

OCCUPATION AND POST-CONFLICT GOVERNANCE

I. OBJECTIVES

- A. Understand the sources of occupation law and policy.
- B. Understand the requirements for the existence of an occupation under international law.
- C. Understand the legal obligations and requirements of an Occupying Power.

II. OCCUPATION LAW AND POLICY

- A. Law. The primary sources of international occupation law include the Hague Resolutions (HR), Section III; Geneva Convention (GC) IV, Part III, Sections I, III and IV; various provisions of AP I; and CIL. The application of International Human Rights Law (IHRL) to an occupation is more controversial.¹ Note also that the domestic civil and criminal laws of an occupied territory also apply during an occupation.
- B. Policy. U.S. policy on occupation is discussed in FM 27-10, Chapter 6. Note that while many of the provisions in FM 27-10 merely restate existing occupation law, and cite such law when applicable, other provisions within FM 27-10 are statements of policy that may not reflect a *legal* obligation.

III. OCCUPATION DEFINED

- A. General. Belligerent occupation is the military occupation of enemy territory: “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.” (HR, art. 42; FM 27-10, para. 351).
 - 1. Commencement of occupation is a *question of fact*. A state of occupation exists when two conditions are satisfied: first, the invader has rendered the invaded government incapable of publicly exercising its authority; and second, the

¹ Compare, e.g., EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 13 (2d ed. 2012) (citations omitted) (while “[s]ome have claimed that when armed conflict erupts, most ‘peacetime’ human rights are temporarily superseded by the humanitarian laws of war[.]. . . the opposite position ultimately gained the upper hand”) with Captain Brian J. Bill, *Human Rights: Time for Greater Judge Advocate Understanding*, ARMY LAW., Jun. 2010, at 54, 58 (citation omitted) (according to general U.S. policy, “in situations where the law of war applies, the law of war (*lex specialis*) prevails over human rights law (*lex generalis*)”). See also *infra* the LOAC Deskbook Chapter on Human Rights.

invader has successfully substituted its own authority for that of the legitimate government. (FM 27-10, para. 355).

2. **Occupation = Invasion + Firm Control.** The radius of occupation is determined by the effectiveness of control; occupation must be actual and effective. (FM 27-10, para. 356).
- B. Proclamation Not Required. No proclamation of occupation is legally necessary, but the fact of military occupation should be made known (FM 27-10, para. 357). In post-WWII Germany, General Eisenhower issued Proclamation Number 1. In Operation Iraqi Freedom, L. Paul Bremer, civilian administrator of the Coalition Provisional Authority (CPA) issued CPA Regulation Number 1 on 16 May 2003.²
- C. No Transfer of Sovereignty.
1. Military occupation does not transfer sovereignty to the Occupant, and the Occupant's powers are provisional only. The Occupant may take only those measures necessary for the maintenance of law and order and proper administration of the occupied territory. (FM 27-10, para. 358).
 2. Annexation and the establishment of "puppet governments" are prohibited. (GC IV, art. 47)

² CPA Regulation No. 1, available at <http://www.iraqcoalition.org/regulations>. Key provisions regarding occupation law include the following:

Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council Resolutions, including Resolution 1483 (2003), and the laws and usages of war, I hereby promulgate the following:

Section 1, The Coalition Provisional Authority

- 1) The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.
- 2) The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, . . .

Section 2, The Applicable Law

Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.

Section 3, Regulations and Orders issued by the CPA

- 1) In carrying out the authority and responsibility vested in the CPA, the Administrator will, as necessary, issue Regulations and Orders. . . .

- D. Termination. Occupation does not end upon cessation of hostilities, but continues until full authority over the occupied area is returned to the displaced sovereign, or until sovereignty is assumed by another State.
1. The Fourth Geneva Convention states that the legal occupation should last no more than one year: “In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations. . .” (GC IV, art. 6(2)).
 2. **But** Additional Protocol I, art. 3(b) purports to replace GC IV, art. 6(2). Article 3(b) rejects the one-year expiration, extending application of the Conventions and Protocol until “termination of the occupation.”³ FM 27-10, para. 361 tracks Article 3(b), providing that “the law of belligerent occupation generally ceases to be applicable under the conditions set forth in paragraphs 353 [a passage of sovereignty] and 360 [cessation of the occupation].”
 3. The Occupant is bound to apply certain provisions throughout the duration of occupation (*e.g.*, humane treatment, fair trial, and protection against forced transfers or deportations).

IV. PROTECTING POWERS

- A. The 1949 Geneva Conventions envisioned that the interests of parties to conflicts would be safeguarded by neutral nations designated as “Protecting Powers.”⁴ Such Protecting Powers have a named role in certain aspects of occupation.
- B. Additional Protocol I restated and clarified the duties of parties to conflicts to designate Protecting Parties or substitutes. (AP I, art. 5). In practice, such designations are rare; the ICRC often serves as a substitute. (GC IV, art. 11).

V. TREATMENT OF “PROTECTED PERSONS” IN OCCUPIED TERRITORY

- A. As discussed in the previous chapter on Protections for Civilians, GC IV provides specific protections for “protected persons” located in occupied territory.⁵ (GC IV, Part III, Sections I, III, and (if interned), IV) While some of those protections are listed again in this chapter, not all of them are. For a complete understanding of this

³ See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 67-68 (Yves Sandoz et al. eds., 1987).

⁴ See, *e.g.*, Convention IV relative to the protection of Civilian Persons in Time of War. Geneva, August 12, 1949, art. 9.

⁵ See *supra* LOAC Deskbook Chapter on Protections for Civilians.

issue, please review the sections of that chapter that reference GC IV, Part III, Sections I, III, and IV.

- B. As a matter of law, the provisions outlined in this chapter (and the previous chapter) that reference GC IV apply only to “protected persons” located within the occupied territory. Note, however, that occupation rights and obligations found in the HR, AP I, CIL, and FM 27-10, may, as a matter of law and/or policy, also extend to individuals located in the occupied territory who do not meet GC IV’s definition of “protected persons.”⁶

VI. AUTHORITY OF OCCUPANT

- A. The occupying power must work to maintain law and order, while also respecting the domestic laws of the occupied territory: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, **unless absolutely prevented**, the laws in force in the country.” (HR, art. 43 (emphasis added)).
 - 1. The authority of the occupying force is supreme, constrained only by:
 - a. The doctrine of military necessity; and
 - b. Limitations imposed by binding international law, including customs and treaties, such as the rights of protected persons contained in GC IV.
 - 2. The Occupant is obligated to maintain public order and can demand obedience from inhabitants of occupied territory for the security of its forces, maintenance of law and order, and proper administration. (FM 27-10, para. 432),
 - 3. Inhabitants have a duty to behave in a peaceful manner, to take no part in hostilities, to refrain from acts harmful to the occupying force and its troops, and to render strict obedience to orders of the Occupant. (FM 27-10, para. 432).
 - 4. All functions of legitimate [domestic?] government cease upon commencement of occupation; functions of government continue only to extent the Occupant allows. (FM 27-10, para. 367).

⁶ See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, June 8, 1977, art. 11, Protection of persons, which covers, among others, “all persons in the power of the adverse Party, i.e., prisoners of war, civilian internees, . . . and the inhabitants of territory occupied by the adverse Party. . . .” AP I Commentary at 153.

- B. Security Measures. Military authorities in occupied territories have the right to perform police functions and to protect their own security.
1. The following are examples of permissible population control measures. (GC IV, arts. 27(4), 48, 49(2), 64, 66, and 78):
 - a. Restricting freedom of movement;
 - b. Evacuation;
 - c. Judicial process;
 - d. Assigned residence; and
 - e. Internment.
 2. The following are examples of prohibited population control measures. (GC IV, arts. 31, 32, 33(1) and (3), 49(1)):
 - a. Violence;
 - b. Physical or moral coercion, particularly to obtain information;
 - c. Brutality;
 - d. Punishment for acts of others (reprisals or collective penalties); and
 - e. Individual or mass forcible transfers.
- C. Penal Laws. The domestic criminal laws should stay in force to the extent possible: “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupant in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.” (GC IV, art. 64).
1. The Occupant does not bring its own jurisdiction and civil and criminal laws. Ordinarily, the laws of the occupied territory continue in force and courts continue to sit and try criminal cases not of a military nature. (GC IV, art. 64).
 2. Local courts should be used when feasible, but may be suspended for the following reasons:

- a. Judicial personnel will not perform their duties;
 - b. Courts are corrupt or unfairly constituted;
 - c. Local courts have ceased to function; or
 - d. Judicial process does not comply with fundamental human rights.
3. The Occupant may establish military courts or provost courts, which may be used as follows:
 - a. To try violations of occupation provisions or regulations; and
 - b. If they are properly constituted, non-political, and located in occupied territory.
 4. The Occupant may suspend, repeal, or alter existing laws, or promulgate new laws, if required by military necessity, maintenance of order, or the welfare of the population. (HR, art. 43; GC IV, art. 64(3)).
 5. Suspension or repeal of local laws should be related to security of the force, mission accomplishment, or compliance with international law. Examples:
 - a. Suspension of the right to bear arms;
 - b. Suspension of the rights of assembly and protest;
 - c. Suspension of freedom of movement; or
 - d. Suspension of discriminatory laws;
 6. Issuing New Laws. (GC IV, art. 65; FM 27-10, para. 435).
 - a. The Occupant must publish any new laws in writing and provide notice to inhabitants in their own language;
 - b. New laws must not be retroactive;
 - c. The Occupant has no obligation to comply with the constitutional or procedural rules of the occupied territory.

7. The Occupying force is exempt from local law and jurisdiction of local courts. (FM 27-10, para. 374)
- D. Competent Courts. When penal provisions are breached, the Occupant may try the accused before its own properly constituted nonpolitical military courts, provided such courts sit in the occupied territory; courts of appeal should likewise sit in the occupied territory. (GC IV, art. 66)
- E. Applicable Law and Penalties.
1. Courts shall apply those laws in effect prior to the offense.
 2. Penalties shall be proportionate to the offenses committed and shall take into account that the inhabitants are not nationals of the Occupant. (GC IV, art. 67).
 3. Offenses against the Occupant which (a) do not constitute attempts on life or limb of members of occupying forces, (b) do not pose a grave collective danger, or (c) do not seriously damage property of the occupying forces, shall carry a punishment of internment or simple imprisonment proportionate to the offense committed. (GC IV, art. 68).
 4. Death Penalty.
 - a. The Occupant may only impose a death penalty on protected persons convicted of espionage, serious acts of sabotage against military installations, or intentional offenses which have caused the death of one or more persons. (GC IV, art. 68).
 - b. A death penalty may not be imposed on protected persons less than 18 years of age at the time of the offense. (GC IV, art. 68).
 - c. A death penalty may only be imposed for those offenses that were punishable by death under the law of the territory prior to occupation. (GC IV, art. 68).
 - d. **U.S. Reservation:** The U.S. has reserved the right to impose the death penalty without regard to whether the offense was punishable by death under the law of the occupied territory prior to occupation. (FM 27-10, para. 438b).
 - e. No person condemned to death shall be deprived of the right to petition for pardon or reprieve; execution of the death sentence suspended for six

months absent grave emergency involving an organized threat to Occupant or its forces. (GC IV, art. 75).

5. Other Offenses and Penalties.

- a. Fines and other penalties not involving deprivation of liberty may also be imposed. (FM 27-10, para. 438c).
- b. The period of time a person spends under arrest awaiting trial or punishment shall be deducted from any sentence of imprisonment. (GC IV, art. 69).

F. Pre-Occupation Offenses.

1. Protected persons shall not be arrested, prosecuted, or convicted by the Occupant for offenses committed before the occupation, except for violations of the law of war. (GC IV, art. 70).
2. Nationals of the Occupant who sought refuge in the occupied territory shall not be arrested, prosecuted, convicted, or deported from the occupied territory, except for the following reasons:
 - a. Offenses committed after the outbreak of hostilities;
 - b. Offenses committed before the outbreak of hostilities which would have justified extradition in time of peace.

G. Penal Procedure.

1. The Occupant may pronounce sentences only after a regular trial. (GC IV, art. 71).
2. The Occupant must promptly provide those accused of crimes with a written copy of the charges in a language they understand; trial must be held as rapidly as possible. (GC IV, art. 71).
3. Accused persons have the following rights at trial (GC IV, art. 72):
 - a. To present evidence and call witnesses;
 - b. To be represented by a qualified counsel or advocate of their choice, and time to prepare their defense;

- c. To have the assistance of an interpreter; and
 - d. To appeal (not absolute).
4. Protecting Power. (GC IV, art. 74).
- a. The Occupant must advise the Protecting Power of proceedings involving the death penalty, or imprisonment for two years or more, and must notify the Protecting Power of any final judgment confirming a death sentence.
 - b. Representatives of the Protecting Power may attend trial of any accused person except for those cases involving the security of the Occupant; Occupant must send the date and place of trial to the Protecting Power.
 - c. The Protecting Power may appoint the accused counsel or an advocate.

VII. PROPERTY

A. General Rules.

1. **Destruction Prohibited.** Destroying or seizing enemy property is prohibited, unless such destruction or seizure is demanded by imperative necessities of war (HR, art. 23(g)). The Occupant is prohibited from destroying real or personal property (State or private) unless absolutely necessary due to military operations. (GC IV, art. 53).
2. **Pillage Prohibited.** Pillage, or looting by occupation troops, is strictly forbidden. (HR, art. 47; GC IV, art. 33).
3. **Property Control Authorized.** Occupant may control property within occupied territory to the extent necessary to prevent its use by hostile forces. (FM 27-10, para. 399).
4. **Seizure.** “Seizure” is the temporary taking of property, with or without authorization from the local commander. Generally, the on-scene commander is the authority to seize property. Seizing private property that has a direct military use (e.g., broadcasting or communications equipment) is permissible, but soldiers must provide the owner with a receipt to reclaim the property later, as well as compensation for any damage to the property. (FM 27-10, para. 409).
5. **Confiscation.** Confiscating, or permanently taking, private property is not permissible. (HR, art. 46(2); FM 27-10, para. 406).

6. Requisition. Requisitioning of services and property from the population is permissible if ordered by the local commander and paid for in cash. Food or other items needed by the civilian population may only be requisitioned after taking those needs into consideration. (FM 27-10, paras. 412 - 415). Specific requisition rules are detailed below.

B. Ownership.

1. Beneficial Ownership. It may be necessary to look beyond legal title to determine whether property is public or private. The Occupier should evaluate the character of property based on who benefits from ownership (*e.g.*, private trust funds are not public property just because they are held in a state bank). (FM 27-10, para. 394a)
2. Mixed or Unknown Ownership. Property is public if the State has assumed economic risk involved in holding and managing the property. If the owner is unknown, the property should be treated as public until its ownership is ascertained. (FM 27-10, para. 394b, c).

C. State Property.

1. The Occupant serves as the administrator and conservator of public buildings, real estate, forests, and agricultural estates belonging to the occupied State; The Occupant must safeguard and administer State property. (HR, art. 55).
2. Real property of direct military use (*e.g.*, forts, arsenals, dockyards, magazines, barracks, railways, bridges, piers, wharves, airfields, and other military facilities) remain in Occupant's control until the termination of the occupation and may be damaged or destroyed if militarily necessary. (FM 27-10, para. 401).
3. Nonmilitary real property may not be damaged or destroyed unless military operations render it absolutely necessary; the Occupant may not sell real property or lessen its value. (FM 27-10, para. 402).
4. Movable Property.
 - a. The Occupant may possess movable State property susceptible to military use. "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for operations of the war." (HR, art. 53).

- b. Classes of Movable Property. All movable property susceptible to military use may be taken and used by the the Occupant; all other property must be respected and may not be appropriated. (FM 27-10, para. 404).

D. Private Property.

1. Municipal, Religious, Charitable, and Cultural Property. Even where such property belongs to the State, it shall be treated as private property; seizure and destruction is forbidden. (HR, art. 56).
 - a. Such property may be requisitioned in the event of necessity for quartering troops and the sick and wounded, storage of supplies and material, housing of vehicles and equipment, and otherwise as allowed for private property; the Occupier must secure these properties against all avoidable injury. (FM 27-10, para. 405b).
 - b. It is U.S. practice that—if emergency conditions require such use—religious buildings, shrines, and consecrated places employed for worship are to be employed only as aid stations, medical installations, or for housing the wounded awaiting evacuation. (FM 27-10, para. 405c).
2. No Confiscation of Private Property. The prohibition extends to outright takings as well as to any acts that, by use of threats, intimidation, or pressure, or by actual exploitation of the Occupant’s power, permanently or temporarily deprives the owner of the property without consent or without authority under international law. (HR, art. 46 para. 2; FM 27-10, para. 406). Private real property may not be seized, but may be requisitioned. (FM 27-10, para. 407).
3. Private Property Susceptible to Direct Military Use.
 - a. Certain types of private property may be seized based on military necessity. Property such as cables, telephone and telegraph plants, radio, television, and telecommunications equipment, motor vehicles, railways, railway plants, port facilities, ships in port, barges and other watercraft, airfields, aircraft, depots of war, all varieties of military equipment, including that in the hands of manufacturers, component parts of or material suitable only for use in the foregoing, and in general all kinds of war material, may be seized provided a receipt is given to the owner for return of the property and/or compensation. (GC IV, art. 53; FM 27-10, para. 410a).
 - b. Destruction of any of the foregoing is permissible only if rendered absolutely necessary by military operations. (GC IV, art. 53; FM 27-10, para. 410b).

E. Requisitions.

1. Requisitions in kind and services shall be made only for the needs of the occupying army. Such requisitions shall be in proportion to the resources of the country; they shall be demanded only by the commander of the occupied locality; and they shall be paid for in cash so far as possible. (HR, art. 52).
2. Almost everything may be requisitioned for the maintenance of the army: fuel, food, clothing, building materials, machinery, tools, vehicles, and furnishings for quarters. Billeting of troops in occupied areas is authorized. (FM 27-10, para. 412b).
3. Requisition of food and medical supplies in the occupied territory is only permissible for use by the occupation forces and administration personnel, and only if the needs of the civilian population have been taken into account; the Occupant shall pay fair value for any requisitioned goods. (GC IV, art. 55 para. 2).
4. Coercive measures must be limited to the amount and kind necessary to secure the requisitioned articles. (FM 27-10, para. 417).

VIII. SERVICES OF OCCUPIED POPULATION

A. Labor.

1. Protected persons may not be forced to serve: “The Occupant may not compel protected persons to serve in its armed or auxiliary forces.” (GC IV, art. 51).
2. Permissible Work. Protected persons over age 18 may only be compelled to do work necessary for the needs of the occupation army, for public utility services, or for feeding, sheltering, clothing, transportation or health of occupied population; they may not be compelled to support military operations. (GC IV, art. 51).
3. Prohibited Labor. The prohibition against working in support of military operations includes services directly promoting the ends of the war such as construction of fortifications, entrenchments, and military airfields, or the transportation of supplies or ammunition in the zone of operations. Voluntary employment for pay to do such work, however, is permitted. (FM 27-10, para. 420).

B. Services That May be Requisitioned. The Occupant may requisition the following services:

1. Professional services, including engineers, physicians and nurses, and artisans and laborers such as clerks, carpenters, butchers, bakers, and truck drivers. (FM 27-10, para. 419).
 2. Services from officials and employees of railways, truck lines, airlines, canals, river or coastwise steamship companies; telephone, telegraph, radio, postal and similar services; and gas, electric, and water works, and sanitary authorities. (FM 27-10, para. 419).
 3. Repair of roads, bridges, and railways, and services on behalf of the local population, including care for the wounded and sick and burial of the dead. (FM 27-10, para. 419).
- C. Protection of Workers. The Occupant may not interfere with employment as a means of obtaining workers: “All measures aimed at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupant, are prohibited.” (GC IV, art. 54).
- D. Judges and Public Officials.
1. The Occupant may not alter the status of judges or public officials, or coerce or discriminate against them for not fulfilling their functions based on reasons of conscience. However, the Occupant may remove officials from their posts. (GC IV, art. 54).
 2. Oath. The Occupant may require officials to take an oath to perform their duties conscientiously, and failure to do so may result in removal (FM 27-10, para. 423). This oath of obedience is distinguished from an oath of allegiance to the Occupant, which is forbidden. (HR, art. 45).
 3. Salaries. Civil officials such as judges, administrative or police officers, and officers of city governments are paid from public revenues of the occupied territory until military government has reason to dispense with their services. (FM 27-10, para. 424).

IX. PUBLIC FINANCE

A. Taxes.

1. If the Occupant collects taxes, dues, and tolls for the benefit of the occupied state, it shall be done in accordance with existing rules of incidence and assessment. (HR, art. 48).

2. Taxes shall be applied first to the costs of administering the occupied territory, and the balance may be used for the needs of the Occupant. (FM 27-10, para. 425b).
 3. No new taxes may be levied by Occupant unless considerations of public order and safety so require. (FM 27-10, para. 426b).
- B. Contributions.
1. If the Occupant levies money contributions in addition to taxes, these may only be for the needs of the army or for administration of the occupied territory. (HR, art. 49).
 2. Contributions may only be collected pursuant to a written order, and receipts shall be given for all contributions. (HR, art. 51).
- C. Costs of Occupation.
1. The economy of the occupied country can be required to bear expenses of occupation, which should not be greater than the economy can reasonably be expected to bear. (FM 27-10, para. 364).
 2. In practice, U.S. occupation expenses are funded by Department of Defense appropriations.

X. CUSTOMARY INTERNATIONAL LAW

- A. Remember that customary international law (CIL) also applies in occupied territory.
- B. The ICRC's CIL Database references many provisions of AP I, including those relevant to occupation, as reflective of customary international law applicable in occupied territories. It also cites other authorities as justification for the CIL status of rules applicable in occupied territories.⁷ Note, however, that the U.S. has disagreed with the ICRC's methodology used to determine many of the rules listed in its CIL study and CIL Database.⁸ Additional references on the CIL status of AP I provisions are referenced in the LOAC Document Supplement.⁹ At a minimum, advisors of any occupying authority should be aware of the potential application of CIL to occupation law.

⁷ See, e.g., ICRC CIL Database *supra* LOAC Protections for Civilians Chapter, at Rule 51, Public and Private Property in Occupied Territory.

⁸ See U.S. Letter on ICRC CIL Rules, *supra* LOAC Protections for Civilians Chapter.

⁹ See generally LOAC Documentary Supplement (2014).