"BELLIGERENT OCCUPATION – CONTEMPORARY ISSUES"

- OM PRAKASH GAUTAM & SAURABH

Abstract

The Paper covers three major issues of occupation addressed in recent times: Transformative Occupation, Use of Force in Occupied Territory and Multinational occupation. Transformative occupation involves a transformation of law and political institutions, seeking creation of new institutions that will enhance local political culture after the occupation ends. The Jurists have diverse opinion on the nature of changes that are permitted, some believe occupying powers are temporary, have no democratic basis for their authority, and should not seek to impose long term or permanent changes to the function or institutions of State. Others believe, transformative occupation is consistent with the rights-based Geneva norms as it does not commit any violation of the rights enhancing provisions of the Fourth Geneva Convention. With regard to the use of force, police operations are not directed at combatants (or civilians directly participating in hostilities) but against civilians (suspected of crimes or threatening public order). While military operations are aimed at weakening the military potential of the enemy, police operations aim to enforce the law and maintain public order. Police operations are subject to many more restrictions than hostilities. Law enforcement model applies in time of peace and is governed by international human rights law; the armed conflict model applies in time of war and is governed primarily by the law of war. United Nations has acknowledged that it is bound by some principles of humanitarian law applicable to peacekeepers, it has not adopted the governance provisions of the law of belligerent occupation. Some authors support the view that Chapter VII authorized forces are subject to the law of occupation, at least to the extent that it constitutes customary law.

Keywords: Humanitarian Law, Transformative Occupation, Use of Force during Occupation, Human Rights in Occupation, Multinational Occupation.

1 Assistant Professor (Law), National Law University Jodhpur.
2 Research Scholar, International Humanitarian Law, Faculty of Legal Studies, South Asian University, New Delhi.
A. SYNOPSIS:

a. **Transformative Occupation:** Legislation and Maintenance of Public Order and Civil Life by Occupying Powers – Jus Post Bellum - Application of IHL or Human Rights Regime [LexSpecialis Model, or Extraterritorial Application or Derogation].

b. **Legal Regime governing the use of force in occupied territory:** For Law enforcement or Conduct of hostilities (suppression of organized armed groups committing violent acts) or situation involving both Law enforcement and conduct of hostilities. Application of IHL or Human Rights Regime [LexSpecialis Model, or Extraterritorial Application or Derogation] - Domestic Law of the Occupying power or Domestic Law of the occupied state. Situations of the application of the legal regime. Application of Principles of Non International Armed Conflict to the Conduct of Hostilities Model.

c. **Legal Regime governing Multinational occupation:**
   
   (a) De jure application of occupation Law to the UN administered territories (Security Council Resolution under Chapter VII of the UN Charter and the consent of the administered territory);
   
   (b) Application of IHL and Human Rights Law on UN Administered territories; and
   
   (c) Occupation by Coalition of States.[/]

B. TRANSFORMATIVE OCCUPATION:

In April 2003, after occupation of Iraq by United States and United Kingdom, the Coalition Provisional Authority (CPA), declared that it would exercise ‘all executive, legislative and judicial authority’ in Iraq to advance ‘efforts to restore and establish national and local institutions for representative governance and facilitat[e] economic recovery and sustainable reconstruction and development’.³ In the fourteen months that followed, the CPA pursued these goals with abandon, issuing decrees that fundamentally remade Iraq’s legal, political, military, and economic institutions.⁴ The Iraqi reforms raised the question of applicable legal regime, whether the 1907 Hague Regulations and the Fourth Geneva Convention of 1949.

³The Coalition Provisional Authority, ‘Coalition Provisional Authority Regulation Number 1’, 16 May 2003, CPA/REG/16 May 2003/01, sec. 1(2), Available at: http://www.iraqcoalition.org/regulations/ (Last Accessed on August 21, 2015).
Gregory H. Fox explains the regime of the transformative (‘good’) occupation as being consistent with the rights-based Geneva norms: First, a transformative occupier commits no violation of the rights enhancing provisions of the Fourth Geneva Convention (Its objectives are instead rights-enhancing); Second, a thorough transformation of law and political institutions is future-oriented, seeking creation of new institutions that will permanently enhance local political culture after the occupation ends. Wouters and Chan contend that the occupation law strictly binds the hand of the occupier and heavily restricts the occupier’s ability to make any changes to the structure of the State – effectively only permitting changes that are necessary for humanitarian purposes. The intention of this design is to ensure that the occupier, who is not appointed via the will of the people, may only act in a transitional capacity until the duly appointed sovereign can assume its proper position. Consequently, the legitimacy of state-building efforts will de jure depend on whether the law of occupation was applied correctly. This makes it very clear that democracy-building and institution-transforming strategies that typify state-building do not find a solid basis in IHL. Occupying powers are therefore temporary, have no democratic basis for their authority, and should not seek to impose long term or permanent changes to the function or institutions of State.

Major Parsons asserts that the individual nations and U.N. coalitions have occupied territory and exercised governmental authority in the territory, engaging in what may be termed as nation building. The U.N. has engaged in these types of occupations, under the heading of transitional administrations. He suggests changes in the occupation law considering application of Human Rights Law during occupation (LexSpecialis): 1) a method for international oversight of the occupant's activities; 2) a requirement for U.N. approval or other multilateral agreement for the system of administration of the occupation; 3) the inclusion of certain human rights in order to clarify the application of those rights within the lex specialis of the law of occupation, the right of self-determination and self-governance being paramount among these rights; and 4) a method to handle transformative

7Major Breven C. Parsons, Moving the Law of Occupation into the Twenty-First century, 57 Naval L. Rev. 1 2009.
occupations. Rüdiger Wolfrum\(^8\) denies accepting the legitimacy of transforming occupation, and explains that the international norms on belligerent occupation referred to are meant to cover a transitional period only, i.e. until the government of the occupied state has reorganized itself. They try to strike – in that period – a balance between the security interests of the occupying power and the presumed interests of the population of the occupied state by preserving the status quo ante as far as the unity of the respective state is concerned and the maintenance of the existing legal order to the extent that the security interests of the occupying power so permit. International law, in principle, does not legitimize the introduction of political changes. This is true even in those cases – and Iraq undoubtedly was such a case – where respective changes in government may be necessary for the transformation from a totalitarian regime into a democratic political system and thus to eradicate the causes of conflict.

Hamada Zahawi\(^9\) argues that the occupying power functions as the administrator of the area and assumes provisional authority over the functions of the ousted national government as well as some of its legislative and judicial responsibilities. It is required to ensure "to the fullest extent of the means available" that the local population has adequate food, medical supplies, clothing, shelter, and essential public services. The occupying power does not become the government of the occupied territory, but rather exercises temporary authority in accordance with the defined terms of the Hague and Geneva Conventions. In this respect, the laws of occupation aim to "preserve the status quo, not to entitle the occupying power to transform the territory it holds. Conor McCarthy\(^10\) contends that it is generally "not permissible for an occupying power to allow an occupied territory to fester in a state of economic, social, political and infrastructural retardation created by the conflict from which the occupation has resulted.

Eric De Brabandere\(^11\) asserts, the laws of armed conflict do not convey any comprehensive responsibilities to the occupier-administrator during occupation other than

---


the mere ‘usufructuary’-type administration provided for by the laws of occupation. The application of the laws of occupation is based on a factual situation, namely the belligerent occupation of a territory by a foreign army. The rationale behind the regulation of such a factual situation is that resort to force and the subsequent (belligerent) occupation of foreign territory cannot lead to the annexation of territory, neither to extensive reforms, nor to the exercise of transformative powers by the occupying forces. Kristen Boon\textsuperscript{12} suggests application of jus post bellum to fill existing gaps and establish a uniform legal regime that is applicable to the exercise of public authority during transitions. A jus post bellum would apply to all actors exercising governance functions, including the United Nations and belligerent occupants, and it would provide parameters for intervention in recognition of the right of self-determination.

C. USE OF FORCE DURING OCCUPATION:

Article 42 of the 1907 Hague Regulations sets out the legal test for occupation: ‘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.’ The occupier is required by Article 43 of the Hague Regulations to ‘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’. This obligation is also reflected in Article 64 of the Fourth Geneva Convention, which states: ‘[t]he Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations . . . to maintain the orderly government of the Territory . . .’.

K. Watkin\textsuperscript{13} argues that, the Law enforcement, based on a human rights normative framework, seeks to limit the use of force to situations of absolute necessity. In contrast, humanitarian law recognizes that the use of deadly force is an inherent part of the


conduct of hostilities. LexSpecialis regulates the application of the two frameworks to control the use of force. The lexspecialis principle has been to variable interpretations. One interpretation has been described as broadly exclusionary in nature, seeing ‘the specialty of IHL operating at a very general level, so that IHL would replace IHRL altogether in times of armed conflict’. It has been indicated that a more correct interpretation of lexspecialis is one applied on a case-by-case basis to certain individual rights in situations where there is an actual conflict such that, where a norm cannot be applied without violating another, ‘the special norm of IHL should prevail’. However, it is also suggested that what can be used is the lexspecialiscompletatlegigenerali principle, where both branches of the law are applied simultaneously, such that human rights norms ‘have to be interpreted in light of IHL norms’. Reflecting this interpretive uncertainty, Françoise Hampson contends, in regard to the lexspecialis principle, ‘[i]t is not clear whether this means only that the special prevails over the general, or whether it means that the former actually displaces the latter’. Another analysis reaches the conclusion that international humanitarian and human rights treaties can ordinarily be reconciled, but that there will be instances where that will not occur, leading to a political choice as to which of the conflicting norms will be given priority. An approach allowing for the application of human rights law, even when IHL applies, has been to interpret lexspecialis as a ‘rule governing conflicting norms’ giving ‘precedence to the rule that is most adapted and tailored to the specific situation.

David Kretzmer\textsuperscript{14} asserts that the Occupying Power has the duty to ensure public order in the occupied territory. In doing so it must exercise ‘policing powers’. Its rules of engagement must be consistent with such powers and with the relationship between a government and a civilian population. What is the situation if hostilities break out in the occupied territory between organized armed groups and the forces of the Occupying Power? Which rules apply to the conduct of the Occupying Power in dealing with such hostilities – those of ‘policing’ or ‘law enforcement’, or those relating to conduct of hostilities in armed conflict? Opinions are divided on these questions. Some seem to think that in occupied territory only the policing rules of ensuring public order can apply, and that existence of armed hostilities in the area can have no influence on the applicable legal

Kenneth Watkin\textsuperscript{15} asserts that, the policing of a territory involves the use of force, in a manner that is fundamentally different than for inter-state conflict, is controlled by a well proscribed human rights based normative regime, which places emphasis on limiting the use of force to situations of absolute necessity. Deciding which normative structure to apply to use of force has proved to be a difficult challenge. Part of that challenge stems from an approach where one of the international humanitarian law or human rights law frameworks being preferred often to the virtual exclusion of the other. In contrast to this approach, human rights law is itself often given less prominence as a result of the claim of lex specialis status for humanitarian law. Further, it has been suggested that international human rights instruments were not intended to apply extraterritorially, and that a requirement to apply “the peacetime protections provided under these instruments during periods of armed conflict and military occupation is likely to produce confusion rather than clarity and increase the gap between legal theory and state compliance. Another approach contemplates a joint application of normative regimes “where the specific rules of the Fourth Geneva Convention take precedence regarding specific measures which are justified on the basis of these provisions. There has been a greater contemporary recognition of “the trend toward convergence of the norms of human rights and international humanitarian law which provides some hope that this challenge can be met by the international community. Possible approaches include the situation based approach of applying the appropriate body of law to specific fact situations and the blended approach of borrowing from each normative regime to address the unique situations confronting the security forces.

Katharina Parameswaran\textsuperscript{16} asserts that, there is a fundamental doctrinal dichotomy between military force and police force. While military operations are aimed at weakening the military potential of the enemy, police operations aim at enforcing the law and maintaining public order. The use of military force is based on the premise that force will be used and humans intentionally killed. As such, police operations are subject to many more restrictions than the conduct of hostilities. Law enforcement operations are governed by domestic law that may vary from case to case. Still, a common ground for general principles inherent to all domestic law can be developed from international human rights law. On the other hand, conduct of hostilities presents a significantly different legal and

\textsuperscript{15} Kenneth Watkin, \textit{Maintaining Law and Order during Occupation: Breaking the Normative Chains}, 41 Isr. L. Rev. 175 2008.

moral challenge under international humanitarian law. Ariel Zemach\textsuperscript{17} contends that the law enforcement model applies in time of peace and is governed by international human rights law; the armed conflict model applies in time of war and is governed primarily by the law of war. The permission granted to a state to exercise lethal force is much broader under the armed conflict model than under the law enforcement model. The paradigm of law enforcement normally requires that the criminal be pursued by means aimed at his capture, not at his death. The status of the law of war as lex specialis taking precedent over the norms of international human rights law extends to conflicts between a state and a non-state actor. Marco Sassòli\textsuperscript{18} explains that the public order is restored through police operations, which are governed by domestic law and international human rights law, and not through military operations governed by IHL on the conduct of hostilities. Police operations are not directed at combatants (or civilians directly participating in hostilities) but against civilians (suspected of crimes or threatening public order). While military operations are aimed at weakening the military potential of the enemy, police operations aim to enforce the law and maintain public order. Police operations are subject to many more restrictions than hostilities.

D. APPLICATION OF OCCUPATION LAW TO MULTINATIONAL FORCES:

Kristen Boon\textsuperscript{19} argues, while the United Nations has acknowledged that it is bound by some principles of humanitarian law applicable to peacekeepers, it has not adopted the governance provisions of the law of belligerent occupation. The occupiers are obliged to protect the civilian population by acting as trustees and reserving fundamental political and legal changes to future governments representing the occupied population. This principle has been described as one of "conservationism," which involves three presumptions: occupations are temporary, non-transformative, and limited in scope. Cordula Droege\textsuperscript{20} argues where the occupying power has effective control, is in a law-enforcement situation and capable of making arrests, it should act in compliance with the


requirements of human rights law. Where hostilities continue or break out anew, humanitarian law on the conduct of hostilities must prevail over human rights law, which presupposes control for its enforcement. Not all criminal activity, even if violent, can be treated like an armed attack. The test for assuming a situation of hostilities, could be based on the test used by the ICTY to establish the existence of a non-international armed conflict—that is, a certain minimum intensity and duration of the violence. Such situations would require a military response, whereas isolated or sporadic attacks by resistance movements could be met by law-enforcement means. Luis Fernando EslavaArcila contends that, the literal interpretation of Article 43 of the Hague Regulations, prohibits change to the laws in force in an occupied territory 'unless absolutely prevented', suggests the Coalition Provisional Authority (CPA) economic reforms in Iraq being contrary to modern interpretations of occupation law. While some changes to the legislation and administrative structures of Iraq may have been permissible on the basis of security, public order, or furthering humanitarian objectives, on the basis of the Fourth Geneva Convention, more wide ranging reforms in terms of economic governance in Iraq were not lawful.

Grant T. Harris compares the old model with new model of occupation and argues that multilateralism has replaced the traditional law of occupation as the primary source of authority and legitimacy in occupation. The new model of occupation includes the formula: Occupation is an end goal rather than a temporary by-product of military intervention, and the conduct of the occupant and outcome of the occupation directly affect the legitimacy of the military intervention in the eyes of the international community. The international law of occupation is generally disregarded by occupying powers. Occupation morphs into nation-building due to the goals of the intervention and efforts to protect the human rights of the occupied population. Regime change and humanitarian interventions explicitly seek to redesign and recreate the government of the occupied territory. The occupant's resource requirements and its need for international legitimacy force some degree of multilateralism, even if the initial intervention was unilateral. In some cases, inclusion of the international community is necessary because of its previous involvement in the state or territory under occupation.

21 Luis Fernando EslavaArcila, (Lis)Occupation Law: (Mis)Use and Consequences in Iraq, 21 Con-texto 79 2007.
Major Nicholas F. Lancaster\(^\text{23}\) contends that the CPA legislated extensively in the areas of government and economics, using its authority under Resolution 1483. Much of the legislation is inconsistent with existing customary international occupation law as reflected in the Hague Regulations and the Geneva Convention. Customary international occupation law has changed as a result of state practice, culminating in the Coalition occupation and administration of Iraq. Customary international law no longer requires adherence to the principle that an occupier is a mere trustee, without authority to transform the occupied state's form of government and economy to reflect democratic values, particularly when the transformative goals are authorized by the UN Security Council. Steven R. Ratner\(^\text{24}\) argues that occupation by states and administration by international organizations operates under common legal framework and those managing both need to find the proper balance among international humanitarian law, international human rights law, local law, and any mandate from an international organization. As a political matter, each encounters resistance from those in the territory opposed to its presence, leading to coercive responses whose legitimacy will be questioned from within and outside the territory. Chris Faris\(^\text{25}\) argues that the laws of occupation apply de jure when UN forces have gained effective control of territory from a State with whom they had engaged in armed conflict. Similarly, and when the host State has clearly consented to UN forces on their soil, the UN forces will not be occupiers.

Christina Rueger\(^\text{26}\) argues that the de jure applicability of the Law of Military Occupation in general is difficult: Firstly, the United Nations as an international organization is not a party to any of the Conventions and Treaties dealing with occupation which means that a particular peacekeeping mission as a UN subsidiary organ cannot be bound by them. Secondly, an international administration comes into force through a resolution of the Security Council which was - in all recent cases - based on Chapter VII of the UN Charter. The UN-mandated territorial interim administrations, usually undertakes


to make efforts to build up new democratic societies including institutional reforms. Another important distinction is the fact that the receiving state usually expresses its consent to the deployment of the peacekeeping forces or the UN-mandated interim administration. The Law of Military Occupation could be made applicable in specific UN mandated civilian administrations with a reference in the authorizing UN SC resolution.

Marco Sassòli\textsuperscript{27} holds that, when the UN or a regional organization enjoys ‘the effective control of power . . . over a territory . . ., without the volition of the sovereign of that territory,’ it is an occupying force. IHL of military occupation would apply if the international territorial administration is run or de facto controlled by military forces even it doesn’t meet any armed resistance. For the occupation of Iraq, Security Council Resolution 1483 (2003) acknowledged the status of the Coalition as occupiers and reminded them of their obligations under IHL. Erika de Wet\textsuperscript{28} argues that the United Nations cannot be bound to international humanitarian law in the same manner as states and that the Security Council may authorise some deviation from these norms if the circumstances so require. Some authors support the view that Chapter VII authorized forces are subject to the law of occupation, at least to the extent that it constitutes customary law. The measures undertaken by these forces are inherently coercive and in those instances where consent is granted by the affected territory, it frequently is procured under the threat to use force.

E. CONCLUSION:

The Iraq occupation spawned an important debate over the role of occupiers in territories in substantial need of legal reform.\textsuperscript{29} Changing military and technological capacities, the growing involvement of the United Nations in peace building, and the shifting motivations and security considerations informing decisions to intervene and withdraw from foreign territories are factors that were not foreseen when the law of occupation was


Military forces mandated by the Security Council are probably the most visible manifestation of United Nations activities. However, recent history, from Somalia to Kosovo, reveals the difficulties faced by UN-mandated forces when the legal regime under which they operate is uncertain. Occupation by states and administration by international organizations operates under common legal framework and those managing both need to find the proper balance among international humanitarian law, international human rights law, local law, and any mandate from an international organization.
