

Occupation and international humanitarian law: questions and answers

04-08-2004

A series of questions and answers by the ICRC's legal team on what defines occupation, the laws that apply, how people are protected, and the ICRC's role.

1. What is occupation?

Article 42 of the 1907 Hague Regulations (HR) states that a " 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. "

According to their common Article 2, the four Geneva Conventions of 1949 apply to any territory occupied during international hostilities. They also apply in situations where the occupation of state territory meets with no armed resistance.

The legality of any particular occupation is regulated by the UN Charter and the law known as *jus ad bellum*. Once a situation exists which factually amounts to an occupation the law of occupation applies – whether or not the occupation is considered lawful.

Therefore, for the applicability of the law of occupation, it makes no difference whether an occupation has received Security Council approval, what its aim is, or indeed whether it is called an "invasion", "liberation", "administration" or "occupation". As the law of occupation is primarily motivated by humanitarian considerations, it is solely the facts on the ground that determine its application.

2. When does the law of occupation start to apply?

The rules of international humanitarian law relevant to occupied territories become applicable whenever territory comes under the effective control of hostile foreign armed forces, even if the occupation meets no armed resistance and there is no fighting.

The question of "control" calls up at least two different interpretations. It could be taken to mean that a situation of occupation exists whenever a party to a conflict exercises some level of authority or control within foreign territory. So, for example, advancing troops could be considered bound by the law of occupation already during the invasion phase of hostilities. This is the approach suggested in the ICRC's *Commentary to the Fourth Geneva Convention* (1958).

An alternative and more restrictive approach would be to say that a situation of occupation exists only once a party to a conflict is in a position to exercise sufficient authority over enemy territory to enable it to discharge *all* of the duties imposed by the law of occupation. This approach is adopted by a number of military manuals.

3. What are the most important principles governing occupation?

The duties of the occupying power are spelled out primarily in the 1907 Hague Regulations (arts 42-56) and the Fourth Geneva Convention (GC IV, art. 27-34 and 47-78), as well as in certain provisions of Additional Protocol I and customary international humanitarian law.

Agreements concluded between the occupying power and the local authorities cannot deprive the population of occupied territory of the protection afforded by international humanitarian law (GC IV, art. 47) and protected persons themselves can in no circumstances renounce their rights (GC IV, art. 8).

The main rules of the law applicable in case of occupation state that:

- The occupant does not acquire sovereignty over the territory.
- Occupation is only a temporary situation, and the rights of the occupant are limited to the extent of that period.
- The occupying power must respect the laws in force in the occupied territory, unless they constitute a threat to its security or an obstacle to the application of the international law of occupation.
- The occupying power must take measures to restore and ensure, as far as possible, public order and safety.
- To the fullest extent of the means available to it, the occupying power must ensure sufficient hygiene and public health standards, as well as the provision of food and medical care to the population under occupation.
- The population in occupied territory cannot be forced to enlist in the occupier's armed forces.
- Collective or individual forcible transfers of population from and within the occupied territory are prohibited.

- Transfers of the civilian population of the occupying power into the occupied territory, regardless whether forcible or voluntary, are prohibited.
- Collective punishment is prohibited.
- The taking of hostages is prohibited.
- Reprisals against protected persons or their property are prohibited.
- The confiscation of private property by the occupant is prohibited.
- The destruction or seizure of enemy property is prohibited, unless absolutely required by military necessity during the conduct of hostilities.
- Cultural property must be respected.
- People accused of criminal offences shall be provided with proceedings respecting internationally recognized judicial guarantees (for example, they must be informed of the reason for their arrest, charged with a specific offence and given a fair trial as quickly as possible).
- Personnel of the International Red Cross/Red Crescent Movement must be allowed to carry out their humanitarian activities. The ICRC, in particular, must be given access to all protected persons, wherever they are, whether or not they are deprived of their liberty.

4. What rights does the occupying power have regarding property and natural resources in the occupied territory?

Private property

Private property cannot be confiscated by the occupier.

Food and medical supplies may be requisitioned exclusively for the use of the occupation forces and administration personnel themselves (i.e. not for purposes of export outside the occupied territory and not for the benefit of anyone beyond the occupying personnel, unless necessary for the benefit of the population under occupation itself) and only if the needs of the civilian population have been taken into account (GC IV, art. 55).

Public property

The occupying power may seize any movable property, belonging to the state, which may be used for military operations (HR, art. 53).

The occupant does not acquire ownership of immovable public property in the occupied territory, since it is only a temporary administrator. Subject to restrictions regarding their exploitation and use, it can nevertheless make use of public property, including natural resources, but it must safeguard their capital value, in accordance with the law of usufruct (HR, art. 55).

5. When does occupation come to an end?

The normal way for an occupation to end is for the occupying power to withdraw from the occupied territory or be driven out of it. However, the continued presence of foreign troops does not necessarily mean that occupation continues.

A transfer of authority to a local government re-establishing the full and free exercise of sovereignty will normally end the state of occupation, if the government agrees to the continued presence of foreign troops on its territory. However, the law of occupation may become applicable again if the situation on the ground changes, that is to say, if the territory again becomes "actually placed under the authority of the hostile army" (H R, art. 42) – in other words, under the control of foreign troops without the consent of the local authorities.

6. What is the situation of people deprived of their liberty, during and after occupation?

Prisoners of war are captured members of armed forces and associated militias who meet the criteria laid down in the third Geneva Convention (GC III art. 4 A (2)); they are entitled to the rights granted in the Convention. All other people held in occupied territory are protected by the Fourth Geneva Convention (GC IV), apart from very few exceptions, such as the nationals of the occupying power or its allies. However, in no case can persons deprived of their liberty for reasons related to the situation of occupation fall outside the customary minimum standards guaranteed in article 75 of Protocol I.

Prisoners of war and civilian internees must be released without delay after the end of hostilities. However, those who are accused of an indictable offence may remain in captivity until the end of criminal proceedings or completion of their sentence (GC III, art. 119 (5), GC IV, art. 133 (2)). Until their release, and as long as they are under the authority of the occupant, all those in custody remain protected by international humanitarian law (GC III, art. 5 (1) and GC IV, art. 6 (4)).

7. What is the basis for ICRC protection activities for persons deprived of their freedom during occupation and afterwards?

The ICRC has a legal right to visit anyone captured in relation to an international armed conflict, including situations of occupation, on the basis of the Geneva Conventions and their Additional Protocols (GC III, arts 9 and 126, GC IV, arts 10 and 143, AP I, art. 81).

If violence continues after the end of occupation, the ICRC's protection activities may have the following legal bases:

In non-international armed conflicts, the ICRC bases its detention activities on article 3 common to the four Geneva Conventions (and Additional Protocol II, where applicable). Article 3 establishes the ICRC's right to offer its services to the parties to the conflict with a view to engaging in relief action and visiting persons detained for reasons related to the conflict.

In other situations of internal violence, which fall short of armed conflict, the ICRC may offer its services based on its right of initiative laid down in the Statutes of the International Red Cross and Red Crescent Movement (articles 5(2)(d) and 5(3)).