

The War in Iraq and International Humanitarian Law
Frequently Asked Questions on Occupation (FAQ)
May 16, 2003

The following FAQ (Frequently Asked Questions) analyzes international humanitarian law with respect to belligerent occupation. It does not attempt to cover the issue of occupation comprehensively, but focuses on those issues that might arise during the occupation of Iraq by the United States and its allies.

The FAQ is based primarily on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and customary international humanitarian law.

Belligerent Occupation

Question: What are the basic principles of international humanitarian law (IHL) underlying military occupation?

International humanitarian law provides that once an occupying power has assumed authority over a territory, it is obliged to restore and maintain, as far as possible, public order and safety (Hague, art. 43). Under the Fourth Geneva Convention, the occupying power must also respect the fundamental human rights of the territory's inhabitants, including non-citizens (Geneva IV, arts. 29, 47).

Four basic principles of international law underlie an occupation:

- 1) The occupying power does not, through occupation, gain sovereignty over the occupied territory.
- 2) Occupation is considered a transitory phase in which the rights of the population must be respected by the occupying power until formal authority is restored.
- 3) When exercising authority, the occupying power must take into account the interests of the inhabitants as well as military necessity.
- 4) The occupying power must not use its authority to exploit the population or local resources for the benefit of its own population and territory.

Security in Occupied Areas

Question: What are the duties of an occupying force to provide security?

An occupying power has a duty to restore and ensure public order and safety in the territory under its authority. Under customary international law, this duty begins once a stable regime of occupation has been established. But under the 1949 Geneva Conventions, the duty attaches as soon as the occupying force exercises control or authority over civilians of that territory, that is, at the soonest possible moment (a principle reflected in U.S. Army Field Manual 27-10) (G IV, art. 6).

Military commanders on the spot must prevent and where necessary suppress serious violations involving the local population under their control or subject to their authority.

The occupying force is responsible for protecting the population from violence by third parties, such as newly formed armed groups or forces of the former regime (Hague, art. 47). Ensuring local security includes protecting persons, including minority groups and former government officials, from reprisals and revenge attacks.

Occupying forces may have to be deployed to secure public order until the time local or international police can be mobilized for such responsibilities. Unless such forces are facing hostilities, the use of force is governed by international standards for law enforcement. That is, only absolutely necessary force may be used and only to the required extent, in accordance with the principle of proportionality.

Looting and “Shoot on Sight” Orders

May an occupying power issue “shoot on sight” orders to soldiers or police in order to stop looters or otherwise maintain security?

“Shoot on sight” orders are prohibited under international human rights law. The International Covenant on Civil and Political Rights, to which the United States is a party, states: “No one shall be arbitrarily deprived of his life.” The Human Rights Committee, the body that monitors compliance with the Covenant, has said that the deprivation of life by state authorities, including arbitrary killing by their own security forces, is “a matter of the utmost gravity.” A state must strictly control and limit the circumstances in which the authorities might deprive persons of their lives.

The U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides guidance on the use of force and firearms by those enforcing the law, including soldiers. Where the lawful use of force and firearms is unavoidable, law enforcement officials must exercise restraint and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; they must minimize injury, and respect and preserve human life.

The Basic Principles further provide that the intentional lethal use of firearms may only be made “when strictly unavoidable in order to protect life.” Exceptional circumstances such as internal instability or other public emergency may not be invoked to justify a departure from these basic principles.

Under international humanitarian law, the United States as the occupying power in Iraq is obligated to restore and ensure public order and safety. Achieving security must however be in conformity with international human rights law standards. These standards apply to all those acting under U.S. authority, including members of the U.S. and coalition armed forces, Iraqi police and international law enforcement officers.

Occupation and the Rights of the Local Population

Question: What are the obligations of an occupying power towards the local population?

An occupying power is responsible for respecting the fundamental human rights of the population under its authority. All persons shall be treated humanely and without

discrimination. This includes respecting family honor and rights, the lives of persons, and private property, as well as religious and customary convictions and practice.

Women shall be especially protected against any attack, in particular against rape, enforced prostitution, or any form of indecent assault. Everyone shall be treated with the same consideration by the occupying power without any adverse distinction based, in particular, on race, religion or political opinion. Private property may not be confiscated. (Hague, art. 46, G IV, art. 27). However, an occupying power may take such measures of control and security as may be necessary as a result of the war (G IV, art. 27).

An occupying power is specifically prohibited from carrying out reprisals and collective penalties against persons or their property (G IV, art. 33) and from taking hostages (G IV, art. 34). In general, no one can be punished for acts for which he or she has not personally committed.

All parties to a conflict are required to provide information on prisoners of war (G III, art. 122) and “protected persons” (civilian nationals) in their custody (G IV, art. 136). The occupying power is prohibited from forcibly transferring protected persons outside of the occupied territory for whatever reason (G IV, art. 49). Foreign nationals in the occupied territory are generally protected by IHL, especially when they do not come under the protection of their own diplomatic representatives.

The Fourth Geneva Convention permits the internment or assigned residence of protected persons for “imperative reasons of security.” This must be carried out in accordance with a regular procedure permissible under IHL and allow for the right of appeal and for review by a competent body at least every six months (G IV, art. 78). The Fourth Geneva Convention provides detailed regulations for the humane treatment of internees.

Occupied Population’s Well-Being and Health

Question: What are the obligations of an occupying power to provide for supplies and healthcare to the population?

Generally, an occupying power is responsible for ensuring that food and medical care is available to the population under its control, and to facilitate assistance by relief agencies. An occupying force has a duty to ensure the food and medical supplies of the population, as well as maintain hospitals and other medical services, “to the fullest extent of the means available to it” (G IV, arts. 55, 56). This includes protecting civilian hospitals, medical personnel, and the wounded and sick. Medical personnel, including recognized Red Cross/Red Crescent societies, shall be allowed to carry out their duties (G IV, arts. 56, 63). The occupying power shall make special efforts for children orphaned or separated from their families (G IV, art. 24) and facilitate the exchange of family news (G IV, arts. 25, 26).

If any part of the population of an occupied territory is inadequately supplied, the occupying power shall facilitate relief by other states and impartial humanitarian agencies (G IV, art.

59). However, the provision of assistance by others does not relieve the occupying force of its responsibilities to meet the needs of the population (G IV, art. 60).

The occupying power shall ensure that relief workers are respected and protected.

Law and Administration in an Occupied Territory

Question: What responsibilities does an occupying power have with respect to the legal system and administration of the occupied territory?

An occupying power has a duty to restore public order and safety. The criminal laws of the occupied country remain in effect. The occupying power may only set aside or modify laws that contradict international legal standards or which pose a security threat to the occupying power (G IV, art. 64). Any criminal laws enacted must be publicized; *ex post facto* (retroactive) laws are prohibited.

So long as they can ensure the effective administration of justice, the courts of the occupied territory shall continue to function (G IV, art. 64). Where this is not possible, the occupying power may set up “properly constituted, non-political military courts” with local or foreign judges to sit in the occupied country; such courts must apply international fair trial standards (G IV, art. 66). This excludes all “special tribunals.” The occupying power’s own courts may only prosecute violations of international humanitarian law and crimes of universal jurisdiction (G IV, art. 70).

Likewise, the administration of the occupied territory shall be given the opportunity to carry on its activities (Hague, art. 43). An occupying power may not compel public officials to stay in their jobs. It is permitted to remove officials from their posts (G IV, art. 54). Should it be necessary, particularly if there is an administrative vacuum, the occupying power may set up a new civil administration.

Prisoners of War and Detained Civilians

When must prisoners of war be released?

The Third Geneva Convention provides that prisoners of war (POWs) shall be released and repatriated “without delay after the cessation of active hostilities.” The Convention and the ICRC Commentary do not provide guidance on the phrase “without delay,” but indicate that only practical concerns, and not political considerations, are relevant.

Must there be a formal determination that the war is over for POWs to be released?

There is no requirement that there be a formal declaration that active hostilities have ended (in the same way that no formal declaration of war is needed for the Geneva Conventions to become applicable during an armed conflict). A formal declaration by a party to the conflict would be indicative of the end of active hostilities, but it is neither required nor conclusive.

Must all POWs be released?

All POWs must be released without delay. There are two important exceptions.

POWs against whom criminal proceedings for an indictable offense are pending may be detained under the end of such proceedings, and if necessary, until the completion of any sentence. But there is no prohibition against releasing such prisoners.

A POW may request not to be repatriated if there are serious reasons for fearing that he or she may become subject to persecution. Such a request must be freely made and individually examined.

May Iraqi officials implicated in crimes or posing a security threat be apprehended after the close of hostilities?

The occupying power may detain a civilian in anticipation of a trial for war crimes, crimes against humanity or other criminal offenses. The occupying power may set up "properly constituted, non-political military courts" with local or foreign judges to sit in the occupied country; such courts must apply international fair trial standards. This excludes all "special tribunals." The occupying power's own courts may only prosecute violations of international humanitarian law and crimes of universal jurisdiction.

The Fourth Geneva Convention also permits an occupying power if necessary "for imperative reasons of security" to subject persons to assigned residence or to internment. Such decisions to detain must be made by the occupying power according to a regular procedure that conforms with international humanitarian law. This procedure shall include the right of appeal, which shall be decided with the least possible delay. A competent body of the occupying power shall review such detentions at least every six months.

Public Officials in an Occupied Territory

Is an occupying power required to pay the salaries of state employees?

International humanitarian law does not specify that an occupying force is required to pay the salaries of all state employees. However, an occupying power has an obligation to ensure public order and safety, and provide necessary services such as health care. Public officials are needed for this and they must be paid a salary. The Fourth Geneva Convention on occupation provides that while an occupying power has the right to remove government employees, it also cannot compel persons to work without payment. From this the conclusion can be drawn that an occupying power must ensure that wages be paid to those state employees retained in their positions.

Property and Resources of the Occupied Territory

Question: What obligations exist concerning the property and resources of the occupied territory?

In general, the destruction of private or public property is prohibited unless military operations make it absolutely necessary (G IV, art 53). Cultural property is entitled to special protection; the occupying power must take measures to preserve cultural property (Cultural Property Convention, art.5).

As a rule, private property cannot be confiscated. Religious, charitable and educational institutions are to be treated as private property. The occupying power may requisition food and medical supplies for occupation forces and administrative personnel so long as the needs of the civilian population have been taken into account and fair payment is made (G IV, art. 55). Taxes and tariffs may also be imposed to defray the administrative costs of the occupation, including the cost of occupying forces (Hague, art. 49).

Public properties are treated as either movable or immovable property. Movable government properties that may be used for military purposes (transport, weapons) are considered "spoils of war" and may be seized without compensation (Hague, art. 53).

Immovable government properties (public buildings, real estate) may not be appropriated; however they can be used and administered by the occupying power so long as their assets are maintained (Hague, art. 55). Any loss of value from their use must be compensated. Oil is an immovable object and so cannot be removed for the benefit of the occupying power. Instead the occupying power has an obligation to properly maintain the oil wells.

End of Occupation

Question: When does an occupation end?

Belligerent occupation ends when control by the occupying power is no longer exercised. This usually occurs when there is a political settlement of the armed conflict, and the occupying power withdraws and a new government assumes authority. Protected persons in custody or serving sentences for offenses committed in the occupied territories must be turned over to the new authorities (G IV, art. 78). Requisitioned private property and immovable government property shall be restored.

The provisions of the Fourth Geneva Convention provisions relating to occupation expire one year after the general close of military operations. However, those provisions concerning fundamental rights remain in effect so long as the occupation continues (G IV, art. 6).