishes is sufficient.

5.6. Presumption of Continuity

To reiterate, Article 42 HR 1907 can be interpreted as only requiring the occupying power being *capable* of exercising its established authority, rather than *actually* exercising it, and further, the possession of effective control could be understood as the occupying power maintaining its ability to prevent any other power from exercising rival effective control, accompanied with its ability to bring its troops back in the occupied territory at will. Considering this, why should not an occupation, once established through 'boots on the ground', be presumed to continue when the occupying power has decided to withdraw its troops but still possess effective control over the territory?

Analysing the concept of statehood could provide a helpful illustration of the difference between the constitutive and the continuative elements of a concept. Article 1 of the 1933 Montevideo Convention entails composite criterias that are commonly understood as outlining the constitutive elements, or definition, of 'statehood' in international law.[129] According to the Convention, 'The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states'.[130] The concept of statehood is, similar to that of belligerent occupation, dependent upon the essential notion of *effectiveness* and ultimately understood as a question of fact. Central for the idea of effectiveness is the

[128] *The Hostages Trial: Trial of Wilhelm List and others* (Law Reports of Trials of War Criminals) Case No. 47 (1949) United States Military Tribunal, Nuremberg, 56 (emphasis added).
[129] Montevideo Convention on the Rights and Duties of States 1933, 165 LNTS 19, (Montevideo Convention 1933), Art 1.
[130] Montevideo Convention 1933, Art 1.

government and its capability to exercise effective authority over the population and territory.[131] However, practice has shown that the legal existence of a state has in fact sustained even in the absence of a government. The most prevalent example is the Federal Republic of Somalia that continued to exist even during a decade-long period of anarchy, in the total absence of a government.[132] With the international community's acceptance of Somalia's continued legal existence, the classical view of the constitutive elements of statehood as *sine qua non* requirements for state's continued existence has lost its significance. Hence, international law presumes the continued existence of a state, even if the state no longer fulfils one or more of its constitutive elements.[133]

This implies that a distinction has to be made between the constitutive elements of statehood and the continuative elements, seeing that the criterias for the establishment of statehood cannot be directly applied as required components for the continuity of a state.[134] Correctly, once established, the state is constructed of more than solely the constitutive elements. As a legal subject in international law, its existence also brings rights and obligations in relation to other states.[135] This could explain the presumption of state continuity. Fundamentally, it is in the practical interest of states that international law reflects order and predictability, and that states can have confidence in their inter-state relations being predicated on legal stability and not uncertainty.[136]

This essential principle of legal stability and presumption of continuity could analogously be applied to the concept of belligerent occupation. In the absence of any treaty provision explicitly defining the end of occupation, it has been argued that the constitutive elements of occupation should apply also for determining the end of occupation.[137] This view leads to the assumption that an occupation ceases once there is no longer any 'boots on the ground' in the occupied territory. However, similarly as statehood being related to rights and obligations, also belligerent occupation is closely tied to the allocation of rights and obligations. The most acute obligations that the law of occupation places upon the occupying power are those in regards to the occupying power's relation towards the civilian population within the occupied

[131] Rim Yejoon, 'State Continuity in the Absence of Government: The Underlying Rationale in International Law', The European Journal of International Law (Oxford University Press, 2021), 485-505, 486.
[132] Ibid, 487.
[133] Ibid, 488-491.
[134] Ibid, 491.
[135] Ibid, 492.
[136] Ibid, 502.
[137] Ferraro: Expert meeting (n5) 28; Spoerri (n4) 190-191.

territory. Article 43 HR 1907 requires the occupying power to 'restore, and ensure, as far as possible, public order and safety'.[138] The 1949 Geneva Conventions extends the protective measures to include provisions requiring the occupying power to, among other things, 'facilitate the proper working of all institutions devoted to care and education of children'[139], ensure 'the food and medical supplies of the population'[140], 'public health and hygiene'[141] as well as ensure fundamental rights with respect to penal laws, regular trials and conditions during detentions.[142] These obligations have great resemblance to the obligations states owe towards their civilian population under international human rights law.[143] In international law, the fundamental concept of state sovereignty could partly be explained as morally founded on a trusteeship between states in which each state is authorized with a 'fiduciary duty to respect, protect, and fulfill human rights'.[144] Thus, resulting from the obligations under occupation law, 'international law tasks the occupying power with serving as a temporary fiduciary for the people of an occupied territory'.[145] In this respect, recognizing the occupying power's temporary role as a fiduciary in the occupied territory, the correct allocation of responsibility over territory becomes a key question with regards to the required stability and predictability in international law.

In an international system partly founded on trust, we cannot allow for bad faith interpretations of the law of occupation. It would be contrary to the humanitarian purpose of the law of occupation to provide occupying states with a leeway from fulfilling its obligations in a territory where its authority has been established, by automatically categorizing an occupation as terminated as a result of a unilateral withdrawal of troops, only. Once a state has established its authority in a territory and obtained the status as occupying power, international law must presume the continued existence of that occupation as long as the occupying power retains its ability to exert control or until the authority has been effectively transferred to the sovereign power. Ultimately, this becomes a question of ensuring basic humanitarian protection, as well as preserving the integrity of global legal norms.

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[138] Hague Regulations 1907, Art 43.
[139] Geneva Convention IV 1949, Art 50.
[140] Ibid, Art 55.
[141] Ibid, Art 56.
[142] Ibid, Art 64-78.
[143] See for example: Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)
[144] Evan J. Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press 2016), 36.
[145] Ibid, 193.

6. Conclusion

This thesis has brought forth an interpretation of Article 42 HR 1907 that provides a more appropriate test for determining the existence of an occupation, in order to encompass non-traditional forms of occupations and resolve the legal challenges that the law of occupation consequently is faced with.

The law of occupation must be interpreted in light of its underlying principle of *effectiveness* as well as its intended purpose to provide a minimum humanitarian protection of civilians. The well recognized notion of 'effective control' is therefore essential for the law of occupation, in order to meet the required effectiveness and not transfer responsibility to a power not in capacity to fulfil the obligations placed on an occupying power by the law of occupation. It is therefore crucial to distinguish an occupation from other forms of administration over foreign territory, or mere invasions. For the establishment of an occupation, the elements of coercion and tangible demonstration of authority becomes crucial. By analysing the concept of occupation and its essential elements, it becomes evident that the authority and effective control must first have been *actually established* for the territory to be considered occupied. For this establishment, the requirement of having 'boots on the ground' must be seen as a *sine qua non* in order to not extend the scope of the definition of occupation to the point when it can no longer be considered effective.

However, this thesis has demonstrated that the elements required for the establishment of occupation must not necessarily mirror the criterias for the maintenance of an occupation that has already been established. Through reading the *travaux prépartories* of Article 42 HR 1907 and the earlier discussions and definitions of occupation that preceded the adoption of Article 42 of the 197 Hague Regulations, it is possible to interpret the definition of occupation as allowing for a distinction between its establishment and its maintenance. While the establishment of an occupation requires the actual exercise of authority, for the maintenance of an already established occupation the definition clearly points to the occupying power retaining its *ability* to exercise authority, as opposed to the *actual* exercise of authority. By interpreting Article 42 HR 1907 through the definition of occupation from the 1880 Oxford Manual, it is emphasized that the occupation continues as long as the occupying power remains in position to exercise authority, to the exclusion of the deposed power exercising its ordinary authority.

It has been demonstrated that there exist alternative ways to maintain and exercise control over foreign territory, other than through having its 'boots on the ground' in the territory. The substantive obligations placed on an occupying power requires it to take control over certain governmental functions. Having established that authority, the occupying power must not continuously have its military forces stationed in the territory for it to retain the possession of this authority. It is established that it suffices that the occupying power retains the capacity to redeploy its troops when needed. The example of Gaza demonstrates how it is possible for a foreign power to retain control over a territory it already has established an occupation in, and even maintain its ability to upon its own decision send in its troops in the territory even after a unilateral withdrawal of troops. Furthermore, this ability to maintain control over foreign territory without being physically present has been made even easier with the advancements in military technology. The possibilities of having such remote control cannot be ignored by the law of occupation, as it would allow for 'invisible' occupations not encompassed by the protection given from the law of occupation.

A state may indirectly control a foreign territory by deploying a proxy group or a local administration that exercises effective control over the territory, while the group itself is under the control of the state in question. In such cases, the state is categorised as an occupying power under the law of occupation and is attributed responsibility for the actions of the proxy group or local administration in the occupied territory, even though the state is not physically present in the territory itself. The occupying state maintains the occupation even though it does not actually exercise authority itself, nor has 'boots on the ground', but through the ability to exercise authority indirectly via proxies, but also through the ability to redeploy its own troops when needed. It is furthermore underscored that an occupation can be maintained also by possessing the ability to effectively exclude others from exercising rival power. In order to exclude rival power, the ability to send troops and assume physical control when desired is sufficient.

To conclude, it is positioned in this thesis that the correct test for determining the maintenance of an already established occupation ought to be the continued *possession* of effective control and the retained *ability* to exercise authority over the occupied territory, to the exclusion of rival power. Thus, to meet this criteria for the maintenance of an already established occupation, keeping 'boots on the ground' is not necessarily required. By applying

this interpretation, the law of occupation can more adequately address the legal challenges that arise from contemporary occupations, and encompass also the more advanced ways to exercise control over foreign territory.

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