

HOSTILE OCCUPATION AND INTERNATIONAL HUMANITARIAN LAW

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I. INTRODUCTION

Civilians are the broadest group of persons who are protected by international humanitarian law. As a consequence of armed conflict, they may become subjects to a hostile army and it is highly likely that this may render them vulnerable if the rules for protecting civilian populations from foreign military oppression are inadequate or inapplicable. This paper will examine the rules applicable to a civilian population during a hostile occupation and evaluation of these rules will be discussed. This essay consists of three main headings. Namely the general application of humanitarian provisions, administration by an occupying power and aspects for the protection of a civilian population.

The effectiveness of the provisions and weaknesses through omissions will be analysed with the context of respective headings.

II. APPLICATION OF HUMANITARIAN PROVISIONS

It is very useful to find a proper comprehensive and legal definition of "occupation", before moving to the analysis of rules which are applicable in occupied territories. In this sense, Mc Coubrey's definition (1990) can be borrowed. He states that:

... occupation... involves the uninvited imposition of administrative control over a territory attached to some other states usually, but not absolutely necessarily, by means of military force in the course of armed conflict.

In chronological order, 1907 Hague Regulations, which are annexed to Hague Convention IV. with respect to the laws and customs of war on land, article 42 provides for application in an occupied territory which "is actually

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placed under the authority of a hostile army" and that such occupation applies to the territory where that authority is established and can be exercised. 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereafter the Fourth Geneva Convention) states by article 2 (2), which is common article of four Geneva conventions, that:

The convention shall also apply to all cases of partial or total occupation of the territory of a ...Party, even if the ... occupation meets with no armed resistance.

Additional Protocol I, 1977, extends the scope of application by article 1 (4), to cover all territories where an "alien occupation" occurred.

The terms "the territory of a ... Party" and "alien" raise some questions, as to the scope of application, of the "Geneva" provisions, whether they are applicable in those territories which are under the control of a hostile power even when power is not lawful sovereign.

Greenwood (1992) supports the view that the Convention is applicable without prejudice to any dispute relating to the status of the territory prior to the occupation. However, in practice as Greenwood (1992) quotes from Shamgar for instance, Israel has declined to accept applicability of the Convention in the West Bank and the Gaza Strip, despite the ICRC's position that the Convention is applicable *de jure*. On the other hand, Dinstein (1978) wrote that, as can be seen in the *Christian Association for the Holy Places v. The Minister of Defence et al*, the government of Israel, in a number of cases, accepted that the Supreme Court of Israel examine the acts of Israeli administration under the Convention and in addition the Attorney General of Israel officially announced in 1971 that Israel will act in accordance with the humanitarian provisions of the Convention. The Article 4 of the Additional Protocol reads:

The application of the Conventions and of this Protocol, ..., shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Another important element which gives the title of occupation is "administrative control". As Oppenheim (1952) writes, when he draws the line between occupation and invasion, that: "The difference between mere invasion and occupation becomes apparent from the fact that an occupant sets up some kind of administration. The question of administration will be examined in the following heading.

It is also necessary to determine the beginning and ending of an occupation to examine whether the humanitarian provisions relating to occupation are applied properly, although it is not always easy to determine precisely. As Roberts (1984) states generally occupations are preceded by invasions. He also agrees with the view that occupation may be said to begin when the invader actually exercises au-

thority. Accordingly, Article 42 of the Regulations considers a territory occupied "when it is actually placed under the authority of the hostile army". According to the British Manual of Law (1958) "... the invader should take measures to make known by proclamation the fact of the establishment of occupation and the area over which it extends". Although this is desirable, there is no formal requirement in the law to do so. Despite the fact that it is not always necessary, an occupation ends when the occupant leaves. However, the Article 6 (3) of the Fourth Convention states that:

In the case of occupied territory, the application of the present convention shall cease one year after the general close of military operations...

It adds that after that time the occupying power is required to observe a list of some articles of the Convention. This "one year after" phrase is very debatable. It can be argued that the "one year after" rule may leave the inhabitants of the occupied territory with less protection against the occupying power, especially in the long occupation cases such as those in the Middle East. On the other hand, as Roberts (1984) argues, the remaining articles to be observed do not provide less protection than those which deal specifically with occupied territories. The occupying power is not required to observe the regulations after one year. He may do so if his motif has been revised by 1977 Additional Protocol by article 3, which states that "the application of the Conventions and of this Protocol shall cease ... in the case of occupied territories, on the termination of the occupation."

III. ADMINISTRATION BY OCCUPYING POWER

As the starting point, Article 43 of the Hague Regulations reads as follows:

The authority of the legitimate power having in fact 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.

There are two requirements in this article: First, the duty to restore and ensure public order and safety, secondly the obligation to respect the laws in force unless prevented. Greenwood (1992) deduced four principles which set up the international legal framework for the administration of an occupied territory. They are:

1. The occupant acquires temporary authority, not sovereignty over the occupied territory

Occupation is a temporary state of affairs and does not confer sovereignty upon the occupying power. Hence, the annexation of occupied territory during a war is prohibited. Even if the occupying power does proclaim annexation of the

territory, it has no right to alter the status of the territory or inhabitants of this territory. In this case, the inhabitants of this territory remain subject to the law in occupied territories.

Article 47 of the Fourth Convention affirms this principle. According to this article it is prohibited to deprive protected persons in occupied territory of the benefits of the convention by any change in institutions or government of the territory, any agreement between the authorities of the said territory or any annexation, complete or partial, of the territory. It can be concluded from this article that, for example, following Iraqi invasion of Kuwait in 1990, the announcement by Iraq of its annexation of Kuwait as an Iraqi province had no effect upon the rights conferred by the Convention on the Kuwaiti territory and its inhabitants. As Oppenheim (1952) pointed out, changing of the status of an occupied territory also involves setting the said territory up as an independent state, and dividing it into administrative districts for political purposes. In this context, German's dividing of occupied Belgium into two separate administrative districts during the First World War infringed this prohibition.

2. The occupying power required to administer the occupied territory

Article 43 of the Regulations requires the occupant to "take all the measures in his power to restore and ensure public order and safety". However, it is doubtful to what extent the occupant administers the territory according to treaty provisions. Greenwood (1992) concludes, considering the French text of the Regulations which require the occupying power to ensure "L'ordre et la vie publique" that the occupying power is under a duty to prevent economic collapse as well as anarchy and disorder and this duty includes an assurance that the valid currency in the occupied territories must function and essential services must be maintained. Dinstein (1978) supports this view and adds that the occupant is entitled to introduce a new currency in the occupied territory since he has responsibility for regulating the social and economic life of the said territory. It seems that the duty to administer also gives many rights which might affect the inhabitants of the occupied territory, if they are not used in good faith. Under the excuse of providing public order, the occupant may oppress the civilian population. The Fourth Geneva Convention imposes a number of specific obligations upon the occupant as Greenwood (1992) mentions, such as the provision of education (Article 50), the supply of foodstuff and medical supplies to the civilian population (Article 55), the maintenance of medical and hospital facilities (Article 56), the distribution of books and articles required for religious needs (Article 58.2) and the facilitation of relief efforts where necessary (Articles 59-62). On the other hand, in reality, it must be born in mind that the administration of the occupation is not an ordinary administration, but a military administration and tries to administer the territory under extraordinary circumstances. Therefore, in practice, the administration must not be expected to fulfil all the requirement "perfectly". Accordingly no one could be held responsible for those

not in his power. This does not mean that the occupant may refrain from doing its best, and the inadequacy of circumstances is an acceptable excuse unless it does its utmost.

3. The occupant should respect the existing law, unless absolutely prevented

This principle is related to legislative competence of the occupying power . The occupying power is required, by Article 43 of the Regulations, to respect the laws in force in the occupied territory, subject to exception of absolute prevention from doing so. The first sentence of the article 64 of the Fourth Geneva Convention reaffirms this principle and provides that:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

In the light of these two provisions Greenwood (1992) concludes that a general legislative competence in the belligerent occupant is not recognised by international law and without the requirement for the legitimate interest of the occupant or concern for the civilian population only constitute an exception to introduce changes. However the exceptions to the duty to respect existing law are broad. As Dinstein (1978) argues the legitimate interests of the occupant includes legislation limiting freedom of movement and association, establishing censorship on the press, introducing food rationing. British Manual of Military Law (1958) also confirm such limitations and states that political laws and constitutional safeguards may be suspended during occupation: for example, among others, the right of assembly and the freedom of the press.

It can be argued that, if these exceptions are used beyond their purposes, they quite possibly create an extra means of oppression over civilian population. However, the British Manual (1958) also recognises that neither the law nor the jurisdiction in force in the occupying power's own country should be extended to the occupied territory.

It is also worth mentioning that the former sovereign which had to leave the authority to the occupying power keeps his sovereignty, but because of the circumstances created by the fact of occupation he is not able to exercise the laws in the occupied part of its territory. Thus, as mentioned by Greenwood (1992), if the displaced state from its territory makes changes in its legal system , these are not applicable in the occupied territory. On the other hand, Dinstein (1978) submits that although such new laws are not "in force" in the occupied territory, the occupying power is not prevented from applying them.

4. The powers of the occupant are limited under international law

International law requires an occupying power to set up an administration under Article 43 of the Regulations. However, the Fourth Geneva Convention Additional Protocol I and, to a certain extent, Hague Regulations introduce a number of constraints upon its power in order to provide humanitarian protection for the civilian population of the occupied territory. There are some certain constraints by international humanitarian law on the occupant, for example the prohibition of reprisals, torture, collective punishments and so on. The aim of these provisions is to preserve minimum humanitarian standards. These provisions will be examined in detail in the forthcoming heading.

IV. ASPECTS OF THE PROTECTION OF CIVILIAN POPULATION

There are some acts which are not permissible at any time and in any place.

Article 75, which is entitled "Fundamental guarantees" prohibits by the second paragraph the following acts at any time and in any place notwithstanding whether committed by a civilian or by military agents:

- a) violence to the life, health, or physical or mental well-being of persons, in particular:
 - (i) murder
 - (ii) torture of all kinds, whether physical or mental
 - (iii) corporal punishment; and
 - (iv) mutilation;
- b) outrages upon personal dignity, in particular humiliating and degrading, treatment enforced prostitution and any form of indecent assault;
- c) taking of hostages
- d) collective punishments; and
- e) threats to commit any of the foregoing acts

These will be examined in more detail under the forthcoming headings.

- a) Basic needs of civilian population

As pointed out by Dinstein (1978), there is a clause of general application of significance in the context of belligerent occupation, in Article 54 of the Additional Protocol I. Article 54 (1) prohibits the starvation of civilians as a method of warfare. According to Article 54(2) of the Protocol I, it is prohibited to destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuff, crops, livestock, drinking water installation and irrigation works,

which are intended to or could possibly result in the starvation of civilians. However, the article may be criticised on the grounds that it does not include in the definition of "objects indispensable to the survival of the civilian population", shelter and clothing. Furthermore in order to provide the sustainability of food production, agricultural equipment, for example tractors, would be expected to be included by the article. On the other hand, the Article 54 of the Protocol I seems not to be exclusive and it can be argued that "all objects indispensable to the survival of the civilian population" could be extended to include other necessary objects, as exemplified above apart from those which are listed in the article. Similarly Article 55 of the Fourth Geneva Convention requires the occupying power to ensure the food and medical supplies of the population "to the fullest extent of the means available to it" and if local supplies are not adequate, to bring them from outside. In other words, Article 55 of the Fourth Geneva Convention includes other "indispensable objects" such as clothing and shelter as well as those which are listed by the Article 54 of the Protocol I. In addition, the Article 69 of Protocol I extends the provision to clothing, bedding, means of shelter other supplies essential to the survival of the civilian population subject to the fullest extent of their availability.

b) Medical services

Medical services are needed in occupied territories as well as under normal circumstances. Under Article 56 of the Fourth Geneva Convention, the occupying power has a duty to ensure and maintain medical services and installations. The occupant must particularly take prophylactic and preventive measures in order to combat the spread of contagious diseases and epidemics. Medical personnel may not be prevented from carrying out their jobs. This duty also extends to new hospitals set up in occupied territory and their personnel. Article 57 of the Fourth Geneva Convention, permits the occupying power to requisition civilian hospitals temporarily and in cases of urgent necessity for the care of military wounded provided that "suitable arrangements are made in due time for the care and treatment of the patients and for the needs of the civilian population for hospital accommodation".

It can be said that although the requisition of civilian hospitals is permitted, this remains subject to some strict conditions, namely, hospitals can be requisitioned only temporarily, and even then the civilian patients must not suffer from this activity. Furthermore, to ensure proper care of civilian patients, Additional Protocol I, by article 14, requires the occupying power to take all necessary measure to meet the medical needs of the civilian population. By Article 14, the general content of requisition of civilian hospitals extended to include "their equipment, their material or the services of their personnel". On the other hand, the conditions of the requisition of hospitals and their materials are restricted by the Article 14 (2) which provides the requisition is subject to the following statement; that "these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment".

By saying that, it achieved an important revision to protect civilian populations. Under Article 15 of the Protocol I, the occupying power must enable the medical personnel to perform their functions in occupied territory and they are not required to give priority to the treatment of any person except on medical grounds. They also cannot be compelled to carry out tasks which are not compatible with their vocation.

c) Work by civilian population

Under *jus in bellum* the occupying power has a right to make the civilian population work, subject to some specific conditions Article 52 of the Hague Regulations permits the occupying power to demand from inhabitants of the occupied country undertake compulsory work for the needs of the army of occupation, and the said work should "be in proportion to the resources of the country". The British Manual (1958) also states that if necessary, services for legitimate purposes may be obtained by force and refusal may be punished.

However, they must not involve taking part in military operations against the inhabitants' own country. Unlike the Hague Regulations, the Fourth Geneva Convention contains more details in relation to the conditions of compulsory work. Article 51 of the Convention manifestly prohibits imposing compulsory services on the inhabitants of the occupied territory in the armed or auxiliary forces of the occupant. However, voluntary enlistment is permitted, though to encourage them to do so, propaganda or other pressure techniques are forbidden. Persons over the age of 18 may be required to work which is necessary for the needs of the occupying army, public utility services or other needs of the civilian population. Protected persons may not be forced under any circumstances to undertake work concerning taking part in military operations. As Mc Coubrey (1990) mentions, to create or induce unemployment in order to secure volunteers for work is not permitted. The work must be carried out only in the occupied territory and the legislation in force must be applicable to the protected persons. They must also be paid a fair wage and work must be proportionate to their capacities both physically and intellectually.

In this context it is not always easy to draw the line between the works which involve "taking part in military operations" and others. Rowe (1987) argues that ammunition bearing falls into this category whereas helping to place sand bags around a particular building in preparation for an attack does not.

d) Internment of civilians

There are two kinds of civilians who can be interned. The first category includes those who are in the enemy country when the conflict occurred and the other group of civilians are those who are inhabitants of the occupied territory. The latter is included within the limits of the present paper, whereas the former is beyond them. Article 78 of the Fourth Geneva Convention allows the occupant to take safety measures concerning protected persons and to assign to them a specific resi-

dence on a compulsory basis or to intern them "for imperative reasons of security". Article 42 provides the basis on which civilians may be interned: Firstly, the security of the occupant, secondly voluntary demands to internment. The former reason may aim, for instance, to prevent the civilians from attending resistance movement which may create a genuine threat to the security of the detaining power, whereas the latter may help to save the life of interned civilians from any local threat. Article 43 provide a guarantee that the situation of the internee must be, as soon as possible, reconsidered by a court or an administrative board which has been designated for that purpose. Once internment or assigned residence has been obtained, the court or board must reconsider the case periodically, at least twice a year. Under Article 75 (3) of the Protocol internees are entitled to be informed "of the reasons why these measures have been taken. Internment must not be considered as a penalty by the occupant but as Dinstein (1978) states it must be resorted to "as a measure denying the suspect the possibility of committing an offence in the future".

There are also detailed provisions with respect to running of internment camps in the Fourth Geneva Convention. Although the detailed analysis of these provisions goes far beyond the limits of this paper, the nature of internment and vulnerability of internees makes it essential to mention them in particular as a means of protecting civilian population from oppression by foreign military forces. The Fourth Geneva Convention permits internees to retain full civil capacity. They must be granted the medical attention required by their state of health. The detaining power must also under the duty to provide support for those dependent on the internees, if they are with inadequate means of support. Family units must be kept together wherever possible. Places of internment must not be set up in areas exposed to the dangers of war. Internees must be kept separate from prisoners of war and "from persons deprived of liberty for any other reason", for example for committing an offence. The hygiene and health of the camp must be ensured by the occupant and observation of the religion must be granted. Canteens must be run and purchase must be enabled at prices not higher than local market prices. It can be argued that, although international law tries to protect the civilian internees by very detailed provisions, they still remain vulnerable. It can also be added that, if it is considered that they are deprived of liberty for no acts which constitute crimes, but merely for potentiality of threat to the foreign military, their internment is not in accordance with the principle of "everyone is innocent until proved guilty".

e) Judicial proceedings

According to the Article 64 of the Fourth Geneva Convention, the penal laws of the occupied territory remain in force unless they constitute a threat to the security of the occupant on an obstacle to the application of jus in bellum. In these cases , the occupying power may repeal or suspend them. The second sentence of the Article provides that "the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws". This provision is also

subject to the above mentioned exception and "to the necessity for ensuring the effective administration of justice". These exceptions are very broad and vague. Therefore it seems that they are inadequate as a means of protecting civilian populations and open to misuse. Furthermore, Article 66 permits the creation of "non-political military courts". It is very difficult to suggest that these "special" courts conduct their duties with impartiality. However, there are also some basic safeguards in the laws of occupation, such as "the right to present evidence and call witnesses" (Art. 72), "the right of appeal" (Art.73) "The right to attend trials by representatives of the Protecting power" (Art. 74) and "human treatment of detained persons"(Art. 76).

Another important aspect of the judicial provisions of the Fourth Geneva Convention is to permit the imposition of capital sentences. This provision can be criticised if one considers that capital punishment has been abolished in most developed countries. Dinstein (1978) concludes that whether or not death sentences passed by the occupant's military courts are permissible, "the Hague Regulations ... do not imply any limitation of the occupant's authority". In this regard he adds that:

Article 68 of the Fourth Geneva Convention lays down that the penal provisions promulgated by the occupant (in accordance with Articles 64 and 65) may warrant inflicting the death penalty on protected persons only where they are guilty of (a) espionage; (b) serious acts of sabotage against the military installations of the occupying power; (c) intentional offences causing death.

If pre-existing laws of the occupied territory do not punish such offences, death penalty cannot be implemented.

There are also some restrictions on the implementation of capital punishment. For example the death penalty in the Fourth Geneva Conventions may not be pronounced against a protected person who is under 18 years of age (Art. 68). Additional Protocol I by Article 76 (3) also introduced further restraints, by forbidding the pronouncement of the death penalty on pregnant women or mothers having dependent infants. Furthermore Article 75 of the Fourth Geneva Convention provides that persons condemned to death penalty have a right to petition for pardon or reprieve.

f) Property

Under this heading only private property will be examined, due to it being included under the subject of this paper. as a general rule, as affirmed by Article 23 (9) of the Hague Regulations and Article 53 of the Fourth Geneva Convention, property may not be destroyed unless for absolute military necessity. Article 46 of the Regulations forbids the confiscation of private property. Article 52 of the Regulations permits requisition in kind and services from inhabitants for only the needs of the army of occupation. It also must be in proportion to the resources of the country and " can only be demanded on the authority of the commander in the lo-

cality occupied". These are safeguards to protect civilian population from oppressive demands of the occupied power.

The seizure of "all kinds of munitions of war" irrespective of the owner "but must be restored and compensation fixed when peace is made".

However the term of munitions of war is very broad. the Court of Appeal in The Dutch Oil Companies Case ruled that a raw material like oil is not munition of war because the fact that it is not suitable for direct military use without extraction and retaining in elaborate installation

V. CONCLUSION

In this paper, the relevant existing provisions in article from jus in bellum, i. e. "Geneva" law to protect civilian populations from the possible oppression that belligerent occupiers are able to exert when they invade foreign territory has been examined.

As can be seen, although the provisions where intended to prevent to abuse of the civilians of those territories which had been taken over and occupied they have not succeeded entirely in their aims. The reasons for this vary according to the situation but generally the provisions had been seen to be too idealistic at times, and incomplete in areas allowing them to be abused, by the occupying power.

Also, since they were designed for regulations of the occupants' power for temporary periods of time, they have not provided for situations where prolonged occupations exist for example in Palestine.

The provisions were also designed during a time when occupations were mainly due to inter-state conflicts. They are seen to be inadequate at the present time, since, especially after the Cold War, the proportion of internal conflicts has become more important than those of an inter-state nature.

To protect the future civilian populations from oppression, the existing provisions must be reviewed and developed further.