



## HIGHLIGHT

### THE RUSSIAN WAR AGAINST UKRAINE AND THE LAW OF THE EUROPEAN UNION

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## HOW DOES BELLIGERENT OCCUPATION END? SOME REFLECTIONS ON THE FUTURE OF THE TERRITORIES OCCUPIED IN THE RUSSIA-UKRAINE CONFLICT<sup>¶</sup>

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In the past months, news outlets have extensively reported on Ukraine's more or less effective counter-offensive, as well as on renewed rumours of possible negotiations between Ukraine and Russia.<sup>1</sup> Given the latter's annexation of several Ukrainian regions in September 2022,<sup>2</sup> these reports clearly raise the question of the future of these and other occupied territories.

While this question may be addressed through the lens of various rules of international law – e.g., the prohibition on the use of force, the principle of territorial integrity, and the duty of non-recognition as lawful of situations resulting from grave breaches of peremptory norms, including that prohibiting aggression –, the present investigation seeks to address it primarily through the prism of relevant rules of international humanitarian law (hereinafter IHL). Thus, after briefly recalling the conditions for the beginning

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<sup>1</sup> See 'Ukraine alone decides when conditions right for peace talks – NATO's Stoltenberg' (17 August 2023) Reuters [www.reuters.com](http://www.reuters.com); K Singh and R Satter, 'Ukraine has recaptured 50% of the territory that Russia seized, Blinken says' (23 July 2023) Reuters [www.reuters.com](http://www.reuters.com).

<sup>2</sup> P Sauer and L Harding, 'Putin annexes four regions of Ukraine in major escalation of Russia's war' (30 September 2022) The Guardian [www.theguardian.com](http://www.theguardian.com).



of a belligerent occupation under IHL, the focus will shift on those for its termination, which will be examined and discussed with reference to the case of Ukraine.

As is well known, belligerent occupation consists in the exercise of effective control over (part of) the territory of a State by one or more other States without the former's consent.<sup>3</sup> In other words, for a belligerent occupation to begin and relevant IHL rules to apply, the foreign troops' presence within a State's territory must not only amount to the exercise of so-called effective control, but also be hostile.

As far as the first requirement is concerned – *i.e.*, the exercise of effective control –, this expression is generally meant to describe the fulfilment of the following cumulative conditions: (a) foreign troops are present within a State's territory; (b) these troops are able "to exercise authority over the areas [in question] in lieu of the territorial sovereign"; and (c) the ousted government is unable to exercise its authority over these areas.<sup>4</sup> The notion of "authority" clearly refers to the exercise of governmental functions through the establishment of a temporary administration over the territory in question.<sup>5</sup> However, in the present writer's view, even the mere *ability* to exercise authority (so-called "potential control") would suffice.<sup>6</sup> Thus, occupation law begins to apply once the occupier has ousted the legitimate sovereign and is in a position to exercise its own authority over the territory in question.

As for the second requirement – *i.e.*, the hostile nature of the foreign troops' presence –, this stems from the wording of art. 42 of the Hague Regulations: occupation law only applies when a "hostile army" occupies part or whole of a State's territory. Since common

<sup>3</sup> This definition has been developed by legal scholarship based on three provisions within existing IHL treaties, *i.e.*, arts 42 and 43 of the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907) (hereinafter, Hague Regulations), and art. 2(2) common to the four Geneva Conventions (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949); Geneva Convention relative to the Treatment of Prisoners of War (1949); Geneva Convention relative to the protection of civilian persons in time of war (1949) (hereinafter, IV Geneva Convention)). For a similar definition, see, *inter alia*, E Benvenisti, 'Occupation, Belligerent' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) 1.

<sup>4</sup> T Ferraro, 'Determining the beginning and end of an occupation under international humanitarian law' (2012) IRRC 133, 143. See also, among others, Y Dinstein, *The International Law of Belligerent Occupation*, (Cambridge University Press 2019) 39; ICJ *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)* (Merits) [19 December 2005] para. 172.

<sup>5</sup> See especially International Criminal Tribunal for the former Yugoslavia judgment of 31 March 2003 IT-98-34-T *Naletilić and Martinović* para. 217.

<sup>6</sup> See, *inter alia*, T Ferraro, 'Determining the beginning and end of an occupation under international humanitarian law' *cit.*, p. 50; M Bothe, 'Effective control during invasion: a practical view on the application threshold of the law of occupation' (2012) IRRC 37. *Contra*, those arguing in favour of a restrictive interpretation of the notion of effective control, which would require the actual establishment of a temporary administration over the occupied territory (so-called 'actual control'). See, among others, G Von Glahn, *The Occupation of Enemy Territory. A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press 1957) 27. This restrictive interpretation also seems to have been endorsed by the ICJ (*Armed Activities on the Territory of Congo cit.* para. 177).

art. 2(2) clearly states that occupation law applies even in the absence of any armed resistance, the hostile nature of an occupation admittedly derives from lack of consent. In other words, military occupation is belligerent only when it is unconsented-to; if consent is given, occupation law does not apply.<sup>7</sup> However, for consent to exclude the hostile nature of an occupation, certain conditions must be met: first, said consent must be valid – *i.e.*, given by an agent or person authorised to do so on behalf of the State, and given without coercion, error, fraud or corruption;<sup>8</sup> second, it must be given explicitly;<sup>9</sup> third, the occupying troops' conduct must remain within the limits of the consent received.<sup>10</sup>

Once a belligerent occupation is established, determining when it ends also depends on the assessment of the abovementioned requirements, *i.e.*, exercise of effective control and hostile nature of the foreign troops' presence.

As far as the first one is concerned, it is widely accepted that, whenever the occupier ceases to exercise effective control over the territory in question, belligerent occupation ends.<sup>11</sup> This may happen by way of either a military withdrawal or a resumption of fighting. In the former case, the occupier itself may choose to withdraw (so-called "unilateral withdrawal") or an agreement may so establish (so-called "negotiated withdrawal").<sup>12</sup> In the latter case, active hostilities with the occupied State's armed forces or with a resistance movement may resume.

As for the requirement of the hostile nature of the occupation, this may cease to apply when either the authorities of the occupied State validly consent to the continued presence of foreign troops<sup>13</sup> or a change in status of the territory in question is established by an agreement<sup>14</sup> or by the exercise of the right to self-determination of the people inhabiting said territory.<sup>15</sup>

Clearly, when it comes to several of the outcomes described above, some caution is warranted, as the analysis of the Ukrainian case will now show.

<sup>7</sup> ICRC, *Commentary on the First Geneva Convention*, 2016, ihl-databases.icrc.org, para. 288. See also, *ex multis*, M Sassòli 'Chapter 67. The Concept and the Beginning of Occupation' in A Clapham, G Gaeta and M Sassòli (eds), *The 1949 Geneva Conventions* (Oxford University Press 2015) 1389, 1402; R Kolb and S Vitè, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actuels* (Bruylant 2009) 87.

<sup>8</sup> International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, UN doc. A/56/10, 72-73.

<sup>9</sup> See M Sassòli, 'Chapter 67' cit. 1402.

<sup>10</sup> See Articles on the Responsibility of States for Internationally Wrongful Acts, cit. 72-73.

<sup>11</sup> See, among others, T Ferraro, 'Determining the beginning and end of an occupation under international humanitarian law' cit. 141; M Longobardo, *The Use of Armed Force in Occupied Territory* (Cambridge University Press 2018) 204.

<sup>12</sup> A Roberts, 'Occupation, Military, Termination' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) 20.

<sup>13</sup> *Ibid.* 27-34.

<sup>14</sup> *Ibid.* 37.

<sup>15</sup> *Ibid.* 41-43, 48. See also A Carcano, *The Transformation of Occupied Territory in International Law* (Brill-Nijhoff 2015) 102.

As things stand today, a significant portion of Ukrainian territory is currently or has recently been under Russian occupation, notably Crimea since 2014, the four regions that have been formally annexed by Russia in September 2022 (*i.e.*, Luhansk, Donetsk, Kherson, and Zaporizhzhia), and some other border areas that were arguably occupied for more or less short periods of time right after Russia's 2022 invasion.<sup>16</sup> Clearly, as active hostilities are ongoing and the situation on the ground is evolving rapidly, any attempt to draw final conclusions on the future status of these and other Ukrainian territories would be vain. What this paper seeks to offer instead is a brief analysis of possible scenarios in light of relevant IHL rules.

As mentioned above, occupation may end when the occupier ceases to exercise effective control. This seems to have already happened – to a limited extent – as a consequence of Ukraine's recent counter-offensive. Indeed, Russian forces appear to have withdrawn from some of the territories previously held due to a resumption of hostilities.<sup>17</sup> However, it is to be noted that hostilities do not automatically result in the termination of a situation of occupation, as IHL rules, State practice, and domestic and international case-law all point to the existence of a presumption in favour of its continuance once effective control has been established and insofar as the abovementioned conditions for its exercise are met.<sup>18</sup> Indeed, a resumption of hostilities may not result in the termination of a belligerent occupation when they are sporadic and do not affect the ability of the occupier to exert its authority. Thus, in the case of Ukraine, while some areas certainly appear to have returned under Ukrainian control, the same may not be true for other areas where intense fighting is currently taking place. The fact that, in those areas, Russian forces are engaged in active hostilities does not necessarily mean that their status as occupying forces and the powers and duties that come with it have ceased. Insofar as these troops are still able to exercise a level of control over the territories in question in spite of the resumption of hostilities and as long as their authority is not substituted by Ukraine's authority, the situation of occupation persists.<sup>19</sup>

It has also been previously mentioned that a belligerent occupation may end when its nature is no longer hostile. In the case of Crimea and the other regions that were annexed by Russia, the question arises as to whether the referendums held in those territories – by which the majority of the inhabitants voted in favour of the incorporation into Russia<sup>20</sup> – amount to an expression of the valid and genuine will of a people that is entitled to the right

<sup>16</sup> For the present writer's view on the classification of the situation as a belligerent occupation already in early March 2022, see F Favuzza, 'Is Russia Occupying Ukraine?' (4 March 2022) SIDIBlog [www.sidi-blog.org](http://www.sidi-blog.org). A constantly updated classification of the conflict is available at RULAC, *Military occupation of Ukraine by Russia* [www.rulac.org](http://www.rulac.org).

<sup>17</sup> See Financial Times, *Ukraine's counteroffensive against Russia in maps: latest updates* [www.ft.com](http://www.ft.com).

<sup>18</sup> For a detailed analysis, see M Longobardo, *The Use of Armed Force in Occupied Territory* cit. 203.

<sup>19</sup> See Y Dinstein, *The Law of Belligerent Occupation* cit. 53; M Longobardo, *The Use of Armed Force in Occupied Territory* cit. 204; Y Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Brill-Nijhoff 2009) 6-7.

<sup>20</sup> See RULAC, *Military occupation of Ukraine by Russia* cit.

to self-determination under international law. In the present writer's view, this is not the case for several reasons. Suffice it to mention that, first, none of the territories in question had been "pacified" prior to the holding of the referendums.<sup>21</sup> As the Brazilian delegate in the UN Security Council clearly put it after the 2022 ones, "[i]t is unreasonable to assume that populations in areas of conflict are able to freely express their will".<sup>22</sup> Second, relevant IHL rules clearly exclude similar alterations to the status of the occupied territory: belligerent occupation is meant to be temporary, and does not entail any transfer of sovereignty to the occupier.<sup>23</sup> Third, even assuming that in principle the exercise of the right to self-determination could justify a violation of the territorial integrity of a State by another State,<sup>24</sup> in the case at hand the populations concerned do not appear to be peoples entitled to self-determination under current international law, as the scope of application of this right is limited *ratione personae* to peoples fighting against colonial domination, racist regimes, or foreign occupation.<sup>25</sup> In light of the above, it may come as no surprise that the invalidity of the referendums held in 2014 and 2022, and of the ensuing annexations, has been declared by a (more or less) large majority within the UN General Assembly.<sup>26</sup>

<sup>21</sup> A Peters, 'Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law' (2014) EJILTalk! [www.ejiltalk.org](http://www.ejiltalk.org).

<sup>22</sup> UN Doc. S/PV.9143 (as cited in M Mancini, 'Il conflitto tra Federazione Russa e Ucraina e i limiti posti dal diritto internazionale a un accordo di pace' cit. 378).

<sup>23</sup> See especially arts 47 of the IV Geneva Convention and 4 of Additional Protocol II. On the temporary nature of belligerent occupation, see, *inter alia*, Y Dinstein, *The International Law of Belligerent Occupation* cit. 58.

<sup>24</sup> In the present writer's view, this is not the case. See, among others, General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations of 24 October 1970, p. 124, which clearly states that the recognition of the right to self-determination "should [not] be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of people [...] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". For a discussion of this issue in relation to Crimea, see E Sciso, 'La crisi ucraina e l'intervento russo: profili di diritto internazionale' (2014) RivDirInt 992, 1011-1012. For the principle of territorial integrity as applying exclusively to the relations between States, see ICJ *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (advisory opinion) [22 July 2010] para. 80.

<sup>25</sup> See, *ex multis*, C Focarelli, *Diritto internazionale* (Wolters Kluwer-CEDAM, 2020) 67. For a similar view on the invalidity of the referendums at issue, see, among others, M Mancini, 'Il conflitto tra Federazione Russa e Ucraina e i limiti posti dal diritto internazionale a un accordo di pace' cit. 382-383; A Tancredi, 'Crisi in Crimea, referendum ed autodeterminazione dei popoli' (2014) Diritti umani e diritto internazionale 480; A Peters, 'Sense and Nonsense of Territorial Referendums in Ukraine' cit.

<sup>26</sup> See especially General Assembly, Resolution ES-11/4 of 13 October 2022, in which the Assembly declares that "the unlawful actions of the Russian Federation with regard to the illegal so-called referendums held from 23 to 27 September 2022 in parts of the Donetsk, Kherson, Luhansk and Zaporizhzhia regions of Ukraine, [...] and the subsequent attempted illegal annexation of these regions, have no validity under international law and do not form the basis for any alteration of the status of these regions of

It is finally worth recalling that belligerent occupation may also end by the conclusion of an agreement between the authorities of the occupied State and the occupier resulting in the transfer of sovereignty over the occupied territories.<sup>27</sup> This is one of the potential outcomes of the Russia-Ukraine conflict that have been debated since the first months of the 2022 invasion. However, the validity of a similar agreement under international law would be questionable. Suffice it to mention that, under art. 52 of the Vienna Convention on the Law of Treaties (VCLT), “[a] treaty is void if its conclusion has been procured by the threat or use of force”. Clearly, this does not mean that any peace agreement would be void. Only an agreement *procured* by the use of force would be. In other words, while a peace agreement regulating the end of the conflict without “leaving the aggressor any unjust advantage” would be valid, one “aimed at reserving to an aggressor the fruits of his illegal attack” would be void.<sup>28</sup> This interpretation of art. 52 VCLT appears to be confirmed by art. 75 VCLT, which clarifies that the latter is “without prejudice to any obligation in relation to a treaty which may arise *for an aggressor State* in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression”.<sup>29</sup> Furthermore, given the peremptory nature of the prohibition of aggression, the invalidity of any peace agreement benefitting the aggressor would also stem from its “conflict with a peremptory norm of general international law”.<sup>30</sup>

In the final analysis, while a negotiated end to the occupation of Ukrainian territories may certainly seem appealing, some caution is required when it comes to determining the content of such an agreement in light of relevant rules on international law. Caution is also warranted in respect of other potential endings to the situation of occupation, *i.e.*, a resumption of hostilities in the occupied territory and the (alleged) exercise of the right to self-determination.

Ukraine” (para. 3; adopted with 143 member States in favour). See also, for the case of Crimea, General Assembly, Resolution 68/262 of 27 March 2014, para. 6 (with 100 States in favour).

<sup>27</sup> On recent practice related to peace treaties, cease-fire agreements and armistices, see, *inter alia*, N Ronzitti, *Diritto internazionale dei conflitti armati* (Giappichelli 2021) 337.

<sup>28</sup> M Bothe, ‘Consequences of the Prohibition of the Use of Force Comments on Arts. 49 and 70 of the ILC’s 1966 Draft Articles on the Law of Treaties’ (1967) *ZaöRV* 507, 513. In the same vein, Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2017) 41.

<sup>29</sup> Emphasis added. For a similar view, see, *inter alia*, JK Kleffner, ‘Peace Treaties’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011) 20; K Schmalenbach, ‘Article 52’ in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (Springer 2018) 937, 948. On the invalidity of agreements stemming from a violation of the prohibition on the use of force and the principle of territorial integrity, see also: MG Kohen and M Hébé, ‘Territory, Acquisition’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2021) 42; M Mancini, ‘Il conflitto tra Federazione Russa e Ucraina e i limiti posti dal diritto internazionale a un accordo di pace’ cit. 384.

<sup>30</sup> Art. 53 Vienna Convention on the Law of the Treaties (1969). See, *inter alia*, Mancini, ‘Il conflitto tra Federazione Russa e Ucraina e i limiti posti dal diritto internazionale a un accordo di pace’ cit. 388.