

# MONITORING INTERNATIONAL HUMANITARIAN LAW IN IRAQ

*A project of the International Humanitarian Law Research Initiative*

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## **Military Occupation of Iraq: I. Application of IHL and the Maintenance of Law and Order**

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(14 April 2003) The situation of general chaos ([see related news](#)) resulting from the fall of Baghdad and other major cities in Iraq has demonstrated the importance of having a clear set of obligations for the maintenance of law and order and the re-establishment of public services in the present circumstances. The Fourth Geneva Convention and the Hague Regulations regulate the situation of belligerent occupation. They set forth a series of duties and obligations for the parties involved from Coalition forces to relief agencies and the Iraqi population itself. Their purpose is to ensure minimal protection of the civilian population and favor the stabilization of the security and living conditions in the territory under the control of invading forces. This featured analysis is the first in a series dedicated to the laws of occupation in Iraq. It focuses on the conditions for the application of the rules of IHL pertaining to occupation and the basic responsibilities for the maintenance of law and order. Forthcoming features will address other aspects of military occupation such as humanitarian relief, the role and responsibilities of humanitarian organizations, the administration of justice and other essential services.

### **What is an occupation?**

IHL follows a very practical approach in defining military occupation. It refers to factual control over a territory or a population. It does not require any form of declaration or intent of the invading forces. The motives for the presence of foreign military forces on the territory, be they liberation, self-defence, or enforcing pre-emptive doctrine are irrelevant. The IHL rules pertaining to occupation apply as soon as:

1. There is an international armed conflict;
2. A foreign military force has made an incursion on enemy territory;
3. This force is exerting any form of control over the population of that territory.

### **What is the law of occupation?**

The law of belligerent occupation is perhaps one of the oldest and today the most developed branch of international humanitarian law (IHL). It is codified in particular in Arts. 42-56 of the [1907 Hague Regulations](#) and in Arts. 47-78 of the [1949 Fourth Geneva Convention](#), which are generally accepted as customary international law.

From the point of view of IHL, civilians in occupied territories deserve and need particularly detailed rules of protection. Living on their own territory, they come into contact with the foreign armed forces independently of their will, merely because of the armed conflict in which those forces obtain territorial control over the place where civilians live. The law of occupation is applicable independently of the motives

or legality of the military campaign. (See HPCR policy brief [On the Legality of War vs. the Laws of Armed Conflict](#).)

The civilians have no obligation of loyalty towards the occupying power, regardless of the motives of the invading forces. The only obligations they have relate to their civilian status, i.e., not to participate in hostilities. Civilians participating in hostilities are no longer immune from attacks. The occupying power is subject to a series of obligations pertaining to the administration of the territories it occupies and the population it controls as a substitute and caretaker for the national authorities.

### **When does occupation begin?**

The criteria for the application of the law of occupation are relatively straightforward. The law of occupation applies whenever, during an armed conflict, a territory and its population come under control of the enemy of the State authorities previously controlling that territory (See [Art. 42](#) of the Hague Regulations and [Art. 2\(1\)](#) and [Art. 4](#) of Fourth Geneva Convention.) The overriding concern of the IHL rules is to regulate the relationship between the civilian population and the invading forces as soon as the two are in contact, independently of the duration or motives of the military operations. In this context, even a military platoon occupying a village for a period of a few hours, has obligations to take care of the population (emergency health care, food and water supplies, etc.), not as a matter of charity but as a duty under the rules of IHL. The longer this occupation lasts, the more detailed the obligations become. In the case of Iraq, the fall of the regime certainly creates long-term obligations pertaining to all spheres of public services, from the maintenance of law and order, the administration of justice, the supply of food, water, and health services, and the administration of the Iraqi resources for the benefit of its people.

### **When does occupation end?**

Occupation ends whenever one of the conditions of occupation is no longer met.

1. The international armed conflict has ended.

An agreement has been signed between the parties at conflict bringing to an end the armed conflict. In general, such agreement will involve the withdrawal of the occupying forces. There may be situations, however, where the former occupier will maintain a military presence in the country, with the agreement of the legitimate government under a security arrangement (e.g. US military presence in Japan and Germany). The legality of such agreement and the legitimacy of the national authorities signing it are subject to international recognition, whereby members of the international community reestablish diplomatic and political relations with the national government. In this context, it is in the interest of all the parties involved to maintain a clear regime of occupation until the conditions for stability and peace are created allowing the re-establishment of a legitimate national government. A post-occupation military presence can only be construed in the context of a viable, stable and peaceful situation.

2. Foreign military forces have withdrawn from enemy territory or are no longer exerting control over the population of that territory.

In case of an on-going conflict, the withdrawal of the forces also brings an end of the applicability of the law of occupation. It implies however that the enemy power has regained control over its population and territory. The mere withdrawal of troops from certain conquered places does not end or suspend the application of IHL rules if it leaves a vacuum of authority. The control of the territory and the legal duties involved remain in effect until the front lines have stabilized. Evidently, in the course of a military

campaign where front lines can move back and forth many times and responsibility over the territory and population is unclear, the implementation of such rules can become impractical. However, in the case of the collapse of enemy forces, as in Iraq, the law of occupation applies to territories and populations entering into contact with invading forces, and remains applicable regardless of further tactical deployment of troops. In other words, there is no vacuum of authority or responsibility once troops have moved into a given territory. Obligations for the maintenance of law and order as well as all other obligations pertaining to occupying powers are applicable to the Coalition forces as soon as they drive Iraqi forces out of civilian areas.

In both cases:

- The hand-over of administrative functions to civil servants does not relieve the Occupying Power of its obligation;
- The set-up of government structures by opposition groups with the continuing military presence of Coalition forces does not fulfil the conditions for the end of the occupation. If changes to the Constitution are required, it can only be amended under its own provisions and procedures or, in exceptional cases, under applicable international law and procedures. Agreements concluded by the U.S. or the U.K. with local authorities of the occupied territory or changes introduced by Coalition Forces to Iraqi institutions or to the government of Iraq cannot deprive protected persons from the protection offered by IHL (see [Article 47](#) of Fourth Geneva Convention.)
- In all cases, the law of occupation applies until one year after the general close of military operations, and even beyond that date basic rules continue to apply, if the occupying power exercises the functions of government in the territory (see [Article 6 \(3\)](#) of the Fourth Geneva convention.) In addition, Protocol I contemplates the extension of the full application of occupation law until the termination of occupation. (See [Article 3\(b\) of Protocol I.](#))

### **What are the obligations of the Coalition forces in Iraq?**

In principle, life in the occupied territory must be allowed to continue as normally as possible. The obligations of the occupying power can be summed up as permitting life in the occupied territory to continue without being affected by its presence. As authority has passed into the hands of the occupant, it becomes responsible for public order, safety and welfare in the occupied territory. IHL is strong in protecting the status quo ante, while weak in responding to new needs of the population of the occupied territory. The longer the occupation lasts, the more shortcomings of the regime established by IHL therefore appear. Only international institutions such as the U.N. or new local authorities established in conformity with the right of the Iraqi people to self-determination can establish a new political system in Iraq.

The legal implications of this approach are the following:

#### Regarding internal security, the maintenance of law and order and public welfare

- The occupying power's only protected interest is the security of the occupying armed forces; it may take necessary measures to protect that security, but it is also responsible to take all measures in its power to restore and ensure, as far as possible, public order and safety (see [Article 43](#) of the Hague Regulations.) In this context, while the U.S. is not responsible for every looting occurring in the territory it controls, it must exercise due diligence to avoid such looting. The claim that its forces are not sufficient in number or not appropriately trained is not a sufficient excuse;

- Similarly, the U.S. and the U.K. are responsible for ensuring public health and sanitation (see [Article 56](#) of the Fourth Geneva Convention) and the provision of food and medical supplies (see [Article 55](#) of the Fourth Geneva Convention);

#### Regarding the administration of justice

- Except concerning the protection of the occupying power's security, local laws remain in force (see [Article 43](#) of the Hague Regulations and [Article 64](#) of Fourth Geneva Convention) and local courts remain competent (see [Article 66](#) of the Fourth Geneva convention);
- Civilians may only be detained in anticipation of a trial or for imperative security reasons, which must be individually determined, allowing for a right of appeal (see [Article 78](#) of the Fourth Geneva Convention). Such civil internees benefit from a very detailed protective regime under the Fourth Geneva Convention (See Arts. 79-135 of [Convention IV](#));
- If civilians commit hostile acts, they may be punished under legislation introduced by the occupying power, but do not lose their civilian status. They may however lose their communication rights (See [Article 5\(2\)](#) of Convention IV). Unless they directly participate in hostilities, they benefit from the protection of civilians against effects of hostilities (See [Article 51\(3\)](#) of Protocol I);
- In no case may a civilian be deported outside the occupied territory (see [Article 49 \(1\)](#) of Fourth Geneva Convention);

#### Regarding property and resources

- Except when rendered absolutely necessary by military operations, private property may not be destroyed (see [Article 53](#) of the Fourth Geneva Convention) and it may only be confiscated under local legislation (see [Article 46](#) of the Hague Regulations.)
- The government previously controlling the territory can obviously no longer administer public property (other than that of the municipalities (see [Article 56](#) of the Hague Regulations.) Such property may therefore be administered by the occupying power, but only under the rules of usufruct (See [Article 55](#) of the Hague Regulations.) If Iraqi oil wells were government owned, the U.S. may administer them and sell the oil. According to some opinions, it may use the proceeds not only for the benefits of the local population, but also, similar to levies, to cover the cost of the occupation (but not of the whole war) (See [Article 49](#) of the Hague Regulations.)

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