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## **33rd International Council Meeting**

### **Circular 12: Military Occupation as an Amnesty Policy Issue**

**AI Index:** ORG 10/6312/2017  
**To:** Sections and structures  
**ICM Session:** Human Rights Working Party  
**From:** Law & Policy Programme, Amnesty International, International Secretariat  
**Date:** 12 June 2017

#### **PURPOSE STATEMENT**

This paper presents AI's existing policy on military occupation and the international legal framework that applies to occupation. It comments on the ICM resolution that proposes a change to our position on occupation, and examines some of the implications this may have for AI's work. The paper is intended as a resource to facilitate discussion of the issue of occupation at the ICM and of some related issues.

#### **DISTRIBUTION**

- The paper is for section/structure delegates to the ICM.
- Delegates should talk to their section/structure management and board; law and policy focal points; advocacy leads; media officers; and campaigners focusing on countries/territories under occupation.

**Papers List**



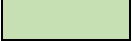


All ICM papers and background papers are available on the ICM website: password 2017\_ICMRome (o = zero) [2017 ICM website](#)

Release date	Circular No.	Paper title (Circulars 1, 3 and 4 have been removed from this table, but are available on the ICM website)	Session	AI index number
Oct 2016	2	Call for internationally elected positions	N/A	ORG 50 4954 2016
June 2017	5	Section and structure voting entitlements	S26 & S27	ORG 10/6318/2017
June 2017	6	Second version resolutions, preliminary costings and draft agenda	Full ICM	ORG 10/6316/2017
June 2017	7	Governance Reform: The new Governance Model explained	Governance Reform working party	ORG 10 6247 2017
June 2017	8	Governance Reform: Frequently asked questions		ORG 10 6248 2017
June 2017	9	Development of a Policy on State Obligations on Elections	HR Pol working party	ORG 10/6310/2017
June 2017	10	Human Rights aspects of climate change		ORG 10/6302/2017
June 2017	11	Drugs and Human Rights		ORG 10/6311/2017
June 2017	12	Military Occupation as an Amnesty Policy Issue		ORG 10/6312/2017
June 2017	13	Civil disobedience and boycotts		ORG 10/6181/2017
July 2017	14	Update on implementation of 2015 ICM decisions and International Board and International Treasurer's Report	S6	TBC
July 2017	15	Secretary General's report to the ICM	S6	TBC
July 2017	16	State of the movement report	S16	TBC
July 2017	17	Final version draft agenda, preparing for the ICM	Full ICM	TBC
July 2017	18	Nominations to internationally elected positions	S7	TBC
<b>Post ICM papers</b>				
Aug 2017	N/A	2017 ICM Decisions Report	N/A	TBC
Sep 2017	N/A	Report of the 2017 ICM	N/A	TBC

**Background papers**

Release date	Paper title	Sessions	AI index number
June 2017	Discussion framework for Governance Reform Working Parties	Governance Reform working party	ORG 10/6313/2017

**Session key**

	ICM plenary session		HR Policy working party
	ICM plenary: HR context		Workshop
	Governance Reform working party		Organisational working party
			Regional meetings

## **Executive Summary**

Occupation is a legal term which describes a situation in which a hostile army gains control over territory and places it under its authority. International humanitarian law, specifically a body of rules known as occupation law, regulates the conduct of the occupying power. The underlying rationale of this law is that occupation is transitional, for a limited period. One of the key aims of its rules is to enable the inhabitants of an occupied territory to live as “normal” a life as possible. Towards that end, occupation law allows the occupying power to take measures absolutely necessary to maintain order and security. But it prohibits it from implementing measures – such as transferring its own civilians into the occupied zone -- aimed at changing the status of the territory. AI’s long-standing policy, in line with international humanitarian law, has been to take no position on military occupation itself, while opposing violations of human rights and international humanitarian law committed during occupation. The situation of occupation on which AI has done the most work is Israel’s occupation of the West Bank, including East Jerusalem, and Gaza – the Occupied Palestinian Territories (OPT). AI has researched and campaigned on a wide range of violations of human rights and IHL, including war crimes, associated with the occupation.

The 2017 ICM will consider a resolution for AI to develop a policy on when AI may oppose occupations which lead to serious human rights violations. The rationale for the proposed change is that, because the law of occupation’s premise is that occupation is a temporary situation, this law alone is not adequate to address long-term occupations. The impact of adopting such a policy will depend on its scope. If the required criteria for opposing military occupation are very restrictive, it will be applicable to only a few situations. In the case of the Occupied Palestinian Territories, opposing the occupation would be a clear position that would facilitate AI campaigning alongside anti-occupation groups. However, we need to consider what calling for an end to Israel’s occupation would mean in practice. What recommendations could we make without taking positions on political issues outside our mission (such as borders and how international disputes should be resolved)? If our policy resulted in taking a position on the status of Western Sahara as occupied, it would have repercussions for AI Morocco and for AI’s access to Morocco and Western Sahara. Another issue to consider is that taking a position opposing occupation (even in limited circumstances) may require us to revisit our neutrality on external self-determination as AI would be requested to start taking positions on which peoples have the right to external self-determination.

## **1. International law and military occupation**

The word occupation is often thought of as a derogatory term. But, as a legal concept, occupation is a term that describes a particular set of facts. Where military occupation occurs, particular rules of international humanitarian law apply that supplement international human rights law (which applies to all situations.)

The long-established definition of military occupation (sometimes called belligerent occupation) comes from international humanitarian law. According to Article 42 of the Hague Regulations (1907), ‘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.’ And as clarified by Article 2 common to the 1949 Geneva Conventions, whether or not there was armed resistance is not a factor in determining whether an occupation exists. In interpreting this definition with respect to particular situations, the notion of “effective control” over the territory in question is central. Its key elements are: the presence of foreign forces to establish and exert control; the ability to exercise authority over the occupied territory; and the fact that the presence of foreign forces is unconsented to. An occupation lasts until either the occupying power withdraws its troops and no longer has the ability to exercise its authority<sup>1</sup> or the occupied state

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<sup>1</sup> In cases such as Gaza after the disengagement of Israeli forces where the occupying power has withdrawn its forces from all or parts of the occupied territory, but has maintained key elements of an occupying power’s authority, this retention of authority can amount to effective control. In such cases occupation law, or at least the provisions relevant to the powers it continues to exercise, could continue to apply.

consents to the presence of the foreign forces.

An occupying power has specific obligations under provisions of international humanitarian law applicable to belligerent occupation including:

- specific provisions of the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annexed Regulations respecting the Laws and Customs of War on Land of 18 October 1907 (hereafter Hague Regulations);
- the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereafter Fourth Geneva Convention);<sup>2</sup>
- customary rules of international humanitarian law applicable to belligerent occupation, including the rule protecting persons in the power of a party to the conflict, detailed in Article 75 of the 1977 Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I).

The core idea of the law of occupation is that occupation is transitional, for a limited period. One of the key aims of the rules is to enable the inhabitants of an occupied territory to live as “normal” a life as possible, whilst allowing the occupying power to take measures absolutely necessary to maintain order and security.

The Fourth Geneva Convention imposes obligations on an occupying power in relation to the inhabitants of the occupied territory, who are entitled to special protection and humane treatment. Among other things, the rules prohibit the occupying power from wilfully killing, ill-treating or deporting protected persons. And it is prohibited from settling its own civilians in the occupied territory. The occupying power is responsible for the welfare of the population under its control. It is strictly prohibited from depriving the occupied population of the protection of Convention, whether by annexation or other means.

The International Court of Justice and UN human rights treaty bodies have affirmed that an occupying power’s conduct in occupied territory is bound not only by international humanitarian law but also by its obligations under the international human rights treaties that it has ratified, as well as customary rules of international human rights law.

## **2. AI policy and practice**

AI’s long-standing policy has been to take no position on military occupation itself, while opposing violations of human rights and international humanitarian law committed during occupation. This neutrality stems from the fact that military occupation does not in itself violate international humanitarian law and from AI’s reluctance to take a position on political issues outside our mission, including how territorial or other disputes between states should be resolved.

The situation of occupation on which AI has done the most work is Israel’s occupation (since 1967) of the West Bank and Gaza. AI has researched and campaigned on a wide range of violations of human rights and IHL, including war crimes, associated with the occupation: administrative detention, extrajudicial executions, settlements, unfair trial, violations of freedom of expression, association and peaceful assembly; torture and other ill-treatment; house destruction and forced evictions; deportations; arbitrary movement restrictions; collective punishments; violations of the rights to work, health, education, and water.

AI has also worked on human rights violations in other situations of occupation, but on a much smaller scale and less consistently. The discrepancy is due both the uniquely long duration of Israel’s occupation and the nature, gravity and scale of the violations associated with the Israel’s occupation.

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<sup>2</sup> The Israeli government stands alone in the international community in contending that the Fourth Geneva Convention does not apply to the Occupied Palestinian Territories (OPT).

The other situations of occupation that AI has addressed – some of which we continue to work on -- include Russia's occupation of Crimea (2013-present), South Ossetia (2008-present), Abkhazia (1993-present) and Transnistria (1992-present); the US-led occupations of Afghanistan (2001-2) and Iraq (2003-4); Iraq's occupation of Kuwait (1990-1); Armenia's occupation of Nagorno-Karabakh (1994-present); and Turkey's occupation of Northern Cyprus (1974-present). AI has also worked on violations by Morocco in the non-self-governing territory of Western Sahara (annexed by Morocco in 1975).<sup>3</sup>

### **3. The 2017 ICM resolution**

We recommend that this resolution be supported. It should be noted that the explanatory note that accompanies the resolution lists Western Sahara as one of three examples of long-term occupation. However, AI has never publicly stated that Western Sahara is occupied territory and we have not analysed the situation there as governed by international humanitarian law. There are good arguments to consider it as occupied, and we need – especially if this resolution is passed – to consider examining the situation and making a determination as to whether it is occupied. The costing of the resolution should reflect the challenges entailed in developing the policy on occupation and holding movement-wide consultations. As far as we are aware, no human rights organization currently has a global position on the issue of military occupation.

### **4. Possible impact of AI taking a position opposing occupation**

The impact will depend on the scope of the ICM decision and the policy that ultimately is adopted. If the required criteria for opposing military occupation are very restrictive it will be applicable to only a few situations.

Given the fact that occupation is meant to be temporary, one likely criteria for opposing a particular situation of occupation would be its duration. This approach would require deciding when a situation qualifies as a long-term occupation (i.e. five, 10, 20 years?) However, in some cases there could be strong grounds for opposing an occupation before it has become long-term. An example would be if the occupying power begins taking measures to permanently change the status of the territory and the occupied population. Annexation of all or part of the occupied territory is one such measure. Settling its own population in the territory, or deporting the local population are other examples of illegal measures, that could be grounds for opposing occupation regardless of its duration.

Also, the policy to be subsequently adopted would be limited to situations that meet the definition of military occupation under IHL. However, a focus on long-term occupation would raise the question of why we are not examining situations of settler colonialism. We may need to recognise that, in the view of some Indigenous peoples advocates, European settler colonialism which decimated the native population and alienated most of the land and resources from the survivors and their descendants, is distinguished from belligerent occupation mainly by the fact that it was carried out in the period that preceded the codification of human rights law and the IHL.

#### **4.1 Potentially positive impact and advantages**

In the case of the Occupied Palestinian Territories, opposing the occupation would be a clear position that would facilitate AI campaigning alongside anti-occupation groups. Many human rights NGOs in Israel and all Palestinian human rights groups oppose the occupation. The occupation is so closely linked with systematic violations that opposing it is a reasonable position for Amnesty to take.

#### **4.2 Potential risks and challenges**

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<sup>3</sup> There is a good case that Western Sahara is occupied by Morocco. But there is not the same degree of international consensus on this that there is regarding the OPT. The UN Security Council has not said that it is occupied; and the International Committee of the Red Cross (ICRC) has not publicly pronounced on whether it is occupied. There is a stalled UN process by which the people of Western Sahara are supposed to vote on whether they should be independent.

We need to consider what calling for an end to occupation would mean in practice. What recommendations could we make without taking positions on political issues outside our mission (such as the precise borders of the occupied territory and how international disputes underlying the relevant conflict should be resolved)? And how would we operationalise the call in situations other than Palestine?

Even if the criteria for when AI opposes occupation are restrictive, the very fact that AI would be opposing occupation would fundamentally change the nature and significance of AI making the determination that a territory is occupied. Up until now, AI's determination was for the purpose of ensuring the appropriate international legal framework was being applied. A new policy condemning all or some occupations risks shifting the focus from the violations to occupation itself.

An associated risk of the new policy would be that AI would oppose some situations of occupation and not others, and this will lead to accusations of inconsistency or political bias. For example, a decision to oppose some occupations will require that we revisit the question of the status of Western Sahara. AI has not determined whether this situation is an occupation. It is more contentious than the OPT. The ICRC and the UN Security Council have not pronounced on whether Western Sahara is occupied by Morocco. But the UN General Assembly has stated that it is occupied and most IHL experts agree that it is occupied territory (a view that is consistent with the 1975 advisory opinion by the ICJ that pre-colonial ties between Morocco and some Sahrawi tribes does not imply Moroccan sovereignty over the territory). If Amnesty were to decide that it is not occupied, or that it is occupied but doesn't meet other criteria in our new policy for opposing occupation, we will be accused of pro-Moroccan bias and a lack of concern for the rights of the Sahrawi people. If our policy were to result in the organization determining that Western Sahara is occupied, and AI were to call for an end to Morocco's occupation we will be accused of undermining the unity and territorial integrity of the state. Obviously, such a call also could have serious repercussions for AI Morocco and for AI's access to Morocco and Western Sahara.

Another tricky issue likely to arise, were AI to take a position on an occupation, is how this could be reconciled with our neutrality on political issues outside our mission (such as borders, how disputes between states should be resolved, and AI not taking sides in armed conflicts.) In cases where there is an armed conflict over occupied territory, AI having taken a position on that situation of occupation could make it appear that AI is supporting one side in the conflict. In addition to reputational risks, this could have operational implications, potentially restricting our access or even compromising the security of our staff.

## **5. Related issues**

### **5.1 Occupation and self-determination**

Any position opposing occupation (even in limited circumstances) may require AI to revisit the issue of self-determination.

The right to self-determination, enshrined as Article 1 of both the ICCPR and ICESCR, is the right of all peoples to "freely determine their political status and freely pursue their economic, social and cultural development". The exact content of this right, however, is not defined in international rights law. [Link to 2005 ICM Circular]

Amnesty International takes no position on internal or international political or legal arrangements that might be adopted to implement the right to self-determination, but works on human rights violations that arise in the context of demands for self-determination.<sup>4</sup> Accordingly, it has not supported calls for independence -- including in instances which have a strong basis in international law such as East Timor, the Occupied Palestinian Territories, and Western Sahara, or in more

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<sup>4</sup> cf. 2005 ICM Decision 9

contentious cases of peoples claiming the right to self-determination through independent statehood: such as Kosovo, Kashmir, Biafra, Tibet, Catalonia, Scotland, Chechnya or West Papua.

A change to AI's neutrality on external self-determination could lead to several complications as AI would be expected to start taking positions on which peoples have the right to external self-determination. Beyond the relatively uncontroversial case of the Palestinians, it would be potentially problematic for us politically and could have serious operational consequences for some AI sections and regional offices.

While occupation and self-determination are related issues, they are different concepts. One is a situation defined by IHL, and the other is a (collective) human right. Sometimes a struggle against occupation corresponds with a people's pursuit of self-determination. But in other situations of occupation or annexation the majority of the population welcome occupation/annexation (e.g. in Crimea or South Ossetia) as fulfilling their right to self-determination.

## **5.2 Apartheid and occupation**

In the case of Israel's occupation of the OPT, some have argued that it amounts to the crime of apartheid, and propose AI could oppose the occupation on that basis. Regardless of whether the ICM adopts a decision on occupation, AI will be examining the situation in OPT to determine whether it amounts to the crime of apartheid.

But it must be borne in mind that ending the crime of apartheid is not necessarily brought about by ending occupation. Practices that amount to apartheid could be ceased by ending systematic discrimination and extending equal rights to all. This could be accomplished through annexing the occupied territory in question and granting citizenship and equal rights to the occupied population (as Russia has done in Crimea). That would end apartheid, but it would violate IHL (occupation law). And it also could be contrary to the right to self-determination.