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## Military occupation

The four Geneva Conventions of 1949 apply to situations of occupation, be it total or partial, of the territory of a state party.

As for all types of armed conflict, the question whether an occupation exists is determined on the basis of the prevailing facts and does not depend neither on the subjective view of the parties involved nor on the lawfulness of the intervention under the legal framework governing the use of force


(<http://www.rulac.org/legal-framework/use-of-force>) in international relations.  *T. Ferraro, 'Determining the Beginning and End of an Occupation Under International Humanitarian Law'*

([http://www.rulac.org/assets/downloads/Ferraro\\_-\\_Beginning\\_and\\_end\\_of\\_occupation.pdf](http://www.rulac.org/assets/downloads/Ferraro_-_Beginning_and_end_of_occupation.pdf)), 885  
*International Review of the Red Cross* 94 (2012) 134ff.

### Elements of occupation

The Geneva Conventions do not define occupation. Yet, the elements of an occupation can be found in Article 42 of the 1907 Hague Regulations (<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=01D426B0086089BEC12563CD00516887>), which affirms that 'a

territory is considered occupied when it is actually placed under the authority of the hostile army.' This same standard is used to determine the existence of a state of occupation under the Geneva Conventions.

 *T. Ferraro and L. Cameron, 'Article 2: Application of the Convention'* ([https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#\\_Toc452462853](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#_Toc452462853)),


*ICRC, Commentary on the First Geneva Convention, 2016, §§296ff*; *T. Ferraro 'Determining the Beginning and End of an Occupation Under International Humanitarian Law'*


([http://www.rulac.org/assets/downloads/Ferraro\\_-\\_Beginning\\_and\\_end\\_of\\_occupation.pdf](http://www.rulac.org/assets/downloads/Ferraro_-_Beginning_and_end_of_occupation.pdf)), 94


*International Review of the Red Cross* 885 (2012) 137; *International Committee of the Red Cross,*


To determine whether a territory is under the 'authority' of a hostile army, the notion of effective control is used. The effective control test consists of three cumulative elements:

- Armed forces of a foreign state are physically present without the consent of the effective local government in place at the time of the invasion.
- The local sovereign is unable to exercise his authority due to the presence of foreign forces.
- The occupying forces impose their own authority over the territory.

 For more details on the individual criteria, see T. Ferraro and L. Cameron, 'Article 2: Application of the Convention' ([https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#\\_Toc452462854](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#_Toc452462854)), ICRC, *Commentary on the First Geneva Convention*, 2016, §§302ff; International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict* ([http://www.rulac.org/assets/downloads/2015\\_Contemporary\\_Challenges\\_report.pdf](http://www.rulac.org/assets/downloads/2015_Contemporary_Challenges_report.pdf)), 32nd International Conference of the Red Cross, 2015, p 11f; T. Ferraro 'Determining the Beginning and End of an Occupation Under International Humanitarian Law' ([http://www.rulac.org/assets/downloads/Ferraro\\_-\\_Beginning\\_and\\_end\\_of\\_occupation.pdf](http://www.rulac.org/assets/downloads/Ferraro_-_Beginning_and_end_of_occupation.pdf)), 94 *International Review of the Red Cross* 885 (2012) 140.


Once one of these three criteria is no longer fulfilled, the occupation has ended.  T. Ferraro and L. Cameron, 'Article 2: Application of the Convention' ([https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#\\_Toc452462854](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#_Toc452462854)), ICRC, *Commentary on the First Geneva Convention*, 2016, §306; T. Ferraro 'Determining the Beginning and End of an Occupation Under International Humanitarian Law' ([http://www.rulac.org/assets/downloads/Ferraro\\_-\\_Beginning\\_and\\_end\\_of\\_occupation.pdf](http://www.rulac.org/assets/downloads/Ferraro_-_Beginning_and_end_of_occupation.pdf)), 94 *International Review of the Red Cross* 885 (2012) 156.

The fact that the occupied territory is contested or its status is unclear does not have an impact on the test whether or not it is placed under military occupation. What matters is that the state whose forces established effective control was not the rightful sovereign over the territory when the conflict broke out or an invasion took place.  T. Ferraro and L. Cameron, 'Article 2: Application of the Convention' ([https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#\\_Toc452462858](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#_Toc452462858)), ICRC, *Commentary on the First Geneva Convention*, 2016, §§323ff; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (<http://www.icj-cij.org/docket/files/131/1671.pdf>), Advisory Opinion, 9 July 2004, §95; Eritrea-Ethiopia Claims Commission, *Ethiopia's Claim* ([http://legal.un.org/riaa/cases/vol\\_XXVI/155-194.pdf](http://legal.un.org/riaa/cases/vol_XXVI/155-194.pdf)), Partial Award: Central Front, 28 April 2004, §29.


A state can also become an occupying power through proxy forces (<http://www.rulac.org/classification/contemporary-challenges-for-classification#collapse4accord>). The question of whether multinational forces (<http://www.rulac.org/classification/contemporary-challenges-for-classification#collapse6accord>), including those operating under the command and control of an international organization such as the United Nations or of a regional organization, can become an occupying power depends on the same criteria as for a single state. The legal basis of their mandate has no impact on the classification of the situation.  *The applicability of the law of occupation to a multinational force under the command and control of the United Nations or a regional organization therefore depends on whether or not these forces are physically present in a territory without the territorial state's consent and exercise authority over the territory. The fact that this happens on the basis of a mandate from the United Nations Security Council does not exclude the possibility that these criteria are fulfilled. However, pursuant to article 103 of the Charter of the United Nations* (<http://legal.un.org/repertory/art103.shtml>), *the Security Council has the power to declare provisions of the law of occupation inapplicable to a situation. See T. Ferrano, Report on the Expert Meeting on Occupation and Other Forms of Administration of Foreign Territory* (<https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>), ICRC, March 2012, p 33ff.


## Relevance of armed resistance



The law of occupation applies even when the occupation does not meet any armed resistance. This is expressly provided for in common article 2(2) (<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=41229BA1D6F7E573C12563CD00519E4A>) to the four Geneva Conventions of 1949.

Rather than armed resistance, what matters is that the occupation is 'hostile', i.e. that there is an invasion or other presence of a foreign state's armed forces to which the territorial state did not consent. The lack of armed resistance of the territorial state cannot be interpreted as consent to the foreign armed forces' presence, nor can the fact that part of the local population welcomes the occupying forces.  *T. Ferraro and L. Cameron, 'Article 2: Application of the Convention'* ([https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#\\_Toc452462848](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#_Toc452462848)), ICRC, *Commentary on the First Geneva Convention*, 2016, §§228f. See also *Contemporary challenges – relevance of consent* (<http://www.rulac.org/classification/contemporary-challenges-for-classification#collapse2accord>).


## Territorial and temporal scope of occupation


The occupation extends to the territory where authority has been established and can be exercised.  See *Article 42 second sentence of the 1907 Hague Regulations* (<http://ihl-databases.icrc.org/ihl/WebART/195-200052?OpenDocument>). It can be difficult to establish the precise territorial dimension.


Occupying forces do not need to be present everywhere at all times to maintain the state of occupation. What matters is whether occupying forces can project their authority throughout the territory. For example, occupying forces may only be present in strategic positions from where they could be dispatched within a reasonable time frame.  T. Ferraro and L. Cameron, 'Article 2: Application of the Convention' ([https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#\\_Toc452462856](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#_Toc452462856)), ICRC, *Commentary on the First Geneva Convention*, 2016, §§314ff; *International Committee of the Red Cross, Occupation and Other Forms of Administration of Foreign Territory* (<https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>), *Expert Meeting*, 2012, p 17; T. Ferraro 'Determining the Beginning and End of an Occupation Under International Humanitarian Law' ([http://www.rulac.org/assets/downloads/Ferraro\\_-\\_Beginning\\_and\\_end\\_of\\_occupation.pdf](http://www.rulac.org/assets/downloads/Ferraro_-_Beginning_and_end_of_occupation.pdf)), 94 *International Review of the Red Cross* 885 (2012) 145.


Some authors claim that for an occupation to exist there must have passed a minimum period of time during which the occupation forces consolidated and stabilized their authority. Only this would enable them to meet all their responsibilities.  *International Committee of the Red Cross, Occupation and Other Forms of Administration of Foreign Territory* (<https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>), *Expert Meeting*, 2012, p 24. The International Committee of the Red Cross rejects this position. Instead, the law of occupation can be gradually applied. While negative obligations prohibiting a certain conduct of the occupying forces apply immediately, positive obligations would take effect only over time.  T. Ferraro and L. Cameron, 'Article 2: Application of the Convention' ([https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#\\_Toc452462857](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#_Toc452462857)), ICRC, *Commentary on the First Geneva Convention*, 2016, §§319ff; *Eritrea-Ethiopia Claims Commission, Eritrea's Claim* ([http://legal.un.org/riaa/cases/vol\\_XXVI/115-153.pdf](http://legal.un.org/riaa/cases/vol_XXVI/115-153.pdf)), *Partial Award: Central Front*, 28 April 2004, §57; *International Committee of the Red Cross, Occupation and other Forms of Administration of Foreign Territory* (<https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>), *Expert Meeting*, 2012, p 18.

## Functional occupation

The question can arise whether an occupation can continue after foreign forces withdrew from occupied territory or parts thereof, but continue to exercise authority remotely. For some, occupation necessarily or 'in principle' requires the presence of troops on the grounds.  S. Vité, 'Typologie of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' ([http://www.rulac.org/assets/downloads/Vite\\_Typology\\_of\\_Armed\\_Conflicts\\_IRRC.pdf](http://www.rulac.org/assets/downloads/Vite_Typology_of_Armed_Conflicts_IRRC.pdf)), 91 *International Review of the Red Cross* 873 (2009) 74; M. Milanovic, 'European Court Decides that Israel Is Not Occupying Gaza' (<http://www.ejiltalk.org/european-court-decides-that-israel-is-not-occupying-gaza/>), *EJIL Talk! Blog*, 17 June 2015; *European Court of Human Rights, Sargsyan v Azerbaijan* ([http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-155662%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-155662%22]})), *Grand Chamber, Judgment (Merits)*, App no 40167/06, 16 June 2015, §§93ff, 143f; *European Court of Human Rights, Chiragov and others v Armenia* ([http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-155353%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-155353%22]})), *Grand Chamber, Judgment (Merits)*, App no 13216/05, 16 June 2015, §96. For others the ability to project

military power from abroad may amount to effective control.  T. Ferraro 'Determining the Beginning and End of an Occupation Under International Humanitarian Law' ([http://www.rulac.org/assets/downloads/Ferraro\\_-\\_Beginning\\_and\\_end\\_of\\_occupation.pdf](http://www.rulac.org/assets/downloads/Ferraro_-_Beginning_and_end_of_occupation.pdf)), 94 *International Review of the Red Cross* 885 (2012) 157f.

According to the International Committee of the Red Cross 'in some specific and exceptional cases – in particular when foreign forces withdraw from the occupied territory (or parts thereof) while retaining key elements of authority or other important governmental functions that are typical of those usually taken on by an Occupying Power, the law of occupation might continue to apply within the territorial and functional limits of those competences'. Although the foreign forces are no longer physically present, 'the authority they retain may still amount to effective control for the purposes of the law of occupation and entail the continued application of the relevant provisions.'  T. Ferraro and L. Cameron, 'Article 2: Application of the Convention' ([https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#\\_Toc452462854](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#_Toc452462854)), ICRC, *Commentary on the First Geneva Convention*, 2016, §§307ff; *International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflict* ([http://www.rulac.org/assets/downloads/2015\\_Contemporary\\_Challenges\\_report.pdf](http://www.rulac.org/assets/downloads/2015_Contemporary_Challenges_report.pdf)), 32nd International Conference of the Red Cross, 2015, p 12; T. Ferraro, *Report on the Expert Meeting on Occupation and Other Forms of Administration of Foreign Territory* (<https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>), ICRC, March 2012, p 31ff. Instead of focusing on the presence of foreign forces, one should focus on the extent of the authority retained and the government functions acquired by the foreign forces during occupation still exercised, either in the whole or in part of the territory.

This concept of 'functional occupation' also permits to establish the applicable legal framework when it is not clear whether occupation has ended. The rules that remain applicable are those that are relevant, depending on the authority still retained. According to the International Committee of the Red Cross, such an approach is necessary and serves a humanitarian purpose, as it prevents states from evading their obligations and the local population from losing its protection.  T. Ferraro and L. Cameron, 'Article 2: Application of the Convention' ([https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#\\_Toc452462854](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#_Toc452462854)), ICRC, *Commentary on the First Geneva Convention*, 2016, §§310ff.

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