# Opinion – Assessing the Legality of Ousting Hamas

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NGUYEN QUOC TAN TRUNG, NOV 21 2023

In the last few weeks, there have been many authoritative articles discussing the legality of the Israel–Hamas incursion that has now escalated into a full-scale war. However, most of these articles refer almost exclusively to the *jus in bello* aspects of the war, which are the area of the law of armed conflict and international humanitarian law. For example, an informative article by David J. Scheffer of the United States Council on Foreign Relations briefly concluded that "International law does not explicitly prohibit the use of force to eliminate an organisation such as Hamas…" before moving on to the discussion of the Geneva Convention and the possibility that there have been war crimes in this conflict. Similarly, the threat posed by Hamas to Israel might, presumably, render Israel's new war aims proportionate under *jus ad bellum*, according to Amichai Cohen and Yuval Shany's detailed work on Just Security. Again, the authors focus more on *jus in bello* legality, insisting that even if the objective is legitimate, the conduct of war needs to conform to the principles of humanitarian law.

While agreeing with the above analysis, the author of this article wishes to reverse the direction of the argument. That is to say, it discusses whether the complete removal of Hamas is an acceptable war objective in international law, and this assessment should, in return, contribute to the way in which we consider the test of proportionality and ceasefire demands.

The debates on the "occupied status" of Gaza will not be revisited here. Resolution A/ES-10/L.25, (October 2023), makes it clear that the majority of the international community continues to follow the existing UNGA/UNSC resolutions, asserting that Israel is the "occupying power" in Gaza and the rest of the "Occupied Palestinian Territories". Indeed, as the story unfolds, the capacity of the Hamas administration to prepare for a full air/ground invasion into Israeli territory challenges the argument that Israel can effectively make its superior authority felt inside Gaza. Nevertheless, if we accept the proposition that Israel is the occupying power of Gaza, Hamas would be seen as the *de facto* "local government", "local authorities", "local institutions", or "public officials" of Gaza, to use the language of the US DoD Law of War Manual (Rule 11.8) and the Fourth Geneva Convention of 1949 (Article 50, 54, and 56). Such a description seems to fit with the reality that governments and news media often communicate.

Despite the fact that the U.S., the U.K., the European Union, Canada and many other countries have designated Hamas as a terrorist organisation, other Western countries, for example, New Zealand, regard only the Qassam Brigades – Hamas' military wing – to be a terrorist group. There is also a significant number of Middle Eastern and developing countries that consider Hamas to be a resistance movement (although the broader peaceful Palestinian appeal for self-determination is more presentable to them also). Even the United Nations has not until now categorised Hamas as a terrorist group, although it often condemns Hamas militant activities. In addition, Hamas provides social services and other administrative functions in Gaza, including education and medical care. And it should not be forgotten that the billions of dollars in US aid to Gaza (over five billion in 2021 alone) has been provided under the aegis of Hamas.

Combining the insistence that Israel is the occupying power of Gaza and the fact that Hamas is effectively the administrator of the territory, we may naturally conclude that Israel has a specific set of rights over Hamas provided by international law as a consequence of the relationship between "occupying power" and "local authorities."

Diplomats and experts have hotly debated the question of Israel's right to self-defence under international law. Some,

especially Western leaders, agree that Israel has the right to self-defence. Others, like Russia, argue that Israel has no right to self-defence as an occupier. All of these stances involve serious legal problems. If we endorse the principle of Israel's legal right to self-defence, then a ground invasion and the toppling of the leadership of the opposition's territory could never be viewed as a legitimate response. Vietnam's intervention in Cambodia provides a clear example in this regard. However, if we have assumed the status of Israel's occupation of Gaza, it would be wrong to claim that Israel has no right to fight back. The status of an ongoing occupation means that the armed conflict is yet to be settled, and therefore, Israel can engage in any proper military activities that it seems fit to maintain order in occupied territories and for the sake of its own security.

Moreover, Article 54 of the Fourth Geneva Convention of 1949 reserves a unique right for an occupying power to remove public officials in occupied territory from their posts. On one hand, the occupying power "may not alter the status of public officials or judges in the occupied territories." As explained by the commentary of the International Committee of Red Cross (ICRC), this means that public officials should not be subjected to intimidation or unwarranted interference. They must have sufficient independence to act in accordance with conscience without risking the accusation of disloyalty when national authorities assume their rights after occupation.

However, Article 54 also allows the occupying power to remove these public officials from their posts for the entire duration of the occupation. As noted by the ICRC, this is a long-standing right, which the occupation authorities may exercise in regard to any official or judge, whatever his or her duties, for reasons of their own. Since Hamas is seen as Gaza's administration, and with the degree of hostility for which they were responsible on 7th October, the status quo that Israel as the occupying power could tolerate is beyond the requirement of law. In other words, the compromise between Israel and Hamas for the normal function, safety and order of Gaza society is unachievable.

Concerning legal justification, employing the right of the occupying Power in Article 54 and adding to it with the derogations of the Fourth Geneva Convention (Article 5), whereby protected persons shall not be entitled to claim privileges under this Convention when engaging in hostilities, Israel has the legal authority to comprehensively remove the Hamas administration in Gaza through the use of force.

Although the above argument is just another interpretation of the law of war, it does change the perspective by which we evaluate the discourse of proportionality and consider other aspects of a possible ceasefire. As mentioned, if we see the ground invasion of Gaza and the elimination of Hamas as retaliation under the rubric of self-defence, it is safe to conclude that the retaliation is legally excessive. However, if we insist that Israel is occupying Gaza, then the inherent right of the Israeli government to remove the Hamas administration should be recognised. In other words, the legality of this intervention is not tied to the proportionality test. Indeed, the respect for international humanitarian law shall not be derogated, even though it does not affect the lawful military objective of the Israeli government.

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## About the author:

**Quoc Tan Trung Nguyen** is a PhD candidate in Public International Law at the University of Victoria, Canada. Trung focuses on the law of state responsibilities and the duty of non-recognition of unlawful situations. His work has appeared in *The Conversation, The Diplomat, Cambridge Journal of International Law* and other peer-reviewed journals.