



## 'Sahada Askerlerin Bulunması' Yükümlülüğü İşgal İçin Hala Gerekli Midir?

*Is The Requirement Of 'Boots On The Ground' Necessary Anymore For An Occupation?*

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## ÖZ

Modern savaşın getirdiği zorluklar, sivillere yönelik daha iyi koruma sağlanması ve devletlerin sorumluluklarını inkâr etmelerinin önlenmesi adına geleneksel konseptleri yeniden yorumlamayı yükümlülük haline getirmektedir. Bu nedenle, 'sahada askerlerin bulunması' yükümlülüğü işgalci gücün otoritesini uygulamasının tek yolu olarak kabul edilmemelidir, zira bugün bu husus bir kural olmaktan daha çok istisna haline gelmiştir. Bu noktada, Uluslararası İnsancıl Hukuk'un yegâne amacı olan sivillerin korunmasına dair yasal boşlukların önlenmesi adına, hangi fonksiyonların yabancı gücün etkin kontrolü altında olduğuna odaklanması ve bu fonksiyonlara ilişkin olarak yükümlülüklerin belirlenmesine odaklanması önem arz etmektedir.

### Anahtar kelimeler

Geleneksel konseptler, sahada askerlerin bulunması, sorumluluklar, fonksiyonlar, Uluslararası İnsancıl Hukuk.

## ABSTRACT

The challenges posed by modern warfare oblige us to reinterpret traditional concepts in order to offer better protection to civilians, and to prevent states to deny their responsibilities. Therefore, the requirement of 'boots on the ground' should not be accepted as the only way to exercise the authority of occupying power since it becomes the exception rather than the rule today. At this point, it is significant to focus on which functions are under the effective control of foreign power and impose duties related to these functions in order to prevent legal gaps with respect to the protection of civilians that is the very purpose of International Humanitarian Law.

### Keywords

Traditional concepts, boots on the ground, responsibilities, functions, International Humanitarian Law.

## INTRODUCTION

While the term 'boot' was first used in World War One as a substitute for 'soldier', 'boots on the ground' belongs to the law of occupation, since the territory will be considered occupied if there are 'soldiers on the ground', and the troops are applying 'effective control' on the enemy territory, which indicates that the 'control' reached a certain level, and in compliance with the Article 42 of the Hague Conventions (Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV, 1907), the law of occupation shall be implemented (Trapp, 2018, p. 151; Why "Boots on the Ground"?, 2014). However, it should be noted that even if effective control had been established, the state of occupation 'does not transfer sovereignty' (Cuyckens, 2018, p. 70). It is a temporary phenomenon, and the control should be handed on the legitimate government when the time has come (Darcy & Reynolds, 2010, p. 216; Meray, 1975, p.518). At this point, the Occupying Power has a right to implement its authority, but this also brings obligations towards the local population (Meray, 1975, p.518). Also, there should be an international armed conflict to implement the law of occupation, and it cannot be applied when the territory is controlled by the consent of sovereign power (Albayrak, 2020, p. 452).

The notion of 'effective control' is based on the Article 42 of the Hague Regulations in which it is stated that

'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'.

While the US Army Field Manual directly copies this definition, the British Manual adopts it with minor changes (US Department of Army, 1956, p.138, para. 351; UK Ministry of Defence, 2004, p. 275, para. 11.2). Although the core notion of the law of occupation is based on the effective control, the term does not find any place in a treaty law, but it is widely used in legal discourse in order to determine the existence of the belligerent occupation (Ferraro, 2012b, p. 17, note 3; ICRC, 2015, p. 11; ICRC, 2016, para. 301). According to the updated commentary of Geneva Conventions, the term 'reflects a notion developed over time in the legal discourse pertaining to occupation to describe the circumstances and conditions for determining the existence of a state of occupation' (ICRC, 2016, para. 301).

Traditionally, three cumulative criteria should be met to establish effective control; (1) the physical presence of the occupying armed forces, (2) the exercise of authority by these forces without the consent of the occupied state, and (3) the incapability of the local government to exercise its powers (ICRC, 2015, p. 12). Although the last two conditions protect their places today, the presence of the armed forces on the territory, namely 'boots on the ground' does not seem to live longer. From this perspective, firstly, the *lex lata* approaches to 'boots on the ground' will be determined in this paper. Secondly, the challenges posed to these approaches will be identified. Finally, it would be briefly argued that the functional approach, which eliminates boots on the ground as a requirement, is more suitable for dealing with today's conflicts.

## THE TRADITIONAL CONCEPT OF OCCUPATION

The traditional concept of occupation can be reviewed under two approaches, namely 'actual control' and 'potential control'. While the former approach accepts the territory as occupied only by establishing 'direct authority over a population', the latter focuses on the physical ability of foreign power to exert its authority (Benvenisti, 2015, p. 6; Roberts, 1984, p. 300). Therefore, as stated in *Case Concerning Armed Activities on the Territory of the Congo* (Armed Activities Case), the actual control test requires the substitution of the authority by the foreign power, and it does not regard mere ability to enforce the authority as an occupation (Armed Activities Case, 2005, para. 173). The decision is criticized by Judge Kooijmans in his separate opinion by stating that the requirement of 'substitution of the occupant's authority' is 'an unwarranted narrowing of the criteria of the law of belligerent occupation as these have been interpreted in customary law since 1907' (Judge Kooijmans, 2005, para. 44). From another perspective, the conclusion of non-occupation by the Court despite the military presence of the Ugandan troops in some areas that belong to Congo, and the loss of the control over these areas by Congolese government, results in an 'awkward legal situation' in which 'no international entity had legal responsibility over the human rights conditions and basic needs of the local population in these areas' (Shany, 2005, p. 378). However, these criticisms did not preclude the adoption of requirement by the European Court of Human Rights (ECtHR), and the Court accepted 'boots on the ground' as a *sine qua non* requirement in order to reinforce the authority of occupying power (Chiragov and others v Armenia, 2015, paras. 94, 144).

On the other hand, even though it seems that there is a strong relationship between boots on the ground and the actual control, it still does not require to deploy soldiers on each square meter of the foreign territory since relevant factors such as the nature of the territory or the density of the population may change the necessary number of forces on the ground (US Department of Defence, 2015, p.764-765, para 11.2.2.1). However, even if there is a small number of foreign forces on the ground, they should be in a position to administer the occupied territory, and to enforce the authority of the occupying power when it is necessary (Sassòli, 2015, para. 14; US Department of Army, 1956, p. 140).

From the perspective of potential control, if the occupying power is in a position to maintain its authority despite the fact that some areas are beyond its actual control and even, they are in hands of resistance movements, the territory will be accepted as occupied (Oxford Manual, Art. 41; UK Ministry of Defence, 2004, p. 11.7.1). This position has found its place in the *Hostage Case* in which the Military Tribunal at Nuremberg recognized the existence of occupation by considering the physical ability of Germans to establish their authority over some parts of the territory whenever they want even if the partisans keep these areas under their control (The Hostage Case, 1949, p.1243). According to Shany, this approach prevents not only the avoidance of the implementation of human rights obligations by the occupier by 'de-linking the existence of occupation from the actual exercise of governmental authority by the military power vis-à-vis the local population' but also the creation of 'puppet-regimes', which was a common practice in World War II (WWII) by Occupying Powers, in order to control the country without having any responsibility (Meray, 1975, p. 519; Shany, 2005, p. 376-377).

In line with above judgement, 'the capacity to send troops within a reasonable time' is also another element which led the acceptance of the territory as occupied by the International Criminal Tribunal for the former Yugoslavia in the *Naletilic Case* (Prosecutor v Mladen Naletilic

and Vinko Martinovic, 2003, para. 217). Thus, the potential control can be distinguished from actual control, not because it requires parties to substitute all local authorities in the territory but suffices to regard a territory as occupied when the occupying power has a mere capacity to exercise its authority unless it is necessary to reoccupy that area (The Einsatzgruppen Case, 1948, p. 492; ICRC, 2016, para. 302). Although this approach interprets the effective control in a less strict manner compared to actual control, it still requires military presence at least close to the occupied area.

## CHALLENGES OF THE TRADITIONAL CONCEPT

Today, there are significant challenges posed to the requirement of boots on the ground. First of all, to be named as an 'occupying power' politically has a negative impact on the prestige of states. This impression pushes states to deny their role over the territory and the application of the law of occupation by taking advantage of the non-existence of clear standards in order to identify the beginning and end of the occupation in the treaty law (ICRC, 2011, pp. 26-27; Ferraro, 2012b, p. 28). Thus, states try to relieve their responsibilities by handing over some of the control to local forces, or by converting it (Gross, 2012). At this point, removing boots from the ground is used as an important argument by occupying powers to evade their responsibilities arising from the law of occupation. A clear example is the Gaza conflict. Even if Israeli soldiers were withdrawn from the ground, they still exert effective control over the territory by controlling Gaza's airspace, territorial waters, registry of the population, land crossings, the capability of the Palestinian Authority, and even the ground by incursions (Bashi & Mann, 2007, pp. 10, 30-31). The remaining nature of occupation in Gaza after 2005 is also recognized by the UN Report (UN Human Rights Council, 2007, para. 6). This acknowledgement brought a significant result that is the acceptance of the violation of the Fourth Geneva Convention, which prohibits collective penalties against local population according to Article 33, by stating that

'The indiscriminate and excessive use of force against civilians and civilian objects, the destruction of electricity and water supplies, the bombardment of public buildings, the restrictions on freedom of movement and the consequences that these actions have had upon public health, food, family life and the psychological well-being of the Palestinian people constitute a gross form of collective punishment' (UN Human Rights Council, 2007, para. 22)

There is no doubt that Israeli occupation of Gaza cannot be determined within the traditional concept, but this does not prevent its effective control over the territory since it has 'the power to send troops at short notice in order to reimpose control and that it is sufficient that the local authorities are prevented from exercising full authority' (Darcy & Reynolds, 2010, p. 235-236, 243).

Even if states are aware of the state of occupation, they attempt to name their operations differently, e.g., 'rescue mission' or 'fraternal aid' (Roberts, 1984, p. 301). By giving such names, they try to emphasize the unique features of the situation and make clear the purpose of their actions due to the fact that occupation is perceived the same as aggression and oppression by the international community (Roberts, 1984, p. 301). Hence, the exploitation of the vague nature of the term by states in order to escape from the political risks proves that a more

comprehensive interpretation of the term, which does not necessarily require a military presence on the ground, must be adopted (ICRC, 2011, p. 27).

Secondly, the changing nature of warfare poses a significant challenge to the requirement of the boots on the ground. Even though advancing over the foreign territory was perceived as a valuable asset in the past, it does not necessarily provide a strategic value nowadays (Benvenisti, 2010, p. 944; 2012, p. 46–47). Rather, from the angle of today's belligerent party, it causes the loss of soldiers and forces the state to honour new obligations towards the civilian population (Benvenisti, 2010, p. 944; 2012, p. 46–47). Instead, they prefer the effective use of airpower which is no less different than being on the ground. While examining how the notion of war has changed till the first quarter of the 20<sup>th</sup> century, Colby states that the physical occupation of a territory is only 'a means of war instead of an end of war', and it does not aim 'any prospects of permanence' since nations give importance to obtain 'trade privileges and economic rights' in modern conflicts (Colby, 1925, p. 912).

Whilst Sassòli claims that '[w]ithout ground control, an Occupying Power cannot respect the many rights it is required to protect and to fulfil', and '[o]ccupation is a concept of the law of land warfare', and Dinstein agrees with him by stating that 'belligerent occupation cannot rest solely on either naval power or air power' since the effective control can be established "through the deployment of some 'boots on the ground'", an argument was developed in theory after the recognition of airpower's strategic importance in WWII that the authority of the occupying power can be maintained by controlling the airspace of a foreign territory (Dinstein, 2019, p. 50; Sassòli, 2015, paras. 13, 15; Scobbie, 2004, p. 15). This theory was realized in the Gulf War. While explaining revolutions brought by Gulf War, Warden found that it is sufficient to occupy a territory owing to airpower, and he claimed that ground troops should come into scene when the foreign power has illegal aims such as colonization or appropriation of the land (Warden III, 1998, p. 121). This is approved by an Israeli commander who claims that they are searching for how to control a territory 'from the air when it's no longer legitimate to hold or occupy that territory on the ground' (Li, 2006, p. 48). This is actually realized by Israel in the West Bank. Weizman states that

'The West Bank must currently be the most intensively observed and photographed terrain in the world. In a "vacuum-cleaner" approach to intelligence gathering, sensors aboard unmanned air vehicles (UAVs), aerial reconnaissance jets, early warning Hawkeye planes, and even an Earth-Observation Image Satellite, snatch most signals out of the air. Every floor in every house, every car, every telephone call or radio transmission, even the smallest event that occurs on the terrain, can thus be monitored, policed or destroyed from the air' (Weizman, 2002).

Hence, it is clear that states already have the capacity to occupy territory without placing any soldier on the ground, and it seems that after WWII, putting boots on the ground has already started to be perceived as illegal.

Last but not least, it is important to note that the law of occupation always favour the benefits of the civilian population in the occupied territory by approaching the intentions of the occupying power in a more cautious manner (Azarova, 2012). At this point, requiring boots on the ground by disregarding how occupying power avoids accountability results in a 'pick and choose' approach (Gross, 2017) which causes to 'turn the law from a "set menu", intended to

restrain and control the occupier, into dishes at a buffet from which the occupier can pick and choose as it likes' (Azarova, 2012). Therefore, it becomes important to apply flexible conditions in order to provide maximum protection to the local population. After emphasizing the necessity of flexible conditions to apply humanitarian and human rights obligations in occupied territories, Benvenisti gives the recent authorization of the Security Council to fight piracy on the Somali coast as an example. He argues that even if the establishment of effective control was 'highly unlikely', the Security Council authorized states on the condition that measures taken by states 'shall be undertaken consistent with applicable international humanitarian and human rights law' (UN Doc S/RES/1851, 2008), and obligations derived from these different bodies of law towards both pirates and Somali citizens were recognized (Benvenisti, 2010, p. 949). Hence, states should apply the law of occupation under International Humanitarian Law (IHL) despite lack of effective control when they have the capacity to fulfill their responsibilities, and it is not rational to give an opportunity to refrain from fulfilling their duties by applying a restrictive approach.

When these challenges are taken into account, 'boots on the ground' is not appropriate anymore for the purposes of IHL seeking today. Interestingly, the requirement of military presence has been already interpreted in a less strict manner at the beginning of the 20<sup>th</sup> century. Thomas Holland recognized the possibility of the exercise of the occupying power's authority 'beyond the places in which his forces are actually present' in his commentary on Article 42 of the Hague Regulations in 1908 (Holland, 1908, p. 52). His stance seems quite reformist since there was no other way to control the people than through the deployment of land forces at that time. The rationale behind this is when the threshold of control for the existence of occupation is determined at a high level, then states may utilize it in a very well manner. At this point, the approach should meet the concern regarding states' responsibility rather than giving the opportunity to use the law as a tool at their hands.

## A STEP TOWARDS FUNCTIONAL APPROACH

There is not any provision in both Hague and Geneva Conventions that explicitly require 'boots on the ground' in order to apply the law of occupation. Although it can be stated that recent ECtHR decisions explicitly referred to that requirement, neither the reason behind it nor the role of this determination within the context of these decisions are clear (Gross, 2017, p. 111; Longobardo, 2018, p. 37). Nevertheless, placing troops on the territory should be held as an evidentiary test since they were accepted as the means to indicate the position of occupying power in order to fulfill its duties (Bashi & Mann, 2007, p. 76). However, when challenges of the traditional concept of occupation are taken into account, it is an inevitable consequence that the requirement of 'boots on the ground' should be reinterpreted. At this point, the functional approach which implicitly finds its place in the Article 6(3) of the Geneva Convention IV (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949) in which it is stated that '*...the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory...*' offers an insightful position to satisfy today's challenges, and it is crystallizing in the legal discourse.

As stated in the updated commentary of Geneva Conventions, developments in technology have made it possible for modern occupying powers to maintain their control over foreign territory or important aspects of civilian life without placing any boots on the ground (Bashi & Mann, 2007, p. 70; Ferraro, 2012a, p. 143,157; ICRC, 2016, para. 309). At this point, the extent of

authority which is maintained by the occupying power should be the focal point instead of the means used to exert its control (Bashi & Mann, 2007, p. 70; Ferraro, 2012a, p. 157; ICRC, 2016, para. 309). Therefore, even if the means of control change (for example by withdrawing boots from the ground), the ability of occupying power to exercise effective control may be continued. While the Commentary calls it 'functional approach', it states that this approach can

'be used as the relevant test for determining the extent to which obligations under the law of occupation remain incumbent on hostile foreign forces that are phasing out or suddenly withdrawing from an occupied territory while retaining a certain authority over it' (Ferraro, 2012a, p. 157; ICRC, 2016, para. 310).

In other words, the occupying power should bear responsibility depending upon the degree of control retained by itself (Sassòli, 2015, para. 49). This approach focuses on certain acts while determining the existence of occupation and liabilities derived from them rather than conceptual terms (Gross, 2017, p. 132). For instance, while the local authority can be responsible for the educational system because of regulating the curriculum of schools, the occupying power may still bear responsibility for the control of civilian movement that has an impact on education (Gross, 2012). Otherwise, occupying power may deprive the civilian population of legal protection by denying, transforming, or relinquishing its control whereas it exerts its authority over important functions of civilian life (Ferraro, 2012a, p. 158; Gross, 2017, p. 135; ICRC, 2016, para. 313).

## CONCLUSION

In this article, I tried to demonstrate the requirement of 'boots on the ground' is not necessary anymore to establish effective control over foreign territory. At this point, first, the traditional concept of occupation was explained. Then, how the traditional concept faces challenges was questioned. It is obvious that today's world politics and the progress of human rights put significant pressure on occupying powers to accept their responsibilities as occupying powers, and the developments in military technologies ease this situation by making it possible to control a territory without locating any soldier on the ground. Therefore, it is very important to adhere to the 'functional approach' and obligate those powers to fulfill their responsibilities towards the civilian population and act according to the very purpose of IHL.

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