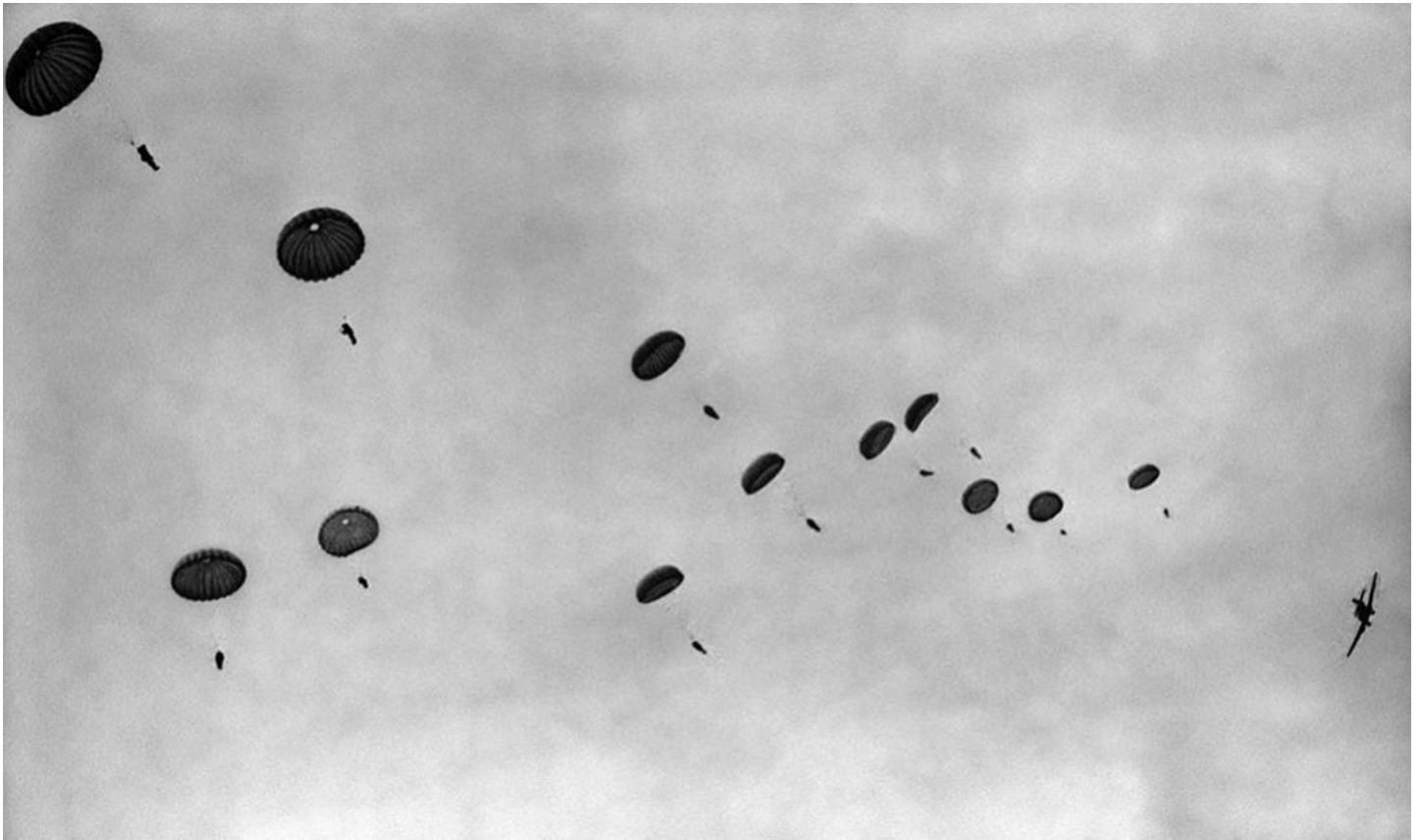


# Belligerent Occupation: Duties and Obligations of Occupying Powers

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# Determining the existence of a belligerent occupation for the purposes of international law

The 1907 Hague Regulations (“Hague Regulations”), Fourth Geneva Convention of 1949 (“Fourth Geneva Convention”), and customary international humanitarian law contain the rules applicable to belligerent occupation. Article 42 of The Hague Regulations is the accepted definition of what amounts to an occupation for the purposes of international law:

*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.*

Article 2 common to the 1949 Geneva Conventions expanded the notion of occupation to include that which encounters no armed resistance.<sup>1</sup>

The definition of occupation provided by Article 42 of The Hague Regulations therefore lays down that in order for an occupation to exist for the purposes of international law, there must be some degree of control by hostile troops over a foreign territory - the so-called notion of “effective control”.<sup>2</sup> Based on this, three elements are identified as being necessary for the existence of an occupation for the purposes of international law:

- i) the unconsented-to presence of foreign forces;
- ii) the foreign forces’ imposition of its own authority;
- iii) the related inability of the local sovereign power to exert its authority over the territory due to the occupation.<sup>3</sup>

Whether a state of occupation exists is a question of fact, and relies not on a subjective perception of the prevailing situation by the parties to the armed conflict, but on an objective determination based on a territory’s *de facto* submission to the authority of hostile foreign armed forces.<sup>4</sup>

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<sup>1</sup> “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” See also Tristan Ferraro, *Determining the beginning and end of an occupation under international humanitarian law*, International Review of the Red Cross, Vol. 95, Number 885, 2012, page 136.

<sup>2</sup> International Court of Justice (ICJ), *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgement, para. 173; ICTY, *Prosecutor v. M. Natelić and V. Martinović*, Trial Chamber Judgement, para. 217; Tristan Ferraro, *Determining the beginning and end of an occupation under international humanitarian law*, International Review of the Red Cross, Vol. 95, Number 885, 2012, page 139-140.

<sup>3</sup> See Tristan Ferraro, *Determining the beginning and end of an occupation under international humanitarian law*, International Review of the Red Cross, Vol. 95, Number 885, 2012, page 142; ICRC, Expert Meeting, Occupation and Other Forms of Administration of Foreign Territory, page 10; ICRC 2016 Commentary on the First Geneva Convention, para. 304.

<sup>4</sup> *The Hostages Trial, Trial of Wilhelm List and others*, United States Military Trial at Nuremberg, Law Reports of the Trials of War Criminals, Volume VIII, page 55; ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgement, para. 173; ICTY, *Prosecutor v. M. Natelić and V. Martinović*, Trial Chamber Judgement, para. 211; Tristan Ferraro, *Determining the beginning and end of an occupation under international humanitarian law*, International Review of the Red Cross, Vol. 95, Number 885, 2012, page 135.

# Duties of an occupying power under international law

Upon seizing control of territory of another state, an occupying power also adopts certain duties and obligations *vis-à-vis* persons within such territory under both international humanitarian and human rights law.

## Obligations Under International Humanitarian Law

Once an occupation is in place, the occupying power becomes bound by the applicable rules of international humanitarian law, whether customary or treaty based. In addition to the specific rules applicable to situations of occupation, any armed confrontation between the armed forces of the state whose territory is being occupied and the occupying power and armed groups operating under its overall control<sup>5</sup> will be governed by international humanitarian law applicable in international armed conflict.

The duties of an occupying power are spelled out primarily in the 1907 Hague Regulations (articles 42-56), the Fourth Geneva Convention, and Additional Protocol I to the Four Geneva Conventions.<sup>6</sup> The overarching principle is that an occupant does not acquire sovereignty over an occupied territory and therefore any occupation must only be a temporary situation. The occupant has an obligation to ensure the well-being of the population, and is prohibited from making permanent changes to the territory in the judicial, economic, or social spheres. The main duties of the occupying power under international law can be summarised as follows:

- 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, civil life and 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 and measures of intimidation are 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.

<sup>5</sup> See ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber Judgement, particularly paras 130-145 which hold that “overall” control requires the showing that “the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity”. It is not necessary however that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

<sup>6</sup> Ratified by the Syrian Arab Republic on 14 November 1983.

- 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 recognised 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).
- 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 of 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.<sup>7</sup>

## International Human Rights Law Obligations

The International Court of Justice (ICJ) has concluded that an occupying power remains bound by those human rights treaties which it ratified in all areas under its jurisdiction - including outside its own territory.<sup>8</sup> UN treaty bodies also state that an occupying power continues to bear responsibility for implementing its human rights treaty obligations in areas it is occupying to the extent that it continues to exercise jurisdiction in those territories.<sup>9</sup>

## Domestic Criminal Law

The Fourth Geneva Convention requires that both the criminal courts and the penal laws of the occupied territory remain in force. Penal laws may only be repealed or suspended by the occupying power if they constitute a threat to its security or an obstacle to the application of the requirements listed under the Fourth Geneva Convention. The occupying power may enact certain provisions which are essential to enable it to maintain the orderly government of the territory, and to ensure the security of the occupying power, its members, its property, and lines of communication. Anyone accused of breaching such enacted provisions may be tried before a properly constituted non-political military court as long as the court sits in the Occupied Territory. The running of such courts is subject to stringent safeguards listed under the Fourth Geneva Convention.<sup>10</sup>

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<sup>7</sup> ICRC, Occupation and international humanitarian law: questions and answers, [www.icrc.org/eng/resources/documents/misc/634kfc.htm](http://www.icrc.org/eng/resources/documents/misc/634kfc.htm).

<sup>8</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, paras. 111-113; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgement of 19 December 2005, para. 178; see also Human Rights Council, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, para. 41.

<sup>9</sup> Human Rights Council, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, para. 41, referencing CCPR/C/ISR/CO/4.

<sup>10</sup> Fourth Geneva Convention, articles 64-78.