military occupation and state-building under international law

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1. The scope of application of the law of occupation (LoO)

2. Application of Human Rights Law (HRL) in times of occupation and interaction with the LoO

3. Obligations of the occupying power: the conservations principle as one of the cornerstones of the law of occupation

4. Application of the law of occupation to State-building operations
1. Scope of application of the LoO

Applicable rules

- The regulations annexed to the **1907 Hague Convention (IV)** respecting the Laws and Customs of War on Land (Section III – Military Authority over the territory of the hostile State)
- **IV GC** (Part III, Section III. Occupied territories)
- **I AP** (art. 1, par. 4, art. 14, 63, 69, 78).

NB. Some of these rules are considered as part of customary law.
1. Scope of application of the LoO

Issues

a) Degree of territorial control required
b) Link between occupation and armed conflict
c) Occupation of non-State territories
1. Scope of application of the LoO

Definition of occupation

Art. 42 HR

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Art. 43 HR

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

EFFECTIVE CONTROL
1. Scope of application of the LoO

a) Effective control

1) Invasion ≠ Effective control

“173. In order to reach a conclusion as to whether a State [...] is an “occupying Power” in the meaning of the term as understood in the jus in bello, the Court must [...] demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question.” (ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda, 19 December 2005) ----- ACTUAL CONTROL

“217. To determine whether the authority of the occupying power has been actually established, the following guidelines provide some assistance: - the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly” (ICTY, Naletilic and Martinovic, 31 March 2003)  

--------POTENTIAL CONTROL
1. Scope of application of the LoO

a) Effective control

2) Direct or indirect control

Authority may be exercised through:

- A military government
- A civilian administration (e.g. OPT)
- A Puppet Government (occupation by proxy)
1. Scope of application of the LoO

a) Effective control

3) Full control or Shared control

e.g. Occupied Palestinian Territories
1. Scope of application of the LoO

   a) Effective control

4) On-site control or External control

   e.g. Gaza Strip
1. Scope of application of the LoO

b) Occupation and armed conflict

1) Classic international law

Belligerent occupation v. Pacific occupation
(during a state of war) (in times of peace)

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<tr>
<td>Start</td>
<td>Declaration of war, occupation meeting with armed resistance</td>
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### 1. Scope of application of the LoO

#### b) Occupation and armed conflict

#### 2) Modern international law

<table>
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<tr>
<td><strong>Start</strong></td>
<td>Whenever a territory is occupied without the genuine consent of the local authorities</td>
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<td>“The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, <strong>even if the said occupation meets with no armed resistance</strong>” <em>(GCIV, art. 2.2)</em></td>
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<td><strong>End</strong></td>
<td>Irrelevance of <em>debellatio</em> and annexation</td>
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<td>“Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention [...] <strong>by any annexation by the latter of the whole or part of the occupied territory</strong>” <em>(GCIV, art. 47)</em></td>
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<td><strong>End of actual control or acquisition of genuine consent of local authorities</strong></td>
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<td>“In the case of occupied territory, the application of the present Convention shall cease <strong>one year after the general close of military operations</strong>; however, the Occupying Power shall be bound, <strong>for the duration of the occupation</strong>, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143” <em>(GCIV, art. 6.3)</em></td>
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<td>“The application of the Conventions and of this Protocol shall cease, [...] in the case of occupied territories, <strong>on the termination of the occupation</strong>” <em>(art. 3, IAP)</em></td>
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1. Scope of application of the LoO

b) Occupation and armed conflict

❌ Belligerent occupation v. pacific occupation

✓ Hostile occupation v. consensual occupation
1. Scope of application of the LoO

c) Non-State territory

Art. 1 IAP

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

see also ICJ, Wall, 2004
CONCLUSION

The LoO applies whenever a foreign power exercises its effective control over a territory which is not subject to its sovereign authority, without the consent of the sovereign power of that territory – or, in the case of territories which are not subject to the sovereignty of any State – of the people living on that territory.

Hostile occupation
1) Application of HRL

- HRL applies in times of war
  
  **Derogations are possible**

- HRL applies to all persons subject to the jurisdiction of the State
  
  **Foreign territories over which a State exercises its effective control fall within its jurisdiction** (e.g. ECHR, Loizidou, 1995; HRC, Concluding observations: Israel, 2003)

**N.B. HRL applies even to consensual occupations!**
2) Advantages of simultaneous application

- HRL provides for extensive procedural obligations (e.g. ECHR, Al-Skeini, 2011)
- HR treaties provide for mechanisms of control which are much more effective than the ones existing under IHL (e.g. treaty based bodies and courts)
3) Problems posed by the interaction LoO/HRL

- Rights protected only by LoO
- Rights protected only by HRL
- Rights protected by both?
  - LoO is lex specialis (ICJ, Wall 2004)
  - Favor victimis (1AP, articles 72 and 75)
2. Application of HRL and interaction with LoO

AP 1, Art. 72 - Field of application

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.
AP I, Art. 75(8)

No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.
2. Application of HRL and interaction with LoO

- But: **ECHR, Hassan v. UK, 2014**

1) Detention of civilians and PoW during an armed conflict or occupation, as provided under GCIV and III respectively, is not congruent with any of the grounds of detention provided under Article 5 ECHR;
2) The UK did not purport to derogate under Article 15 from its obligations under Article 5;
3) Even in situations of international armed conflicts, the safeguards under the ECHR, if not derogated, continue to apply, albeit interpreted against the background of the provisions of IHL;
4) The grounds of permitted deprivation of liberty under Article 5 **should be accommodated, as far as possible,** with the taking of prisoners of war and the detention of civilians who pose a risk to security.
2. Application of HRL and interaction with LoO

PROBLEMS WITH THIS APPROACH

1) This accommodation, is a rather risky operation, what does “as far as possible” mean? Where is the limit of this accommodation endeavor?

2) The choice to draft article 5 as such, providing for an exhaustive list of permissible grounds of detention, was deliberate. Drafters could have used the wording of article 9 of the ICCPR which prohibits “arbitrary” detention, but they didn’t!

3) What’s the point in providing for derogations under article 15 ECHR for the times of armed conflict, specifying that such derogations must comply with IHL, if the respect of IHL is always considered as sufficient to fulfill human rights obligations such as that under article 5, in times of armed conflict?
3. The conservationist principle

Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 64(1) GVIV. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.
3. The conservationist principle

When may the occupier be considered “absolutely prevented” from respecting the laws in force in the occupied territory?

1. “Military necessity”

2. “Normative necessity”
   - Respect for IHL
   - Nowadays also respect for HRL?

Risk of HR imperialism!

Local laws may be suspended only insofar as they conflict with customary norms of HRL.
The term state-building is used to describe a heterogeneous category of multinational operations, whereby States and/or International Organization engage in the construction, reconstruction or strengthening of the democratic institutions of a foreign country.

[VON BOGDANDY et al., 2005]

Types of State-building operations:

1. Post international conflict State-building (e.g. Austria, Germany and Japan after WWII, Afghanistan, Iraq)
2. Post internal conflict State-building (e.g. Somalia, Cambodia)
3. Building of new States (e.g. Bosnia and Herzegovina, East Timor)
4. Other cases (e.g. Kosovo).
3. Occupation and State-building

The issue

Is the law of military occupation applicable to these operations? And if so, to what extent?

State-building openly pursue a “transformative goal”, whereas one of the cornerstones of the law of occupation is the “conservationist principle”

The occupier is considered to be “absolutely prevented” from respecting the laws in force in the occupied territory only in cases of:

- Military necessity
- Humanitarian necessity
- Human rights necessity

None of these exceptions justify State-building!

“a ‘reformist occupation’ is a virtual oxymoron”

[Fox, 2012]
3. Occupation and State-building

Applicability of LoO

a) Not all State-building operations fall within the scope of application of the law of occupation:

1- Exercise of governmental powers v. Supervision

Art. 42 HR. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Effective control!
e.g. The case of Bosnia and Herzegovina

Dayton Agreements (1995)

Parties request the designation of a **High Representative**, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement (*Annex 10, art. 1*).

The HR was designated by the *Peace Implementation Council*, and its appointment was endorsed by the SC.

No direct exercise of governmental powers by the UN or foreign States!
3. Occupation and State-building

Applicability of LoO

a) Not all State-building operations fall within the scope of application of the law of occupation:

2. LoO does not apply to consensual operations

Validity of consent

1. It must come from the legitimate authority of the occupied country
2. It must be an expression of the free will of the legitimate authority (Art. 52 of the 1969 VC)
a) The UN Transitional Administration in East-Timor (UNTAET)


2. Consent of Indonesia and Portugal (agreement 5 May 1999), and of the local population (referendum 30 August 1999)

Law of occupation does not apply!
b) The UN Interim Administration Mission in Kosovo (UNMIK) and the Kosovo Force (KFOR)

1. Established by the Security Council, through Res. 1244(1999)
2. Consent of the FRY (agreement 2 June 1999), obtained only after the military operation led by NATO without prior authorization of the SC

Although in Res. 1244 (1999) the Security Council does not explicitly endorse the military operation led by NATO, it endorses the “product” of that operation, i.e. the 2 June 1999 Agreement. This could prevent us from considering that agreement null and void on the basis of Article 52 of the VC, because the use of force made by NATO cannot be considered «in violation of the principles of international law embodied in the Charter of the United Nations».

Controversial case!
c) The case of Iraq after 28 June 2004

*Puppet government?*

1. Transfer of power from the Coalition Provisional Authority to the Interim Government of Iraq (IG)
2. Request from the IG for foreign troops to remain in Iraq, in order to assist them in the fight against rebels and terrorists

Authority of the IG at that time was still not firmly established

**But**

Security Council recognized the IG as the only sovereign authority in Iraq, and endorsed the agreement reached by the IG and the former occupying countries (res. 1546 (2204))

*Law of occupation does not apply!*
N.B. Although the LoO does not apply to consensual operations, State-builders are bound to respect HRL, insofar as they exercise effective control over the territory.
3. Occupation and State-building

Applicability of LoO

b) Irrelevance of the causes espoused by the occupier

**Bad occupiers v. good State-builders**

While occupying powers seek purely geostrategic objectives, State-builders pursue the enhancement of the rights of the local population, in the assumption that human rights would be better protected by democratic institutions, and that democracy would help the cause of peace.

**But**

“the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, **without any adverse distinction based** on the nature or origin of the armed conflict or **on the causes espoused by or attributed to the Parties to the conflict**”

[Preamble to Protocol I to the CG, 1977]
3. Occupation and State-building

IF STATE-BUILDERS

1. Exercise governmental powers
2. Without the consent of local authorities

The operation falls, in principle, within the scope of application of the law of hostile occupation
3. Occupation and State-building

**Derogations to the law of occupation**

When their mission involves the exercise of governmental powers without the legitimate government’s consent, State-builders can legitimately achieve their aims only if a specific derogation to the traditional international regime of occupation is introduced.

- **Derogations authorised by the Security Council**
- **Derogations agreed upon by the local authorities**
3. Occupation and State-building

A) Derogations authorised by the Security Council

«in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail»

[Art. 103 UN Charter]
A) Derogations authorised by the Security Council

Limits:

1- **Functional limit** – the SC may authorise derogations to the law of occupation only to the extent that this is necessary in order to ensure international peace and security.

2- **Internal normative limit** – Art. 24 (2) UN Charter:
   “In discharging [its] duties the Security Council shall act in accordance with the *Purposes* and *Principles* of the United Nations”

3- **External normative limit** - Respect for *jus cogens* +
   Strict interpretation of any derogation
The case of Iraq before 28 June 2004

Res. 1483 (2203)

• Qualifies the US and the UK as occupying Powers and urges them to respect the law of occupation

• Entrusts the Coalition Provisional Authority with the mission to facilitate the process of formation of new democratic institutions in Iraq

1. Institutional reforms (endorsed by SC, res. 1546 (2004) and by a referendum)

2. Economic reforms? (e.g. CPA orders n. 12 (on custum duties), n. 39 (on the establishment of foreign companies in Iraq), nn. 40 and 94, on banking)
B) Derogations agreed upon by the local authorities

- Article 47 GC IV - “protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention ... by any agreement concluded between the authorities of the occupied territories and the Occupying Power”

Consensual derogations to the “conservationist principle” are admissible for as long as they are for the benefit of the local population.
The case of Japan
- **Potsdam Declaration** (26 July 1945) – The Allies laid down the conditions for the end of hostilities with Japan;
- **Instrument of Surrender** (2 September 1945) - the Emperor of Japan accepts the provisions of the Potsdam Declaration, including the occupation by the Allies of the territory of Japan, until such time as “there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government”.

«Pursuant to [the Instrument of Surrender and the Potsdam Declaration] your authority over Japan, as the Supreme Commander for the Allied Powers, is supreme for the purpose of carrying out the surrender. In addition to the conventional power of a military occupant of enemy territory, you have the power to take any steps deemed [...] proper by you to effectuate the surrender and the provisions of the Potsdam Declaration»

*Basic Initial Post-Surrender Directive to the Supreme Commander for the Allied Powers for the Occupation and Control of Japan – sent to Gen. MacArthur on 3 November 1945*
BIBLIOGRAFIA

ANNONI, L’occupazione “ostile” nel diritto internazionale contemporaneo, Torino, 2012


BENVENISTI, The international law of occupation, Oxford, 2012


