

REPORTS AND DOCUMENTS

The ICRC Project on Occupation and Other Forms of Administration of Foreign Territory*

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Dr Tristan Ferraro describes the objectives and development of the project undertaken by the ICRC on Occupation and Other Forms of Administration of Foreign Territory, which resulted in three expert meetings and the publication of a report in June 2012 (a summary of which is reproduced below).

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Recent years have been characterized by an increase in extraterritorial military interventions. Some of these interventions – be they of the more classical form of occupation or of the form of extraterritorial military intervention – have given rise to new forms of foreign military presence in a state’s territory, sometimes on a consensual basis, but more often not. These new forms of military presence have – to a certain extent – refocused attention on occupation law.

Legal commentary about recent occupations has reflected on the alleged inability of occupation law to deal with contemporary occupations. In particular, some authors argue that the emphasis on maintaining the *status quo ante*, which precludes wholesale changes to the legal, political, institutional, and economic structure of an occupied territory, is too strong. It has been contended that the

* Report available at: <http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>

transformation of oppressive governments or the redress of society in complete collapse by means of occupation was in the interest of the international community and should be authorized by occupation law. Moreover, it has been affirmed that existing occupation law does not sufficiently take into account the development of human rights law and the principle of self-determination. Recent occupations have also highlighted how difficult it is to determine when an occupation begins and terminates, as well as to identify with certainty the legal framework governing the use of force in an occupied territory. Eventually, the UN administrations of territory have raised the question as to whether occupation law could be relevant in such situations.

The legal challenges raised by contemporary forms of occupation outlined above have been at the core of the ICRC project that produced the report 'Occupation and Other Forms of Administration of Foreign Territory'. The purpose of this initiative, which began in 2007, was to analyse whether and to what extent the rules of occupation law are adequate to deal with the humanitarian and legal challenges arising in contemporary occupations, and whether they might need to be reaffirmed, clarified or developed. Three informal meetings, involving experts from states, international organizations, academic circles, and the NGO community, were organized to address, in detail, the legal issues raised above.

As a result of this process, in June 2012 the ICRC published a report, *Occupation and Other Forms of Administration of Foreign Territory*. This report gives a substantive account of the main points discussed during the three experts meetings. The report does not reflect the ICRC's views on the subject matter addressed, but provides an overview of the range of current legal positions on the questions discussed. The ICRC believes that the report – which is the final outcome of the project – will serve to inform and nourish ongoing and future legal debates on the need for clarification of some of the most significant provisions of occupation law.

The overall picture emanating from the ICRC project and report shows that the law of occupation, because of its inherent flexibility, is sufficiently equipped to provide practical answers to most of the humanitarian and legal challenges arising from contemporary occupations. Thus, the ICRC believes that this body of law is, on the whole, adequate to meet the challenges of today's occupations.

Accordingly, the ICRC concludes that the law of occupation does not require further development. However, some clarification of the existing norms would be, or may be, desirable. The ICRC believes that the report will be a useful instrument in relation to any clarification, while at the same time reaffirming the relevance of current occupation law.

Expert meeting

Occupation and other forms of administration of Foreign Territory

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SUMMARY¹

1. FIRST MEETING OF EXPERTS: THE BEGINNING AND END OF OCCUPATION

The beginning of occupation

The experts discussed the cumulative constitutive elements of the notion of effective control over a foreign territory, which underpins the definition of occupation set out in Article 42 of the Hague Regulations of 1907.

The presence of foreign forces: this criterion was considered to be the only way to establish and exert firm control over a foreign territory. It was identified as a prerequisite for the establishment of an occupation, notably because it makes the link between the notion of effective control and the ability to fulfil the obligations incumbent upon the occupying power. It was also agreed that occupation could not be established or maintained solely through the exercise of power from beyond the boundaries of the occupied territory; a certain number of foreign “boots on the ground” were required.

The exercise of authority over the occupied territory: the experts agreed that, once enemy foreign forces were present, it was their ability to exert authority in the foreign territory that mattered, not the actual and concrete exercise of such

1 The aim of this summary is to identify the major trends of the discussions during the three meetings, as perceived by the conveners. Divergent views and specific opinions on the subjects addressed during the debates can be found in the text of the report.

authority. Using a test based on the ability to exert authority would prevent any attempt by the occupant to evade its duties under occupation law by deliberately not exercising authority or by installing a puppet government. It was also agreed that occupation law did not require authority to be exercised exclusively by the occupying power. It allows for authority to be shared by the occupant and the occupied government, provided the former continues to bear ultimate and overall responsibility for the occupied territory.

The non-consensual nature of belligerent occupation: absence of consent from the State whose territory is subject to the foreign forces' presence was identified as a precondition for the existence of a state of belligerent occupation. For occupation law to be inapplicable, this consent should be genuine, valid and explicit. The experts felt that because occupation law does not provide for any criteria for evaluating it, consent should be interpreted in the light of current public international law. Eventually, the existence of a presumption of absence of consent when foreign forces intervened in a failed State was approved.

With regard to *the invasion phase*, the experts almost without exception expressed their support for Pictet's theory as reflected in the ICRC's *Commentary* on the Fourth Geneva Convention (Article 6), according to which certain provisions of occupation law would be applicable during the invasion phase as a matter of law or policy. In relation to the practical application of Pictet's theory, it was stressed that only some provisions of occupation law would be applicable to the invasion phase. Discussions on the search for alternative protective frameworks led to the emergence of a consensus that Part III, Section I of the Fourth Geneva Convention – titled "Provisions common to the territories of the parties to the conflict and to occupied territories" – would apply as a matter of law to invasion, providing the civilian population in this area a certain minimum amount of protection.

The concept of indirect effective control: the theory of indirect effective control holds that a State may be considered an occupying power for the purposes of IHL when it enforces overall control over *de facto* local authorities or other organized groups that have effective control over a territory or part thereof. In the course of the discussions, this theory was met with approval.

It was also agreed that occupation could be *limited geographically* to very small places. However, the discussions on the *time span* necessary for acknowledging the establishment of effective control over a territory or part thereof revealed some divergence of opinion.

The end of occupation

Determining precisely when an occupation had ended was deemed to be a very difficult task. However, it was emphasized that the legal criteria for establishing the end of an occupation should mirror those used for determining when it had

begun. Therefore, the continued physical presence of foreign forces, their ability to exercise authority over the territory concerned in lieu of the territorial sovereign and the continued absence of the territorial sovereign's consent to the foreign forces' presence should, cumulatively, be studied when assessing the termination of occupation. Should any of these conditions cease to exist, the occupation ought to be regarded as having terminated. The discussions about the criteria for determining, for the purposes of IHL, the existence of a state of occupation took place with the idea of classical occupation in mind. During the debates, the possibility that the *sui generis* character of some situations may alter the criteria previously identified at the meeting was not discarded by some experts, particularly in terms of means to exercise effective control.

The presence of foreign forces: classical occupation presupposes the presence of a certain number of foreign troops in the occupied territory. It was felt that effective control could not usually be exercised without the continued physical presence of the foreign forces. Therefore, the absence of any hostile armed forces on the territory in question was thought to be a prerequisite for establishing that an occupation had ended.

The role of consent: it was agreed that genuine consent to the foreign presence could be given during the occupation and could mark its termination. In this respect, Article 47 of the Fourth Geneva Convention could not be interpreted as prohibiting the local government to give – over time – its consent to the foreign presence, thereby precluding the applicability of occupation law. The importance of assessing the end of occupation in the light of the actual situation was also emphasized. Where the actual situation remained unchanged – for example, if foreign forces continued to exert effective control over the foreign territory – the consent given by the local government would be meaningless and, ultimately, the occupation would endure.

The exercise of authority: the view according to which only a full transfer of powers and competences to the local authorities would end an occupation was found to have no basis in IHL. It was submitted that foreign troops could retain some competences over the foreign territory without necessarily being regarded as continuing the occupation. The discussions highlighted the need to identify a more precise legal framework for governing situations where foreign forces still exert some level of authority but not enough to qualify as effective control under IHL. With regard to the legal basis for residual responsibilities incumbent upon the former occupying power, opinion was split in two: one group of experts argued that remnants of authority would be governed by occupation law despite the absence of effective control for the purposes of IHL; the other group held that the residual responsibilities of the former occupant should be governed by other bodies of law such as human rights law.

Multinational occupation

It was agreed that occupation law could be applicable *de jure* to multinational operations, including those under UN command and control, provided the conditions for its applicability were met. It was argued that the criteria for assessing a state of occupation involving UN forces ought not to differ from those for more classical forms of occupation. The functional approach was deemed appropriate for identifying which countries participating in a coalition would be considered occupying powers for the purposes of IHL. Thus, the nature of a State's involvement in a multilateral occupation was regarded as a key factor in determining whether it was an occupying power.

2. SECOND MEETING OF EXPERTS: DELIMITING THE RIGHTS AND DUTIES OF AN OCCUPYING POWER AND THE RELEVANCE OF OCCUPATION LAW FOR UNITED NATIONS ADMINISTRATION OF TERRITORY

Delimiting the rights and duties of an occupying power

*The obligation to restore and ensure – as far as possible – public order and safety while respecting, unless absolutely prevented, the laws in force in the country:*² the participants emphasized the need to interpret this obligation broadly in order to allow the occupant to fulfil its duties under occupation law. A broad interpretation would be of particular assistance to the occupant in administering the occupied territory for the benefit of the local population while ensuring the security of its own armed forces. The experts took the view that this obligation did not grant the occupant the authority to enter into treaties on behalf of the occupied territory. They also pointed out that nothing under IHL would prevent the occupant from concluding treaties in its own name for the purposes of fulfilling its duties under occupation law.

The role of human rights law in occupied territory: the applicability of human rights law to situations amounting to occupation was accepted almost unanimously. The experts also felt that it would be useful to have a framework for interpretation in order to address the simultaneous application of human rights law and IHL. In this regard, it was affirmed that IHL was the *lex specialis* in situations of occupation.³ However, a majority of the experts argued that this did not definitively preclude the application of human rights law. They explained that it meant only that human rights law could not be applied in an unqualified manner; it should be applied in a manner that respects the balance set by the *lex specialis* between humanitarian

2 Article 43 of the Hague Regulations of 1907. This provision, combined with Article 64 of the Fourth Geneva Convention, sets out the core duties incumbent upon the occupying power under IHL.

3 *Lex specialis* was defined as a principle according to which, in choosing between two rules, the one that was more specific and pertinent should be given precedence, since a special rule would usually give a clearer answer to the question at hand than a general one.

considerations and military necessities. Conversely, it was also contended that IHL was not automatically the *lex specialis* in situations of occupation because the issue of its interrelationship with human rights law could not be settled by a general analysis of the two legal regimes. Instead, some experts suggested, the *lex specialis* ought to be determined by using a rule-by-rule or case-by-case approach.

Applying the International Covenant on Economic, Social and Cultural Rights (ICESCR) in occupied territory: Most of the experts shared the ICJ's view that foreign forces are bound by the ICESCR in exercising the powers available to them as an occupying power and that they should not impede implementation of the ICESCR's provisions in those fields where power has been transferred to the local authorities. The nature of the obligations enshrined in the ICESCR, as well as the flexibility given by the instrument for their implementation, was regarded by some experts as facilitating application of the ICESCR during occupation. It was argued nonetheless that the concept of progressive realization contained in the ICESCR,⁴ which epitomizes the flexibility of the instrument, should not be interpreted as an excuse for not implementing the core of each right. Citing the examples of the right to food and the right to health, some experts argued that the occupant's obligations were not limited to the minimum defined by IHL, but also encompassed the complementary contribution made by human rights law.

Transformative occupation: the concept of transformative occupation was defined as an operation, the main objective of which was to overhaul the institutional and political structure of the occupied territory, often to make it accord with the occupying power's own preferences. It was agreed that such occupation had no basis under current IHL, in particular because the transitory character of the rights and duties incumbent upon the foreign administrator precludes making definitive large-scale changes in the institutional structure of the occupied territory. However, a distinction was made between full-fledged transformative projects entailing disruptions of sovereignty and smoother changes aimed at getting the basic infrastructure of the occupied society to work in accordance with the relevant norms of occupation law. Compliance with the obligation to restore and maintain public order and civil life in occupied territory might call for some transformations and oblige the occupant to engage in important reforms. Five reasons that might justify transformation during occupation were put forward: respect for human rights law; consent of the local population; the particular characteristics of prolonged

4 This concept of progressive realization is drawn from Article 2 of the ICESCR. In this provision, the ICESCR recognizes the differences in States' ability to fulfil the rights outlined in the covenant. The concept of "progressive realization" constitutes a recognition of the fact that it will generally not be possible to fully realize all economic, social and cultural rights in a short period of time. However, progressive realization should not be misinterpreted as depriving economic, social and cultural rights of all meaningful content. The purpose, rather, is to give governments flexibility in recognition of the differences in their economic state and their capabilities. It is not an escape clause. It includes the idea of continuous improvement and the obligation of the government to ensure that no regressive measures are taken.

occupation; the case of occupied failed States; and decisions taken by the UN Security Council.⁵

Prolonged occupation: it was recognized that nothing under IHL would prevent occupying powers from embarking on long-term occupation. Occupation law would continue to provide the legal framework applicable in such cases. It was pointed out that prolonged occupation could affect the implementation of occupation law and special measures usually unnecessary during short-term occupation might be called for. Decisions related to the social, economic and, sometimes, political realms might need to be taken in order to maintain as normal a life as possible in the occupied territory. It was also agreed that the welfare of the local population should be established as the main principle guiding the measures and policies undertaken by the occupying power in the administration of the occupied territory. Decisions made by the occupying power should always respect the principles contained in the Hague Regulations and the Fourth Geneva Convention, which are flexible enough to accommodate most of the needs that arise during prolonged occupation. The need to set limits on the measures an occupying power may adopt to ensure the well-being of the local population was emphasized. To that end, it was suggested that the participation of the local population in decision-making could serve as a litmus test. External mechanisms of control could also be set up.

The relevance of occupation law for UN administration of territory

The de jure applicability of occupation law to UN administration: despite the potential dissonance between occupation law and the transformative purpose of the UN administration of territory, this *corpus juris* was identified as applicable *de jure* to UN administrations provided the criteria implied in Article 42 of the Hague Regulations were met.

The criterion of consent was regarded as a major hurdle for the *de jure* applicability of occupation law to UN administration of territory, since the UN, which generally seeks the consent of the host State, would not appear to be the “hostile” entity required by Article 42 of the Hague Regulations. The case of the UN administration of Kosovo illustrated how difficult making a concrete and objective evaluation of the consent criterion could be. The discussion about determining the criterion of consent revealed differences of opinion on the methods and means of interpreting the notion of consent, as well as on identifying the entity whose consent was required.

The relationship between occupation law and the Security Council resolution establishing the international administration: it was suggested that the Security Council would be entitled to determine whether a particular instance of consent to UN presence was valid, thus excluding the application of occupation law. However, this

5 A majority of experts asserted that a Security Council resolution could, under certain circumstances, shape the provisions of occupation law that might be applicable.

suggestion did not go uncontested: some participants rejected the idea that the Security Council could unilaterally exclude the application of occupation law merely by reclassifying a belligerent occupation as an international administration not subject to IHL, regardless of the prevailing facts. The possibility that the Security Council was permitted to act in this way was thought to contradict the core idea that the applicability of IHL depended on the prevailing facts, not on the legal classification of the situation in question.

The necessity of supplementing a Security Council resolution with rules taken from various relevant legal instruments was also emphasized. In this regard, a “default rule theory” was identified. This holds that since a UN mandate would never be sufficiently detailed to permit the precise identification of the rules applicable to the UN administration, it would be necessary to determine the default legal regime to be added to the Security Council’s mandate. The default regime in turn would be determined by the legal criteria for determining whether a situation amounts to occupation, particularly by the criterion of absence of consent. When the UN administration is deployed with the consent of the host State, the default regime would be human rights law. Should the UN administration be deployed without the consent of the sovereign, occupation law would serve as the default regime supplementing the Security Council resolution setting out the UN mandate.

The de facto application of occupation law to UN administration: the possibility of applying occupation law by analogy – irrespective of whether it applied *de jure* – was also discussed. It was agreed that occupation law could offer practical guidance to the UN on matters such as the maintenance of public order and safety and the management of private and public property. Those who opposed this view said that human rights law provided a more appropriate legal framework, one that was more protective, and ought therefore to be the body of law that governed UN administration.

3. THIRD MEETING OF EXPERTS: THE USE OF FORCE IN OCCUPIED TERRITORY

Delimiting the legal framework applicable to the use of force in occupied territory

Defining the legal regimes applicable: three different legal regimes relevant for regulating the use of force in occupied territory were identified. The experts felt that IHL, in particular the rules governing occupation and those regulating the conduct of hostilities, would form a first set of legal provisions. Attention was also drawn to the importance of human rights law in relation to the use of force by the occupying power. However, there was some divergence of views regarding the extraterritorial reach of this body of law. Third, the relevance of the occupying power’s domestic law was emphasized insofar as it played an important role in determining the occupying forces’ armed response to a threat.

Theories and conditions for determining the legal model applicable: given the differences between the law enforcement and ‘conduct-of-hostilities’ models, it was deemed important to find ways of determining precisely when and how each of these would apply in occupied territory. The experts agreed that an approach that allowed for parallel application of both would be best.

The experts discussed criteria that would both justify the application of either model and the transition between them. Two trends emerged. The first one relates to a so-called “situation-based” or “sliding scale” approach. Under this approach, the choice and application of the model would be based on the actual situation prevailing at the time the occupying power decides to resort to force. This approach allows for a smooth transition between the two models based on the level of threat faced by the occupying power. The following considerations would be instrumental in determining when to shift from the law enforcement model to the ‘conduct-of-hostilities’ one in a specific situation: the nature of the threat faced by the occupying power and the differences in the level of control exerted by it, as well as the nature and duration of the occupation.

The second trend reflected the view that the transition between the law enforcement and conduct-of-hostilities models was not as straightforward as suggested by the “sliding scale” approach. In fact, a specific trigger was required to effect the shift from the law enforcement to the ‘conduct-of-hostilities’ model. Fulfilment of the criteria used to determine the existence of a non-international armed conflict was suggested as this trigger, which, under certain circumstances, would warrant application of the ‘conduct-of-hostilities’ model. Thus, the organization of the parties involved and the intensity of the armed confrontation would need to be examined: they would determine which model would apply when force was resorted to in occupied territory.

Finally, it was stressed that where the two models are applied simultaneously, law enforcement should be the default model. Therefore, except when the occupying power faces a threat that clearly originates in the armed forces of the occupied territory and/or affiliated armed groups, application of law enforcement rules and standards should be presumed.

The role of human rights law in regulating the use of force in occupied territory: a minority of participants emphasized human rights law’s ability to regulate the use of force in all circumstances, including occupation. They said that the flexibility of the provisions of human rights law pertaining to the use of force would permit their application in almost all situations faced by the occupying power, ranging from the enforcement of the law against criminal acts such as robbery or drug trafficking to open hostilities pitting the occupying forces against insurgent armed groups. This position was contested on the basis that each body of law – IHL and human rights law – is designed for fundamentally different sets of circumstances. IHL aims to regulate the use of force in armed conflict while human rights law is intended primarily for peacetime.

The role of occupation law in regulating law enforcement activities: some experts declared that it was necessary to dispel the misconception that occupation law *per se* could not provide a valuable legal framework for regulating the use of force in law enforcement operations. In fact, they said, the law enforcement model applied in occupied territory, as a matter not of human rights law but of occupation law as stipulated in key provisions of the Hague Regulations and the Fourth Geneva Convention. It was suggested that the combination of Article 43 of the Hague Regulations and Articles 27 and 64 of the Fourth Geneva Convention would constitute a workable legal framework for regulating the use of force in occupied territory. The interpretation and application of law enforcement standards in occupied territory was then discussed. In this regard, it was argued that law enforcement standards should be applied more liberally when occupying forces resorted to force during police operations. This position was challenged on the basis that any use of force by the occupying power in situations other than the conduct of hostilities remained subject to the law enforcement standards of precaution, proportionality and necessity similar to those deriving from human rights law.

The application of the ‘conduct-of-hostilities’ model in occupied territory

When does the ‘conduct-of-hostilities’ model come into play? It was claimed that occupation, *per se*, would not justify the use of this model without a clear manifestation of organized armed violence. A distinction was drawn between armed violence linked to the original international armed conflict and that emanating from armed groups not affiliated to the occupied State. It was made clear that the occupying power would be entitled to use the ‘conduct-of-hostilities’ model when military force was used against the armed forces of the occupied State, affiliated militias or other resistance movements fulfilling the criteria of Article 4(A)(2) of the Third Geneva Convention, particularly if active hostilities persisted or had resumed within the framework of the original international armed conflict. However, it was pointed out that hostilities and other acts of violence directed towards the occupying power would usually emanate from organized armed groups not formally “belonging to” the occupied State within the meaning of IHL. The experts felt that IHL’s response, when such armed groups not belonging to the occupied State carried out hostile activities in occupied territory, was not clear and necessitated clarification regarding when IHL rules on the conduct of hostilities would begin to apply. The threshold for determining the existence of a non-international armed conflict within the meaning of Article 3 common to the four Geneva Conventions was considered a workable test for determining when the ‘conduct-of-hostilities’ model would apply – to instances of force being used by the occupying power against organized armed groups not formally belonging to the occupied State.

The legal classification of hostilities on occupied territory: a distinction was made between armed confrontations pertaining to the original international armed conflict from which the occupation derived and those related to a “new”

non-international armed conflict emerging alongside the occupation. It was agreed that, for the purposes of IHL, a non-international armed conflict could occur in conjunction with an occupation.

Finally, an attempt was made to determine the legal framework governing the use of force in operations that were both a police operation against individuals violating the laws in force in occupied territory (including measures promulgated by the occupying power) and a military operation against legitimate military targets under IHL. The participants were clearly divided on this question. Some claimed that the presumption of the law enforcement model's application would prevail; others were clearly inclined to promote the application of the 'conduct-of-hostilities' model as a matter of law. In the end, the majority of experts favoured the prevalence of the 'conduct-of-hostilities' model in such circumstances.