

# Determining the beginning and end of an occupation under international humanitarian law

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## **Abstract**

*International humanitarian law (IHL) does not provide a precise definition of the notion of occupation, nor does it propose clear-cut standards for determining when an occupation starts and when it ends. This article analyses in detail the notion of occupation under IHL and its constitutive elements, and sets out a legal test for identifying when a situation qualifies as an occupation for the purposes of IHL. It concludes by suggesting an adjustment of the legal test to the specific characteristics of occupation by proxy and occupation by multinational forces.*

**Keywords:** occupation, effective control, authority, consent, legal test, occupation by proxy, occupation by multinational forces.

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Recent occupations have raised a new set of legal questions. Much attention, however, has been given to the substantive rules of occupation, to the detriment of the difficult issues concerning standards to determine when an occupation begins or when it ends. This is surprising, given that one has to determine whether an occupation has been established and endures before one can address any substantive question of occupation law.

\* This article was written in a personal capacity and does not necessarily reflect the views of the ICRC.

The determination as to whether a situation amounts to an occupation is not easy to make. This is mainly because the definition of occupation contained in Article 42 of the 1907 Hague Regulations is somewhat vague. Indeed, this provision defines the concept of occupation 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’.

Besides the imprecision of the legal definition of occupation, there are a number of other complicating factors as well, such as the continuation of hostilities, the continued exercise of a degree of authority by the local government, or the invading party’s refusal to assume the obligations stemming from the exercise of authority over a foreign territory. It may also be very difficult to assess the end of an occupation from a legal perspective. Progressive phasing out, partial withdrawal, retention of certain competences over areas previously occupied, maintenance of military presence on the basis of consent that is open to question, or the evolution since the Hague Regulations of the means of exercising control: all these issues can complicate the legal classification of a given situation and raise numerous questions about when an occupation may be said to have ended.

The objective of this article is to elaborate on the notion of occupation – in particular the legal criteria for determining when the presence of foreign troops in a territory amounts to an occupation under international humanitarian law (IHL). After a reminder that determining the existence of an occupation is based on the prevailing facts, it attempts to clarify the notion of occupation by identifying its constitutive elements derived from Article 42 of the Hague Regulations. It then discusses these elements, before proposing a legal test for determining the existence of an occupation under IHL. Finally, the article addresses the issue of the beginning and end of occupation in two specific situations: occupation by proxy and occupation conducted by a coalition of states or by multinational forces.

## Occupation: a question of facts

The starting point of this analysis is that the existence of an occupation – as a species of international armed conflict – must be determined solely on the basis of the prevailing facts. This view, besides being widely held, is reflected notably in international instruments and jurisprudence, as well as in some military manuals.

In 1880, the Institute of International Law, in Article 41 of its *Manual on the Laws of War on Land* (the *Oxford Manual*), had already declared that a

territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, *in fact*, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there.<sup>1</sup>

1 Emphasis added.

The use of the words ‘in fact’ clearly affirms that it is the facts that establish the existence of a state of military occupation.

This position has since been endorsed by the US Military Tribunal of Nuremberg in the *Hostages* trial, which stated that ‘whether an invasion has developed into an occupation is a question of fact’.<sup>2</sup> It has also been reaffirmed in recent, emblematic decisions handed down by the International Court of Justice (ICJ)<sup>3</sup> and the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>4</sup> In addition, a number of military manuals have adopted the position expressed in the *Oxford Manual* and in international jurisprudence. For example, the US *Field Manual 27-10* specifies in its Section 355 that ‘military occupation is a question of fact’.<sup>5</sup>

Therefore, the definition of occupation, as set forth in Article 42 of the Hague Regulations, does not rely on a subjective perception of the prevailing situation by the parties to the armed conflict, but on an objective determination based on a territory’s *de facto* submission to the authority of hostile foreign armed forces.

A determination of this kind, based on the prevailing facts, conforms to the strict separation of *jus in bello* from *jus ad bellum*. The separation retains all its relevance and validity for situations of occupation. This was expressly stated by the US Military Tribunal at Nuremberg: ‘International law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in occupied territory’.<sup>6</sup> Therefore, the law of occupation, as a branch of IHL, applies without any adverse distinction based on the nature or origin of a particular armed conflict, the objectives pursued by the occupying power, the lawfulness under *jus ad bellum* of the extra-territorial military intervention, or the causes espoused by or attributed to the parties to the conflict.

Nonetheless, establishing, on a factual basis, that foreign forces exert a significant degree of authority over a territory is a complex exercise, mainly because of the ‘fogs of war’. In this regard, the transition between the invasion and occupation phases is particularly difficult to identify with exactness.<sup>7</sup> Given this difficulty, determining the existence of an occupation would undoubtedly be made

2 See US Tribunal at Nuremberg, *Hostages* trial, *Law Reports of Trial of War Criminals*, Vol. III, UN War Crimes Commission, 1949, London, p. 55.

3 In a recent case – *DRC v. Uganda* – the ICJ was emphatic that it had to examine the prevailing facts before stating that Uganda had in fact established its authority over parts of the territory of the Democratic Republic of the Congo; ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, para. 173.

4 To interpret the notion of occupation, the ICTY made literal use of the Nuremberg Tribunal’s formula and decided that ‘the determination of the existence of a state of occupation is a question of fact’; ICTY, *Prosecutor v. M. Naletilić and V. Martinović*, Judgment, Case No. IT-98-34-T, Trial Chamber, 31 March 2003, para. 211 (hereafter *Naletilić* case).

5 FM 27-10, *Department of the Army Field Manual: The Law of Land Warfare*, Washington, DC, July 1956. See also, for instance, Canada, *Joint Doctrine Manual: Law of Armed Conflict at Operational and Tactical Levels*, JAG Office, 2001, Section 1203(1); New Zealand Defence Force, DM 112, *Interim Law of Armed Conflict Manual*, 1992, Section 2(1302)(1).

6 US Tribunal of Nuremberg, *Von List* case, *Law Reports of Trial of War Criminals*, Vol. VIII, 1949, p. 59.

7 For instance, it has been extremely difficult to identify the precise date marking the beginning of the occupation of Iraq in 2003. This is mainly because of the continuation of hostilities, the advance of the

easier by setting out criteria for guiding the factual assessment. What follows is an attempt to define those criteria and to develop a legal test for determining the beginning and end of an occupation on the basis of the relevant norms of occupation law, in particular Article 42 of the Hague Regulations.

## The definition of occupation under IHL

The notion of occupation has been sketched out by Article 42 of the Hague Regulations. However, in light of the vagueness of that provision's plain language, a careful examination of its interpretation over time is necessary for clarifying the exact meaning of the notion of occupation. This will enable us to establish the components of a legal test for determining the existence of an occupation for the purposes of IHL.

### The central role played by Article 42 of the Hague Regulations

After some fluctuations,<sup>8</sup> the definition of occupation was conclusively established in Article 42 of the Hague Regulations: '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.' Subsequent IHL treaties have not altered this definition. The notion of occupation has been expanded by Article 2 common to the 1949 Geneva Conventions specifically in order to include occupation that encountered no armed resistance. However, nothing in the *travaux préparatoires* indicates that the drafters of these instruments intended to change the widely accepted definition of occupation contained in Article 42 of the Hague Regulations.<sup>9</sup> Since Common Article 2 explicitly recognizes the application of these instruments to all cases of occupation but fails to define the notion of occupation, one can logically conclude that the applicability of the Conventions' relevant norms – in particular those of Part III, Section III of the Fourth Geneva Convention – is predicated on the definition of occupation laid down in Article 42 of the Hague Regulations. This is also suggested by Article 154 of the Fourth Geneva Convention governing the relationships between this instrument and the Hague Conventions of 1907.<sup>10</sup>

coalition troops, and the initial uncertainty about their ability to exert authority over parts of Iraqi territory.

- 8 See, for instance, Article 1 of the International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874; Article 41 of the *Oxford Manual* adopted in 1880 by the Institute of International Law; and Article 42 of the Regulations concerning the Laws and Customs of War on Land (Hague Convention II), The Hague, 29 July 1899.
- 9 Federal Political Department of Switzerland, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A (Bern), pp. 650, 672, 675–676, 728, and 811.
- 10 Article 154 of the Fourth Geneva Convention (GC IV) states: 'In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague'.

This interpretation of the concept of occupation is confirmed by those made by international tribunals such as the ICJ and the ICTY, who have described Article 42 of the Hague Regulations as the *exclusive* standard for determining the existence of an occupation under IHL.<sup>11</sup> In fact, the ICTY has used the definition of occupation contained in the Hague Regulations in various decisions in order to determine whether an occupation existed within the meaning of the Fourth Geneva Convention. Relying on Article 154 of the Convention, it decided that,

while Geneva Convention IV constitutes a further codification of the rights and duties of the occupying power, it has not abrogated the Hague Regulations on the matter. Thus, in the absence of a definition of ‘occupation’ in the Geneva Conventions, the Chamber refers to the Hague Regulations and the definition provided therein, bearing in mind the customary nature of the Regulations.<sup>12</sup>

The Trial Chamber then quoted Article 42 of the Hague Regulations and specified that it endorsed this definition.

The ICJ has had two opportunities recently to consider the notion of occupation. In its Advisory Opinion of 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and in its 2005 decision on *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, the Court relied exclusively on Article 42 of the Hague Regulations to determine whether an occupation existed in the territories in question and whether the law of occupation applied in those situations.<sup>13</sup> In particular, the ICJ’s reliance on Article 42 of the Hague Regulations to assess the applicability of Part III, Section III of the Fourth Geneva Convention – titled ‘Occupied territories’ – leads to the conclusion that Article 42 of the Hague Regulations is the basis for determining the existence of a state of occupation. The law of occupation is thus a normative construction essentially made up of the Hague Regulations and the Fourth Geneva Convention; its scope of application is predicated entirely on the fulfilment of the conditions inferred from Article 42 of the Hague Regulations.

It has been argued that two distinct definitions of occupation exist, one drawing on the Hague Regulations and the other on the Fourth Geneva Convention.<sup>14</sup>

- 11 It should also be noted that, at the domestic level, the Supreme Court of India indicated in 1969 that Article 42 of the Hague Regulations was the only legal basis on which the determination of a state of occupation should be made. See Supreme Court of India, *Rev. Mons. Sebastiao Francisco Xavier dos Remedios Monteiro v. The State of Goa*, 26 March 1969, *All India Reporter*, 1970, SC 329, *Supreme Court Reports*, 1970, pp. 87–102.
- 12 ICTY, *Naletilić* case, above note 4, paras. 215–216.
- 13 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 78; ICJ, *DRC v. Uganda*, above note 3, paras. 172–177.
- 14 The authors of the ICRC’s *Commentaries* on the Geneva Conventions argued in 1958 that the concept of occupation under GC IV would be broader than that used under the Hague Regulations as far as the protection of individuals was concerned. See *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, ICRC, Geneva, 1958, p. 60. This view may be found in recent international jurisprudence as well as in scholarly writings. See Vaïos Koutroulis, ‘L’affaire des activités armées sur le territoire du Congo: une lecture restrictive du droit de l’occupation?’, in *Revue belge de droit international*, No. 2, 2006, pp. 719 ff. However, in the absence of any express definition of occupation under GC IV and given the operation of

However, various scholars have also stressed the importance and prevalence of Article 42 of the Hague Regulations for defining an occupation.<sup>15</sup>

Finally, various military manuals have confirmed the importance of Article 42 of the Hague Regulations as a trigger for the application of occupation law. In fact, when dealing with the law governing territory under the authority of hostile foreign armed forces, these manuals usually follow the same logic: the section on occupation starts with a restatement of the definition of occupation set out in Article 42 of the Hague Regulations. The manuals then describe and comment on numerous provisions borrowed from the Hague Regulations and Part III, Section III of the Fourth Geneva Convention, indicating clearly that their drafters considered Article 42 of the Hague Regulations as the trigger for all norms of occupation law.<sup>16</sup>

its Article 154, which emphasizes the supplementary character of the instrument in relation to the Hague Regulations, the assertion that GC IV would provide a distinct definition of occupation has no legal basis under IHL. Article 154 of GC IV governs the relationship between GC IV and the Hague Regulations and makes it clear that the former has not changed the definition contained in Article 42 of the latter. Moreover, one should not misinterpret the position expressed in the ICRC's *Commentaries* as well as in the ICTY's decision in the *Naletilić* case (see above note 4, para. 221). They suggest only that certain provisions of the law of occupation, as set out in GC IV, should also apply during the invasion phase. The interpretations given in the ICRC's *Commentaries* and in the ICTY decision do not persuasively demonstrate that the definition of occupation found in Article 42 of the Hague Regulations has been relaxed to the extent that effective control over foreign territory is no longer required for applying occupation law norms. On the contrary, they simply mean that the threshold of application for certain norms of GC IV has been lowered so that they can also take legal effect during the invasion phase. In the *Naletilić* decision, the ICTY said only this: 'the application of the law of occupation as it effects [sic] "individuals" as civilians protected under Geneva Convention IV does not require that the occupying power have actual authority'. The very last part of this sentence clearly indicates that effective control is not necessary to give effect to the protections set out in Part III, Section III, of GC IV. The definition of occupation contained in Article 42 of the Hague Regulations is therefore not affected. The threshold of application of Part III, Section III, of GC IV is diminished only for the purposes of according more protection to individuals during the invasion phase. Such an interpretation can also be inferred from the jurisprudence of the Eritrea–Ethiopia Claims Commission (*Partial Awards: Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25, and 26*, Decision, 19 December 2005, para. 27). See also Dapo Akande, 'Classification of armed conflicts: relevant legal concepts', in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 44 ff.

- 15 Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 4; Gerhard Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, pp. 28–29; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 42 ff.; Yuval Shany, 'Faraway, so close: the legal status of Gaza after Israel's disengagement', in *Yearbook of International Humanitarian Law*, 2005, Vol. 8, pp. 374 ff.; Marten Zwanenburg, 'The law of occupation revisited: the beginning of an occupation', in *Yearbook of International Humanitarian Law*, 2007, Vol. 10, pp. 109 and 128–129; Hans-Peter Gasser, 'Belligerent occupation', in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, Oxford, 2008, pp. 273–274; Michael Bothe, 'Beginning and end of occupation', in *Collegium*, No. 34, Autumn 2006, pp. 26 ff.
- 16 See, for instance, Australian Defence Force, *Law of Armed Conflict: Commander's Guide*, 1994, para. 1202; Canada, *Joint Doctrine Manual*, above note 5, para. 1203; Germany, *The Handbook of Humanitarian Law in Armed Conflict*, 1995, para. 526; United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, paras. 11.2–11.3; US Army, *Field Manual 27-10*, above note 5, paras. 351 ff.; New Zealand, *Interim Law of Armed Conflict Manual*, above note 5, 1302; Sweden, *International Humanitarian Law in Armed Conflict, with Reference to the Swedish Total Defence System*, Swedish Ministry of Defence, 1991, section 6.1.2; Argentina, *Leyes de Guerra*, Ejército Argentino, RC-46-1, 1969, section 5.001; Germany, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch*, 1992, para. 526; France, *Manuel de droit des conflits armés*, Ministère de la Défense, SGA, 2003, p. 121.

In view of the above, Article 42 of the Hague Regulations can be regarded as the only legal basis on which the determination of the existence of a state of occupation can be made.

### Identifying the components of a legal test for determining a state of occupation under IHL

The definition contained in Article 42 of the Hague Regulations is pivotal, but it needs further clarification. To this end, the following section aims to set out the various components of a legal test, derived from Article 42, that will make it possible to determine when a situation amounts to an occupation for the purposes of IHL.

#### *The importance of the notion of 'effective control'*

To identify the elements of the occupation test,<sup>17</sup> one must first examine the concept of effective control, which is at the heart of the notion of occupation and has long been associated with it. The phrase 'effective control' is not found in treaty law; it 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.

In this regard, it is self-evident that occupation implies some degree of control by hostile troops over a foreign territory or parts thereof in lieu of the territorial sovereign. However, the application of occupation law will not be triggered only when foreign forces exert full control over foreign territory but also when they exercise a lesser level of authority.<sup>18</sup> It has often been argued that occupation is a question of degree. As Yoram Dinstein points out,

effective control is a *conditio sine qua non* of belligerent occupation. But defining the exact amount of control deemed objectively 'effective' is an imponderable problem. In particular, the optimal size of the army of occupation and the manner of its deployment cannot be determined *a priori*. Circumstances vary from one occupied territory to another, and the degree of effective control required may depend on the terrain, the density of the population and a slew of other considerations.<sup>19</sup>

In any case, it is the effectiveness of the control exercised by the foreign forces that sets off the application of occupation law.<sup>20</sup> Indeed, effective control will

17 For the purposes of this article, 'occupation test' means the criteria inferred from Article 42 of the Hague Regulations, whose fulfilment on a cumulative basis will make it possible to designate a situation as an occupation within the meaning of IHL.

18 Daniel Thürer and Malcolm MacLaren assert that occupation exists 'when a party to a conflict is exercising *some* level of authority over enemy territory'. See "'*Ius post bellum*" in Iraq: a challenge to the applicability and relevance of international humanitarian law?', in Klaus Dicke *et al.* (eds), *Weltinnenrecht: Liber Amicorum Jost Delbrück*, Duncker & Humblot, Berlin, 2005, p. 757.

19 Y. Dinstein, above note 15, pp. 43–44.

20 The choice of the word 'effective', which is commonly associated with the notion of control in order to define the nature of the foreign forces' ascendancy over the territory in question, reflects the analogy made

permit the foreign troops to enforce the rights and duties granted to them by occupation law.

This assertion is corroborated by the legal literature, which has established the notion of effective control as a central element in the issue of occupation.<sup>21</sup> A careful examination of the international jurisprudence,<sup>22</sup> and of the content of some military manuals, also supports the assertion that the notion of effective control is at the heart of the concept of occupation<sup>23</sup> and should be the starting point for devising a test for determining the existence of an occupation. In this regard, ‘effective control’ is an essential concept as it substantiates and specifies the notion of ‘authority’ lying at the heart of the definition of occupation contained in Article 42 of the Hague Regulations. As such, effective control is the main characteristic of occupation as, under IHL, there cannot be occupation of a territory without effective control exercised therein by hostile foreign forces.

Therefore, the notion of effective control has to be examined more closely. This will enable us to identify the criteria for defining occupation for the purposes of IHL.

between occupation and blockade during the negotiations related to the Brussels Declaration of 1874. At the discussions that took place during the drafting process of this Declaration, the delegates, almost without exception, pointed out the similarities between occupation and blockade: both had to be effective to be said to exist for the purposes of the law of armed conflict. See M. Zwaneburg, above note 15, p. 102; Shane Darcy and John Reynolds, “‘Otherwise occupied’: the status of the Gaza Strip from the perspective of international humanitarian law”, in *Journal of Conflict and Security Law*, Vol. 15, No. 2, 2010, pp. 218–220; T. J. Lawrence, *The Principles of International Law*, 6th edition, Macmillan & Co, London, 1917, pp. 435–436; James Molony Spaight, *War Rights on Land*, Macmillan & Co, London, 1911, pp. 328–329. It was argued that, just as blockades are not recognized unless they are effective, the existence of occupations, too, must be decided on the basis of effective control. In this regard, a consensus emerged among the delegates indicating that, in fact, an occupation would come into existence only to the extent to which the foreign army could exercise a certain degree of control over the territory in question. See Doris A. Graber, *The Development of the Law of Belligerent Occupation, 1863–1914: A Historical Survey*, Columbia University Press, New York, 1949.

- 21 Georg Schwarzenberg, *International Law as Applied by International Courts and Tribunals*, Vol. 2: *The Law of Armed Conflict*, Stevens, London, 1968, pp. 274–276. The same position had previously been expressed by G. Von Glahn, above note 15, pp. 27–29. See also E. Benvenisti, above note 15, p. 4, who defined occupation as ‘the effective control of a power (be it one or more states or an international organization such as the UN) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory’. More recently, Yoram Dinstein described the notion of effective control as indispensable for the purposes of determining the existence of an occupation (Y. Dinstein, above note 15, pp. 42–43). Finally, Robert Kolb and Sylvain Vit  say that, for determining the existence of an occupation, ‘tout revient   se demander   partir de quel moment le contr le de l’arm e ennemie est suffisamment effectif au sens de l’article 42 du R glement de 1907’, in *Le droit de l’occupation militaire: perspectives historiques et enjeux juridiques actuels*, Bruylant, Bruxelles, 2009, p. 142.
- 22 ICTY, *Prosecutor v. Duško Tadić*, Trial Chamber, Judgment, 7 May 1997, Case No. IT-94-1-T, para. 580: ‘Whether or not the victims were “protected persons” depends on when it was that they fell into the hands of the occupying forces. The exact moment when a person or area falls into the hands of a party to a conflict depends on whether that party has effective control over an area’. See also, ICJ, *DRC v. Uganda*, above note 3 para. 175.
- 23 For example, US Army, *Field Manual 27-10*, above note 5, section 352 (addressing the distinction between invasion and occupation), indicates that ‘an invader may attack with naval or air forces or its troops may push rapidly through a large portion of enemy territory without establishing that effective control which is essential to the status of occupation’. See also UK, *Manual*, above note 16, section 11.7; Italy, *Manuale di diritto umanitario*, Stata maggiore della Difesa, SMD-G-014, 1991, p. 12 at 32; New Zealand, *Interim Law of Armed Conflict Manual*, above note 5, 1302; Germany, *Humanit res V lkerrecht*, above note 16, para. 526; Canada, *Joint Doctrine Manual*, above note 5, para. 1203.7.

### *The constitutive elements of the notion of effective control*

International jurisprudence, some army manuals, and legal scholarship tend to propose a consistent approach to the notion of effective control based on the ability of the foreign forces to exert authority, in lieu of the territorial sovereign, through their unconsented-to and continued presence in the territory in question. With regard to international jurisprudence, the US Military Tribunal in Nuremberg stated the following, in connection with the *Von List* case:

The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of an established government. This presupposes the destruction of the organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.<sup>24</sup>

The Tribunal also emphasized the importance of the potential ability of the Occupying Power to effectively enforce its authority in the area in question: 'While it is true that the 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'.<sup>25</sup>

More recently, in its decision in the case of *DRC v. Uganda* (2005), the ICJ stated:

In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as the result of an intervention, is an 'occupying Power' in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.<sup>26</sup>

Other elements that could form part of the notion of effective control have also emerged in the jurisprudence of the ICTY. In the *Naletilić* case, it elaborated a few guidelines for determining whether a situation amounted to occupation:

To determine whether the authority of the occupying power has been actually established, the following guidelines provide some assistance:

- 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;

<sup>24</sup> See US Tribunal of Nuremberg, *Von List* case, above note 6, pp. 55–56.

<sup>25</sup> *Ibid.*

<sup>26</sup> ICJ, *DRC v. Uganda*, above note 3, para. 173.

- the enemy’s forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;
- 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;
- a temporary administration has been established over the territory;
- the occupying power has issued and enforced directions to the civilian population.<sup>27</sup>

Military manuals have also elaborated the notion of effective control. For instance, the United Kingdom’s *Manual of the Law of Armed Conflict* states:

To determine whether occupation exists, it is necessary to look at the area concerned and determine whether two conditions are satisfied:

- First, that the former government has been rendered incapable of publicly exercising its authority in that area;
- Second, that the occupying power is in a position to substitute its own authority for that of the former government.<sup>28</sup>

Finally, legal scholarship has also endorsed the elements put forward, by the international jurisprudence and army manuals mentioned above, to determine whether a situation amounts to occupation for the purposes of IHL.<sup>29</sup>

IHL treaties and their *travaux préparatoires*, scholarly literature, military manuals, and judicial decisions all give proof of the pre-eminence accorded to three elements in the occupation equation, namely, the unconsented-to presence of foreign forces, the foreign forces’ ability to exercise authority over the territory concerned in lieu of the local sovereign, and the related inability of the latter to exert its authority over the territory. All together, these elements constitute the so-called ‘effective-control test’ used to determine whether a situation qualifies as an occupation for the purposes of IHL. These three elements are also the only ones

27 ICTY, *Naletilić* case, above note 4, para. 217. It is important to note that some of the elements identified by the ICTY constitute criteria (for instance, that the Occupying Power must be in a position to substitute its own authority), while others are only useful indicators for identifying whether the constitutive criteria of occupation have been effectively met (for instance, the establishment by the Occupying Power of a temporary administration).

28 UK, *Manual*, above note 16, point 11.3, p. 275. Other military manuals have employed the same interpretation of the notion of effective control, reflecting a common reading, as it were, of the constitutive elements of the concept of occupation for the purposes of IHL. See, for instance, Canada, *Joint Doctrine Manual*, above note 5, para. 1203; US Army, *Field Manual 27-10*, above note 5, para. 355; New Zealand, *Interim Law of Armed Conflict Manual*, above note 5, 1302(4).

29 See G. Von Glahn, above note 15, pp. 28–29; M. Bothe, above note 15, pp. 26–32; Y. Shany, above note 15, pp. 374–378; M. Zwanenburg, above note 15, pp. 128–130; Y. Dinstein, above note 15, pp. 35–36 and 38–45; Eyal Benvenisti, ‘The law on the unilateral termination of occupation’, in T. Giegerich and U. Heinz (eds), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference*, Berlin: Duncker & Humblot, 2009, pp. 371–375; H.-P. Gasser, above note 15, pp. 273–274.

that – cumulatively – reflect the tension of interests between the local government, the Occupying Power, and the local population, which is an unchanging characteristic of a situation of belligerent occupation.<sup>30</sup> In light of their importance, these elements should be established as prerequisites for the effective-control test. As such, they form the constitutive and cumulative conditions of the notion of occupation for the purposes of IHL.

## The main elements of the effective-control test

The previous section showed that three cumulative criteria – the unconsented-to foreign military presence, the foreign forces' ability to exercise authority over the areas in lieu of the territorial sovereign, and the related inability of the latter to exert their authority over the territory – have emerged as the constitutive elements of the notion of effective control. However, their exact meaning requires further clarification and interpretation. This section will examine how these criteria might be interpreted.

### The importance of foreign military presence in the occupied territory

Recent occupations have raised the question of whether the physical presence of hostile foreign troops is required for establishing and maintaining a state of occupation. It has been argued that the concept of occupation and the definition thereof, as set out in Article 42 of the Hague Regulations, could be re-interpreted in light of changes in technology and/or in the use of force.<sup>31</sup> It has been notably contended that the development of modern technologies has made it possible for contemporary Occupying Powers to assert effective control over foreign territory and significant aspects of the civilian life of its inhabitants without having a continuous military presence therein. Seen in this way, the maintenance of effective control for the purposes of occupation law could be detached from its modalities of enforcement:<sup>32</sup> this definition of effective control implies that an occupation could exist solely on the basis of the foreign power's ability to project military power from a position beyond the boundaries of the 'occupied territory'.<sup>33</sup> At first sight, this

30 M. Bothe, "Effective control": a situation triggering the application of the law of belligerent occupation', background document for the ICRC project on occupation and other forms of administration of foreign territory, First meeting of experts in *Occupation and Other Forms of Administration of Foreign Territory*, Report prepared and edited by T. Ferraro, ICRC, Geneva, April 2012, pp. 36 ff [hereinafter 'ICRC Report on Occupation']. See also M. Zwanenburg, above note 15, pp. 109–110.

31 Gisha – Legal Center for Freedom of Movement, 'Disengaged occupiers: the legal status of Gaza', Position Paper, 2007, pp. 69 ff. See also, M. Zwanenburg, above note 15, pp. 125 ff. However, Zwanenburg stresses that technological and military developments do not lead to the conclusion that it is no longer necessary to have hostile foreign troops on the ground for the purposes of the effective-control test.

32 It must be noted that the requirement of the foreign military presence cannot be questioned for the *establishment* of an occupation. If one might argue that an occupation can be maintained – once established – by a kind of remote control under specific circumstances, it is submitted here that the establishment of an occupation still requires the physical presence of the foreign armed forces in the invaded areas.

33 Gisha, above note 31.

position seems to be in line with Article 42 of the Hague Regulations, which, when interpreted literally, tends to confirm that the physical presence of the foreign forces enforcing effective control is not necessarily required.

However, it is very much open to question whether, without the physical presence of enemy forces, the authority of the territorial sovereign can be said to have been suppressed and replaced by that of the enemy. Article 42 of the Hague Regulations specifies expressly that authority – and the inherent control over an occupied territory that it requires – must be *established* before it can be *exercised*: ‘occupation extends only to the territory where . . . authority has been established and can be exercised’.

Article 42 thus creates an inseparable connection between the establishment of authority, which presupposes the deployment of foreign enemy forces within the area concerned, and the ability to exercise the related military control.<sup>34</sup> Effective control over foreign territory requires the Occupying Power to be able, because it has already established its authority as the result of the military invasion, to impose its authority in that territory within a reasonable time. Thus, in principle, the ability to exert authority over occupied territory cannot be separated from the physical military presence of the Occupying Power.<sup>35</sup>

The actual physical presence of the hostile army in occupied territory – the working assumption on which IHL drafters relied<sup>36</sup> – is also presumed throughout the provisions of the Hague Regulations and the Fourth Geneva Convention.<sup>37</sup> In general, the obligations and rights conferred upon the Occupying Power by IHL require, to be given effect, its physical presence in the occupied territory.<sup>38</sup> For example, how could an occupant discharge its obligation to maintain law and order without being present in occupied territory? How could it ‘administer’ the occupied

34 R. Kolb and S. Vité, above note 21, pp. 179–180.

35 In other words, occupation and its related element of effective control cannot – in principle – be established and maintained solely by exercising power from beyond the boundaries of the occupied territory. The test of effective control cannot include the potential ability of one of the parties to the armed conflict to project power through its forces positioned outside the ‘occupied territory’ without stretching the concept of occupation so much that it makes any assignment of responsibilities under occupation law meaningless. Otherwise, any state capable of invading the territory of its weaker neighbours by virtue of its military superiority, and of imposing its will there, would be said to be in ‘effective control’ of that territory and considered an occupant for the purposes of IHL. Such an interpretation would be unreasonable. See, in particular, Eyal Benvenisti, ‘Responsibility for the protection of human rights under the interim Israeli–Palestinian agreements’, in *Israeli Law Review*, 1994, pp. 308–309. However, one should wonder whether this position could be nuanced in very specific and exceptional circumstances, notably when the occupying forces leave the area under their control while still maintaining key elements of authority therein. See below, ‘A legal test for determining whether a situation qualifies as an occupation for the purposes of IHL’.

36 The drafters of IHL instruments that contain provisions related to occupation have always assumed that the armed forces of the invader must be present in the territory for it to be regarded as occupied under IHL. For instance, during the negotiations for the Brussels Declaration of 1874, most of the delegates rejected a proposal made by the German delegate according to which an occupation could be said to exist even in the absence of occupying forces on the ground. Their rejection of the German delegate’s proposal was linked to the view that an occupation, like a blockade, had to be effective; and such effectiveness could not be achieved without the deployment of foreign troops in occupied territory.

37 M. Zwanenburg above note 15, p. 105; S. Darcy and J. Reynolds, above note 20, pp. 218–219.

38 See, for instance, Articles 43, 46, 52, 53, 55, and 56 of the Hague Regulations, and Articles 55, 56, 59, and 66 of GC IV.

territory, within the meaning of IHL, from outside? How could it requisition or seize properties if it is not deployed in the occupied territory? How could it ensure and maintain medical establishments and services, public health, and hygiene?

Should the occupier not be in a position to effectively assume those duties under occupation law (in particular when it has removed its troops from the foreign territory), it would then become quite meaningless to invoke occupation law as the legal frame of reference. For this reason, control over air space alone, for instance, has been rejected as constituting effective control for the purposes of IHL.<sup>39</sup>

Effective control also implies the enemy foreign forces' potential ability to substantiate their activities of occupation. In other words, effective control means that the occupant will put its authority into effect by, for instance, enforcing – or by being able to enforce – directives issued to the local population, and by making them respected.<sup>40</sup> In this regard, the setting up of an administration run by the occupant in the occupied territory, albeit not compulsory, has been identified, repeatedly, as a necessity for the foreign forces: only then will the occupant be able to discharge its obligations and enforce its rights effectively under occupation law. The Hague Regulations assumed that, on gaining control, the occupant would establish its authority, introducing a system of direct administration.<sup>41</sup> This bolsters the view that the occupant's presence is a precondition for establishing the existence of a state of occupation. G. Von Glahn emphasized the point when discussing the difference between invading forces and occupying forces: 'In the former case, the invading forces have not yet solidified their control to the point that a thoroughly ordered administration can be said to have been established'.<sup>42</sup> Consequently, effective control is – in principle – achieved when the Occupying Power, through its presence on the ground, is in a position not only to exert authority but also to assume responsibilities attached to it under IHL.

However, requiring the presence of foreign troops on the ground does not mean that effective control obliges them to inhabit every square metre of occupied territory. For instance, the US Army's *Field Manual* specifies that the size of the foreign forces cannot be pre-determined and will vary according to the circumstances, in particular the topographical characteristics of the territory, the density of the population, and the degree of resistance encountered. Effective control could be exerted by positioning foreign troops in strategic positions on the occupied territory: this would make it possible for the Occupying Power to dispatch troops, within a reasonable period of time, to make its authority felt throughout the area

39 See H.-P. Gasser, above note 15, para. 527: 'Supremacy in the air alone does not fulfil the requirement of actual occupation'. See also, Y. Dinstein, above note 15, p. 48: 'As such, belligerent occupation of the airspace is inconceivable independently of effective control over the subjacent land. This is a corollary of the proposition that air supremacy alone does not qualify as effective control'.

40 See H.-P. Gasser, above note 15, para. 527.

41 See E. Benvenisti, above note 15, p. 4.

42 G. Von Glahn, above note 15, p. 28. This assumption is also reflected in US Army, *Field Manual 27-10*, above note 5, para. 356: 'Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory'.

in question. Thus, effective control may, to a certain extent, take the form of remote control.<sup>43</sup>

The importance of the physical presence of hostile armed forces is also widely reflected in legal scholarship<sup>44</sup> and can be deduced from the ICJ's decision in *DRC v. Congo*, which states in paragraph 173:

In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as the result of an intervention, is an occupying power in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were *not only* stationed in particular locations *but also* that they had substituted their own authority for that of the Congolese Government.<sup>45</sup>

In this paragraph, the ICJ follows the classic sequence of occupation: intervention by armed forces in foreign territory that permits them to establish their authority over that area, this authority reinforced by the continuous stationing of enemy troops, and, finally, the substitution of this authority for that of the legitimate government. The presence of the hostile army as a precondition is acknowledged by the use of the words 'not only' and 'also', which link presence and exercise of authority and put the two notions on equal footing in terms of preconditions. Both must be fulfilled for

43 One might wonder whether, in some specific instances (in particular when the belligerents' territories are contiguous), the same result could be attained by positioning troops in strategic places located just outside the occupied territory.

44 IHL experts, such as M. Bothe, while referring to the definition of belligerent occupation laid down in Article 42 of the Hague Regulations, have identified two essential characteristics: military presence and lack of consent from the occupied state. Bothe asserts that the cumulative existence of these two elements will determine the beginning and the end of occupation. He also states that a certain threshold of military presence must be passed for the occupant to be said to exert effective control. See M. Bothe, above note 15, p. 27. H.-P. Gasser, who has also stressed the requirement regarding the occupant's presence for the purposes of effective control, writes: 'The question [of occupation] is whether in fact the armed forces that have invaded the adversary's territory have brought the area under their control *through their physical presence*, to the extent that they can assume the responsibilities which attach to an occupying power'. See H.-P. Gasser, above note 15, p. 274 (emphasis added). A. Roberts has written that 'At the heart of treaty provisions, court decisions and legal writings about occupations is the image of the armed forces of a State exercising some kind of domination or authority over inhabited territory *outside the accepted international frontiers*'. See Adam Roberts, 'What is military occupation?', in *British Yearbook of International Law*, Vol. 55, 1984, p. 300 (emphasis added). Military presence as a precondition for the occupation test can be also inferred from writings that analyse the conditions for the termination of occupation: many scholars who emphasize that the test for the end of occupation mirrors that for its beginning say that an occupation ends when the troops leave the foreign territory. As Oppenheim points out, 'occupation comes to an end when an occupant withdraws from a territory, or is driven out of it'. See L. F. L. Oppenheim, *International Law*, Vol. 2, Longmans, London, 1952, p. 436. For Gerhard Von Glahn, 'normally, military occupation ends through permanent and voluntary withdrawal of the occupying power'. See G. Von Glahn, above note 15, p. 30. More recently, Yuval Shany has stressed that 'none of the arguments raised against the negation of the first condition (physical presence in the territory) is ultimately convincing. First, *lex lata* still seems to insist upon physical presence of hostile forces on the ground. This is not mere formalism, as it is hard to conceive of the manner in which an occupier with no ground presence could realistically be expected to execute its obligations under *jus in bello*'. See Y. Shany, above note 15, p. 380.

45 ICJ, *DRC v. Uganda*, above note 3, para. 173 (emphasis added).

a situation to qualify as an occupation. Had the Court relied exclusively on the exercise of authority, it would not have used the ‘not only . . . but also’ formula, but would have referred directly to the concept of substitution of authority without mentioning the presence of hostile troops on the ground.

In light of the above, it can be asserted that the presence of hostile military forces on foreign territory is – in most cases – a necessary condition for describing that territory as ‘occupied’.<sup>46</sup> While the presence of foreign troops may not be sufficient to cause an area to be classified as occupied territory, it is nonetheless a prerequisite because it generally provides the necessary conditions for the exercise of effective control. Finally, requiring the presence of foreign forces in the occupied territory conforms to the principle of effectiveness underlying occupation law, according to which the Occupying Power must be capable of enforcing rights and duties under occupation law.

Lowering the threshold of effective control by ignoring the requirement that the occupant must have a presence in the occupied territory will ineluctably affect the application of occupation law. The rights and duties assigned to an Occupying Power by IHL have been calibrated in relation to a certain threshold of control that normally presupposes the physical presence in occupied territory of the occupying forces. Any attempt to lower the threshold of effective control – particularly by not requiring the physical presence of hostile troops in the occupied territory – will necessarily diminish the importance and extent of the occupant’s obligations since, in such instances, it will generally not be in a position to assume them. To accept a type of effective control that will not permit the occupant to execute the obligations listed under occupation law could harm the relevance of that body of law and could potentially prevent it from producing legal effects and responding adequately to the social needs arising from a state of occupation.

Therefore, the test of effective control cannot be defined in terms of the general capabilities – detached from their means of enforcement – of the foreign forces in comparison with those of their opponent. The test should generally refer instead to the effect of the foreign forces’ presence on the exercise of authority in the contested area, in particular the ability of these forces to exert authority over the territory concerned in lieu of the local government. In other words, the test for an occupation, as set out in Article 42 of the Hague Regulations, should not be: who has the military capability to impose its will? Instead, it should be: which of the belligerents has the military capability, *by virtue of its presence in a given area*, to impose its authority therein and prevent its opponent from doing so, and, as a result of this, be in effective control of that area?

### The notion of authority

The notion of authority under Article 42 of the Hague Regulations is not easy to understand and interpret. This is mainly due to the ambiguous nature

46 Y. Shany, above note 15.

of this provision, which combines the actual exercise of authority<sup>47</sup> with the potential exercise of such authority<sup>48</sup> while not specifying the nature of such authority.

Concerning the nature of the authority, it is submitted here that ‘authority’ under Article 42 of the Hague Regulations should refer to the notion of governmental functions exercised by the hostile foreign armed forces, since occupation has to do with political direction of the territory concerned and cannot be enforced by anything short of governmental functions.<sup>49</sup>

The way in which this authority is exercised by the Occupying Power has also been the subject of controversy. The first relates to the question whether *only* the Occupying Power must exercise authority in the occupied territory. The second concerns this question: must the foreign forces, in addition to their presence in the concerned area and the related disablement of the territorial sovereign, *actually substitute* their authority for that of the ousted government or is it enough that they exert a degree of control sufficient to place them *in a position to substitute* their authority for that of the former local government (i.e. ability to exercise authority)?<sup>50</sup>

### *Does the Occupying Power’s authority need to be exclusive?*

As already noted, one of the underlying principles of occupation law is that the Occupying Power, through its firm control of the occupied territory, must prevent the territorial sovereign from exercising its governmental authority. This position has been inferred in particular from Article 41 of the 1880 *Oxford Manual*, which states:

Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs *has ceased, in fact, to exercise its ordinary authority therein*, and the invading State is alone in a position to maintain order there.<sup>51</sup>

Some authors have deduced from this that occupation requires the exercise, in the occupied territory, of authority that is exclusive and unique: that of the foreign forces. In this regard, Daphna Shrager has pointed out that ‘it is the fact of exercising exclusive governmental or administrative authority in the territory independently of the displaced sovereign which qualifies the foreign presence as an occupant and the

47 ‘Territory is considered occupied when it is actually placed under the authority of the hostile army’.

48 ‘The occupation extends only to the territory where such authority . . . can be exercised’.

49 ICRC Report on Occupation, above note 30, p. 19.

50 This conception of the notion of authority reflects the views of various delegates during the negotiations that led to the 1874 Brussels Declaration. For instance, on that occasion Baron Jomini, the Russian delegate, observed that ‘if the occupier is in position to exercise his authority, the occupation is a reality; from the moment that this power no longer exists, the occupation ceases’. See UK, House of Commons, *Parliamentary Papers*, ‘Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare (Miscellaneous, No. 1)’, 1875, p. 259.

51 Emphasis added.

“source of authority” in the occupied territory’.<sup>52</sup> Those who support this view deny the possibility of any sharing of authority in occupied territory and assert that the previous government must necessarily have been ousted or must have collapsed because the military operation resulted in an occupation.

This position was endorsed by the US Military Tribunal in Nuremberg in the *Von List* case,<sup>53</sup> but it does not necessarily reflect current IHL, which does not exclude the possibility of authority being shared by the occupant and the government of the occupied territory and even suggests it in various provisions.

While occupation law does assume that the Occupying Power will bear all responsibility in occupied territory as the result of its enforcement of its military domination, it also allows for a ‘vertical sharing of authority’. It is submitted here that this ‘vertical sharing of authority’ reflects the hierarchical relationship between the Occupying Power and the local authorities, the former maintaining a form of control over the latter through a top-down approach to the allocation of responsibilities. ‘Horizontal sharing of authority’ would, in contrast, imply competition of a sort between the foreign troops and the local authorities, which would ultimately bring into question the ability of the former to impose their will on the latter, thus casting doubt on the existence of effective control for the purposes of IHL.

This ‘vertical sharing of authority’ is implied by some provisions of the Fourth Geneva Convention – notably Articles 6(3), 47, 50, and 56 – that require co-operation between the Occupying Power and national and local authorities. Such sharing of power must not, however, affect the ultimate or overall authority of the occupier over the occupied territory and must not impinge upon its security and military operations in the areas in question; and it must issue from the Occupying Power’s genuine desire to share the authority it has gained as the result of the military invasion and not from an inability to overcome the local government and/or its surrogates. The continued operation of the local government must therefore depend on the occupier’s willingness to let it function and exert responsibilities to a certain extent. In other words, the ‘vertical sharing of authority’ must contain within it the notion of subordination, which always characterizes the relationship between the Occupying Power and the occupied territorial sovereign and which reflects the view that no authority can be exercised other than that imposed or permitted by the foreign forces. The allocation of competences that this sharing of authority implies has been emphasized notably by the Supreme Court of Israel, which decided that

the [occupying] military force may determine to what degree it exercises its powers of civil administration through its direct delegates and which areas it leaves in the hand [*sic*] of the former government, whether local or central government officials. Permitting the activities of such governmental authorities does not, per se, detract from the factual existence of effective military

52 Daphna Shraga, ‘Military occupation and UN transitional administrations: the analogy and its limitations’, in M. G. Cohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum L. Caflisch*, M. Nijhoff, Leiden, 2007, p. 481.

53 See above note 6, pp. 55–56.

control over the area and the consequences that ensue therefrom under the laws of war.<sup>54</sup>

### *Ability to exert authority versus actual authority: which criterion prevails?*

As to the nature of the authority exerted by the Occupying Power over the occupied territory, the ICJ's recent decision in the case of *DRC v. Uganda* has complicated the interpretation of the notion of authority. The Court declared that occupation required the exercise of *actual* authority by the foreign forces.<sup>55</sup> In other words, the ICJ decided that foreign troops had to substantiate their authority in order to qualify as an Occupying Power. The ICJ judgment, in emphasizing actual over potential control, represents a significant change in the interpretation and application of the test laid down in Article 42 of the Hague Regulations. It is submitted here that the ICJ's interpretation is too narrow and does not reflect *lex lata*, which continues to emphasize the ability to exert authority, not the actual exercise of authority. As we have already seen while examining the elements constituting the notion of effective control, an expansive reading of the notion of effective control that sanctions the occupant's potential exercise of governmental authority in occupied territory is supported, notably, by post-World War II jurisprudence,<sup>56</sup> some military manuals,<sup>57</sup> and the prevailing legal scholarship,<sup>58</sup> all of which have opted for a test based on the Occupying Power's ability to exert authority over the occupied territory.

Therefore, it is argued here that – once the local government has been subdued by the invading army – the occupation test must be based solely on the *ability* of foreign forces to exert authority over a specific area. One has only to turn to the situation of Denmark during World War II: there, German armed forces chose not to exert authority and allowed the Danish government to function despite their military supremacy. Had the test proposed by the ICJ been applied in this instance, one would have had to conclude that Germany was not occupying Denmark. It is also submitted here that the necessity of opting for a test based on the ability to exert authority is supported by other considerations.<sup>59</sup>

In fact, the interpretation of Article 42 of the Hague Regulations that disconnects the existence of occupation from the actual and concrete exercise of governmental authority by the military power vis-à-vis the local population would eventually dissuade the Occupying Power from evading its obligation to govern the occupied territory. Indeed, it is argued here that requiring the foreign forces to exercise concrete authority (for instance, by establishing a provisional civil administration) would open the door to a bad-faith interpretation of this criterion.

54 High Court of Justice, Israel, 102/82, *Tsemel v. Minister of Defence*, 37(3), P.D. pp. 373–374.

55 ICJ, *DRC v. Uganda*, above note 3, para. 173, emphasis added.

56 *Von List* case, above note 56, p. 59 See also ICTY, *Naletilić* case, above note 4, para. 217.

57 See, for instance, UK, *Manual*, above note 16, point 11.3, p. 275.

58 See above note 29.

59 See Y. Shany, above note 15, p. 376.

It would be enough for the occupier to refuse to assume its duties under the law in order to be regarded as not actually exerting authority over the territory it had just invaded. Ultimately, such an approach could encourage foreign forces to refrain from maintaining law and order or from meeting the basic needs of the local population – simply to avoid being regarded as the Occupying Power. This would leave the local population without any protection, because its own government would be incapable of governing the area and the foreign troops would be unwilling to do so. In addition, a test based on the ability to exert authority would prevent any attempt by the Occupying Power to evade its duties under occupation law by installing a government by proxy that would exercise governmental functions on its behalf.

Therefore, the notion of authority under Article 42 of the Hague Regulations should be interpreted as referring to the local government's submission to the foreign forces' military superiority resulting from the successful invasion combined with the ability of these foreign forces to exercise governmental functions in lieu of the local government.

Finally, in relation to interpreting the notion of authority for the purposes of the occupation test, one should also examine the impact of local armed resistance on the Occupying Power's ability to exert authority in the occupied territory. It is an established principle of IHL that military occupation can be said to exist despite the presence of resistance to it, and can be said to exist even when some part of the territory in question is temporarily controlled by resistance forces.<sup>60</sup> Paragraph 509 of the 2004 UK *Manual of the Law of Armed Conflict* stipulates clearly that

occupation does not become invalid because some of the inhabitants are in state of rebellion, or through occasional successes of the guerrilla bands or 'resistance' fighters. Even a temporarily successful rebellion is not sufficient to interrupt or terminate occupation, provided that the authority of the legitimate government is not effectively re-established and that the occupant suppresses the rebellion at once.

However, if foreign armed forces are required to engage in significant combat operations to recapture the area in question from forces of the local armed resistance, that part of the territory cannot be considered to be occupied until the foreign forces have managed to re-establish effective control over it.

The US Army's *Field Manual 27-10*, in its Section 356, stipulates that 'the mere existence of a fort or defended area within the occupied district, provided the fort or defended area is under attack, does not render the occupation of the remainder of the district ineffective'. Thus, the existence of an unoccupied space within a larger area under the effective control of the foreign troops does not negate

60 See US Tribunal at Nuremberg, *Hostages* trial, above note 2, p. 56. The Court stated that 'while it is true that the 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'.

the existence of a state of occupation over the rest of the territory. Yoram Dinstein explains:

Should the occupying power be expelled from – or lose its grip over – an occupied territory, in whole or in part, the occupation in the area concerned is terminated. Over time, the territory subject to the effective control of an occupying power is likely to grow or shrink in size, and the fluctuations may be egregious... The ebb and flow in the extent of the territory subject to belligerent occupation may be the direct outcome of battlefield victories or defeats.<sup>61</sup>

Therefore, local armed resistance may be of great significance and, in certain circumstances, might even challenge the authority of the foreign forces to such an extent that the latter would no longer qualify as an Occupying Power within the meaning of IHL.

There is another issue to be considered: what role does interpreting the notion of authority play in determining the end of occupation? It has been argued that some form of transfer of authority, from the former occupant to the local government, should occur to make it unambiguously clear that the occupation has ended: for instance, the local government's authority should replace that previously exerted by the occupant. For the supporters of such position, any transfer of competences short of such a complete handover would prolong the state of occupation and the application of occupation law (with regard to the responsibilities of the foreign forces).<sup>62</sup>

It is submitted here that it is difficult to find a basis under *lex lata* for this position. Empowering the local government is not a precondition for ending an occupation, since IHL is silent on the issue. In fact, a situation in which foreign troops completely withdraw from territory they had occupied, leaving behind them a vacuum of authority, has already been tackled, by the Eritrea–Ethiopia Claims Commission.<sup>63</sup> It can be inferred from the Commission's jurisprudence that one cannot justify on the basis of IHL the continued application of occupation law to foreign forces that have withdrawn completely from a territory formerly under their effective control and that no longer exert key elements of authority therein.

### Absence of consent from the local governmental authority: a necessity

Military occupation is by definition an asymmetric relationship: the existence of an occupation implies that foreign forces are imposing their authority over the government of the occupied territory by coercive, military, means. Therefore, the distinguishing features of a military occupation within the meaning of IHL will always be a) its coercive character and b) the related absence of consent. These are

61 Y. Dinstein, above note 15, p. 45.

62 M. Bothe, above note 15, p. 29; Gisha, above note 31, pp. 82 ff.

63 Eritrea–Ethiopia Claims Commission, Partial Awards: Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22, paras. 67, 71, 83–84.

also the elements that distinguish ‘belligerent occupation’ from ‘pacific occupation’, to which the sovereign government consents.<sup>64</sup>

The absence of consent seems to be an essential element of the occupation test, but determining its existence remains something of an undertaking. First of all, it is worth specifying that absence of consent is not merely one element to factor into the occupation test: it must be established as a prerequisite for the test. Indeed, it is doubtful whether one could find a single example of belligerent occupation – and the related application of occupation law – that has occurred with the consent of the host state. The existence of consent is simply incompatible with the institution of belligerent occupation. The use of the word ‘hostile’ in Article 42 of the Hague Regulations notably precludes from occupation law’s field of application situations in which foreign troops are stationed on and exercise authority over a territory with the consent of the local government.

Consent, in this context, has to be genuine, valid, and explicit in order to entail the inapplicability of occupation law.<sup>65</sup> Determining whether this is so, in any given situation, is not an easy task, notably because of the existence of ‘engineered consent’, which can be defined as a process by which a state intervening in a foreign territory ensures, by any means or legal constructions available to it, that the host state gives the appearance of consenting to the presence of its armed forces. The complexity of interpreting the notion of consent should not, however, detract from its overall importance in determining the applicability of occupation law.

Another issue in determining the existence of consent for fixing the applicability of occupation law relates to the identity of the consenting party. It can be argued that consent to the foreign forces’ presence should be given by the *de jure* government. However, it can also be argued that the consent that counts is that of the *de facto* government effectively exercising authority over the territory concerned just before the foreign forces’ invasion, not that of the *de jure* government.

The latter position would be in line with the theory according to which the classification of a situation for the purposes of occupation law can be made only on the basis of the prevailing facts; ultimately, this requires determining who has *de facto* effective authority, in order to identify who would be entitled to permit the presence of the foreign military. This focus on the prevailing facts also implies not having to enter into sensitive, controversial, and often endless discussions about the legitimacy of the authority concerned. It is submitted here that this position should be preferred when tackling the notion of consent for the purposes of determining the applicability of occupation law. Finally, determining the identity of the consenting party on the basis of the effectiveness of authority would conform to that principle of public international law according to which an entity must be

64 ‘Pacific occupation’ does not trigger the application of occupation law.

65 M. Bothe, above note 15, p. 30: ‘where it is considered that there is no genuine, freely expressed consent given by the legitimate and effective government, the foreign military presence must be regarded as belligerent occupation’.

considered the legal government of a state if it is independent and is in fact the *effective* government.<sup>66</sup>

It is also submitted here that the consent given should be explicit in order to avoid the ambiguities attached to the assessment of consent that is implicit. In this regard, it is necessary to distinguish between the absence of military opposition to the foreign troops' presence and formal consent given by the local governmental authority. As suggested in Article 2(2) common to the 1949 Geneva Conventions,<sup>67</sup> the fact that the invaded state does not carry out military operations to contest the deployment of foreign forces does not mean that it has consented to their presence on its soil and that occupation law would therefore not be applicable to the situation.

An intervention by the United Nations Security Council might also be of consequence for assessing the notion of consent: it would be very difficult to classify a situation as an occupation when consent – even if initially the product of coercion – is validated *a posteriori* by the Security Council through a resolution. However, even though the Security Council can override IHL by virtue of Articles 25 and 103 of the United Nations Charter, it could be argued that the Security Council should not change legal definitions and concepts and declare that there is no occupation if the prevailing facts say otherwise. In other words, the Security Council should not unilaterally change the facts on the ground and state that an occupation has ended if the effective government of the territory concerned has not genuinely consented to the foreign forces' presence.

Another case in point is when consent is given by local authorities after the situation has stabilized and effective control by foreign forces has been clearly established. It has been argued that, in this instance, free and genuine consent cannot be said to have been given, the local government being under the authority of the Occupying Power. It can therefore be said that free consent can be given only when both parties possess some measure of independence. An agreement concluded during an occupation for the purposes of securing consent to the foreign forces' presence – leading ultimately to the end of the occupation – would reflect a relationship that entailed the subordination of the local government to the Occupying Power and would imply a coerced consent.<sup>68</sup> It has also been argued that Article 47 of the Fourth Geneva Convention would freeze the situation and would imply the presumption that occupation law should continue to apply until the Occupying Power transferred its provisional authority to the local government.<sup>69</sup> For the

66 Hans Kelsen, *Principles of International Law*, The Lawbook Exchange, Clark, NJ, 2003, p. 279. Whether an entity is an 'effective government' can be determined by reference to its capacity to control the territory and population, as well as its willingness to carry out the international obligations incumbent on the state. See Quoc Dinh Nguyen, Patrick Dailler, and Alain Pellet, *Droit international public*, 7th edition, L.G.D.J., Paris, 2002, pp. 416–417.

67 *Commentary on the Geneva Conventions of 12 August 1949*, above note 14, pp. 21–22.

68 ICRC Report on Occupation, above note 30, p. 29.

69 Article 47 of GC IV: 'Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory'.

supporters of such a position, the end of the occupation could be triggered only by the complete withdrawal of the foreign forces together with the full empowerment of the local government. However, this position can be challenged on the basis that genuine consent can be given during an occupation and can result in its termination. A local government with a good deal of authority and credibility, and recognition as a representative body, could conceivably emerge from an occupation, as was the case in Iraq in 2004.

In conclusion, consent – as it has been shown – can be very difficult to evaluate. Consent may be far from genuine when the difference in power is great, but that does not mean that occupation law would apply automatically. In this regard, it is submitted here that when the existence of genuine, valid, and explicit consent is in doubt, the presumption of absence of consent should prevail – resulting in the application of occupation law as the default regime if the other criteria are fulfilled.<sup>70</sup> This would be the case particularly when foreign forces are deployed in a failed state: in this instance, absence of consent should be deduced from the absence of effective governmental authorities.

### **A legal test for determining whether a situation qualifies as an occupation for the purposes of IHL**

In light of what has been discussed above, one may infer the following test for the purposes of determining the existence of a state of occupation within the meaning of IHL. The effective-control test consists of three *cumulative* conditions:

- the armed forces of a state are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion;
- the effective local government in place at the time of the invasion has been or can be rendered substantially or completely incapable of exerting its powers by virtue of the foreign forces' unconsented-to presence;
- the foreign forces are in a position to exercise authority over the territory concerned (or parts thereof) in lieu of the local government.<sup>71</sup>

70 This presumption is particularly important and relevant, especially when a new local government established during the occupation consents to the foreign forces' presence on its territory and – potentially – their exercise of authority therein. In such cases, it is submitted here that the situation on the ground will always be the decisive factor in order to determine whether such consent has terminated the occupation and therefore ended the application of occupation law. If the situation in terms of exercise of authority has not changed on the ground and foreign forces still exert effective control over the territory in which they are deployed, the existence of genuine consent will be more difficult to assess. In such situations, occupation law should continue to apply, since it is difficult to imagine a local government delegating entirely effective control – and related authority – over its own territory (or parts thereof) to foreign forces that were previously the Occupying Power. When a local government consents to the presence of foreign forces that were previously occupying the territory, this consent – to be considered genuine – should be accompanied by an effective transfer of authority from the foreign forces to the local government and thus be characterized by a significant degree of empowerment of the local government, demonstrating the independence of the latter vis-à-vis the foreign forces.

71 This test equally applies to the forces of international or regional organizations. Nothing under occupation law permits the argument that this test would be different if the effective control over a foreign territory

The concept of effective control must be analysed as a whole and its components regarded as an integral part of that concept. Any attempt to ignore or set aside an element of the effective-control test will affect the entire structure and *raison d'être* of occupation law, the implementation of which revolves around the fulfilment of the criteria set out in Article 42 of the Hague Regulations.

In principle, this test applies equally for the beginning and the end of occupation. In fact, the criteria to be met in order to establish the end of occupation should generally mirror the ones used to determine its beginning.<sup>72</sup> In other words, the criteria should be the same as for the beginning of occupation, but in reverse. Therefore, the physical presence of foreign forces, their ability to enforce authority over the territory concerned in lieu of the existing local governmental authority, and the continued absence of the local governmental authority's consent to the foreign forces' presence, cumulatively, should be scrutinized when assessing the termination of occupation. If any of these conditions ceases to exist, the occupation should be considered to have ended.

The criteria to be used for establishing the end of an occupation should reflect the *rationale* of the concept and definition of occupation, which is the ability of foreign forces to replace the local governmental authority by invading its territory and establishing a presence there without securing consent for it. Effective control over the foreign territory or parts thereof generally ceases to exist when one of these criteria is absent; when that happens, occupation law no longer applies in the area concerned.

The identical nature of the tests for determining the beginning and the end of an occupation can be deduced from the legal literature and military manuals, as these do not distinguish between the criteria to be used for assessing the beginning or the end of an occupation, implying that the test is the same for both. As S. Vité and R. Kolb assert, '*de manière générale, la fin de l'occupation renvoie, en négative, à ce qui en constitue le commencement. Elle se détermine par référence aux critères définissant son champ d'application*'.<sup>73</sup> In addition, this view, which holds that the criteria for determining the beginning and the end of an occupation are the same, seems to have been endorsed by the ICJ in the case of *DRC v. Uganda*. The Court based its analysis of whether Uganda was an occupying power within the meaning

were exerted by armed forces of an international or regional organization. See Tristan Ferraro, 'The applicability of the law of occupation to peace forces', in Gian Luca Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations*, 31st San Remo Round Table on current problems of international humanitarian law, 4–6 September 2008, International Institute of Humanitarian Law, 2009, pp. 133–156.

72 It has been argued by some that Article 6(3) of GC IV sanctioned a new definition for the end of occupation, one that changed the criterion from effective control to the exercise of functions of government. See ICRC Report on Occupation, above note 30, p. 30. However, it is submitted here that this position is premised on a misinterpretation of Article 6(3). This provision has never been intended to provide a criterion for assessing the beginning and end of occupation, but only to regulate the end or the extent of GC IV's applicability on the basis that occupation would still continue. Article 42 of the Hague Regulations and Article 6(3) of GC IV are two distinct provisions pertaining to different specific *material*. Therefore, Article 6(3) can in no way be used as a provision of reference for determining the end of occupation.

73 R. Kolb and S. Vité, above note 21, p. 150. See also, Y. Shany, above note 15, p. 378.

of IHL on a test inferred from Article 42 of the Hague Regulations without distinguishing between the beginning and end of occupation.<sup>74</sup> Thus, it is submitted here that *lex lata* generally imposes a ruling not to differentiate the tests for the beginning and the end of occupation.

However, in some specific and exceptional cases – in particular when foreign forces withdraw from occupied territory (or parts thereof) while retaining key elements of authority or other important governmental functions therein which are typical of those usually taken on by an Occupying Power – it is proposed here that occupation law might continue to apply within the territorial and functional limits of those competences.

Indeed, it is submitted here that, despite the absence of the foreign forces' physical presence in the territory concerned, the authority they retained can – in some cases – amount to effective control for the purposes of the law of occupation and entail the continued application of that body of law's relevant provisions.

This functional approach to occupation would thus be used as the relevant test for determining the extent to which obligations under occupation law remain incumbent upon hostile foreign forces progressively phasing out or suddenly withdrawing from the occupied territory. This test applies to the extent that the foreign forces still exercise within all or part of the territory governmental functions acquired when the occupation was undoubtedly established and ongoing.

This functional approach permits a more precise delineation of the legal framework applicable to situations where it is difficult to determine with certainty if the occupation has ended or not. This is all the more important insofar as the law of occupation does not expressly address the question of the legal obligations applicable during the unilateral withdrawal from an occupied territory. The silence of IHL on this very issue is notably due to the fact that occupation usually ends either by force, by agreement, or by a unilateral withdrawal often followed by a related empowerment of the local government. In most of the cases, the foreign forces leaving the occupied territory do not continue – at least without the consent of the local government – to exercise important functions therein.

However, today, the continued exercise of effective control from outside the territory subject to it cannot be discarded outright. Indeed, it may be argued that technological and military developments have made it possible to assert effective control over a foreign territory (or parts thereof) without a continuous foreign military presence in the concerned area. In such situations, it is important to take into account the extent of authority retained by the foreign forces rather than focussing exclusively on the means by which it is actually exercised. One should also recognize that, in these circumstances, any geographical contiguity existing between the belligerent states might play an important role in facilitating the remote exercise of effective control, for instance by permitting an Occupying Power that has relocated its troops outside the territory to make its authority felt within reasonable time.

74 ICJ, *DRC v. Uganda*, above note 23, paras. 172–173.

Therefore, it is submitted here that any unilateral withdrawal from an occupied territory in which foreign forces, without the consent of the occupied territory's government, retain key elements of authority (previously exerted as a result of their legal status as Occupying Power and amounting to effective control under IHL)<sup>75</sup> calls for the application of those provisions of the law of occupation that remain relevant to the functions that the power continues to exercise.

The continued application of the relevant provisions of the law of occupation is indeed particularly important in that it is specifically equipped to deal with and regulate the sharing of authority – and the related assignment of responsibilities – between belligerent states.<sup>76</sup>

This dynamic and teleological interpretation of the law of occupation would thus require an application *rationae temporis* of this *corpus juris* that, in those circumstances, would not be dependent upon the continued presence of hostile foreign forces in the concerned territory but rather upon the subsistence of a form of authority which still qualifies as an effective control for the purposes of IHL.

A contrary position, which would not allow for the application of certain relevant provisions of occupation law in such specific situations, would encourage Occupying Powers to withdraw their troops from the occupied territory (or parts thereof) while still retaining some important functions remotely exerted in order to evade the significant duties imposed by IHL. This artificial legal construct would ultimately leave the local population bereft of any major legal protection and would run contrary to a teleological interpretation of the law of occupation.

## **Special cases of occupation: occupation by proxy and occupation conducted by a coalition of states or by multinational forces**

### Occupation by proxy and the notion of indirect effective control

It is submitted here that effective control may be exercised through surrogate armed forces as long as they are subject to the overall control of the foreign state. Thus, a state would be an occupying power for the purposes of IHL when it exercises overall control over *de facto* local authorities or other local organized groups that are themselves in effective control of a territory or part thereof.<sup>77</sup>

75 This retention of competences can also – but not necessarily – be accompanied by the prohibition of the local authorities exerting certain governmental functions.

76 The rationale of the law of occupation is the necessity to organize the allocation of responsibilities between the belligerents with the view to avoiding, as far as possible, vacuum of authority and protection in occupied territory.

77 It is important to note that the first part of this test refers to the notion of 'overall control' *over a group of individuals*, which is used with the view to assessing whether the actions of such a group can be attributed to a foreign state. Should this be the case, the second part of the test addresses the question as to whether this group has 'effective control' *over the concerned territory* for the purposes of classifying the situation as an occupation for the purposes of IHL. Therefore, the first part of the test (i.e. 'overall control over *de facto* local authorities') relates to the concept of imputability under public international law, whereas the second

The existence and relevance of this theory is corroborated by various decisions of international tribunals. A notable example is the decision in the well-known *Tadić* case: the ICTY decided that ‘the relationship of *de facto* organs or agents to the foreign Power includes those circumstances in which the foreign Power “occupies” or operates in certain territory solely through the acts of local *de facto* organs or agents’.<sup>78</sup> In the case of *DRC v. Uganda* (2005), the ICJ examined whether Uganda exerted overall control over Congolese insurgent groups.<sup>79</sup> This clearly demonstrates that the Court had endorsed the position developed by the ICTY and thus accepted the possibility of an occupation being conducted through indirect effective control.

The notion of indirect effective control has scarcely been addressed in the legal literature<sup>80</sup> or in military manuals. It is argued here that the criterion requiring the military presence of hostile foreign troops is fulfilled when the theory of indirect effective control is applied, because the overall control exerted over local entities themselves having effective control over the areas in question turns the individuals

part of the test (‘effective control of a foreign territory’) corresponds to the notion of effective control under IHL, which is at the core of the notion of occupation. Therefore, the two distinct parts of the test must be cumulatively satisfied in order to determine the existence of an indirect effective control exerted by one state over the territory of another.

- 78 ICTY, *Tadić* case, 7 May 1997, above note 22, para. 584. In March 2000, the ICTY confirmed this interpretation in the *Blaškić* case. On that occasion it stated: ‘In these enclaves, Croatia played the role of occupying Power through the overall control it exercised over the HVO [a local militia, the “Croatian Defence Council”], the support it lent it and the close ties it maintained with it. Thus, by using the same reasoning which applies to establish the international nature of the conflict, the overall control exercised by Croatia over the HVO means that at the time of its destruction, the property of the Bosnian Muslims was under the control of Croatia and was in occupied territory’ (ICTY, *Prosecutor v. Tihomir Blaškić*, Trial Chamber, 3 March 2000, Case No. IT 95-14-T, para. 149). However, in the *Naletilić* case (2000), the Trial Chamber challenged the position adopted by the ICTY in the *Blaškić* case: ‘The Chamber notes that the jurisprudence of the Tribunal relating to the legal test applicable is inconsistent. In this context, the Chamber respectfully disagrees with the finding in the *Blaškić* Trial Judgement argued by the Prosecution. The overall control test, submitted in the *Blaškić* Trial Judgement, is not applicable to the determination of the existence of an occupation. The Chamber is of the view that there is an essential distinction between the determination of a state of occupation and that of the existence of an international armed conflict. The application of the overall control test is applicable to the latter. A further degree of control is required to establish occupation’ (ICTY, *Naletilić* case, above note 4, para. 214). However, this latter piece of jurisprudence can be challenged, since the Trial Chamber confuses overall control over a territory with overall control over an entity that itself has effective control over the territory concerned.
- 79 ICJ, *DRC v. Uganda*, above note 3, para. 177: ‘The Court observes that the DRC makes reference to “indirect administration” through various Congolese rebel factions and to the supervision by Ugandan officers over local elections in the territories under UPDF control. However, the DRC does not provide any specific evidence to show that authority was exercised by Ugandan armed forces in any areas other than in Ituri district. The Court further notes that, although Uganda recognized that as of 1 September 1998 it exercised “administrative control” at Kisangani Airport, there is no evidence in the case file which could allow the Court to characterize the presence of Ugandan troops stationed at Kisangani Airport as occupation in the sense of Article 42 of the Hague Regulations of 1907. Neither can the Court uphold the DRC’s contention that Uganda was an occupying Power in areas outside Ituri controlled and administered by Congolese rebel movements. As the Court has already indicated, the evidence does not support the view that these groups were “under the control” of Uganda’.
- 80 In their recent book, Robert Kolb and Sylvain Vité do not seem to adhere fully to the theory of indirect effective control, as they emphasize the necessity of the presence of foreign boots on the ground. They only concede that ‘dans le cas d’un exercice d’autorité indirect, par contrôle global ou effectif d’une faction interposée, il n’est pas exclu que certains devoirs issus du droit de l’occupation puissent ponctuellement s’appliquer, du moins indirectement’ (R. Kolb and S. Vité, above note 21, pp. 180–181).

belonging to those entities into ‘agents’ or ‘auxiliaries’ of the foreign state.<sup>81</sup> Such control exerted over these local entities reflects a real and effective link between the group of persons exercising the effective control and the foreign state operating through those surrogates.

Finally, the question of indirect effective control has been tackled in Section 11.3.1 of the UK *Manual of the Law of Armed Conflict*:

In some cases, occupying troops have operated indirectly through an existing or newly appointed indigenous government... In such cases, despite certain differences from the classic form of military occupation, the law relating to military occupation is likely to be applicable. Legal obligations, policy considerations, and external diplomatic pressures may all point to this conclusion.

In any case, the theory of indirect effective control is important insofar as it prevents a legal vacuum arising as a result of a state making use of local surrogates to evade its responsibilities under occupation law. Taking into account the validity of the concept of indirect effective control, the test for determining a state of occupation within the meaning of IHL should be adapted to read as follows:

- the armed forces of a state *or agents controlled by the latter* are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion;
- the effective local government in place at the time of the invasion has been or can be rendered substantially or completely incapable of exerting its powers by virtue of the foreign forces’ unconsented-to presence or by virtue of *agents controlled by the latter*;
- the foreign forces or *agents acting on their behalf* are in a position to exercise authority over the territory concerned (or parts thereof) in lieu of the local government.

## Occupation conducted by a coalition of states or by multinational forces

Usually, occupation involves one state exerting effective control over another state’s territory. Contemporary multinational operations may also create a situation in which the territory of a belligerent is occupied by more than one state operating within the framework of a coalition.<sup>82</sup> This occurred in Iraq in 2003–2004 and raised a critical question: how should one determine which of the states forming the

81 See International Law Commission, Articles on Responsibilities of States for Internationally Wrongful Acts, with Commentaries (2001), Article 8, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two. The word ‘agent’ should be interpreted broadly, as any person through whom the foreign state acts. See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, *ICJ Reports*, 1949, p. 1977.

82 The notion of multinational occupation should not be confused with occupation conducted by an international organization such as the UN. It is submitted here that such an international organization can also qualify as an occupying power for the purposes of IHL. On this issue, see T. Ferraro, above note 71, pp. 133–156.

international coalition is/are the Occupying Power(s)? The question has very important practical consequences albeit it did not generate much legal debate at the time.<sup>83</sup>

There are two options for determining which states involved in a multinational operation exercising effective control over a territory can be classified as Occupying Powers for the purposes of IHL.<sup>84</sup> The first option consists of applying to each state in a coalition, separately, the legal criteria developed earlier in this article. In order to qualify as an Occupying Power for the purposes of IHL, each member of the coalition would need to have troops deployed on the ground without the consent of the local governmental authority and be in a position to exert authority, in lieu of the displaced local government, over those parts of the occupied territory it was assigned to.

The ICRC chose a different option to deal with the occupation of Iraq in 2003. This involves taking a so-called functional approach to occupation by a coalition.<sup>85</sup> In addition to the states that individually fulfil the criteria of the effective-control test, other coalition members who perform functions and tasks that would typically be carried out by an Occupying Power, and for which respecting occupation law would be relevant, should be classified as Occupying Powers and be bound by the rules contained in the relevant instruments of occupation law. In other words, it would be the actions of the foreign forces, and the functions assigned to them, that turned them into Occupying Powers.

Despite the relevance of the functional approach proposed above, in practice it remains difficult to differentiate the legal status under IHL of the various members of a coalition occupying a country, when one takes into account the existence of a sliding scale of activities ranging from humanitarian assistance to exercise of administrative authority on behalf of the Occupying Powers. In fact, carrying out tasks under the command or instruction of the 'recognized' Occupying Powers would tend to confer the status of Occupying Power on those co-operating with these Occupying Powers, particularly when such tasks are essential to the fulfilment of the administrative responsibilities stemming from the law of occupation.<sup>86</sup>

83 D. Thürer and M. MacLaren, above note 18, pp. 759–762.

84 A complementary approach based on the law of state responsibility may also be used. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts could be a useful tool in this regard, for distinguishing members of a coalition involved in an occupation from those who should not be classified as Occupying Powers. According to this view, if the actions of a member state's armed forces could be attributed exclusively to the organization running the coalition *per se* or to other states participating in the coalition, that state should not be classified as an Occupying Power, since it has relinquished the effective or overall control over the troops it has put at the coalition's disposal.

85 Knut Dörmann and Laurent Colassis, 'IHL in the Iraq conflict', in *German Yearbook of International Law*, Vol. 47, 2004, pp. 302 ff.

86 Adam Roberts, 'The end of occupation in Iraq', in *International and Comparative Law Quarterly*, Vol. 54, June 2005, p. 33. See also Liesbeth Lijnzaad, 'How not to be an Occupying Power: some reflections on UN Security Council Resolution 1483 and the contemporary law of occupation', in Liesbeth Lijnzaad, Johanna van Sambeek, and Bahia Tahzib-Lie (eds), *Making the Voice of Humanity Heard*, Martinus Nijhoff, Leiden, 2004, p. 298 : 'carrying out tasks under command or instruction of an Occupying Power tends to confer Occupying Power status on those cooperating with them, particularly when such tasks are

It must also be stressed that, whatever the task performed by a coalition member, even if not a core task in terms of the occupier's duties under IHL, it would contribute to the occupation, since it would – at the very least – permit the 'uncontested' Occupying Powers to forego secondary tasks in order to focus on the main ones, such as enforcing law and order. Consequently, the actions of 'co-operating' member states would appear to be in support of the Occupying Power and would make it particularly difficult to fix their legal status, at least from the perspective of the enemy. In addition, one should also recognize that the evolution in the Occupying Power's rights and duties vis-à-vis the occupied territory, and the acknowledged role of full-fledged administrator – stemming from the prevailing interpretation of Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention – make it virtually impossible to observe the distinction, mentioned above, between primary and secondary tasks, since all these tasks would fall into the occupant's competences under *lex lata*. Thus, a presumption – rebuttable as it is – of status of occupier for those states participating in a coalition enforcing effective control over a foreign territory should be proposed.<sup>87</sup> This presumption may be rejected when, for instance, a state putting its troops at the disposal of a coalition also relinquishes operational command/control over them to another state or to the international organization occupying the territory as a result of the international military operation.

## Conclusion

It is hoped that this article will contribute to clarifying an essential aspect of occupation law; and, especially, that it will help to determine more precisely when the protective norms of occupation law will come into play after a foreign military invasion and the establishment of effective control over a particular territory.

The article proposes a legal reading and interpretation of Article 42 of the Hague Regulations. It argues that this central provision of occupation law is still relevant and provides the sole legal basis for inferring the conditions or criteria for

core to the position of an Occupying Power. This is clearly the case when tasks carried out are crucial to the way in which the Authority executes its role as an Occupying Power and carries out its administrative responsibilities. Participation may create responsibilities which may not be politically desirable. Thus, this late participation could confer the status of Occupying Power on such cooperating states, depending on the nature of their cooperation'.

87 This proposed presumption seems to be corroborated by UK, *Manual*, above note 16, section 11.3.3, which implies that all coalition members are Occupying Powers for the purposes of IHL: 'in cases where two or more states jointly occupy territory (following a coalition military campaign, for example), it is desirable that there be an agreement between them setting out the relationship between the occupying powers'. This view is shared by Y. Dinstein, who states: 'A number of Occupying Powers may act together as a coalition governing a single occupied territory. If they maintain unified command, as happened in Iraq in 2003–4, the Occupying Powers will bear the brunt of joint responsibility for what is happening within the area subject to their combined effective control. The coalition partners may also opt to divide the occupied territory into discrete zones of occupation with little or no overlap of authority. Should each Occupying Power administer its own zone, it will assume sole responsibility commensurate with the span of its respective effective control'. See Y. Dinstein, above note 15, pp. 48–49.

identifying the existence of an occupation. As a result of the analysis conducted here, one may conclude that the notion of effective control, which is at the core of the definition of occupation under IHL, has the following characteristics: the unconsented-to military presence of foreign forces in the territory concerned, the foreign forces' ability to exercise authority over that territory in lieu of the local government, and the related potential inability of the local government to exert its authority in the territory in question. Based on these prerequisites, which cumulatively make up Article 42's requirement of being 'actually placed under the authority of the hostile army', this article submits a legal test for determining more precisely when and how a specific situation amounts to an occupation for the purposes of IHL. The article also emphasizes the fact that, in principle, the same legal test can be used to establish the beginning and end of an occupation. It also argues that, in a situation of unilateral withdrawal of the foreign troops from the occupied territory, remnants of occupation law might continue to apply when those troops retain the competences acquired previously, provided that the authority retained still amounts to effective control over the concerned area. Finally, the article shows how this test can be used, with a few adjustments, to cover situations in which foreign forces can be classified as an Occupying Power because they have overall control of local surrogates exerting effective control over the territory in question. The article also addresses the issue of multinational occupation, submitting that the proposed legal test does apply to multinational forces when it is supplemented by a functional approach according to which the Occupying Power's status can also be derived from the nature of the functions effectively carried out by coalition members.