DETERMINING THE END OF BELLIGERENT OCCUPATION: ASSESSMENT OF POSSIBLE SITUATIONS

By
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Abstract

The Geneva Conventions and Additional Protocol I do not provide much guidance in determining the end of belligerent occupation in international armed conflict situations and discussions within the academic circle provided little assistance in analysing the situation. In this article attempt has been made to analyse various mechanisms and instances which may or may not end belligerent occupation. While the matter is largely a question of fact, the write-up will assist academics and practitioners alike in clarifying the delicate nature of the concept of occupation.

Introduction

Several books, articles and conference papers have been written on the commencement of belligerent occupation[1] and relevance of the concept of occupation in modern days. Most of these works centred on or were in the context of the prolonged occupation of Gaza and West Bank by Israel and the fairly recent belligerent occupation of Iraq and Afghanistan by the Coalition Forces led by the United States. Relevant rules on determining the commencement of occupation are therefore fairly clear. Most striking however, is the paucity of materials on the end of belligerent occupation. Several works avoided discussing the issue by simply considering it as a question of fact determinable on case by case basis. Although recognised as complicated but avoidance obviously is not the appropriate response. The attitude fell short of assisting this unfortunate but important situation.

Determining the end of belligerent occupation is not only important but equally imperative as many fundamental issues such as those relating to the obligations of the occupier, the occupied State and the rights of the civilian population in the occupied territory are implicated. Clarity in the law will guide all the stakeholders in

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[1] **Some of these have been referred to in this paper.**

discharging their respective duties. Belligerent occupation is not a new phenomenon and its end is yet to be seen as evidenced by the recent occupation of Iraq and the continued occupation of Palestine. Perhaps one of the longest modern occupation in history, the Israeli occupation of Gaza and West Bank has highlighted the difficulties, challenges and complications associated with the concept of occupation and have put to question, the adequacy and effectiveness of the rules in modern time. The situation has challenged the hitherto understanding of occupation as a temporary phenomenon and the concept of suspended sovereign.

There have been several situations of occupation in history, from the primitive and ancient periods to the modern and fairly recent time which ended in particular ways. While not two situations are necessarily the same but certain characteristics are observable which may have significant if not decisive effect on our understanding and operation of the law. Historical school of thought will posit the relevance of history in the determination of valid and enforceable rules while the positivists understanding of law as command of the sovereign could equally further our understanding of law and its operation. In the context of belligerent occupation and its termination, the relevance of rules which have withstood the test of time and the exercise of international power are inescapable.

The objective of this article is to examine through historical perspectives situations which may or may not end belligerent occupation. The article examined several relevant legal instruments from historical perspective, investigated military manuals, analysed several experts' opinions, and where necessary drew conclusions.

The analysis confirmed what has been aptly put that the core meaning of the term occupation is "obvious enough" but "its frontiers are less clear". This uncertainty confirms the difficulty of answering the vexed question "when does occupation end". Determining the end of occupation not only helps clarify the law but carries with it legal consequences such as the responsibility for the protection of the population in a territory and the status of such persons, the question of the applicable law in the administration of a territory, persons deprived of their

liberty and the extent to which certain changes can be made during such period. Ascertaining whether an area is still occupied is relevant in many respects such as for example on addressing the issue of responsibility for war crimes, the validity of actions of both the occupying power and the occupied, the continued applicability of the law of occupation etc. This article responded to some of these questions and it is hoped that the responses will contribute in further clarifying this problematic legal situation.

Determining the End of Belligerent Occupation Internationally, there are no universally agreed
guidelines laid down for the determination of when occupation is considered terminated. As early as 1863, it was considered that "martial law" will only cease to apply in occupied territory either when a special proclamation by the commander-in-chief is issued or when it is specially mentioned in a peace treaty.[2] This supposes that occupation can only terminate when a pronouncement to that effect is made or when a peace agreement has been signed by the occupying and occupied powers.
Similarly, neither The Hague Regulations nor the Geneva Conventions sets limit to the duration of an occupation.[3] From the lane of history, an attempt was made during the negotiations of the Brussels Code in 1874 to set conditions under which belligerent occupation should be considered to have ended but the discussion ended without success.[4] What came out of the negotiations left open "the question of whether or not physical occupation is required and how large the occupation forces must be to make occupation effective".[5] Answers to these questions would have provided a clear indication of when it could be argued that in a specific occupied territory, the law of occupation is no longer applicable. Due to the lack of sufficient clarity in

[2] **Article 2 Lieber Code 1863**

[3] **Breau, S.C., 'The Humanitarian Law Implications...,' at p. 218.**

[4] **For fear "that it might indicate the physical presence of troops in an occupied territory is essential to the existence of occupation". For the different views canvassed, see Graber, D.A., The Development of the Law..., at p. 44-5, 53.**

[5] **Ibid**

the law, ascertaining when occupation has ended is therefore very problematic not only because it is not depended on proclamation but also because "[i]n some instances, there may have been no formal statement that an occupation has ended, and no withdrawal of the occupying troops, yet the territory ceases to be viewed as occupied."[6] Yet in other instances withdrawal of troops does not necessarily amount to ending belligerent occupation. In the commentary to article 3 of AP I it was stated that:

[t]he termination of occupation may occur a long time after the beginning of that occupation, and can come about in various ways, de facto or de jure, depending on whether it ends in the liberation of the territory or in its incorporation in one or more States in accordance with the right of the people or peoples of that territory to self-determination.[7]

As previously stated, the end of occupation is determined by the loss of effective control and the ascertainment of that situation is dependent on which test of effective control is employed. In this context, two tests are relevant: actual control test and potential control test.

Under actual control, a situation will no longer be characterised as that of occupation when the occupier ceases to exercise his authority, while under potential control it is when the capability of exercising control by the occupier is absent.[8] Clearly therefore, the law of belligerent occupation will cease to apply whenever a situation is created that the Occupying Power loses effective control or when his ability to exercise such control is fundamentally in question.[9] The determination clearly, is factual in nature.[10]

In determining the end of occupation, it has been suggested that since belligerent occupation occurs when foreign troops are present in a foreign territory without the

[6] **Roberts, A., 'What is a Military Occupation'..., at p. 259**

[7] **Commentaries to article 3 AP I, para. 156 <http://www.icrc.org/ihl.nsf/COM/470-750006?OpenDocument> accessed on 15 July, 2015**

[8] **Benvenisti, E., The International Law..., at p. 9**

[9] **Schwarzenberger, G., The Law of Armed Conflict: International Law as applied by International Courts and Tribunals vol 2) (London, Stevens &Sons. 1968) at p. 277. See also article 1 of the Brussels Code and article 42 HR. 184 (1968),**

[10] **Heintschel von Heinegg, W., 'Factors in War to Peace Transition', (2003-2004) 27 Harvard Journal of Law and Public Policy, at p. 845**

consent of the foreign sovereign, the beginning and the end of occupation could also be determined on the basis of such criteria.[11] Some have argued that since the presence of foreign military forces together with their ability to exert some form of effective control (though not exclusive) over the occupied territory without consent must be established cumulatively before a situation of occupation is considered established, failure to establish the conditions cumulatively has brought about the end of such occupation.[12]

Similarly, military manuals approached the issue from factual perspective. For example, according to the UK Manual, occupation of a territory will cease when the occupier has been driven out of the territory or on its own evacuates the area.[13] Similar approached is contained in the US Field Manual.[14] Aligning to this view is the writing in legal texts example being the view of Oppenheim which is that the end of occupation comes when the occupier withdraws or is driven out.[15] Closely connected to this is also a situation where effective control is transferred to a different authority and the occupying power no longer has authority over the territory.[16] In all of these, the conclusion drawn was that like the commencement of occupation, its ends should also be assessed in the light of factual circumstances which are not depended on a formal proclamation.[17] It must equally be mentioned that proclamation in itself without other accompanying and ascertainable facts may not in fact end military occupation. The importance of proclamation if any would be limited where the situation on the ground demonstrated a contrary

[11] Bothe, M., 'The Beginning and End...,' at p. 26

[12] See 'Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law', Program on Humanitarian Policy and Conflict Research, Harvard University (Policy Brief of November, 2004) at p. 9

[13] UK Ministry of Defence, The Manual of the Law..., at p. 277

[14] US Department of the Army, Field Manual, The Law of Land Warfare 138 (FM 27-10, 1956) paragraph 360 (In case the Occupant evacuates the district or is driven out by the enemy, the Occupation ceases).

[15] Oppenheim, L., International. Law: A Treatise vol 2 Disputes, War and Neutrality (Lauterpacht (ed)) (7th edn Longmans Green London 1952) at p. 436.

[16] Ibid

[17] Roberts, A., 'The End of Occupation: Iraq 2004' (2005) 54 International and Comparative Law Quarterly, at 47.

position.[18] This article looks at various situations which may have impacts on the applicability of the law of occupation with the aim of answering the question of who in a given situation effectively exercises governmental authority.[19] However some preliminary questions on who has the power and the duty to bring about the end of occupation are considered important.

Power and Duty to End Occupation

There is no designation in either The Hague Regulations or the Geneva Conventions on who has the power to declare the beginning or end of occupation. This may not be unconnected with the fact that since occupation is basically a question of fact, its beginning or ending does not depend on an external power or the pronouncement of the occupying power or the occupied. Although not legally required, recent practice shows that the occupying and occupied powers, the population of the occupied territory as well as the Security Council play a major role in contributing to the ascertainment of the beginning and end of occupation.

On designating a territory as occupied for example, the United Nations had in several instances both in the General Assembly and Security Council regarded certain territories as occupied. Instances of this for example are Hungary in 1956, the continued consideration of West Bank and Gaza as occupied territories since 1967,[20] Namibia from 1968 until its independence,[21] Northern Cyprus,[22] and Western Sahara.[23] However, the Security Council is usually reluctant in pronouncing the end of occupation, typical example being that of Israel withdrawal from Southern

[18]Thürer, D., 'Current Challenges to the Law of Occupation' in Collegium, No. 34 (Autumn 2006) at p. 21.

[19]Sassòli, M., 'Legislation and Maintenance of Public Order...,' at p. 682

[20] See, e.g., UNGA Res ES-10/6 (9 February 1991) U.N. Doc A/RES/ES-10/6.

[21] See Roberts, A., 'What is Military Occupation?'..., at p. 301 also citing other actors such as the Organisation of African Unity (now African Union), ICRC and ICJ.

[22] See e.g., UNGA Res S 33/15 (9 November 1978) UN Doc A/RES/33/15.

[23] See e.g., UNGA Res 34/37 (21 November 1979) UN Doc A/RES/34/37.

Lebanon in June, 2000. A major shift was however seen in the case of Iraq in 2004 where the Security Council in a Resolution welcomed the end of occupation of Iraq, though in actual sense it was endorsement of a transfer of authority from the Coalition Forces to the Iraqi Government.

On whether there is a duty to end occupation, the traditional recognised way of ending occupation is the conclusion of a peace treaty but there is no such obligation under the HR on the occupying power to promote the conclusion of such a treaty.[24] This perhaps could be the basis why recent occupations are prolonged.

Modes of Terminating Occupation

The conclusion of a Peace Treaty is the recognised traditional way of ending an occupation.[25] However recent State practice makes this traditional way less relevant. If one takes the widely-agreed notion that sovereignty lies in the people and not the ousted government which recent practices confirmed to be the position, then a situation is created where occupation could end in a variety of ways not necessarily with the conclusion of a peace treaty.[26]

Consensual Termination (Peace Treaty)

Conclusion of a peace treaty is recognised as one of the valid modes of terminating belligerent occupation.[27] As early as 1863, considering the temporary nature of occupation and permissible changes which can be made in the occupied territory in conformity with the law, it was contemplated that for the permanency of such changes to be established it depends on the peace treaty to be concluded afterwards.[28] The conclusion of a peace treaty may come at the end of the war or may lead to its ending.

There may not be a particular format of how a Peace Treaty should be concluded except that it should be in

[24]Benvenisti, E., The International Law …, at p. 214

[25]Idem

[26] Consider for instance the creation of the State of Bangladesh by India and the establishment of new governments in Kampuchea, Granada and Panama (all cited by Benvenisti, E., The International Law..., at page 215)

[27] See Dinstein, Y., The International Law…, at p. 270

[28]See United States War Department, General Orders Affecting the Volunteer Force: Adjutant General's Office, 1863 at p. 70

writing but what is obvious is that it will lead to the cessation of hostilities between the parties and may lead to the handing over of effective control to the displaced sovereign. A Peace Treaty may provide for the complete withdrawal of the occupying power's forces or may provide for the presence of such forces for a particular period of time,[29] which may be under a security arrangement.[30] It may also provide for a future return of the forces should the Peace Treaty provision be breached by the occupied State.[31] According to Mini "[t]he legality of such agreement and the legitimacy of the national authorities signing it are subject to international recognition, whereby members of the international community re-establish diplomatic and political relations with the national government" and that "it is in the interest of all the parties involved to maintain a clear regime of occupation until the conditions for stability and peace are created allowing the re-establishment of a legitimate national government." An example of a Peace Treaty is that between Israel and Egypt on the Sinai Peninsula concluded in 1979.

Where a Peace Treaty is concluded between belligerent which provided for the return of effective control of the territory, the law of belligerent occupation will cease to apply and the occupation has been effectively terminated.

Belligerent Termination/Resistance

Belligerent activities may sometimes erupt in occupied territories between the occupying power and enemy troops or insurgents capable of weighing down the control of a territory an occupying power may have over some territories.[32] Could this be considered end of occupation in those territories? Preponderant view seems to be that a 'momentarily triumphant rebellion' alone is not sufficient 'to interrupt the occupation so long as the authority of the legal government is not effectively re-

[29] **Dinstein, Y., The International Law…, at p. 270 citing the Occupation of the Rhineland.**

[30] **Mini, F., 'Liberation and Occupation: A Commander's Perspectives' (2005) 35 Israel Yearbook on Human Rights, at p. 86**

[31] **Dinstein, Y., The International Law…, at p. 270 citing Treaty of Versailles as example**

[32] **Idem at p. 45 and 100**

established' and does not therefore terminate the occupation."[33] A support on this view is provided in the Hostages trial.[34] However, where effective control is lost by the occupying power, occupation of that territory is terminated.[35] The French Permanent Military Tribunal in Bauer trial confirmed this.[36]

Closely connected to belligerent termination is the effect of strong resistance. The right of occupied people to resist the occupation as well as against specific illegal measures adopted by the occupying power had been recognised, subject however to the exclusion of such actions considered as violation of international law.[37]

Instances have occurred in the past where a territory is no longer considered to be occupied by reason of the "widespread" nature of a resistance to such extent that the occupier though present in the territory but "is presumed" to have lost effective control.[38] During the Brussels Code negotiations; Belgium sought to ascertain the extent to which resistance to occupation must have ceased in an occupied territory for effective control to be established. Germany's response indicated that "when the local

[33] Graber, D.A., The Development of the Law..., at p. 56. This is also the view of The UK Ministry of Defence, The Manual of the Law..., at p. 277 which considers "occasional successes" by inhabitants, guerrillas or resistance fighters as not ending the Occupation so long as the Occupying Power has taken steps to deal with the situation and re-establish its authority.

[34] Hostages trial (List et al.) (US Military Tribunal, Nuremberg, 1948), 8 LRTWC 34, 59.

[35] Dinstein, Y., The International Law…, at p. 45

[36] Bauer et al. trial (Permanent Military Tribunal at Dijon, 1945), 8 LRTWC 15 at p. 18.

[37] Such as attacking unarmed civilians (see Mini, F., 'Liberation and Occupation...,' at p. 92)

[38] Roberts, A., 'What is a Military Occupation'..., at p. 259.

Though he cited different positions taken by tribunals, of relevance here he noted in his footnote 37 ‘‘Trials of War Criminals before the Nuremberg Military Tribunals, vol. 11 (1950), pp. 1243-4. In the Einsatzgruppen case (USA v. Otto Ohlendorf et al.), United States Military Tribunal II ruled on 8-9 April 1948 that in parts of the Soviet Union occupied by Nazi Germany ‘the so-called partisans had wrested considerable territory from the German Occupant, and ... military combat of some dimensions was required to reoccupy those areas ... In reconquering enemy territory which the Occupant has lost to the enemy. He is not carrying out a police performance but a regular act of war’: Ibid. vol. 4 (1950) pp.492-3

population have been disarmed, even though there are still flying columns operating throughout the region, which on occasions, establish contact with the local authorities”.[39] A final decision on this issue was not addressed by the Conference.[40] In Germany’s view therefore, such type of resistance must not have a decisive effect on the local administration of the territory. Occasional contacts may not be such that will disrupt or otherwise effectively temper with the capability or administrative powers of the occupier and as long as the authorities have the power and machineries to confront and suppress the resistance a situation of occupation continues.

In the legal texts, several views have been expressed on the impact of resistance on the applicability of the law of occupation: to Pillet a complete absence of resistance in the occupied territory is essential,[41] while Mérignhac do not share this view and was of the opinion that acts of isolated resistance are not sufficient to prevent the commencement of the applicability of the law of occupation.[42] In the Hostages case the US Military Tribunal in Germany held that the existence of an occupation "presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order."[43]

The continuation of occupation may be adversely affected by the existence of a widespread resistance and outbreak of hostilities in an occupied territory and are capable of terminating such occupation.[44] The UK Manual 2004 stated that:

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39 Graber, D.A., The Development of the Law..., at p. 46

40 Idem

41 Pillet, A., Les Lois Actuelles de la Guerre (2nd edn., Paris 1901) pp. 238-241 (see Graber, D.A., The Development of the Law..., at p. 62

42 Merignhac, A., Les Lois et Coutumes de la Guerre sur Terre (Paris 1903) at p. 248 (seeGraber, D.A., The Development of the Law..., at p. 62-63)

43 U.S. v. Wilhelm List, et al, (Trial of War Criminals Before the Nuremberg Military Tribunals 1948) at p. 1243

44 Wills, S., 'Occupation law and Multi-national Operations: Problems and Perspectives' (2006) 77 British Yearbook of International Law, at

This is also the view taken in Einsatzgruppen case, (US Military Tribunal, Nuremberg, USA v. Otto Ohlendorfet al.

259. (Einsatzgruppen Trial), 10 April 1948, (1948) 4 LRTWC 411, at 492-3, where the issue concerned war crime committed by Nazi in the Soviet Territory and the

[w]hether or not a rebel movement has successfully terminated an occupation is a question of fact and degree depending on, for example, the extent of the area controlled by the movement and the length of time involved, the intensity of operations, and the extent to which the movement is internationally recognized.[45]

Ascertaining the existence of the above criteria and the level to which they apply require judging the circumstance which may not be successfully accomplished without the involvement of politics.[46] It is true that international recognition as political rather than factual and its inclusion here is unwarranted as recognition does not constitute but merely declares. Involvement of politics may have a negative consequence on the civilian population domicile in the area where they may be left without adequate legal framework providing them with the needed protection.

In 1877, the Institute of International Law suggested that absence of local resistance and failure of the old sovereign to exercise its authority in a territory should be the criteria for determining the existence of occupation,

> **[47]when no such exist, the occupation has ended. The US Field Manual 1956 considered that occupation does not cease by the existence of a rebellion or the activity of guerrilla or paramilitary units provided however that:**
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> **the occupant could at any time it desired assume physical control of any part of the territory. If, however, the power of the occupant is effectively displaced for any length of time, its position towards the inhabitants is the same as before occupation.[48]**

The conclusion to be drawn here is that occupation could be terminated by the belligerent act of the displaced sovereign or the local population where it gains effective control of its territory whereas mere resistance challenging the power of the occupying power may not normally end the

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Court was of the view that "[l]n many of the areas where the Einsatzgruppen operated, the so-called partisan had wrestled considerable territory from the German Occupant, and ... military combat action of some dimensions was required to reoccupy those areas".

[45]UK Ministry of Defence, The Manual of the Law..., at p. 277, para. 11.7.1.

[46] Wills, S., 'Occupation law and Multi-National Operations...,' at p. 260.

[47] Graber, D.A., The Development of the Law..., at p. 50

[48] US Department of the Army, Field Manual, The Law of Land Warfare

138 (FM 27-10, 1956) para 360

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occupation unless such resistance is widespread and has rendered the exercise of power by the occupant impossible.

Withdrawal of Enemy Forces

Withdrawal of enemy forces from the occupied territory may be actuated by several reasons: it may be on the basis of a peace agreement; it may be unilateral due to political or strategic reasons;[49] or as a result of counter-offensive by the occupied forces, its allies or the insurgents of the territory.[50]

In the late nineteenth century, it was considered that departure of the enemy troops does not end occupation unless there was renunciation by the occupying power or it has been effectively driven out of the occupied territory either by the legitimate sovereign or the local population.[51] Under this theory, momentary success of rebellion short of restoring the effective control of the former sovereign is not sufficient to consider occupation ended. This may be true when it is considered that during hostilities frontlines may move back and forth making the situation unclear. In this context, it would be in the interest of the civilian population for the application of the law of occupation to continue, except where it becomes clear that enemy forces have been defeated and have retreated. In the Hostages case (USA vs. Wilhelm List et al.) partial withdrawal of forces was not on its own considered as amounting to ending an occupation and the tribunal was of the opinion that a territory could still be considered occupied though the occupying army had partially evacuated certain parts of the territory and lost control over the population, as long as it could "at any time" if it so desires assume physical control of any part of the territory.[52]

Recent authorities however took the view that withdrawal of troops from the occupied territory may

[49]Dinstein, Y., The International Law…, at p. 272
[50]Idem

[51] Pradier-Fodéré, P., Traité de Droit International Public Européen et Américain (vol. VII Paris, 1897) pp. 700-14 (see Graber, D.A., The Development of the Law..., at p. 57.

[52] USA vs. Wilhelm List et al., Law Reports of Trials of War Criminals, vol. VIII (London, United Nations War Crimes Commission 1949) at p.

56.

amount to ending the occupation regime,[53] but it was also conceded that "occasional successes of resistance groups within occupied territories are not sufficient to end an occupation."[54] While in some cases troops withdrawal may signify end of occupation and will not pose any problem, however, such withdrawal may not at all times serves as a criteria for ascertaining the end of occupation because the occupier "has not necessarily withdrawn at the end of all occupations".[55] In some instances, withdrawal of troops could "only entail the 'thinning out' of the foreign army", and that determination would then have to be made whether in fact effective control has ceased.[56]

Some opinions are worth mentioning in this context: Lauterpacht/Oppenheim was of the view that occupation terminates with the withdrawal of the forces of the Occupying Power or where they have been successfully driven out.[57] Mini opined that where a conflict is on-going, withdrawal of enemy forces from the occupied territory brings an end to the applicability of the law of occupation.[58] This according to him is a signal that the ousted sovereign "has regained control over its population and territory."[59] Even with the withdrawal of the enemy forces however, the legitimate sovereign must effectively establish its presence in the territory and no vacuum of authority must be left."[60] There is no such vacuum once troops have been deployed into the territory.[61] Regarding a partial withdrawal and for the occupation to have ended, there is legal obligation on the part of an occupying power to "facilitate the entry of a fully-fledged legitimate government".[62] This may however

[53]Thürer, D., 'Current Challenges to the Law...,' at p. 18; Bothe, M., 'The Beginning and End...,' at p. 29; Shany, Y., 'Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement', International Law Forum of the University of Jerusalem Research Paper No. 12-06 of August, 2006, at p. 14

[54]Thürer, D., 'Current Challenges to the Law...,' at p. 18

[55] Roberts, A., 'The End of Occupation...,' at p. 28

[56] Bothe, M., 'The Beginning and End...,' at p. 29

[57]Oppenheim, L., International Law: A Treatise (7th edn. Lauterpacht (ed), 1952) at p. 436.

[58] Mini, F., 'Liberation and Occupation...,' at p. 86

[59]Idem

[60]Ibid

[61]Ibid at p. 87

[62] Bothe, M., 'The Beginning and End...,' at p. 29

be referring to withdrawal with the cooperation of the displaced sovereign. Withdrawal of armed forces from the territory of enemy by agreement has same legal consequences with Peace Treaty in that by such withdrawal, the territory would no longer be qualified as occupied. A typical example of this situation is that of Austria in 1955 where by agreement with Austria, the US, UK, USSR and France withdrew from the territory restoring back full sovereignty of Austrian territory to Austria.[63]

It must however be noted that not all cases of withdrawal have the same consequences. Withdrawal where the occupying power continues to have an external control of the territory may not end the occupation. This is for example in the context of Gaza Strip by Israel in 2004. The Plan approved by the Israel Cabinet on the 6 of June, 2004 and carried out in August, 2005 provided for the evacuation of Israel troops from the Gaza Strip "including all existing Israeli towns and villages, and will redeploy outside the Strip."[64] It contained provisions to the effect that Israel Security Forces will no longer have "permanent presence" in the areas of the Gaza Strip which have been evacuated.[65] However, certain provisos are to the effect that:

That "Israel will guard and monitor the external land perimeter of the Gaza Strip, continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip";

That "[n]o foreign security presence may enter the Gaza Strip and/or the West Bank without being coordinated with and approved by the State of Israel";

That "Israel will continue to maintain a military presence along the border between the Gaza Strip and Egypt (Philadelphi Route). This presence is an essential security requirement. At certain locations, security considerations may require some widening of the area in which the military activity is conducted"[66].

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[63] Roberts, A., 'What is a Military Occupation'..., at p. 257

[64] Government of Israel, Decision of June 6, 2004 on the Revised Disengagement Plan <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm> accessed on 15 July, 2015

[65] Idem

[66] Ibid

It was suggested that the word "permanent" should be understood in the context of the follow-up clause on self-defence which according to this view is a "right that does not depend on any specific mention in the Plan",[67] and hence should be understood as "entirely political".[68] It was observed that the word is simply the possibility that Israel may continue to exercise its right of self-defence and in so doing may temporarily enter into the Gaza Strip.[69] Looking at the provisos in the Plan it could be argued that effective control as the basis of the existence of occupation is not lost irrespective of the Israel Security Forces withdrawal. By maintaining exclusive control over the air space, territorial waters and external land of Gaza, Israel continues to maintain control over some of the essential elements of authority a "State" has over its territory, the restriction of which significantly affects the power of that "State" to assert its authority. This simply depicted that what goes over the air space is entirely under the effective control of Israel. The deployment of troops along the border signifies the pressure being exerted by Israel on the authorities at Gaza. It is the combination of all these measures which must be taken into consideration in assessing whether effective control has been lost or otherwise surrendered by Israel. Worthy of note is the observation by Rubin on this point:

> ...by assuming close proximity and, in particular, contiguity between the allegedly occupied territory and the home territory of the occupant, as well as military superiority on the side of the alleged occupant, effectiveness of control may be maintained not only by moving forces of occupation from one part of the territory to another, but also through keeping, just outside the borders of the territory, forces on which the occupant may call in time of need.[70]

This contention assumes that the alleged occupant is able to deploy its forces at will from outside the allegedly occupied territory into that territory, just as an occupant is able to deploy its forces from one part of the territory to another part in order to enforce its effective control.[71]

While it is admitted that simple pressure from a foreign government is not synonymous with occupation,

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67 Rubin, B., 'Disengagement from the Gaza...,' at p. 534

68 Idem

69 Ibid

70 Ibid at p. 537

[71] **Ibid**

this should be analysed in the light of the surrounding circumstances. In the context of Gaza for example this situation may point to an irresistible conclusion that occupation continues in the territory for the simple reason that such evacuation does not in any meaningful sense amounts to a complete withdrawal and restoration of effective control of the territory to the Palestinian Authority. Indeed, effective control does not depend on the military strength of the enemy forces outside a State's border but the extent to which the occupier has effective control over the civilian lives.[72]

The conclude on this therefore, if we take the authority that it is not always the physical presence of the military that signifies occupation and that as long the occupier has the capacity to despatch troops within a reasonable time to assert its authority,[73] the occupation of Gaza has not ended. Similarly, the various measures which Israel can exercise and contained in the Plan such as who goes in and who goes out coupled with the control over the population register further demonstrated that it continues to have influence over civilian lives in the Gaza territory albeit its security forces are not stationed within the territory. Worth noting in this context are the two reports to the Commission on Human Rights.[74] It was stated that despite the evacuation by Israel from Gaza, the territory remains occupied and Geneva Convention continues to be applicable.[75]

Because the end of occupation is determined on the basis of loss of effective control and it has been previously mentioned that such effective control must be maintained

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[72]Benvenisti, E., 'The Present Status of the Palestinian Authority'in Eugene Cotran & Mallat Shibli (eds.) The Arab-Israeli Accords: Legal Perspectives (London, Kluwer Law International 1996) at p. 57

[73] See for example Naletilic' Case at p. 217 and UK Ministry of Defence, The Manual of the Law..., at p. 276

[74] UNGA 'Israeli Practices affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory' (18 August 2005) UN Doc A/60/271 and ECOSOC Commission on Human Rights, 'Report on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967' (22 December 2005) UN Doc E/CN 4/2006/029.

[75] UNGA 'Israeli Practices affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory' (18 August 2005) UN Doc A/60/271 para. 9

throughout the occupation period, the loss of such effective control should be durable and not simply momentarily.[76] However an argument could be made that going by the provisions of article 70 of GC IV which recognises temporary interruption of occupation, it could be concluded that loss of effective control though temporary has brought about the interruption in the applicability of the occupation law during that phase of interruption otherwise the occupying power may be held responsible for acts which it may not have properly committed. This may however not be in the interest of the civilian population which may be left without effective protection during the interrupted period. Occupation should not be coterminous with all the powers of a lawful sovereign of an area. Many limitations have been placed on the occupying power which the lawful sovereign where no occupation exist was not subjected to. Withdrawal which is clear and which resulted to the handing over or surrender of effective control of the territory to the former sovereign as a matter of fact has brought about the end of the applicability of the law of occupation.

Unilateral Termination

Occupation could equally be terminated unilaterally consequent upon the influence of doctrine of self-determination.[77] This could be the case where the occupant pursuant to the demand of the international community or the local population unilaterally acceded to the call without the conclusion of any agreement and terminates the occupation unilaterally. Similarly, where the occupying power unilaterally (without any belligerent activity from the enemy or demand from the local community) withdraws from the occupied territory, this withdrawal is a sign of abandoning effective control.[78]

[76] See for example Graber, D.A., The Development of the Law... at p. 69 (1949); Dinstein, Y., The International Law…, at p. 272; UK Ministry of Defence, The Manual of the Law..., at p. 277

[77] See generally Benvenisti, E., The International Law …, at p. 215.

[78] See Kelly, M.J., Peace Operations: Tackling the Military Legal and Policy Challenges (Canberra, Australian Government Publishers 1997) at p. 4-14

By the unilateral withdrawal of Israel from Gaza, it made a claim that its belligerent occupation has ended.[79] This claim was accepted by some writers[80] but rejected by some on the basis that it was geographically a partial withdrawal and Israel has not lost "core ingredients of effective control" of the territory.[81] As noted previously, mere pronouncement by the occupant or the occupied does not in itself ends the occupation. The situation would under the circumstances be determined in the light of all existing facts but what is clear is that unilateral termination could be valid where the circumstance is pointing to the surrender or transfer of effective control to the displaced sovereign.

Continued Presence of Hostile Armed Forces

The most notable episode of this situation in recent time is that of Afghanistan and Iraq where though hostilities have ended, new government established but the forces of the occupying power(s) continue to remain on the territory either on the basis of a request or conclusion of an agreement between the State and foreign armed forces. This situation is however not new. Some of these could be seen in the case of a Treaty of Alliance concluded on 25 August, 1941 between UK, USSR and Iran which provided for the continued presence of forces in the Iranian territory but according to the Treaty the situation was not considered as occupation.[82] Similarly, the occupation of Japan by the United States which ended in 1952 and that of West Germany in 1955, are other examples.[83]

In the above situations, the occupation has ended but a separate treaty concluded provided for the continued presence of the forces of previous Occupying Power.[84]

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[79]Dinstein, Y., The International Law…, at p. 15 and 276

[80]Rostow, N., 'Gaza, Iraq, Lebanon: Three Occupations under International Law', (2007) 37 Israel Yearbook of Human Rights, at p. 217-19 cited in Dinstein, Y., The International Law of…, at p. 277

[81]Dinstein, Y., The International Law…, at p. 277. See also Cavanaugh, K., 'The Israeli Military Court System in the West Bank and Gaza' (2007) 12(Issue 2) Journal of Conflict and Security Law at p. 199.

[82] See article 4 of the Treaty of Alliance (United Nations Treaty Series, vol. 93 p. 279

[83] See Roberts, A., 'What is a Military Occupation'..., at p. 258; see also Thürer, D., 'Current Challenges to the Law...,' at p. 19

[84] Roberts, A., 'What is a Military Occupation'..., at p. 258

These agreements could be seen as limiting the power of the foreign forces in such territories "so stringently that many of the potential points of friction between the inhabitants and the occupant, which are addressed in the law on occupations, are unlikely to arise in practice."[85] The situation may be in the same circumstances and legal consequences with the normal stationing of troops in foreign land in peace time pursuant to an agreement.[86]

How valid or effective such agreement may be however, depends on a number of factors. The legitimacy of the new local government concluding the agreement for example impacts on its validity. For the treaty to be effective, the power of a new government to conclude such a treaty must be truly legitimate.[87] This is so because; the new government may merely be an installed puppet of the occupying power which makes its legitimacy controversial.[88] Similarly, there could also be situations where a government may be ousted and a new government installed which then would grant such consent for the stationing of foreign troops, instances being those of Hungary 1954 and Afghanistan 1980.[89] Except in certain instances (for example in Iraq in 2003-4 where Security Council and members of the international community considered Iraqi Interim Government valid and with power to conclude international agreement such as for the request of the continued presence of the multinational forces), this type of consent is fundamentally tainted.[90]

Determination of new government's legitimacy is a question of fact. It would be considered legitimate if it was elected by its local population in the exercise of their right to self-determination,[91] or where the government receives international recognition,[92] or where the Security Council considers it legitimate.[93] Legitimate government's

[85]Idem at p. 288.
[86]Ibid
[87]Thürer, D., 'Current Challenges to the Law...,' at p. 20
[88]Idem at p. 20; See also Sassòli, M., 'Legislation and Maintenance of Public Order...,' at p. 683
[89] Bothe, M., 'The Beginning and End...,' at p. 30
[90] See Idem at p. 29
[91]Thürer, D., 'Current Challenges to the Law...,' at p. 20
[92]Idem
[93]Ibid

conclusion of a treaty or power to request for the continued presence of the forces of the previous occupying power is valid (as in Iraq in 2004), and this will turn the hitherto enemy forces under the Hague Rules to friendly forces thereby bringing an effective end to the occupation.[94]

Whereas conclusion of a treaty for the continued presence of the armed forces may provide a legal basis for such presence without the situation being qualified as occupation, the situation is not limited to the conclusion of such treaty. In other words, the continued presence of military forces in a territory could still be considered as not amounting to occupation where there has been "legitimate transfer of sovereignty".[95] In this situation the presumed consent of the territorial State is present otherwise any expression or action of such State on its non-acceptance of such continued presence would qualify the situation as occupation. The situation would also be qualified as occupation where the consent is not genuine or was obtained by force,[96] hence it was suggested that the situation must be assessed objectively and it is not exclusively depended upon "the judgment of the two States involved."[97]

A situation where forces previously considered enemy graduate into friendly forces and their continued presence in the territory agreed by the new local government, some other logical factors regarding the situation may be considered. Factors such as whether the new local government has the political power to control the military operations of the previous occupying power and whether it equally has the power to overturn previous regulations put in place by the occupying power.[98] These would go in a long way in establishing the extent of powers and control the new government has in the territory. In the case of Iraq, it was obvious that the military operations of the Multinational Forces are not subject to the control of the

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[94] **Ibid**

[95] **Roberts, A., 'What is a Military Occupation'..., at p. 259 citing "the treaty transfer of territory from Turkey to Greece after the Balkans Wars of 1912-13" as an example.**

[96] **Bothe, M., 'The Beginning and End...,' at p. 30**

[97] **Idem**

[98] **Thürer, D., 'Current Challenges to the Law..., at p. 21**

Interim Government of Iraq notwithstanding that the Security Council could terminate the mandate of the Multinational Forces upon the request of the Iraq Interim Government to that effect.[99] Whether the Security Council could do so is however doubtful. What however remains the position is that the so-called Interim Government has such power because it is considered sovereign, and hence "[i]n such circumstances, it would be difficult to continue to speak of an occupation."[100] The conclusion therefore is that valid and effective consent for the continued presence of the hostile forces may effectively terminate a situation of occupation.[101]

Self-Determination

The emphasis under The Hague Regulations on the law of occupation was on the State i.e. the ousted government. Gradually however, there has been a shift from this notion to that of the protection of individuals in the State i.e. the civilian population. This was brought about by the impact of the principles of self-determination and self-rule.[102]

From the international legal instruments, the UN Charter recognises the right of all peoples to self-determination,[103] and self-determination seemed to have been ranked higher than the territorial integrity of a State.[104] The international Covenant on Civil and Political Rights as well as the International Covenant on Economic Social and Cultural Rights of 1996 have both recognised in a common provision the right of all peoples to self-determination and

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99 See operative Paragraph 12 of the Security Council Resolution 1546 (2004) [UNSC Res 1546 (8 June 2004) UN Doc S/RES 1546] which provides that the Security Council "Acting under Chapter VII of the Charter of the United Nations" "Decides further that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four above, and declares that it will terminate this mandate earlier if requested by the Government of Iraq".

100 Thürer, D., 'Current Challenges to the Law...,' at p. 21

101 Bothe, M., 'The Beginning and End...,' at p. 31

102 Benvenisti, E., The International Law …, at p. 6

103 See article 1(2) and article 55 of the UN Charter <http://www.hrweb.org/legal/unchartr.html> accessed 16 July 2015

104 See Benvenisti, E., The International Law …, at p. 176

in furtherance to that, the peoples are to "freely determine their social status" and "pursue their economic, social and cultural development."[105] Similarly, United Nations General Assembly Resolution 2625 recognises the right of people to self-determination and imposes a duty of assistance to those in struggle. [106]

Because of the importance attached to self-determination any successful resistance from the population say for example against colonialism receives support and recognition once a government is established.[107] Whether self-determination has any impact on the end of occupation what this section explores. The question is whether it ends occupation or "reverses" the "roles of the occupant and occupied"[108] but commencing with the position of self-determination under international law.

The ICJ has pronounced on the question of self-determination in many instances.[109] In the Case Concerning East Timor[110] where the court has had to determine among others, question on the right of the people of East Timor to self-determination recalled several UN Security Council's and General Assembly resolutions on the issue wherein the UN reiterated the right to self-determination as "inalienable right."[111] The ICJ considered it to have erga omnes

[105] See article1 common to both provisions. <http://www2.ohchr.org/english/law/ccpr.htm> and <http://www2.ohchr.org/english/law/cescr.htm> accessed on 16 July 2015.

[106] See also the Charter of Economic Rights and Duties of States of December 12, 1974; UNGA Res 3171 (XXVIII) (17 December 1973) on Permanent Sovereignty over Natural Resources.

[107] See Benvenisti, E., The International Law …, at p. 185; see also article 1(4) AP I; article 12(12) International Convention against the Taking of Hostages 1979 cited in Benvenisti at p. 186.

[108] Idem

[109] See the following cases: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), International Court of Justice, Advisory Opinion [1971] ICJ Rep. pp. 31- 32, paras. 52-

53 (South-West Africa); Western Sahara, International Court of Justice, Advisory Opinion [1975] ICJ Rep. pp. 31-33, paras. 54-59).

[110] Case Concerning East Timor (Portugal v. Australia) [1995] ICJ Rep.

[111] **See Ibid at p. 96 specifically the UNSC Res 384 (22 December 1975) UN Doc S/RES/384 and UNSC Res 389 (22 April 1976) UN Doc S/RES/389; UNGA Res 3485 (XXX) (12 December 1975), UNGA Res**

character which is irreproachable[112] and concluded that "it is one of the essential principles of contemporary international law."[113] Similarly, in the Separation Wall Opinion, the ICJ had occasion to address the question of self-determination as erga omnes. It observed that:

> [T]he obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature 'the concern of all States' and, 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.' (Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J Reports 1970, p. 32, para. 33.) The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.[114]

The recognition that the Palestinians constitute a "people" with a right to self-determination as a right erga omnes, the duty incumbent on Israel to respect this right as well as the obligation imposed on every State to promote this right jointly and severally form some of the highlights of this ICJ opinion.[115] Under the Peace Treaty concluded between Israel and Egypt in 1974 and with Syria in 1994 the issue of the Palestinian territory was left to be determined by Israel and the Palestinians in their context of their right to self-determination.[116]

On the basis of several international instruments and documents on self-determination coupled with the notion attached to "foreign occupation" as illegal, a conclusion has been drawn that self-determination could lead to the conclusion that the authority of the occupier is

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31/53 (1 December 1976) UN Doc A/RES/31/53; UNGA Res 32/34 (28 November 1977) UN Doc A/RES/32/34; UNGA Res 33/39 (13 December 1978) UN Doc A/RES/33/39; UNGA Res 34/40 (21 November 1979) UN Doc A/RES/34/40; UNGA Res 35/27 (11 November 1980) UN Doc A/RES/35/27; UNGA Res 36/50 (14 November 1981) UN Doc A/RES/36/50 and UNGA Res 37/30 (23 November 1982) UN Doc A/RES/37/30.

[112] Case Concerning East Timor, at p. 102

[113] Ibid

[114] Para.155.

[115] Zyberi, G., The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles (Intersentia, 2008) at p. 133-134

[116] Dinstein, Y., The International Law…, at p. 52.

"curtailed" and this renders "the law of occupation irrelevant".[117] Roberts states:

Over the past four decades the international community has favoured self-determination in respect of at least five occupations - those of Namibia, the West Bank and Gaza, Cambodia, East Timor, and Western Sahara. In all five cases the withdrawal of foreign forces has been seen as one key aspect of the ending of occupation. External armed forces remain in place only in those cases in which the occupation has not (or at least not completely) ended-i.e. the Israeli-Occupied Territories and Western Sahara.[118]

The realisation of self-determination of the inhabitants of an occupied territory is at variance with the presence of belligerent forces. However, termination of occupation is not dependant on the realisation of self-determination.[119] The end of occupation may in certain circumstances be just the beginning of the realisation of self-determination. Similarly, withdrawal of enemy forces is not "the sole criteria" for determining the end of military occupation.[120]

On the basis if the strength of international legal instruments and judicial decisions on the concept of self-determination of a people it could be concluded that where pursuant to self-determination an effective government is established which led to the loss of occupying power's effective control, the occupation has ended.

Annexation?

The doctrine of debellatio and its effects have been discussed before. State practice demonstrated that Japan had in 1910 annexed Korea, Italy had invaded and annexed Ethiopia in 1936 and Albania in 1939 on the basis of debellatio[121], Germany had absorbed a number of cities including Luxembourg and eastern Belgium, Bulgaria had annexed parts of Greece.[122]

However, one of the fundamental principles upon which the law of occupation is founded is the inalienability

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117 See Benvenisti, E., The International Law …, at p. 187

118 Roberts, A., 'The End of Occupation...,' at p. 28

119 Rubin, B., 'Disengagement from the Gaza...,' at p. 547

120 Roberts, A., 'The End of Occupation...,' at p. 28

121 For a counter argument on the application of the doctrine see Benvenisti, E., The International Law... at p. 64.

122 Benvenisti, E., The International Law …, at p. 65

of sovereignty of territory by the threat or use of force.[123] This is one of the fundamental principles of the UN as encapsulated in several UN documents,[124] hence it has been recognised that effective control by an occupier no matter how strong, is not but a "temporary managerial power..." over the territory.[125] It has been generally accepted that de jure sovereignty during occupation is retained by the ousted sovereign while the occupying power only retains de facto control.[126] Occupation, by its nature, is only temporary, "it follows that a territory cannot be annexed prior to the end of the war".[127] The commentary on article 47 of GC IV share similar view to the effect that even if the occupying power has occupied the whole of the territory, it cannot annex the territory so long as the state of hostilities continues.[128] The UK Manual of Armed Conflict, 2004 stated that annexation of the occupied territory is prohibited and sovereignty can only pass under the principles provided by "international law usually by cession under a peace treaty".[129]

It is a long standing rule of the Security Council that it is inadmissible to annex a territory subject to occupation. For instance in Resolution 662 the Council decided that "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity and is considered null and void".[130] The UN General Assembly in resolution 31/53 of

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[123] **Idem at p. 5**

[124] **See UNSC Res 242 (22 November 1967) UN Doc S/RES/242; UNSC Res 252 (21 May 1968) UN Doc S/RES/252; UNSC Res 476 (30 June 1980) UN Doc S/RES/476; UNSC 478 (20 August 1980) UN Doc S/RES/478; UNSC Res 497 (17 December 1981) UN Doc S/RES/497; UNSC Res 662 (9 August 1990) UN Doc S/RES/662; Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970); Declaration on the Strengthening of International Security UNGA Res 2734 (XXV) (16 December 1970); Final Act of the Conference on Security and Co-operation in Europe (1975) 14 ILM 1292, 1294-95 (articles 3 and 4)**

[125] **Benvenisti, E., The International Law…, at p. 5. See also: Pictet, J.S., Commentary on the Geneva Convention..., at p. 275; Greenwood, C., 'The Administration...,' at p. 265**

[126] **Goodman, D.P., "The Need for Fundamental Change..., at p. 1580**

[127] Graber, D.A., The Development of the Law..., at p. 40.
[128] Pictet, J.S., Commentary on the Geneva Convention..., at p. 275
[129] UK Ministry of Defence, The Manual of the Law..., at p. 278
[130] See UNSC Res 662 (9 August 1990) UN Doc S/RES/662 para. 1

December 1, 1976, and resolution 32/34 of November 28, 1977 rejected "the claim that East Timor has been incorporated into Indonesia, inasmuch as the people of the territory have not been able to exercise freely their right to self-determination and independence".[131] Israel by law made Jerusalem its capital thereby annexing it;[132] however, the Israel Supreme Court acknowledged in the Yinon case that an occupying power does not acquire territory on the basis of belligerent occupation.[133]

Derivable from the above is that annexation of an occupied territory is illegal and must not be recognised.[134] In fact annexation of occupied territory has even been linked to aggression.[135] Even in the nineteenth century when war was considered to be a means of achieving national goals and hence not outlawed, occupation was still considered "a transient situation" and is to last only before the conclusion of a peace treaty which will determine the status of the territory.[136]

It was incontestable even during the normative period of the law of occupation that occupation does not confer sovereignty of the territory to the occupying power even with the vague nature of article 43 HR.[137] The non-transfer of sovereignty after the war may be one of the reasons responsible for prolonged occupation.[138]

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[131] Case Concerning East Timor ..., at p. 97.

[132] See: Basic Law: Jerusalem, Capital of Israel of 1980, 34 LSI 209 (1979-80).

[133] Dinstein, Y., The International Law ..., at p. 50

[134] Goodman, D.P., "The Need for Fundamental Change..., at p. 1580-1

[135] Roberts, A., 'Transformative Military Occupation...,' at p. 584

[136] Benvenisti, E., The International Law …, at p. 27 where he also cited the 1870-1871 Franco-Prussian War where French territory was occupied by the Prussia and which after the conclusion of peace treaty some of the territory was subsequently conceded to Prussia.

[137] Idem at p. 8. He justifies this from the position taken by Von Glahn in The Occupation of Enemy Territory... at p. 10-12 that despite the vagueness of the provision relating to sovereignty, "it is quite clear that the framers of The Hague Regulations unanimously took the view that an Occupant could

not claim sovereign rights only because of its effective control over the occupied territory". See Benvenisti, E., The International Law…, in his footnote 9. See also Jennings, R.Y., The Government in Commission'..., at p. 133

[138] **Ibid at p. 30.**

While the position on non-annexation is clear, it becomes somewhat complicated where the population of the occupied territory overwhelmingly voted in favour of annexation to the occupying State.[139] If this was in the light of self-determination it could be argued the annexation is valid and occupation has ended. If, however it is merely an agreement between the occupying power and the government of the occupied State, article 47 of GC IV considers that protected persons shall not be deprived of the benefits of the Convention by any agreement whatsoever concluded between the governments of the occupying and occupied or any annexation of the occupied territory by the Occupant. In the same light, article 4 of AP I provided that the application of the Convention or the Protocol or the conclusion of any agreement shall not affect the legal status of the parties to the conflict or the status of the territory. Such annexation is therefore invalid.

The rejection of annexation in situation of occupation is not only assessed de jure, the position extends to de facto situations where no such law or pronouncement is made but the effect in fact of the practice of the occupying power is to annex the territory in question. A most recent example is the situation of Occupied Palestinian Territory. The ICJ in its Advisory Opinion in the Separation Wall, pointed out the effect, the construction of the Wall might have on the future of the territory which in its opinion might amount to de facto annexation irrespective of Israel's assurances to the contrary.[140] This Opinion demonstrated that annexation cannot bring an end to the occupation and annexation is not now one of the traditional ways of acquiring sovereignty over territory.[141]

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[139] This was the case for example where the national assemblies of Western Ukraine and Western Byelo-Russia (which were then part of Poland invaded by the Soviet Union) elected by at least 90 percent of the population "unanimously voted for their incorporation into the Soviet Union". Similar situation occurred in the case of Estonia, Latvia and Lithuania all cited in Benvenisti, E., The International Law…., at p. 67-8.

[140] Separation Wall opinion ..., [2004] ICJ Rep. para. 121

[141] Imseis, A., 'Acquisition of Territory, Annexation and the Jordan Valley' a Paper presented at Al-Quds University/Diakonia IHL Forum on 31 May 2007

United Nations: Security Council and General Assembly Membership of the United Nations conferred on the Security Council the primary responsibility of maintaining international peace and security, for the purpose of ensuring prompt and effective action by the United Nations within the confines of the purposes and principles of the Charter.[142] They have further agreed that pursuance to such responsibility, the Council should act on their behalf,[143] and they have resolved to accept and carry out it resolutions.[144] Resolutions of the Security Council prevail on the members
over any other international obligation.[145]
An issue that came under discussion recently is whether the powers of the Security Council under article 24 is only for the purpose of discharging its functions specifically named in chapters VI, VII, VIII and XII or it has further competences though not mentioned but necessary for the discharge of its functions.[146] The authors of the Commentary to the Charter observed that while taking the wording alone of paragraph 2 of article 24 'could speak in favour of a narrow interpretation', but if understood 'in a qualitative sense' it could be concluded that the Security Council has 'general powers beyond those named in paragraph 2 second sentence, since these are referred to as specific powers'.[147]

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142 See article 24 Charter of the United Nations 1945. See also Bruno, S. et al (eds.), The Charter of the United Nations: A Commentary. (Vol. 1, Oxford, Oxford University Press 2002) at p. 445.

143 Ibid. though it has been suggested that the Security Council as an organ of the UN only acts on behalf of the UN and not on behalf of the individual State and hence opined by a majority of writers that the understanding that it acts on behalf of the members is "legally erroneous and superfluous" (see Bruno, S. et al (eds.), The Charter of the United Nations..., at p. 449)

144 Ibid article 25.

145 Article 103 Charter of the United Nations

146 Sarooshi, D., 'The Legal Framework Governing United Nations Subsidiary Organs' (1996) 67 British Yearbook of

International Law, at p. 422; Sarooshi, D., 'The Powers of the United Nations International Criminal Tribunals' (1998) 2 Max Planck United Nations Yearbook of Law, at p. 143; see also South-West Africa opinion [1971] ICJ Rep at p.16. (See Bruno, S. et al (eds), The Charter of the United Nations..., at p. 446)

[147] **Bruno, S. et al (eds), The Charter of the United Nations..., at p. 446**

The scope of the powers of the Security Council under article 24(1) and (2) was debated in many instances notably on the Soviet troops in northern Iran in 1946, the Spanish question in 1946, the Statute of Trieste in 1947, the Palestine case in 1947-8 and more recently on the establishment of the ICTY and ICTR.[148] Decisions arrived at by the Security Council portrayed the enormous powers it possessed under the Charter. It has the right to retain a dispute on its agenda even after the withdrawal of the case by the parties;[149] it has the power to deal with an issue even when no prior determination of a threat to peace has been made;[150] and has the power to guarantee the territorial integrity and security of a State or region.[151] The wide scope of powers of the Council was accepted in the Palestinian case.[152] The ICJ Advisory Opinion in the Namibia case has confirmed the practice of the Security Council "that the SC is also empowered to take binding decisions outside chapter VII"[153] Decisions of the Security Council may even extend to non-members by the provision of article 2(6) of the Charter under which the UN has the power to ensure that their actions are in compliance with the article so long as that may be required for the maintenance of international peace and security.[154]

However, in 1995, the ICTY in the Tadic case[155] has said that though the Security Council under article 39 exercises a very wide discretion, it "does not mean that its powers are unlimited" and that "neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus". While noting some of the limitations of the Security Council the Tribunal concluded on this issue

[148] Idem at p. 450)

[149] As in the Iranian Case (see Ibid at p. 450)

[150] As considered in the Spanish case though vetoed (Bruno, S. et al (eds.), The Charter of the United Nations..., at p. 450 - 1)

[151] As decided in the Trieste (Bruno, S. et al (eds.) The Charter of the United Nations..., at p. 451)

[152] Idem

[153] South-West Africa) opinion [1971] ICJ Rep pp. 16-345 (see Bruno, S. et al (eds.), The Charter of the United Nations..., at p. 461)

[154] See Bruno, S. et al (eds.), The Charter of the United Nations..., at p. 460)

[155] Prosecutor v Tadic (Decision on Interlocutory Appeal on Jurisdiction) ICTY-IT-94-1-AR72 (2 October 1995) para 28

that the language of the Charter is that of "specific powers" and "not absolute fiat".[156]

Now, is the Security Council's power limited even when acting to maintain or restore international peace and security? This was a question explored by Akande.[157] The "Security Council is not a sovereign authority", "it is an organ of limited membership"[158] that derives its power from the UN Charter but identifying such limits is certainly far from easy.[159] The first limitation may be for the Council to act in accordance with articles 1 and 2 of the Charter though as broad as they are but they are not without limitations.[160] Compliance with general international law unless stated otherwise by the Charter is a limit to the powers of the Council.[161] An author has however argued that the Council need not necessarily act in accordance with existing international law while acting for the purposes of maintaining or restoring international peace and security on the basis that the purpose is not maintaining or restoring the law but peace and security.[162] However, considering the travaux préparatoires it was assumed by the delegates to the Conference that such power was limited by the principles of international law.[163] Other limits to the power are the observance of the norms of jus cogens,[164] human rights and humanitarian law obligations.[165]

Article 39 of the Charter empowers the Security Council to determine the existence of "any threat to the peace, breach of the peace or act of aggression" and to make

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[156]Ibid

[157]Akande, D., 'The International Court of Justice and the Security Council: Is There Room for Judicial Review of the Decisions of the Political Organs of the United Nations?' (1997) 46 International and Comparative Law Quarterly, at pages 314-25.

[158]Idem at p. 315

[159]Ibid

[160]Ibid at p. 316-7.

[161]Ibid at p. 317.

[162] See Kelsen, H., The Law of the United Nations: A critical Analysis of its Fundamental Problems (London, Stevens 1950) at p. 294. (See Akande, D., 'The International Court of Justice and the Security Council...,'

[163] Akande, D., 'The International Court of Justice and the Security Council...,' at p. 320.

[164] Idem at p. 322

[165] Ibid at p. 323

recommendation or decides on the measures to be taken.[166] With respect to foreign military presence, the Security Council can take three types of decision:

i. It may address the problem of applicable law to a situation, although such a situation may have developed without any input from the Security Council;
ii. t may give a mandate for the presence of armed forces of a State or of a group of States;
iii. It may establish a United Nations presence.[167]

The Security Council Resolution 1483 of May, 2003 on Iraq recognised the US and UK forces in Iraq as occupying powers. Resolution 687 of April 3, 1991 also portrays the powers of the Council to determine the conditions of truce to be concluded in the case of Iraq after Iraq has been defeated.[168] Considering the enormous powers of the Security Council, could it be said that a resolution of Security Council could end a situation of occupation?

By Resolution 660 of 2 August, 1990, the Security Council ordered Iraq to immediately withdraw its forces from Kuwait. Specifically, resolutions 661 of 6 August, 1990 and 662 of 9 August, 1990 mentioned that the Security Council is determined to bring an end to the occupation of Kuwait by Iraq and to restore the sovereignty, independence and territorial integrity of Kuwait and also to restore the authority of the legitimate government of Kuwait and to put an early end to the occupation. It also called on States not to recognise any regime set up by the occupying power in Kuwait.[169]

It was considered that a binding resolution of the Security Council prevails on the States over any international agreement or customary rules (this was obviously relying on the combined effect of article 25 and 103 of the UN Charter) but that since this resolution is one of its kind, "it is premature to draw all-embracing general conclusions".[170] Another classical example in this instance

[166] Article 39 Charter of the United Nations
[167] Bothe, M., 'The Beginning and End...,' at p. 32
[168] Bruno, S. et al (eds.), The Charter of the United Nations..., at p. 462)
[169] UNSC Res 661 (6 August 1990) UN Doc S/RES/661 para. 9(b)
[170] Dinstein, Y., The International Law…, at p. 273

is the Security Council Resolution 1546.[171] This Resolution in essence was adopted by the Council acting under Chapter VII of the UN Charter. The Resolution welcomes by 30 June, the end of occupation of Iraq by the Coalition Provisional Administration and endorses the formation of a sovereign Interim Government of Iraq. It noted the continued presence of the Multinational Forces in Iraq at the request of the incoming Interim Government of Iraq. Though the request for the continued presence of the Multinational Forces has been opined to be invalid on the basis that it emanating from a Government that is not in existence and hence the continuation of occupation,[172]Sassòli did not consider this resolution as "application of the rules of IHL on the end of application of the law of military occupation to the facts on the ground."[173]

To analyse the above resolution, it could be said that the Security Council is merely welcoming and endorsing the decision by the multinational forces to end the occupation and restore sovereignty to the Iraqi Government. Since occupation is factual, do the facts in Iraq after this resolution demonstrated surrender or loss of effective control by the occupying powers? An opinion was that little change was noted in practice after,[174] and that despite the

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[171] **UNSC Res 1546 (8 June 2004) UN Doc S/RES1546**

[172]**Christopher J. and Le Mon, C.J., 'Legality of a Request by the Interim Government for the Continued Presence of the United States Military Forces' (2004) American Society of International Law Insights. <http://www.asil.org/insights/insigh135.htm> accessed on 16 July, 2015 (see Carcano, A., 'End of the Occupation in 2004? The Status of the Multinational Force in Iraq after the Transfer of Sovereignty to the Interim Iraqi Government' (2006) 11 Journal of Conflict & Security Law, at p. 48**

[173]**Sassòli, M., 'Legislation and Maintenance of Public Order...,' at p. 683, positing that the rules of IHL on occupation would continue to apply. He considers that "as for the facts more than 100,000 Coalition troops remain in Iraq, they are involved in daily fighting, they are not put under the direction of the Iraqi provisional government and the latter may not even ask them directly for their withdrawal from Iraq". Similarly doubting the control of the government of Iraq over the reality of the situation he concluded that "Resolution 1546 must rather be seen as a decision overriding the rules of IHL on the subject" which is "valid under Article 103 of the UN Charter".**

[174] **Walker, P.J., 'Iraq and Occupation' in Wippman, D. and Evangelista, M. (eds.) New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts (New York, Transnational Publishers 2005) at p. 284**

formal handing over of administration to Iraqi authorities, "the coalition forces have not changed or given up their "de facto" control of the territory" hence it is "highly questionable whether the nominal control in the hands of the local authorities is sufficient to end the "occupation regime".[175]

If the resolution is taken to have amounted or bring about the end of the occupation, then what could be said of the status of the so-called "invited" forces in the light of the surrounding circumstances? In this light, Mini's comment is worth considering:

> It is clear that the formal new status of "invited" forces cannot have fewer obligations than the statusof occupants.
>
> Furthermore, the local security forces have no power to control the situation, have no intelligence, no surveillance, no strength to effectively face the situation and not even the means to adequately support the coalition. In fact, the coalition still has full control of the security instruments and their apparent status of "supporting" the local authorities is a fiction. As a matter of fact, the so-called passage of "sovereignty" (in reality, according to international law, Iraq never lost its sovereignty) to the Iraqis has added the Iraqis themselves and their immature, unprepared, ineffective security forces to the list of enemies of the criminals and the rebels.[176]

Although the facts are as they have been described in the above statement, the relative powers of the previous occupant and the local government will need to be assessed in a particular context. It is not in all situations where the foreign forces are stronger that the situation will continue to be characterised as occupation. Moreover, the fact that in a given situation a genuine consent for the presence of foreign forces can be established, a situation of occupation does not exist.

On the other hand, however, since end of occupation means the restoration of both internal and external sovereignty to the displaced sovereign, could Iraq therefore be considered truly sovereign externally and internally after 30 June? Externally, the sovereignty of Iraq could be easily ascertained considering the view of the international community on the issue and their acceptance of the situation. With respect to its internal sovereignty however, the situation is not easily ascertainable especially

175 Mini, F., 'Liberation and Occupation...,' at p. 91

176 Ibid

when it is not clear whether the new government actually enjoys the support of the majority of Iraqi population.[177] It is equally unclear if indeed the Coalition Forces could withdraw at the request of the Interim Government of Iraq together with the fact that it does not have effective control of its territory.

Whatever may have been said about this Resolution, it is not in doubt that it revives the law of occupation. It is equally "the latest and most authoritative restatement of several basic principles of the contemporary law of occupation."[178] This article is however only concerned with whether a binding resolution of Security Council could bring an end to an occupation. Relying on the enormous powers cited above, a conclusion can be reached that a binding resolution of the Security Council could end occupation especially where such resolution is taken under chapter VII and where the continuation of the occupation is a threat to international peace and security.

A contrary opinion was expressed in an ICJ dissenting opinion of Judge Gerald Fitzmaurice in the Namibia Advisory Opinion[179] where he states:

Even when acting under Chapter VII of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration. Even a war time occupation of a country or territory cannot operate to do that. It must await the peace settlement. This is a principle of international law that is as well established as any there can be, and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual members are. The Security Council might, after making the necessary determinations under Article 39 of the Charter, order the occupation of a country or a piece of territory in order to restore peace and security, but it could not thereby, or as part of that operation, abrogate or alter territorial rights ... It was to keep the peace that the Security Council was set up not to change world order.

If the Security Council or the General Assembly terminates the occupation of a territory could that be said to be ultra vires? The ICJ in the South West Africa Advisory Opinion had posited:

That, it would not be correct to assume that, because the GA is in principle vested with recommendatory powers, it is debarred

177 **Walker, P.J., 'Iraq and Occupation'..., at p. 284**

178 **Benvenisti, E., The International Law…, at p. ix**

179 **South-West Africa opinion [1971] ICJ Rep at p. 16.**

from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.[180]

If therefore the General Assembly with merely recommendatory powers could adopt a resolution with operative effect what more could be said of the Security Council. What then would the States do if such determination has been made by the Security Council? The ICJ in both the Separation Wall and South West Africa Advisory opinions had occasions to address this issue. In South-West Africa, ICJ was of the opinion that binding determination made by a competent organ of the UN to the effect that a situation is illegal could not remain without consequences.[181] The State against which such determination was made is under a duty to end the situation and withdraw its administration from the territory.[182] With respect to other States, they are under a duty not to recognise the existence of such administration but this must be without prejudice to the interest of the local population.[183]

It is suggested that since the Security Council has the responsibility of maintaining international peace and security and almost all situations of occupation have implications on peace and security; the Security Council has the power to adopt a binding resolution bringing an end to a situation of occupation. Considering that the Security Council is more likely to act within the purposes and principles of the UN Charter and taking cognizance of the UN position on the protection of human rights and principle of self-determination of all people (which is almost always at variance with military occupation) and that the position taken by the Geneva Convention which focused more on the protection of individuals rather than the abstract entity of State, the Security Council should be more actively involved. It must however be mentioned that in exercising this power, the Security Council cannot however override rules of jus cogens.[184]

[180] **Idem para. 105**

[181] **See Ibid para. 117**

[182] **See Ibid para 118**

[183] **See Ibid para. 125**

[184] **See Pellet, A 'La formation du droit international dans le cadre des Nations Unies' (1995) 6 EJIL at p. 423**

Restoration of Limited Sovereignty/Operating Through the Local Authority

The assumption under article 43 of The Hague Regulations is that the occupying power will administer the territory directly through its armed forces.[185] Perhaps it was not envisaged during the negotiations that situations may arise where the occupying power will act through agents or even through local authorities. The occupying power may also grant or restore a limited administrative self-government to the population of the occupied territory for reasons of expediency.[186] Similarly, the occupying power in order to minimise administrative costs may resort to establishing a "friendly and cooperative local indigenous government, operating as much as possible according to pre-existing procedures" but with respect to major policy formulation, the will of the occupying power will prevail while on matters relating to municipal administration, local indigenous administration may have substantial independence.[187]

States practice demonstrated instances where the occupying power permitted the local authorities to continue to exercise functions of government. For example, when Denmark was occupied by Germany between April, 1940 to August, 1943, Germany allowed the then existing Danish Government to continue to function. Similar situation existed in occupied Iran between 1941 and 1946 which was allowed by the British and the Soviet Union.[188]

What then is the impact of this on the law of occupation? Mini is of the view that the occupying power is still under obligation under the law of occupation irrespective of the handing over of administrative functions to civil servants.[189] Further, occupation law will also continue to apply even in situations where oppositions have set-up government structures in the occupied territory.[190] Analysis of the situations on this subject reveals that the

185 Roberts, A., 'What is a Military Occupation'..., at p. 252

186 Dinstein, Y., The International Law..., at p. 57

187 Gerson, A., 'War, Conquered Territory and Military Occupation...,' at p. 528

188 Roberts, A., 'What is a Military Occupation'..., at p. 284

189 Mini, F., 'Liberation and Occupation...,' at p. 87

190 Idem

decisive criteria continues to be as long as effective control remains with the armed forces of the occupying power, a situation of occupation continues to exist.[191] Military manuals confirmed this view. For example, article 367 (b) of US Department of the Army, Field Manual: The Law of Land Warfare considered that the occupant "may call upon the local authorities to administer designated rear areas, subject to the guidance and direction of the occupying power. Such action is consistent with the status of occupation, so long as there exist the firm possession and the purpose to maintain paramount authority".[192] The UK Manual contemplated the issue of troops operating indirectly through an existing or newly appointed indigenous government and concluded that the law of military occupation is likely to be applicable to such situations.[193]

Perhaps a recent classical example of this situation is that of Gaza and West Bank where following the Oslo Accords in the 90s, Israel withdrew from parts of the areas and transferred some powers and responsibilities over certain areas to the Palestinians while retaining some.[194] The fact that residual powers exist and continues to be with Israel was an indication the occupation has not truly ended.[195]. This was also the view of ICJ in the Wall Case.[196]

The subscription by the major powers to anti-colonial ideologies and principles has reinforced the tendency in the contemporary world for the occupying power "to operate through indigenous political forces".[197] Relevant to the discourse is article 47 of GC IV regime. The article provided that protected persons "shall not be deprived" of the benefits of the Convention "by any change introduced, as the result of the occupation of a territory, into the institutions or government of the . . . territory, nor by

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191 **See for example Loizidou v. Turkey (Merits) (European Court of Human Rights 1996) (1997) 36 ILM at p. 453.**

192 **US Department of the Army, Field Manual, The Law of Land Warfare**
138 (FM 27-10, 1956)

193 **See UK Ministry of Defence, The Manual of the Law..., at p. 276**

194 **Dinstein, Y., The International Law…, at p. 274.**

195 **Idem**

196 **Separation Wall opinion at p. 1031 (see Dinstein, Y., The International Law …, at p. 275**

197 **Roberts, A., 'What is a Military Occupation'..., at p. 288.**

any agreement concluded between the authorities of the occupied territories and the Occupying Power".[198]

The Israel Supreme Court in the Ansar Prison case has stated that:

> **Allowing the former government to act does not alter the fact that the military force is maintaining an effective military control in the area, nor does it relieve the occupant from the responsibilities for the consequences of such acts as far as the rules of warfare are concerned.[199]**

Operating through the local authorities does not therefore relieve an occupying power from its obligations under the Convention especially if read in conjunction with article 6(3) of the Convention which is to the effect that if the occupying power continues to exercise functions of government it will continue to be bound by certain provisions of the Convention which includes article 47.[200] A situation would not however, be characterised as that of occupation "where there is local independent civil government" in a situation where the "local government is able to exercise its authority independent of the putative occupier".[201]

Division of the Occupied Territory/Creation of a "New State" and Establishment of a "Puppet Government"

Precedents have shown that occupying powers have either attempted to separate territory or have actually divided it creating new States in the process.[202] Take for example the creation of Bangladesh by India from a Pakistan province. A cursory look at the situation depicted that whether or not the situation is acceptable largely

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198 **See Sassòli, M., 'Legislation and Maintenance of Public Order...,' at p. 682**

199 **Judgment delivered 13 July 1983. (see Roberts, A., 'What is a Military Occupation'..., at p. 286**

200 **See Sassòli, M., 'Legislation and Maintenance of Public Order...,'**

201 **Bell, A and Dov, S., 'The Mythical Post-2005 Israeli Occupation of the Gaza Strip' at p. 5 <http://ssrn.com/abstract=1577324>accessed on 21 July, 2015**

202 **Benvenisti, E., The International Law..., at page 47 noted for example the widely criticised German policy of attempting to separate Flanders and Wallonia which was copied by subsequent occupiers like France in the occupied Rhineland; attempt by British to separate Libya into two political units**

(Cyrenaica and Tripolitania) after the second World War and the creation of Bangladesh by India from a province of Pakistan.

depends on the facts and circumstances prevailing in a given territory. It is both a question of fact as well as a 'sophisticated' 'question of law.'[203] Arguably, under the law of occupation the first attempt to establish a puppet government by the occupying country was in the case of the occupation of Manchuria by Japan which was driven by the Japanese economic and political interest and which subsequently led to the establishment of the Japanese created "State of Manchukuo".[204] This Japanese practice has been resisted by the international community.[205] Similarly in Europe, puppet States were created in Slovakia and Croatia while puppet governments were established in Norway and Greece.[206]

The establishment of a new State may not be completely dismissed, take for example the creation of the West and East Germany (before 1990) and North and South Korea[207] which have effectively established themselves as States within the meaning of international law and recognised by the international community. To determine therefore whether creation of such State would serve as bringing an end to an occupation, questions such as the influence of the principle of self-determination is relevant. Take for example the creation of Bangladesh and attempt on Turkish Cypriot where the former succeeded on the basis of self-determination and the latter was rejected by the international community as having failed to establish such a need. Other factors that play a role are the acceptability of the international community especially where the State receives widespread recognition or where it was recognised by a resolution of the Security Council or the General

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[203] **Idem at p. 183**

[204] **See Ibid at p. 60. Where Japan constituted a fictitious indigenous government supervised by Japanese consultants which assured through a bilateral agreement all Japanese interests.**

[205] **He cited 'Report of the Commission of Enquiry into the Sino-Japanese Dispute in 1932' League of Nations Publications VII Political, 1932. VII, 12, 1, at It 97 (Lytton Commission) where the Commission denounced Manchukuo and referred to the territory as Occupied by Japan and this conclusion was endorsed by the League of Nations Resolution of February 24, 1933 which also called on members not to recognise Manchukuo.**

[206] **Benvenisti, E., The International Law…, at p. 65.**

[207] **Roberts, A., 'What is a Military Occupation'..., at p. 285**

Assembly,[208] or where it is admitted into the membership of the United Nations. Devolution of power to a legitimate indigenous government through free and fair electoral process which restores effective control of a previously occupied territory may be considered to have ended the occupation.[209] However Sassòli is of the view that the legitimacy of the "new government is often controversial (as is the question of whether the new government's consent to the continued presence of foreign troops is freely given)."[210] A way of considering whether such a government is legitimate is by looking at whether it was elected by its local population in the exercise of their right to self-determination.[211] Express international recognition may similarly point to the legitimacy of such a government.[212] Preferably as Sassòli has pointed out, the position of the Security Council on the issue "may offer a clear indication."

Because of the intricacies associated with devolution of power to a local government it was concluded that it is not indeed in all situation where such occurs that could be considered as amounting to ending the occupation, that for occupation to be considered ended, such transfer of power must be "sufficiently effective."[213] The logic for this is that if any devolution of power to a local government is considered effective end of occupation, civilians and property in the territory may find themselves devoid of protection because the occupying power may indeed be retaining the effective control of the territory while circumventing the law of occupation.[214]

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[208] See also Ratner, S.R., 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' (2005) 16 EJIL, at p. 699

[209] See Sassòli, M., 'Legislation and Maintenance of Public Order...,' at 683 considering it to be the opinion of ICRC on the requalification of conflict in Afghanistan to non-international after the election of Hamid Karzai as the President (relying on Roberts, A., 'The Laws of War in the War on Terror' (2002) 32 Israel Yearbook of Human Rights, at p. 193

[210] Idem

[211] Thürer, D., 'Current Challenges to the Law...,' at p. 20

[212] Idem

[213] Ibid at p. 19

[214] See Ibid at p. 19.

The establishment by the occupying power of a puppet civilian government to manage the administration of the occupied territory while effective control continues to be in the hands of the occupying power, is not in conformity with IHL.[215] An occupying power cannot therefore escape its duties under the law of occupation by relying on a puppet government it has created and installed on the occupied territory. Dinstein agreeing with Talmond[216] opined that an occupying power cannot create a new puppet government within the occupied territory.[217] It was commented that "the potential effective control approach does not permit the occupier to evade its responsibilities through the creation of 'puppet regimes' – a 'government by proxy', which would exercise control, in effect, on its behalf."[218] Article 47 of GC IV considers that a change introduced into the institutions or government of the occupied territory or an agreement concluded between the occupying power and the occupied shall not deprived protected persons the enjoyment of the benefits provided by the Convention. Commentaries of article 47 GC IV stated that "the clause applies both to cases where the lawful authorities in the occupied territory have concluded a derogatory agreement with the occupying power and to cases where that power has installed and maintained a government in power".[219] Similarly, "[t]he provision is intended to prevent local authorities, under pressure from the occupying power, from making concessions to the detriment of the inhabitants of the territory, impairing their protections and rights."[220]

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215 This seemed to be the view endorsed by the Dutch Special Court of Cassation in the criminal case of Re Rauter of 12 January, 1949 (A.D 1949, No. 190) at p. 540 cited in Verzijl, J.H.W., International Law..., at p. 212

216 Talmond, S., 'Who Is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law', in Goodwin-Gill G.S. and Talmond, S (eds) The Reality of International Law: Essays in Honour of Ian Brownlie, (Clarendon Press 1999) at p. 503-4.

217 Dinstein, Y., The International Law…, at p. 51

218 Shany, Y., 'Faraway, So Close...,' at p. 12

219 Pictet, J.S., Commentary on the Geneva Convention..., at p. 275

220 Thürer, D., 'Current Challenges to the Law...,' at p. 20

Connected to operating through the local authorities is whether the holding of an election and handing over of governmental control could serve as indication of the end of occupation? Analysing from the concept of self-determination, it is doubtful if merely the holding of election would be considered sufficient. Indeed election "is only a first and formal step towards the realisation of the principle" of self-determination.[221] A number of issues therefore needs to be considered such as the procedures of election, the free and fairness of its nature, citizens' participation and "the handover of governmental control in the substantive sense can be determined on the basis of the timing of the democratic elections by the local population in occupied territory."[222] In the context of Iraq in 2004, some have argued that, though the then Interim Government had received widespread recognition and was considered legitimate, the validity of its sovereignty is in doubt as it was neither elected by the Iraqi people nor had effective control over the Iraqi territory.[223]

The conclusion to be drawn is that creation of a "new State" from the occupied territory which was truly on the basis of a realisation of self-determination may end the occupation of that territory whereas the installation of a puppet government does not.

Termination where Boundary is Disputed

This is a question that involves both the territorial integrity of a State which is ius ad bellum issue and the question of the applicability of the law of occupation which is ius in bello issue. Could it be said that in this situation the operation of one must give way to the other, i.e. will the law of occupation continue to apply until final settlement on the status of the territory is adjudged? Or that the law of occupation is not applicable because of the status of the territory? The opinion of ICJ on Israel with respect to Occupied Palestinian Territory is not applicable where a boundary is disputed. The reason being, in the Separation Wall case it is legally undisputed that the OPT is not part of the Israel territory. All questions bordering on the status of

221 Arai- Takahashi, Y., The Law of Occupation..., at p. 21

222 Idem at p. 20

223 Carcano, A., 'End of the Occupation in 2004?...,' at p. 49

territory as being claimed by Israel is not a legal issue but rather political. But in this situation one is dealing with a case where a State considers a territory to legally belong to it. The question therefore of when it will withdraw is not in the offing. The best solution to would be that the population in the territory should be given the opportunity to freely determine their future in line with the principle of self-determination.

The ICJ had pointed out in the Western Sahara Advisory Opinion that article 1(2) and articles 55 and 56 of the UN Charter on self-determination "have direct and particular relevance for non-self-governing territories".[224] And in the South-West Africa[225] opinion the ICJ had stated that "... the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them."[226]

If the applicability of the law of occupation is adopted, it continues to apply until a final solution is found.

Rejection of Termination by the Local Population? The attitude of the occupied population has

influence with regard to the changes brought about by the circumstances in the occupied territory.[227] Could it therefore be said that where the occupied population accepted the government established by the occupying power though, as puppet as it may be the occupation has ended? Or where the occupied population out rightly rejected the termination of the occupation and continue to regard the occupying power as the legitimate government of the occupied territory that the occupation continues since practice has now shown that sovereignty inheres in the population rather than the ousted government?

It is suggested here that by the combined effect of the principle of self-determination and the fact that sovereignty inheres in the population of the occupied rather than the ousted government, the interest of the population should be given paramount consideration. This is because

[224]Western Sahara opinion [1975] 1CJ Rep at p. 12 para.54
[225]South-West Africa) opinion [1971] ICJ Rep at p. 31
[226]Idem at p. 31
[227]Benvenisti, E., The International Law…, at p. 183

of the consideration that since of law of occupation especially the GC IV is intended to provide protection to the population and it may well have been that the population feels secured under the occupying power. In this unique situation, unless the occupying power facilitated the installation of a legitimate government acceptable to the local population, situation of occupation may not be considered ended.

Ceasefire?

Where there is a ceasefire of hostilities, could it be considered as end to an occupation which resulted from the hostility? In the contemporary situation, the effect of ceasefire is equated with that of armistice.[228] Like armistice, ceasefire could be general or local which as the names suggest, the effect of general is to suspend belligerent military operation in all the territories of the enemy while local restricts the suspension of hostilities in certain parts.[229] An important difference between ceasefire and armistice is that more often, ceasefire is a prelude to the conclusion of an armistice between the belligerents hence it does not terminate but suspends hostilities.[230]

Typical situation of ceasefire is that of the Golan Height occupied by Israel since 1967 (where hostilities have been punctuated by ceasefires but no peace treaty – to which Dinstein said (as long as the state of war between the two countries is not terminated, the Golan Heights are under Israeli belligerent occupation).[231]

If the UN Security Council ordered ceasefire, could that affect the territory that comes under occupation during the conflict? The Security Council as noted above has the primary responsibility of maintaining international peace and security and therefore could order the belligerents to conclude a ceasefire agreement which will be binding on the parties.[232] It is argued here that since ceasefire merely suspends the hostilities, absent any express authorisation to the contrary, such resolution of the Security Council which

[228] Heintschel von Heinegg, W., 'Factors in War to Peace...,' at p. 855
[229] Idem
[230] Ibid
[231] Dinstein, Y., The International Law…, at p. 19.
[232] See article 25 of the UN Charter

merely authorises ceasefire and nothing more does not terminate the belligerency[233] neither does it brings about an end to occupation. The law remains that rules of occupation continue to apply despite the general close of military operation as long as the functions of government continue to be exercised by an occupying power.[234]

Prescription

Could occupation of a territory for a long period of time absence the continued existence of hostilities amount to prescription conferring the title of the territory to an aggressor State thereby ending the state of occupation? Dinstein on the authority of the ICJ in the Palmas Case[235] and Shaw[236] thinks such a situation could exist. This does not however square with the law of occupation. In prescription, the territory is uncontested over a long period of time whereas in the case of occupation, normally the occupied will continue to challenge the presence of the occupying power in the territory. In this situation therefore, the occupying power does not acquire title to the territory, moreover as discussed earlier, the UN Charter and other UN resolutions have forbidden acquiring territory by the use of force.[237]

Legal Effects of Termination of Occupation

The most fundamental legal effect of the end of occupation is that sovereignty is restored to the occupied power and authority of the occupying power lapses.[238] As early as 1877 it was considered that since the power of the occupier was based on the force he exercises, when such physical force ceased by the end of the occupation the

[233] Heintschel von Heinegg, W., 'Factors in War to Peace...,' at p. 856

[234] See Article 6(3) GC IV and Art. 3 (b) AP I

[235] "continuous and peaceful display of State authority during a long period of time" in the words of Arbitrator M. Hubert in Island of Palmas case (Netherlands v USA) (1928) 2 RIAA at p. 869.

[236] Relying on Shaw, M.N., International Law (5th edn, Cambridge, Cambridge University Press 2003) at p. 426 stated "title may be acquired by the State in charge through prescription, although that would be contingent on a peaceful and uncontested possession over a protracted period of time through presumed acquiescence".

[237] See the discussion on annexation above

[238] Dinstein, Y., The International Law…, at p. 284.

powers of the old sovereign are restored automatically.[239] This obviously means the application of the law of occupation will cease, the occupying power will be released from the obligations imposed by the status of "Occupying Power" such as ensuring that the population of the occupied territory has access to food, or other essential supplies as mandated by article 55 and 56 of GC IV and article 69 of AP 1. Where however, civilian internees or detainees are in the territory of the occupying power and their internment or detention is connected to the occupation, the law of occupation will continue to apply until their final release and repatriation.[240]

The status of civil concluded during the occupation when such occupation ends was not addressed. There was such discussion during the Brussels Code negotiations but no meaningful conclusion was reached due to differences of opinions expressed by the delegates.[241]

With respect to the acts of the occupying power during occupation, several opinions have been expressed. A view was elaborated that the returns of legitimate sovereign renders political acts of the occupier void unless of course consented to before it was performed, by the people, whereas all other "non-political acts" will remain valid only to the extent of their consistency "with the organic law of the nation" at the time they were performed.[242] A slightly different opinion was expressed by Bluntschli that the legitimate sovereign should recognise all non-political acts of the occupying power as long as they were performed 'within his sphere of power' but recognition of political acts or payment of public debts contracted by the occupying power is not necessary.[243] Corollary to this is that acts performed contrary to international law by the occupier or

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[239]Funck-Brentano, T. and Sorel, Albert, Précis du Droit de Gens, (Paris 1877) pp. 275-6, 328-30 (see Graber, D.A., The Development of the Law..., at p.50)

[240] See Article 6 (3) GC IV

[241] Graber, D.A., The Development of the Law..., at p. 47-8

[242] Field, David D., Outlines of an International Code (2nd edn., New York 1876) pp. 482-484 (see Graber, D.A., The Development of the Law..., at p. 51-52).

[243] This is the opinion of Bluntschli in Bluntschli, J.K., Das Moderne Voelkerrecht…, cited in Graber, D.A., The Development of the Law..., at p. 52

in excess of its powers may be ignored by the restored sovereign. The restored sovereign may however not pass laws retroactively.[244]

Similarly, when occupation ends, only occupier's acts performed in conformity with 'the established constitution and administrative practice and which were necessary and useful are considered legally effective' while all other acts lie at the discretion of the legitimate sovereign.[245]

In 1945 the Criminal Court of Heraklion took the view that where the occupying power enacted legislation in the interest of public order and safety hence under its powers under international law, private rights arising from such legislations are valid and are to be respected.[246] It would be considered a matter within domestic jurisdiction of a formally occupied State if its population either directly or through their representatives voted for the adoption of the measures installed by the previous occupying power.[247]

Conclusion

The article looked at certain situations from State practice which may or may not have impact on the law of occupation. In this light, the conclusion of a peace treaty between the occupying power and the occupied has been considered a valid mode of terminating occupation. This is because the treaty has provided for the final status of the territory as agreed by the parties.

Another situation considered is the effect of a strong resistance by forces of the occupied State or the local population. It has been shown that strong resistance could significantly impact on the effective control power of the occupant. Where the Occupant has been defeated under these situations or was driven out from the occupied

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[244]Idem

[245]Ibid at p. 51: see also Oppenheim, L., International Law: Dispute at p. 487 that postliminium leaves unaffected acts of the former Occupying Power which were done in conformity with the applicable law and the restored sovereign is under obligation to recognise them.

[246] Ferraro, T., 'Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities' (2008) 41 Israel Law Review, at p. 351

[247] Heintschel von Heinegg, W., 'Factors in War to Peace...,' at p. 865

territory thereby surrendering effective control, the territory is no longer considered occupied.

Similarly, withdrawal of the enemy forces which genuinely signifies surrender of effective control to a displaced sovereign would bring an end to occupation. The intention to restore or surrender effective control should however be clear and there is no termination where the withdrawal is merely a proclamation while in reality, control is retained by the occupying power.

There are situations when an occupying power may unilaterally terminate its occupation. Where these exist and control is restored, occupation has ended. Similarly, in some cases the forces of an occupying power may continue to remain in a previously occupied territory pursuant to an agreement or where consent for their continued presence has been given. In this situation, the occupation would be considered terminated notwithstanding the continued presence of foreign forces. The consent must however be valid and it must be granted by a legitimate government.

The establishment of an effective and functional government in the occupied territory pursuant to the principle of self-determination would also terminate occupation while annexation of an occupied territory by an occupying power by whatever way is illegal and does not end an occupation.

The United Nations Security Council has enormous powers especially when acting under chapter VII of the UN Charter. The Security Council has the power to override certain international law provisions and the members have agreed under the Charter UN to abide by the resolutions of the Council. To that extent, a binding Security Council resolution may bring an end to occupation in a given situation.

From historical perspectives, it has been shown that an occupying power has in many instances operated or acted through the government of the occupied State for reasons which may include administrative convenience. In other situations, the occupier has even restored a limited power to the occupied State. The position is that notwithstanding these developments, the law of occupation will continue to apply.

Similarly, the law of occupation will continue to apply to a situation where the occupier created a new State from an occupied territory if such situation does not meet with the requirement of self-determination. The installation of a puppet government by the occupying power while effective control is retained by the latter does not also absolved the occupier from its obligations under the law of occupation.

It is suggested that where there is a dispute on the status of a territory which has become subject of occupation, the law of occupation should continue to apply until when a final solution between the parties has been found. This is to ensure that civilians are not left without adequate protection.

The position where the local population rejected the termination of an occupation is not clear but it is suggested that self-determination of the people should be a guiding principle while the conclusion of a ceasefire merely brings about interruption in the conduct of hostilities and does not brings an end to an occupation even if such ceasefire was ordered by the Security Council. This would continue to be the case unless a binding resolution to that effect is adopted by the Council.

The concept of prescription does not equally apply to situation of occupation. Prescription being a continuous, uncontested and peaceful display of sovereignty over a territory is not the same as occupation because in occupation the title to an occupied territory is always asserted by the displaced sovereign.

Some of the challenges observed in the course of this research from the materials consulted revealed the following:

i. **Denial of the existence of occupation by an occupying power and hence signifying its intention not to observe and apply the relevant provisions of the law of occupation.**
ii. **The law of occupation is not geared towards addressing prolonged occupation despite the widely acknowledged temporary nature of occupation.**
iii. **Tendency is emerging where the notion of occupation is going beyond the traditional conception where one State belligerently occupies**

the territory of another. It is being considered now to encompass peacekeeping forces which certainly impacts on when occupation should be considered ended.

iv. **Geneva Conventions have essentially no accountability mechanisms under which the occupied territory (or the individuals within it) can challenge an occupying power's acts. The Geneva Conventions create no reporting requirements, they provide for no judicial review of the occupying power's acts, and they contain no requirements for a consultative process.**

v. **Occupation is an end goal rather than a temporary by-product of military intervention,[248] 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**

vi. **The international law of occupation is generally disregarded by occupying powers.**

[248] **Goodman, D.P., "The Need for Fundamental Change..., at p. 1592-3**