



# Revisiting the law of occupation

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International humanitarian law (IHL) rules on occupation date back from the beginning of the Twentieth Century (Hague Regulations 1907 and GCIV 1949).

Two main principles (strongly intertwined):

- 1) **Obligation to maintain the status quo ante:** the occupying power is not allowed to make any substantial changes to the occupied territory.

cf. Article 43 of the Hague Regulations of 1907: "the authority of the legitimate power having in fact passed in 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".

- 2) **Limited duration:** "[a]n important, but implicit, assumption of much of the law on occupation is that military occupation is a provisional state of affairs (...)" (Adam Roberts, 2000).



However, some territories, such as for example the Occupied Palestinian Territories (OPT), have been occupied for decades (since 1967 in case of the OPT).

**Problem:** the law of occupation has not foreseen situations of long-term occupation. Consequently, it is ill-suited to address such situations.

Can International Human Rights Law (IHRL) be used to fill in the gaps left by the law of occupation under IHL?

- IHRL applies to situations of occupation in addition to the rules under IHL (cf. ICJ, opinion on the Construction of a Wall in the OPT – 2004).
- IHL remains, however, the main framework of reference in situations of occupation.



Three elements influence the relationship between IHL and IHRL in situations of occupation:

- 1) **The situation on the ground:** a situation of conduct of hostilities/actual fighting vs. a more stable situation requiring law enforcement measures. Since occupation is a situation somewhere between peace and war, a fluctuation between conduct of hostilities and law enforcement situation can occur.

→ When we are closer to a situation of actual fighting, IHL prevails, whereas in a more stable, law enforcement, situation, IHRL will prevail.

- 2) **The duration of the occupation:** occupation has been originally foreseen as something of inherently short duration. However, this view has been more than once challenged over the last decades (cf. OPT for example).

→ The longer the occupation lasts, the more shortcomings IHL tends to reveal, hence the more important IHRL becomes

- 3) **The nature of the right concerned:** "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both branches of law" (ICJ, opinion on the Construction of a Wall in the OPT – 2004).

→ With regard to the rights that are exclusively matters of IHL or IHRL, the solution is simple: they respectively fall under the legal regimes of IHL and IHRL. It is more complicated with regard to the rights which are matters of both bodies of law: here we have to assess on a case by case basis and look which body of law offers the more detailed protection.



However, when doing so, we always have to take into account the rationale behind IHL in general, and the law of occupation more in particular, as well as the facts on the ground, including duration.

**Conclusion:** International human rights law can help in making the legal framework of occupation more fitted to the situations of occupation as we know them today, in particular situations of long-term occupation.

A different and additional body of law can thus help in making 'old' law more suited to actual situations, in other words, it can help innovating the existing legal framework.