CONCEPTUALISING BELLIGERENT OCCUPATION UNDER INTERNATIONAL HUMANITARIAN LAW

By

Kasim Balarabe*

Introduction

International legal instruments and developed theories have made the ascertainment of commencement of belligerent occupation fairly if not sufficiently clear. These rendered denial arguments less likely or untenable in situations where the requirements or criteria exist. The instruments equally provided for the rights of the occupying and occupied powers and those of the occupied population. Similarly, limitations have been imposed regarding changes which can be introduced by the occupying power, the prohibition of annexation of a territory acquired through war and the relationship between occupying power and the occupied population regarding allegiance, forcible deportation, and collective punishment. Traditional and functional approaches equally provide basis upon which facts may be assessed to determining when occupation has commenced and the legal implications which necessarily follow. The law on commencement of belligerent occupation therefore, is fairly clear and settled.

With respect to the end of belligerent occupation however, the situation is hazy. Legal instruments and academic writings largely treated the issue as a question of fact determinable by the prevailing circumstances, hence no sufficient guide exists in the codes as to when belligerent occupation could authoritatively be considered to have ended. As fundamental in the life of a country as occupation is, this is an unfortunate situation which ought to have been addressed.[1] Although it is true that the end of occupation is a question fact, yet, there are identifiable features or situations,

BL (Nigeria), LLM (Geneva), LLM (VU Amsterdam), PhD Candidate (Maastricht, Netherlands), Lecturer, School of Law, Kampala International University. Email: kasim.balarabe@kiu.ac.ug

[1] This shall be the subject of next article on determining the end of belligerent occupation.

the existence of which have profound legal implications on the continued applicability of the law of occupation.

Factually, the control foreign forces exercise over an enemy territory determine the commencement of occupation. This customary rule is reflected in the provision of article 42 of the Hague Regulations annexed to the Fourth Hague Convention of 1907. The criteria under article 42 is that as soon as the enemy forces establish effective control in a foreign territory without the consent of the foreign State the rules of belligerent occupation become operational irrespective of the legality or otherwise of the use of force in the enemy territory. In other words, the law of occupation is *ius in bello* and its applicability is independent of the legality or otherwise of the use of force. In the separate opinion of Judge Kooijmans of the International Court of Justice in *Democratic Republic of the Congo v. Uganda* it was observed that:

> *"In particular, no distinction is made in the ius in bello between an occupation resulting from a lawful use of force and one which is the result of aggression. The latter issue is decided by application of the ius ad bellum, the law on the use of force, which attributes responsibility for the commission of the acts of which the occupation is the result. […]*
>
> "It goes without saying that the outcome of an unlawful act is tainted with illegality. The occupation resulting from an illegal use of force betrays its origin but the rules governing its regime do not characterize the origin of the result as lawful or unlawful."[2]

In this context, the distinction between *ius in bello* and *ius ad bellum* in International Humanitarian Law (IHL) and law of occupation is vital from both theoretical and practical perspectives. The civilian population in the occupied territory must at all times be protected irrespective of whether the occupation is legal or illegal. If the applicability of the law of occupation depended on the validity of the use of force by the occupier, the civilian population may be left without adequate protection. Because all that the occupying power is obliged to establish is that its action is justified under the circumstances and

[2] Separate Opinion of Judge Kooijmans in the *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v.* Uganda) International Court of Justice, Merits [2005] ICJ Rep. Paras 58 and 60 at p. 321 (*Armed Activities* case)

hence entitled to administer the territory in a manner consistent with its desires. But the law of occupation ensures that certain rules are observed by the occupying power and certain changes are not made and certain actions are not taken. The law puts limits to the powers exercisable by the occupying power.

Historical Regulation of Belligerent Occupation

The historical regulation of belligerent occupation can be traced fairly recently. Before the late nineteen century there appears to be no sufficient interest in regulating this situation. The main interests which generated attention for regulations are issues such as who has the right to wage war, concept of just war, war as obligatory or voluntary etc. Until the time when war may only be resorted to when all other means of settling disputes have failed, there was not a legally binding international instrument from which the actions of a belligerent occupier can be measured.

It is true that from historical perspectives, judicial decisions and legal writings have reflected on the concept and nature of belligerent occupation,[3] but not much attention was paid to it until the nineteenth century when it began to be developed as specialise part of the law of war. A graphic illustration of what occupation was considered to be from the ancient time to the nineteenth century can be seen in the work of Graber:[4] As far as the regulation of belligerent occupation is concerned, initially an occupier was regarded as having absolute ownership of the territory occupied. The occupier has the power to exercise all rights of ownership of the territory with the right to treat the inhabitants as desired.[5] There was no limitation to what can be undertaken as long as the occupier continued to have effective control over the territory.

However, this position was challenged by the writings of Grotius, Bynkershoek and Purfendorf which greatly impacted on the modern concept of occupation and in fact have laid the "foundation for the subsequent development of the law of belligerent occupation."[6] Through this foundation, the law

[3] See Graber, D,A., *The Development of the Law of Belligerent Occupation 1863-1914; A Historical Survey* (New York, Columbia University Press, 1949) at p. 14
[4] *Idem* at p. 13.
[5] *Ibid*
[6] *Ibid*

develops through practices and modifications to its current position.

History of occupation gained significance on account of the prolong nature and the extents of the Napoleonic wars and the two world wars.[7] The occupations flowing from these periods put to test the law as contained in The Hague Regulations in a number of occupations. These were notably the occupation of Dodecanese Islands by Italy in 1912,[8] when Italy subsequently ceded the Islands after First World War under the Lausanne Treaty of Peace 1923,[9] because as stated, it was initially conceived that military occupation of an enemy territory could lawfully confer title of sovereignty to the occupier over the territory.[10] Other notable occupations were Germany in occupied Belgium from 1914 to 1918 and British occupation of Basra in Iraq which ended in 1921.[11] Similarly other instances of occupations took place after the Second World War such as the British occupation of Libya from 1942 until after the war.[12] With this in mind, the history of belligerent occupation could be said to have developed in two phases:

1. The period from the late nineteenth century to the conclusion of The Hague Conferences 1899 and 1907; and
2. The period during and after Second World War.[13]

The nature of the obligations of the occupying power in each of these periods depended on the understanding of the concept at the time;[14] from the unlimited powers of the occupying

[7]Verzijl, J.H.W., *International Law in Historical Perspective*, (Vol IX, Alpen Aan Den Rijn: Sijthoff & Noordhoff 1978) at p. 150

[8]Dinstein, Y., *The International Law...*, at p. 9. Citing Benvenisti, *The International Law of Occupation* (Oxford, Princeton University Press 2004).., stated that "myriad aspects of the policy and practice of the Occupying Power were put to the test of the Hague Regulations and found wanting".

[9]*Idem*

[10]Verzijl, J.H.W., *International Law...*, at p. 151

[11] Wilson, A., *The Laws of War in Occupied Territory* (Transactions of the Grotius Society, Vol. 18, Problems of Peace and War, Papers Read before the Society in the Year 1932 (1932)), pp. 17-39 at p. 17

[12]Dinstein, Y., *The International Law...*, at p. 10 citing G .T. Watts, 'The British Military Occupation of Cyrenaica, 1942-1949',37 TGS 69-81 (1951)

[13] Goodman, D.P., 'The Need for Fundamental Change in the Law of Occupation', (1985) 37 Stanford Law Review at p. 1575-6

[14] Under the first phase the occupying power is required not to disrupt the existing local structures in the occupied territory whereas the practice of the second phase

power to the recognition that certain actions may not be undertaken by the occupying power in the occupied territory. Nowadays, the rules on the powers and obligations of the occupying power are detailed and contained in international conventions notably, the Geneva Conventions.

Determining the existence of belligerent occupation is not dependent on the pronouncement of any particular institution, however, some factors such as judicial decisions and judicial pronouncements have assisted in this regard,[15] while the United Nations Security Council has also played a similar role.[16]

The notion and nature of "Belligerent Occupation"

The phrase belligerent occupation was a translation from the Latin phrase *occupatio bellica,*[17] which was initially regarded as the effect of war phenomenon where effective control of a territory fell to the enemy resulting from a fight.[18] This was because occupation was conceived to have an "inextricable" link with war among States (however, this conception was reversed by

suggested that fundamental changes can be made in the occupied territory, although the Geneva Conventions did not substantially alter the law's traditional focus. See Goodman, D.P., "The Need for Fundamental Change..., at p. 1575-6

[15] See Dinstein, Y., *The International Law*…, at p. 11-2 citing ICJ in the *Armed Activities* case at 310; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion (2006) 43 ILM 1009 at 1031(*Separation Wall* opinion); *Prosecutor v.LubangaDyilo,* International Criminal Court, Pre-Trial Chamber (2007) 101 AJIL 841 at 843; ICTY in the following cases: *Prosecutor v. Rajic'* (ICTY, Trial Chamber) (1996) 108 ILR 142at 160-1; *Prosecutor v. Blaskic* (2000), 122 ILR 1 at 64; *Prosecutor v. Naletilic' et al* (ICTY, Trial Chamber, 2003), para. 587; Eritrea Ethiopia Claims Commission, Partial Award (Central Front), Ethiopia's Claim 2, (2004) 43 ILM 1275 at 1282; *Loizidou v. Turkey* European Court of Human Rights, Merits (1997) 36 ILM at p. 453-4.

[16] See United Nations Security Council Resolution [UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483] which called the United States of America and the United Kingdom of Great Britain and Northern Ireland in Iraq as "occupying powers".

[17]Dinstein, Y., *International Law* …, at p. 31.

[18]Benvenisti, E., *The International Law of Occupation*, (Oxford, Princeton University Press 2004) at p. 3. Benvenisti however argued that twentieth century history has shown that even the threat of force leading to the concession by the occupied government of effective control could amount to Occupation citing the German Occupation of Bohemia and Moravia in March, 1939.

article 6 of the Geneva Convention IV).[19] The word "belligerent" is rarely used recently except in very limited circumstances,[20] probably because of the odious nature attached to it.

In establishing the existence or commencement of occupation, certain conditions are required to be satisfied. There are four conditions:

1. That the occupant should have physical control of the region;

2. That there should be full intention to exercise the rights of an occupant;

3. That the occupant has a complete power to use his authority continuously and repeatedly; and

4. That the authority is uncontested in the region.[21]

These conditions are cumulative and strict in nature and where situations exist creating doubt as to their clear existence, occupation has not commenced. Military manuals such as those of the United Kingdom, the existence of occupation centred on whether the control an enemy has on a territory is effective.[22] In other words, it is the level of effectiveness and not mere pronouncement that determines the existence or otherwise of occupation. Aside other arguments advanced which would follow later under functional occupation, legal experts have not completely dismissed the requirement of effectiveness as the legal yardstick. Of particular and specific reference, Benvenisti was of the opinion that occupation is the "effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no

[19]*Idem*. Article 6 GC IV provided that the Convention applies to situations of partial or total Occupation even if not met with armed resistance. Dinstein cited the example of German Occupation of Denmark in 1940.

[20] According to Benvenisti this could be because many Occupants are "reluctant to admit the existence of state of war or of an international armed conflict" or even a "failure to acknowledge the true nature of their activities on foreign soil".

[21]Waxel, Platon de, L'Armée d'Invasion et la Population. (Leipzig: 1874) at p. 77 (See Graber, D.A., *The Development of the Law...*, at p. 51.

[22] See UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, (Oxford, Oxford University Press 2004) at p. 275

sovereign title, without the volition of the sovereign of that territory".[23] Control of a foreign land accompanied by lack of consent on the part of the owner distinguishes the existence of belligerent occupation from another category of occupation termed, consensual occupation. Under the current law of armed conflict, occupation takes place only in international armed conflicts. However, one important question to draw attention from Benvenisti's comment is the idea expressed that even United Nations could, in certain circumstances be considered an occupying power.

The powers of the Security Council no doubt, are enormous and decisive pursuant to which force can be used against any State as long as authorisation had been issued under chapter VII. However, the preliminary question begging response is whether, in the first instance, the United Nations is bound by IHL with which to assess United Nations compliance or otherwise. It makes no point to term a situation as occupation if the supposed occupier is not obliged to respect the rules regulating the concept of occupation.

While several arguments have been canvassed for and against the obligation of United Nations to comply with IHL the conclusion subscribed to here is, undoubtedly, some of these rules have formed part of customary law binding and applicable to all irrespective of treaty obligations but three countervailing points must be noted.

Firstly, it is true that independent forces for the United Nations was envisaged by the UN Charter. However, decades later, the United Nations is yet to acquire one. It is accepted that when States have (voluntarily) contributed forces to a United Nations mission abroad, such troops are under the umbrella of the UN, the contributing States however, continue to maintain significant control over their contingents rendering argument as to the independence of the UN to determine absolutely course for the troops a hollow one. This does not however obviate the responsibility under treaties of the contributing States.

Secondly, if it is accepted that such forces are absolutely under the control of the United Nations and hence separate from their sending States, the problem of obligation becomes obvious.

[23]Benvenisti, E., *The International Law*..., at p. 4.

Notwithstanding the universality and relativity of IHL rules, to the extent IHL remains treaty rules exonerated the United Nations from obligation as such rules were negotiated and binding only *erga omnes partes*.

Thirdly, could it be said with certainty that the United Nations forces could be prosecuted for violation of IHL rules at the international level? No doubt United Nations forces in several missions such as those in Liberia, Congo, Bosnia and Haiti were alleged to have committed sexual offences such as rape and trafficking in women. Despite international outcry and calls for justice, it appears these troops enjoy the immunity being under an international organisation. As it stands currently, there exist no rules demonstrating the culpability of United Nations forces while on mission.

From this traditional conception of the notion of occupation, effective control of a territory is fundamental. This connotes "the degree of control" necessarily required to bring about belligerent occupation.[24] Such control occurs "when a party to a conflict enters a foreign territory and oust the local sovereign."[25] The ousting of the sovereign has to be in fact and it must be demonstrated that the ousted sovereign no longer exercises control over the territory due to the existence and exercise of power by the occupier. Occupation is "a specific situation where the armed forces of one or more States are for a certain period of time present in the territory of another State without the consent of the latter."[26] This stresses the non-permanence and non-consensual nature of occupation. However, history has demonstrated instances where States have annexed some occupied territories. Similarly, the current situation in the Palestine which presently, there seems to be no effective solution and which its possibility of ending is not near confirms and challenges this position. It is true that the occupation is non-consensual and it is characterised by crises frequently but

[24] Rubin, B., 'Disengagement from the Gaza Strip and Post-Occupation Duties' (2010) 42(3) Israel Law Review, at p. 534

[25] Goodman, D.P., 'The Need for Fundamental Change...,' at p. 1574

[26] Bothe, M., 'The Beginning and End of Occupation' in the Proceedings of the Bruges Colloquium, *Current Challenges to the Law of Occupation* (Collegium No. 34 Autumn 2006) at p. 26<http://www.coleurop.be/file/content/publications/pdf/Collegium%2034.pdf> accessed 15 July, 2015

demonstrated that occupation can run for a period never imagined or contemplated.

Walsh and Peleg conception focused on the occupied population as opposed to the displaced sovereign. According to them, occupation is "a *de facto* control, by a foreign military force, of a population which is ethnically, religiously, culturally, or nationally different from the occupant's population."[27] If this understanding is taken, it means that there cannot be occupation between States which share ethnic, religious or cultural characteristics. This indeed is doubtful. Take for example, the invasion of Kuwait by Iraq, where both countries are predominantly Muslims and Arabs with cultural affinities and historical relationships.

From the above positions, what appears derivable is that, a state of occupation exists when foreign forces are present in a foreign territory without consent and exert or exercise control or has the power to do so in respect of the governance and administration of that territory for a temporary period.

Purposes or motives for occupying another State's territory could be many such as "to implement territorial claims; to put pressure on an adversary to perform obligations under an already existing treaty; or else to negotiate a peace treaty; to prevent the use of occupied territory as a military base....; to protect a given area or section of the population against internal disturbances or against foreign attacks"[28] etc. As stated earlier, the legality or otherwise of an occupation is irrelevant to the application of IHL.[29]

There have been situations in the past where the main aim of the occupying power is to transform the occupied territory way beyond what was permitted in The Hague Regulations. Instances of this for example are the occupation of Germany after Second World War and Iraq after the regime of Saddam Hussein was

[27] Walsh, B., 'Human Rights Under Military Occupation: The Need for Expansion' (1998) 1 The International Journal of Human Rights, at p. 64

[28] Roberts, A., 'What is Military Occupation?'..., at p. 300

[29] See United States v. List 15 ANN (1948) Public International Law Cases at p. 637 ("International Law makes no distinction between a lawful and an unlawful Occupant in dealing with the respective duties of Occupant and population in occupies territory ... Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.").

ousted. Roberts termed this situation as "Transformative Occupation",[30] and Burke noted that "several orders of the Coalition Provisional Authority (CPA) were aimed at the regulation of areas which could not be considered strictly necessary under the laws of occupation" citing complete revision of investment law and reorganisation of tax system as examples.[31]

There are instances where the occupying power has only certain military interest of a periodic nature and once such goals have been achieved, the occupying power is no longer interested in the continuance of such occupation. This for example involves a situation where foreign forces are in a State for the protection of a population which is being oppressed by its own State. In this light, Benvenisti proposed what he called 'Limited-Purpose Occupation' as a situation which arises where "the invading troops have no intention to remain in control over the area once the military goal of the invasion is achieved".[32] The Coalition's occupation of Southern and Northern Iraq and the Israeli occupation of Southern Lebanon were cited as examples.[33]

As a prerequisite, existence of coercion distinguishes *occupatio bellica* from *occupatio pacifica,*[34] and the law of occupation is only applicable to *occupatio bellica.* Further, as an *ius in bello* issue, occupation once established, its motive is irrelevant, the legality or otherwise of such situation is settled by the law applicable to the use of force in international law.[35]

By its nature, belligerent occupation is temporary,[36] it is the "intermediate phase before peace or sovereignty is restored" or

---

[30] See Roberts, A., 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL at p. 580.

[31] Burke, N., 'A Change in Perspective...,' at p. 113

[32]Benvenisti, E., *The International Law* …, at p. 181

[33]*Idem*

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

[35] See the *Armed Activities* Case at p. 310

[36] This was indicated clearly under article 6 of the Oxford Code. See Graber, D. A., *The Development of the Law*..., at p. 37; Pictet, J.S., *Commentary on the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (ICRC Geneva 1958) at p. 275; Benvenisti, E., *The International Law* …, at p. 5; Jennings, R.Y., 'The Government in Commission' (1946) 23 British Yearbook of International Law, at p. 133; UK Ministry of Defence, *The Manual of the Law*..., at p. 278; Imseis, A., 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion' (2005) 99 AJIL at p. 103; Article 3 of the Lieber Code which speaks about suspension of laws during occupation.

pending the creation or establishment of a new administration.[37] Being temporary therefore, it does not deprive the occupied power its statehood or sovereignty;[38] it only interferes with its power to exercise its rights.[39] Arai-Takahashi commented that "[t]he most obvious legal ramification of the termination of the occupation is that the territory which has been hitherto occupied will be restored to the displaced sovereign."[40]

Once a situation of occupation exists and effective control established, some authorities considered that a duty is imposed on the occupying power to establish a government in the occupied territory which must be for a limited purpose.[41] Others however posited that though it is preferable, no such duty exists, rather, what should be done depends on the facts and circumstances of each case.[42] The occupying power is however required to, in principle, allow normal life to continue as much as possible within the occupied territory,[43] and the responsibility for public order, safety and welfare is on the occupying power since the *de facto*

---

[37] Burke, N., 'A Change in Perspective: Looking at Occupation through the Lens of the Law of Treaties' (2008) 41 New York University Journal of International Law and Politics, at p. 109

[38]Imseis, A., 'Critical Reflections...,' at p. 103

[39]Pictet, J.S., *Commentary on the Geneva Convention...*, at p. 275

[40] Arai- Takahashi, Y., *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden, Martinus Nijhoff Publishers 2009) at p. 16

[41] See for example US Department of the Army, Field Manual, *The Law of Land Warfare* 138 (FM 27-10, 1956) at paragraph 1362 {"Military government is the form of administration by which an Occupying Power exercises governmental authority over Occupied territory.") cited in Benvenisti, E., *The International Law….,* at p. 4 who also argued that the current position appears to be that such establishment of Government is an exception rather than the rule. See also Greenwood, C., 'The Administration of Occupied Territory' in Emma Playfair (ed) *International Law and Occupied Territory* (Oxford, Clarendon Press 1992) at p. 265; *Prosecutor v. Naletilic* et al. (ICTY, Trial Chamber, 2003), para. 21; UK Ministry of Defence, *The Manual of the Law*..., at p. 277 requires at least an arrangement for the administration of the territory to be made.

[42]Dinstein, Y., *The International Law*…, at p. 55 relying on the ICJ judgment in the *Armed Activities* case as a sounder opinion on the topic; see also *Tzemel Adv. Et al. V. (a)Minister of Defence, (b) Commander of the Ansar Camp* (Ansar Prison case), (Israeli High Court, 1982), (2003) 13 Israel Yearbook on Human Rights, pp. 360-64; Kelly, M.J., 'Iraq and Law of Occupation: New Tests for an Old Law' (2003) 6 Yearbook of International Humanitarian Law, at p. 130

[43] See article 43 of The HagueRegulations concerning the Laws and Customs of War on Land (annexed to Convention (IV) respecting the Laws and Customs of War on Land, 18 October, 1907 (Hague Regulations)

authority of the territory has passed to it.[44] The fact that control of the territory has passed to the occupier, it will be more reasonable for an effective government to be established which will see to the administration of the territory because allowing normal life to continue will require the continued existence of institutions and services necessary and these must be supervised or coordinated by an effective government.

Article 42 Hague Regulation requires not only effective control of an area but also the ability to exercise that authority.[45] This does not however meant stationing the troops in all the territories occupied,[46] it can be achieved for example by possessing the capacity to despatch troops within a "reasonable time to make the authority of the occupying power felt".[47] Some authors however considered physical presence of forces essential.[48] Physical presence, no matter how negligible the number, may demonstrates the *de facto* control of the occupying power. Where however fighting continues in a territory, such territory may not be considered as occupied.[49]

The existence of belligerent occupation confers rights and responsibilities on the occupier. As to the status of the occupier, some views have been expressed that the occupier is a trustee of the occupied territory,[50] because The Hague Regulations and GC

[44] See article 43 of The Hague Regulations

[45] See also ICJ in the *Armed Activities* case at p. 310-1; British Military Manual 1956; 'Tzemel Adv. et al. v. (a) Minister of Defence, (b) Commander of the Antzar Camp (1983) 13 IYHR 360 at p. 363

[46]Dinstein, Y., *The International Law...*, at p. 44. See also Bluntschli, J.K., *Das Moderne Voelkerrecht*, (3rd edn Noerdlingen 1878) at p. 308-412

[47]*Idem* citing *Naletilic*' Case at p. 217. This is also the view taken by UK Ministry of Defence, *The Manual of the Law...*, at p. 276

[48] Graber, D.A., *The Development of the Law...*, at p. 51. See also Breau, S.C., 'The Humanitarian Law Implications of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' in Susan C. Breau and Agnieszka Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law* (London, British institute of International and Comparative Law 2006) at p. 196.

[49] . Dörmann, K., and Colassis, L., 'International Humanitarian Law in the Iraq Conflict' (2004) 47 German Yearbook of International Law at p. 301.

[50] Wilson, A., *The Laws of War...*, at p. 38 available also at http://www.jstor.org/stable/743013 accessed on 20 July, 2015. Wilson observed that to ensure civilians in the occupied territory are protected, the military commander of the occupied territory should understand that he is acting as a trustee *pro tem*of the legitimate sovereign and concluded that "enemy territories in the occupation of the armed forces of another country constitute… a sacred trust, which

IV "can be interpreted as putting the occupier in a quasi-trustee role".[51] Von Glahn shares the opinion that the rights of the occupying power in the occupied territory are temporary and exercisable on a "sort of a trusteeship basis".[52] Dinstein, however, considered trustee concept in the law of occupation to be wrong as no premise of "trust between enemies in wartime is warranted." It is however more in accord to consider an occupier as an administrator of public property since article 55 of The Hague Regulations treated the occupying power as "administrator and usufructuary" and tilts more towards protecting the interest of the displaced sovereign. In this light, Jennings pointed out that "the law of belligerent occupation is designed to serve two purposes": (i) the protection of "the sovereign rights of the legitimate government of the occupied territory" (assuming such government continues to exist) and hence the denial of sovereignty to the occupying power, and (ii) the protection of the inhabitants of the occupied territory from exploitation.[53]

Recently, States practice on the existence of occupation is demonstrating that States are reluctant in framing their actions in foreign States as occupation and hence reluctant in invoking the relevant rules applicable to situations of occupation.[54] This according to Dinstein could "possibly" be "due to the odium attached to belligerent occupation by the appalling Nazi and Japanese record"[55] while to Roberts it "may be because of a fear of having to apply the full range of the law on occupation", and because also the word 'occupation' has adverse connotation as it "is almost synonymous with aggression and oppression."[56]States try to justify the non-applicability of the law of occupation to their

must be administered as a whole in the interests both of the inhabitants and of the legitimate sovereign or the duly constituted successor in title"; see also Sai, D.K., "American Occupation of the Hawaiian State: A Century Unchecked", (2004) 1 Hawaiian Journal of Law and Politics, at p. 70

[51] Roberts, A., 'What is Military Occupation?'..., at p. 295

[52] Gerhard von Glahn, *Law Among Nations* (4th ed., London, Macmillan Publishing Co.Inc. 1981) at p. 673

[53] Jennings, R.Y., 'The Government in Commission' at p. 135

[54]Benvenisti, E., *The International Law*…, at p. 5. According to him the occupants purport to annex or establish puppet government or simply refrain from establishing any form of government in the occupied territory. This is obviously a signal that the Occupier will not respect the law of occupation.

[55]Dinstein, Y., *The International Law*…, at p. 10

[56] Roberts, A., 'What is Military Occupation?'..., at p. 301

actions by referring to some claims,[57] and also by using terms which appeared to be more humanitarian in nature though some of them are incompatible with the legal consequences of occupation.[58] Whether or not States recognise their actions as amounting to occupation:

> *"Occupation law remains an important backstop for the use of military force that leads to belligerent occupation both during and after an armed conflict. Even if an occupying force chooses not to comply with or even recognize occupation law, at least the government and relevant officials executing the action are on notice and can be held accountable for violations during a belligerent occupation."*[59]

Similarly, the rules as they existed in The Hague Regulations were not adhered to especially during the Second World War. This for example was acknowledged by a judicial decision in the *Justice* trial decided by the American Military Tribunal. The Tribunal was of the view that on the basis of the "undisputed evidence" before it, "Germany violated during the recent war every principle of the law of military occupation".[60] It was because of these series of non-compliance that a new set of rules were devised in 1949 when the Geneva Convention IV Relative to the Protection of Civilian Population in times of War ("GC IV") was adopted as a response to the experience of the war.[61] The section on the legal framework will look into this issue in more details.

Recent practice is pointing towards the vanishing of the traditional HR and GC IV concept of an "ousted sovereign". Recently, sovereignty is more considered to be in the population

---

[57]Dinstein, Y., *The International Law*…, at p. 10 captured it quite correctly with respect to China dispatching troops to Tibet – by relying on 'old suzerain-vassal feudal relationship'; India relying on a claim that Goa is part of it when it militarily took it over and more recently the claim by Iraq for the invasion of Kuwait.

[58] Terms such as "protectorate, fraternal aid, rescue mission, technical incursion, peacekeeping operations ... liberation". (see Roberts, A., 'What is Military Occupation?'..., at p. 301

[59]Scheffer, D.J., 'Agora: Future Implications of the Iraq Conflict. Beyond Occupation Law' (2003) 97 AJIL, at p. 849

[60]*Justice* trial (Alstötter et al) (US Military Tribunal, Nuremberg, 1947), 6 LRTWC 1, 59. Cited in Dinstein., Y., *The International Law*…, at p. 10

[61]Benvenisti, E., *The International Law*…, at p. 59. At page 60 he cited as examples of disobedience to the HR by Germany, Italy and Japan with Italy annexing Ethiopia and Albania, Japan setting up puppets governments in Southeast Asia and Germany doing both.

of the occupied territory as opposed to mere State in its abstract form.[62]Attention is now focused on what the population of the territory desires and would better advanced their interests rather than the prescriptions of the ousted sovereign.

Regarding sovereignty, some authors have argued that with limited exception occupation does not affect sovereignty.[63] The UK Manual, 2004 for example, considered sovereignty to have just been suspended.[64] The Occupier only acquired *de facto* control of the territory while the ousted sovereign continues to retain title *de jure*.[65] The corollary to this is that the Occupying Power is prevented from considering the population of the occupied territory as its lawful subjects and should therefore not expect allegiance but obedience.

There is however the concept of *debellatio* which is to the effect that "[i]f one belligerent conquers the whole territory of an enemy, the war is over, the enemy State ceases to exist, rule on State succession concerning complete annexation apply, and there is no longer any room for the rules governing mere occupation."[66]*Debellatio* is "the extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated".[67] Expression of this principle can be found in early writings and manuals. For example, article 33 of the General Orders Affecting the Volunteer Force[68] considered it lawful to issue a Proclamation following a "fair and complete conquest" that a conquered Country or district is now permanently part of the victorious Country such that the subjects of the conquered Country can be forced into the service of the victorious Country. Relying on the theory of State under international law, Kelson noted that "the principle that enemy territory occupied by a belligerent in the course of war remains the territory of the State against which the

[62]Benvenisti, E., *The International Law* …, at p. 183

[63]Dinstein, Y., *The International Law*…, at p. 49. See also UK Ministry of Defence, *The Manual of the Law*..., at p. 278

[64] UK Ministry of Defence, *The Manual of the Law*..., at p. 278

[65]Dinstein, Y., *The International Law*…, at p. 49

[66]Feilchenfeld, E.H., *The International Economic Law of Belligerent Occupation* (Washington, Carnegie Endowment for International Peace 1942) at p. 7

[67] Oppenheim, L., *International Law: Dispute* (5thedn. Longman, Green and Co. 1963) at p. 470-471

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

war is directed, can apply only as long as this community still exists as a State within the meaning of international law."[69] However even under *debellatio*, it was argued that the right to self-determination of the people needs to be taking into consideration.[70] The doctrine of *debellatio* has however little relevance if any in view of the adoption of the Geneva Conventions and Additional Protocol I ("AP I"),[71] and *ius ad bellum* issue of acquiring territory through the use of force.[72]

It must be noted that since occupation is about exerting control on a territory of a foreign State, the concept is unknown to a non-international armed conflict.[73] Roberts had posited that "at the heart of almost all treaty provisions and legal writings about occupation is the image of the armed forces of a State exercising some kind of coercive control or authority over inhabited territory outside the accepted international frontiers of theirs State."[74] Article 1 of Brussels Code[75] which formed the basis of article 42 of the HR considered a territory to be "occupied when it is actually placed under the authority of the hostile army". Under these instruments "occupation extends only to the territory where such authority has been established and can be exercised." The territory referred to could cover any foreign territory for example that of a neutral country so long as it is not the territory of the Occupying Power and not necessarily enemy territory.[76] This seems to be the opinion

[69]Kelsen, H., *Principles of International Law* (1stEdn.New York, Rinehart & Company, Inc. 1952) at p. 75. This he argues that is because the States has been "deprived of one of the essential elements of a state in the sense of international law: an effective and independent government, and hence has lost its character as a State".

[70]Dinstein, Y., *The International Law*…, at p. 50

[71]Scheffer, D.J., 'Agora: Future Implications of the Iraq Conflict...', at p. 848; see article 6(3) and (4) of GC IV and article 3(b) of API

[72] See Ulrich-Meyn, K., 'Debellatio' in *Encyclopaedia of Public International Law* (Max Planck Institute for Comparative Public Law and International Law, ed. 1992) at p. 969

[73] See Gasser, H.P., 'Protection of the Civilian population', in Fleck, D., (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (2ndedn, USA, Oxford University Press 2008) at p. 272.

[74]Roberts, A., 'What is Military Occupation?'..., at p. 293

[75]Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874.
<http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument> accessed 19 July, 2015.

[76] Kolb, R., 'Etude sur l'occupation et sur l'article 47 de la IVème Convention de Genève du 12 aout 1949 relative à la protection des personnescivilesen temps de

earlier taken by Roberts that the common trait of military occupation is the intervention by the military and their exercise of control of a territory beyond their internationally recognised frontiers.[77] In this regard, Feilchenfeld asserts:

> *Section III of The Hague Regulations applies expressly only to territory which belongs to an enemy and has been occupied without the consent of the sovereign. It is, nevertheless, usually held that the rules on belligerent occupation will also apply where a belligerent, in the course of the war, occupies neutral territory, even if the neutral power should have failed to protest against the occupation.*[78]

However, the Occupying Power in occupied neutral territory "does not possess such a wide range of rights to the occupied Country and its inhabitants as he possesses in occupied enemy territory."[79]A Country ceases to be neutral as soon as it is attacked and resisted such attack.[80] With respect to allied territory however, several views have been expressed.[81]

An opinion however, had been expressed on the applicability of the law of occupation on liberation movements occupying the territory of another State but even here it was noted that due to their nature it may not always be possible to implement certain provisions.[82]

Debate recently taking shape is whether forces of the United Nations could be subject to the law of occupation. The conclusion which seems to be gaining ground is that where UN is involved in peace operations under chapter VI, which by its nature and guiding principles do not involve the use of force except in self-defence, the law of occupation is not applicable,[83] whereas the

---

guerre : Iedegré : d'intangibilité des droits enterritoireoccupé' (2002) 10 African Yearbook of International Law at 278-279 et seq.

[77] Roberts, A., 'What is Military Occupation?'..., at p. 300

[78]Feilchenfeld, E.H., *The International Economic* Law..., at p. 8

[79] Oppenheim, L., *International Law*, (7thEdn, New York, David Mckay Co., 1948-1952) at p. 241

[80] Roberts, A., 'What is Military Occupation?'..., at p. 262

[81] For a fuller discussion on the issue see Roberts, A., 'What is Military Occupation?'..., at p. 263.

[82] Roberts, A., 'What is Military Occupation?'..., at p. 255

[83] Others however, completely reject the applicability of IHL to United Nations. See Shraga, D., 'The United Nations as an Actor Bound by IHL' in L. Condorelli, A.M. La Rosa, S. Scherrer (Eds.), *Les Nations Unies et le DIH*, (Paris, Pedone 1996) at p. 325; Glick, R.D., 'Lip Service to the Laws of War: Humanitarian Law

situation may differ when UN is involved in peace enforcement or combat action and it may end up in belligerent occupation,[84]similar position exists where the central authority of the host State collapses.[85] It is not however within the confines of this paper to address this issue.

Legal Frameworks Regulating Occupation

The law regulating occupation developed as part of the law of war.[86] Several legal instruments have been adopted over the years to provide for the regulation of occupation.

Lieber Code, 1863

The first legal instruments embodying rules relevant to the law of occupation is the Lieber Code of 1863,[87] which sets the "embryonic normative measures"[88] of the law of occupation. However, it must be noted that the articles bearing on belligerent occupation are rather "illogically dispersed".[89] The purpose of the Lieber Code was to put together "new doctrines" which "were being introduced into the customs and usages of warfare and to incorporate them in a written code which will give them a greater degree of certainty and authority."[90] The articles on belligerent occupation constitute roughly one-third of the Code,[91] which demonstrated the importance attached to the law of occupation even at that time, taking cognizance of the position before it. This is however, notwithstanding the criticisms level against the

and United Nations Armed Forces' (1995-1996) Michigan Journal of International Law, at p. 69.

[84]See for example Dinstein, Y., *The International Law*…, at p. 37; Ferraro, T., 'The Applicability of the Law of Occupation to Peace Forces' in *International Humanitarian Law, Human Rights and Peace Operations* (IIHL San Remo, 2008)at p. 122 and 124-125 ; Roberts, A., 'What is Military Occupation?'..., at p. 289-91

[85] Roberts, A., 'What is Military Occupation?', at p. 291

[86]Benvenisti, E., *The International Law*..., at p. 3.

[87] Instructions for the Government of Armies of the United States in the Field, 1863 (known as Lieber Code, 1863)

[88]Dinstein, Y., *The International law*…, at p. 8

[89]Verzijl, J.H.W., *International Law*..., at p. 152

[90]Mallison, W.T. and Jabri, R.A., 'The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity' (1973-1974) 42 George Washington Law Review, at p. 192

[91] Graber, D. A., *The Development of the Law*..., at p. 15

Code.[92] This giant stride marked what is known as "the beginning of the recognition of occupation as a definite state in military operations",[93] and which clearly stipulated the martial law as applicable law in the occupied territory as distinct from the law applicable in the occupying power's territory.[94] It has often been said that Lieber Code emphasised more on the rights of the occupying power rather than those of the occupied population.[95] Striking however is the Code's recognition of the temporary nature of belligerent occupation,[96] that the occupying power has only *de facto* sovereignty, and that the inhabitants of the occupied territory owe only a duty of obedience to the occupying power.[97]

International Declaration Concerning the Laws and Customs of War, 1874

In 1874, the Russian Government sponsored the conclusion of the Brussels Project of an International Declaration Concerning the Laws and Customs of War, 1874.[98] It was the first attempt to codify the laws and usages of war at the international level. The Declaration was inspired by the Lieber Code and its provisions served as improvement on the Lieber Code.[99]Article 2 of the Brussels Declaration for example provided that:

The authority of the legal power being suspended, and having actually passed into the hands of the occupier, he shall take every step in his power to re-establish and secure as far as possible, public safety and social order.

---

[92] For such criticisms see the following works: *The War of the Rebellion-Official Records of the Union and Confederate Armies*, 1899, Series II, VI, 41-43; Bordwell, P., *The Law of War between Belligerents* (Chicago 1908) at p. 74; Holland, Thomas E., *The Laws of War on Land*. (Oxford 1908) at p. 71. (See Graber, D.A., *The Development of the*…, at p. 18).

[93] Conner, Jacob Elon, 'The Development of Belligerent Occupation, (1912) 4 Bulletin of the State University of Iowa, at p. 5

[94]Mallison, W.T. and Jabri, R.A., 'The Juridical Characteristics of Belligerent Occupation...,' at p. 192. Article 4 of the Lieber Code defined martial law as "simply military authority exercised in accordance with the law and usages of war. Military oppression is not Martial Law; it is the abuse of the power which that law confers."

[95]*Idem* at p. 193

[96] See articles 1, 2 and 29.

[97] See article 26.

[98] Also known as Brussels Code

[99]Holland, Thomas E., *The Laws of War on Land*. (Oxford 1908) at p. 75 (see Graber, D.A., *The Development of the Law*…, at p. 20 and 28)

Article 3 provided that: *With this object, he will maintain the laws which were in force in the country in time of peace, and he will only modify, suspend or replace them by others if necessity obliges him to do so.* Art. 36 contained: *The population of occupied territory cannot be forced to take part in military operations against its own country*. Art. 37 is to effect that: *The population of occupied territory cannot be compelled to swear allegiance to the hostile Power*.

In the above articles, the nature of occupation, powers and responsibility of the Occupying Power and the rights of the occupied population are clearly demonstrated. Curiously also, almost one-third of its articles contains directly or indirectly provisions relevant to occupation. The Code was considered "imminently proper to serve as basis for instruction to be given by belligerent to their armies" by the Institute of International Law.[100] There were however problems in the implementation of this Declaration by States and the Institute of International Law prepared and adopted what is known as the Oxford Code.[101]

The Oxford Code

The Oxford Code is somewhat similar to the Brussels Code except in its arrangement and simplification which were intended to further understanding and application by soldiers.[102] The Oxford Code was subsequently sent to States by the Institute urging them to instruct their armies using manuals similar to its provision.[103]

The Hague Convention on the Laws and Customs of Land Warfare, 1899

In 1899, on the invitation of the Russian Government, an international conference was held in The Hague which *inter alia* was to discuss a revision of the Brussels Code in a way most acceptable to States.[104] In furtherance to that, The Hague Convention on the Laws and Customs of Land Warfare was adopted. Examinations of its provisions depicted a close adherence

[100] Graber, D. A., *The Development of the Law*…, at p. 27.
[101] See *Idem* at p. 28-9.
[102] *Ibid* at p. 29
[103] *Ibid* at p. 30.
[104] *Ibid* at p. 30

to the Brussels Code.[105] With the adoption of this Convention and in terms of application, some States[106] have acted in accordance with The Hague Conventions 1899, but many failed to comply. The failing States cited curious reasons for not doing so. This necessitated the need to revise the laws and customs of warfare "either with a view of defining them more precisely or of laying down certain limits for the purpose of modifying their severity as far as possible."[107] It was in this regard that The Hague Convention on the Laws and Customs of Warfare, 1907 was negotiated but with respect to the law of belligerent occupation, only few amendments were made.[108]

Hague Convention on the Laws and Customs of Warfare, 1907

Provisions on the law of occupation have been codified in particular in Articles 42-56 of the 1907 Hague Regulations. The entire provisions of The Hague Regulations have generally been considered as a reflection of customary law binding on all states.[109] The aims of The Hague Regulations were among others "to strike a balance between" the interests of the occupier, the local population and the displaced Sovereign.[110] Both the 1899 Hague Conventions and 1907 Hague Regulations took the view that "military occupation occurs in the context of war" where the

[105]*Ibid* at p. 32.

[106] For example England, France and Russia (see Graber, D. A., *The Development of the Law*…, at p. 34)

[107] *Deuxième Conférence Internationale de la Paix, la Haye, 15 Juin-18 Octobre 1907* (see Graber, D. A., *The Développent of the Law*…, at p. 34)

[108] Graber, D.A *The Development of the Law* …, at p. 34

[109] See *Judgment of the Nuremberg International Military Tribunal* 1946 (1947) 41 AJIL 172 at 248-9; see also *Separation Wall* opinion at p. 1034-5; *Armed Activities* case at p. 317; *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion of 8 July 1996, (1996) lCJ Rep p. 256, para. 75 *Nuclear Weapons* opinion) all cited in Dinstein, Y., *The International Law...*, at p. 5; See also, e.g., von Glahn, G., *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press 1957) at p. 10-12. Municipal courts have also regarded the Hague Regulations as codified customary international law. Morgenstern, F., 'Validity of Acts of the Belligerent Occupant', (1951) 28 British Yearbook of International Law, at p. 292. All cited in Benvenisti. E., *The International Law*…, footnote 8

[110]Zwanenburg, M., 'Substantial Relevance of the Law of Occupation for Peace Operations' in *International Humanitarian Law, Human Rights and Peace Operations* (IIHL Sanremo, 2008) at p. 142.

hostile armed forces of one State directly controls the territory of another State.[111]

Under article 42 a "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army" and "occupation extends only to the territory where such authority has been established and can be exercised".[112] This article not only provided for what should be considered as a belligerent occupation but also the extent of its geographical coverage. It provided a "simple factual basis for determining what an occupation is."[113] Because the provision establishes occupation on the basis of the absence of *de jure* sovereign, it had however been suggested that this definition should be modified so as to clearly demonstrate that occupation is not only the absence of *de jure* sovereign title but also absence of such other modes of acquiring title or interest in a territory such as lease, trusteeship or mandate.[114]

The temporary nature of occupation, the non-passage of *de jure* sovereignty and a framework regulating the power of the occupying power were provided for under article 43 HR which states that: *[t]he authority of the legitimate power having 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.*

This provision is "the gist of the law of occupation."[115] This is because the provision "protects the international personality of the Occupied State, even in the absence of effectiveness."[116] The effect of the article is that the only legitimate interest of the occupying power is the security of its forces and

---

[111] Roberts, A., 'What is a Military Occupation'..., at p. 251

[112] Article 42 of the Hague Regulations

[113] Roberts, A., 'What is a Military Occupation'..., at p. 252

[114] Ronen, Y., 'Illegal Occupation and its Consequences' (2008) 41 Israel Law Review p. 201 at p. 202

[115]Benvenisti, E., *The International Law...,* at p. 7. Opining the position that the encapsulated provision resulted from the prescriptive efforts "by national courts, military manuals, non-binding international law instruments and many legal scholars in the nineteenth century.

[116]Dumberry, P., 'The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continue as an Independent State Under International Law' (2002) 2(1) Chinese Journal of International Law, at p. 682

maintenance of public order[117] and it does not empower the occupying power to transform the occupied State. Occupation law is premised towards confining the occupying power to the "humanitarian objectives that essentially preserve the status quo."[118]

Although considered fundamentally important, The Hague Regulations did not expressly provide for instances where occupation would be deemed ended. It left it to speculations and assumption on what would come within the purview of article 42.

Geneva Convention IV, 1949

Recognising the inadequacy of Hague Regulations in regulating occupation, the disobedience by States to observe and respect it and coupled with instances where administration of occupied territories was not strictly in conformity with the contemplation of the HR,[119] GC IV was adopted in 1949. Under GC IV a revolutionary position was taken not only to clarify but to also to extend the body of law from the traditional conception to a more realistic position. This effort culminated into among others, the adoption of common article 2 in the Geneva Conventions.[120]

Provisions relevant to occupation are contained in articles 47 to 78 while as a sign of continuity of protection to the civilian population, article 154 GC IV stated that it is supplementary to The Hague Regulations. On the definition of occupation, GC IV avoided establishing its existence only in the context of war. Under article 2 of the conventions, the conventions apply even is situations which met no resistance,[121] or even situation where a state of war is rejected by one of the belligerents. Similarly, occupation could also occur from foreign domination that is not the result of armed conflict.[122] The conventions are designed to

[117]Benvenisti, E., *The International Law*…, at p. 28

[118]Scheffer, D.J., 'Agora: Future Implications of the Iraq Conflict...', at p. 851

[119] See also Roberts, A., 'What is a Military Occupation'..., at p. 252 citing occupation of Czechoslovakia and Denmark as examples.

[120]*Idem*

[121] See Benvenisti, E., *The International Law...*, at p. 4. According to him, the rationale being that a potential conflict of interest exists between the Occupant and the Occupied with respect to the administration of the occupied territory. Seegenerally article 42 HR and article 2 GC IV.

[122]Vité, S., 'L'applicabilité du droit international de l'occupation militaire aux activités des organisations' internationales (2004) No, 853 RICR, at p. 11

apply to *de facto* international armed conflict and by obviating the need for the determination of an aggressor.[123]

Additional Protocol I, 1977

Another major development was the conclusion of Additional Protocol I to the Geneva Conventions in 1977.[124] Through its article 1(3) it supplements the GCs and it applies in situations mentioned under article 2 of the Conventions. Article 1(4) extended the applicability of laws relating to international armed conflict to situations where people are fighting against colonial domination, alien occupation, and racist regimes in the exercise of right of self-determination. According to Roberts, what article 1(4) does "is to close a tiny technical loophole left by common article 2 of the Geneva Convention by making a little clearer what was already widely accepted", the applicability of the law of occupation to territories not belonging to a High Contracting Party.[125] Regarding the end of occupation the only addition provided by the Protocol is that which is contained under article 3(b) which extended the position taken by article 6(3) of GC IV. Article 3(b) rather than retaining the one year rule, provided for the applicability of the Protocol until the end of the occupation. This is more realistic considering the dimension of recent occupations where occupation could last for decades and in some instances yet no feasible solution or likelihood of its ending is in sight. The Geneva Conventions have been considered as reflecting the position of customary law by the Ethiopia-Eritrea Claims Commission but whether AP I is also considered customary international law is arguable.[126]

Some Types of Occupation

This section briefly discussed some most prominent types of occupations in history. The aim is to further clarify the applicability of the law of occupation and the implication with

[123]Mallison, W.T. and Jabri, R.A., 'The Juridical Characteristics of Belligerent Occupation...,' at p. 189

[124]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977

[125] Roberts, A., 'What is a Military Occupation'..., at p. 254

[126] As rightly noted by Dinstein, the "Israel Supreme Court of Israel has expressly acknowledged that several of the Protocol's provisions enshrined customary international law" in among others the "Targeted Killings Case and Fuel and Electricity Case. See Dinstein, Y., *The International Law*..., at p. 8

respect to when such occupations could be considered to have ended.[127]

1. Belligerent Occupation

This type of occupation is known in Latin as *occupatio bellica*.[128] The distinguishing characteristics of this type of occupation were stated by Roberts who adapted the definition contained in Graber.[129] He stated that a belligerent occupation is one that is "(a) by a belligerent State, (b) of territory of an enemy belligerent State, (c) during the course of an armed conflict, and (d) before any general armistice is concluded."[130] By these characteristics, the existence of an armed conflict between at least two States is a fundamental requirement and such conflict must not have resulted to the conclusion of a peace treaty. In other words, the occupation of a territory must have resulted during the state of enmity between the parties. The territory occupied however needs not be that of any of the States in conflict. This is because the term belligerent occupation is also used "to cover wartime occupations of neutral territory.[131] This opinion is shared by Kolb.[132] In terms of the applicability of the law, there is no ambiguity that the law of occupation regulates this type of occupation.[133] In fact an author asserted it to be the only occupation recognised by international law.[134]

As noted, article 42 HR (from article 1 Brussels Code) considered a territory "occupied when it is actually placed under the authority of the hostile army." The word "actually" was the equivalent of the Latin word *de facto* as opposed to *de jure*.[135] The sovereignty of the territory continues to be intact such that only its administration changes. This signifies the temporary nature of occupation until a treaty on the final status of the territory is

---

[127] For a detailed analysis of different types of occupation see Roberts, A., 'What is a Military Occupation?'..., at p. 261. Roberts cited 17 types of Occupation.

[128]Which according to Roberts, A., 'What is a Military Occupation?'..., at p. 261 in the past this Latin word carries a more extreme meaning to imply acquisition of sovereignty.

[129] Graber, D.A., *The Development of the Law...,* at p. 5.

[130] Roberts, A., 'What is a Military Occupation'..., at p. 261

[131]*Ibid*

[132]SeeKolb, R., 'Etude sur l'occupation et sur l'article 47…,' at pp. 278-279

[133] Roberts, A., 'What is a Military Occupation'..., at p. 262

[134] von Glahn, G., *The Occupation of Enemy Territory...* at p. 27

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

concluded. Article 41 of the Oxford Code elaborated it further to consider such territory to be occupied "following its invasion by enemy forces, the State which is driven out has ceased, in fact, to exercise regular powers there, and the invading State finds itself the only one capable to maintain order".[136] Von Glahn summarised the control test for the existence of occupation opining that from a legal point of view, the existence of occupation is predicated on the control and exercise of power or the ability to exercise such power in the whole of the territory within a reasonable time by an occupant.[137]

The use of force or the exercise of power against the occupied State as noted, is an important element in establishing belligerent occupation which means there is no occupation when there is a valid consent. The "concept of consent does not square with the legal institution of military occupation" because it is "opposed to the concept of 'hostile' army" expressly stated under article 42 of the HR.[138] Although motive of the occupation is irrelevant in the application of the law of occupation, belligerent occupation has "military or security objectives" it was therefore "not designed to win the heart" of the population.[139]

Another important issue on the existence of belligerent occupation is whether proclamation needs to be given by the Occupier. It must be stated that there is no obligation in the law that such proclamation must be given. However, it was suggested that such proclamation be issued as a notice to the inhabitants "about the new legal regime".[140] This will enable the population to properly adjust itself to the military and security needs of the

---

[136] Institut de Droit International, "Réglementation de Lois et Coutumes de la Guerre. Manuel des Lois de la Guerre", (1881-1882) 5 Annuaire de l'Institut de Droit International, at p. 166 (see Graber, D.A., *The Development of the Law...*, at p. 53)

[137] von Glahn, G., *The Occupation of Enemy Territory*... at p. 29

[138] Ferraro, T., 'The Applicability of the Law of Occupation...,' at p. 122.

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

[140] *Idem* at p. 48; article 1 of the Lieber Code; See UK Ministry of Defence, *The Manual of the Law*..., at p. 276. See however Graber, D.A., *The Development of the Law*..., at p. 50 where the Institute of International Law in 1877 considered notification to an occupied region of the beginning of occupation as compulsory. This was incorporated under article 42 of the Oxford Code prepared by the Institute. See also Breau, S.C., 'The Humanitarian Law Implications...,' at p. 196 where it was considered that notification is essential. See also Roberts, A., 'What is a Military Occupation'..., at p. 257

occupying power. Belligerent occupation once established must also be maintained.[141] It will be deemed ended with the loss of effective control of the territory.

2. Non-Belligerent Occupation

As the name suggests, this is the opposite of belligerent occupation. It would therefore be deemed to exist when it failed to meet the criteria for the existence of belligerent occupation. A view has been expressed that there would seem to be no reason why the criteria for the ascertainment of the existence of occupation in belligerency should be different from a non-belligerent occupation. This was on the basis that the fundamental indicator of the existence of belligerent occupation is effective control of the territory in the hands of the enemy forces. However, since existence of consent in the presence of the foreign forces in a territory negatives belligerent occupation, non-belligerent or pacific occupation is to be determined on the basis of the arrangement governing the presence or continued presence of such foreign forces.[142]

There are several reasons for the existence of this type of occupation and some of them for example are to ensure compliance with international obligations on the part of the occupied power; this may be for the purposes of extracting reparation or adequate guarantees for the future while the holding of the territory is serving as security and in order to be able to supervise whatever arrangement for the reparation put in place.[143] Examples of this was the occupation of France by German forces arising from a Peace Treaty following the conclusion of Franco-Prussian war of 1871 and British Occupation of Egypt in 1882.[144]

Regarding the powers available to the foreign forces in this type of occupation as well as the occupation which resulted from foreign intervention, Robin observed:

---

[141] Halleck, H.W., *International Law* (1st edn, San Francisco I86I) pp. 777-789. See also Dinstein, Y., *The International Law*…, at p. 44 quoting Hyde, C., *International Law Chiefly as Interpreted and Applied by the United States*, vol. Ill, 1881 (2nd edn, 1945); UK Ministry of Defence, *The Manual of the Law*..., at p. 276

[142] Kelly, M.J., 'Non-Belligerent Occupation' (1998) 28 Israel Yearbook on Human Rights, at p. 17-18

[143] *Idem* at p. 18

[144] *Ibid* at p. 19-20

> *... in cases of occupation by way of intervention, the powers of the occupant are, in general, more extensive than they are in cases of occupation by way of guarantee. Often, to be specific, occupations for the purpose of intervention admit of a certain interference in the administration of the occupied country; a fact which may be explained by the very purpose of these occupations (i.e., to restore order). But they have no fixed rule: their extent varies with the circumstances attending the occupation. Sometimes the result is tantamount to placing the government of the Occupied State in a position of tutelage and giving to the Occupant what is apparently supreme authority; and sometimes, on the other hand, the occupying state confines itself to taking care of police matters and the re-establishing of order.*[145]

The above position is justifiable since the law of occupation does not apply to a situation where consent exists as well as where no effective control of a territory is with the foreign forces. Recently, non-belligerent occupation by way of intervention have taken place in Kampuchea "Cambodia" (where Vietnam justified intervention on the request of Cambodian people); Afghanistan (where Soviet claimed to have been requested to intervene by the 'Afghan Government'); Grenada (where US was invited by the Organisation of Eastern Caribbean States); and Panama (which intervention overthrew the government of Noriega).

The difficulty however is ascertaining whether in fact, such intervention was with the true consent of the foreign country. Even if there was consent whether it was issued by the authority empowered to do so under the laws of the country. The claim of consent or request for intervention seems to be a convenient way for the occupier to escape the stricter application of the law of occupation hence States find it easy to brand their action as intervention. Benvenisti stated that "many occupants of the last two decades have claimed that they were invited by the territory's lawful government to assist it in quelling illegal opposition forces".[146] These so-called interventions have been denounced by

[145]Robin, R., *Des Occupations Militaires En Dehors Des Occupations De Guerre* (Washington, Carnegie Endowment for International Peace 1942) pp. 27-40 and 228-38 (extracts translated). (see Kelly, M.J., 'Non-Belligerent Occupation'..., at p. 18-19

[146]Benvenisti, E., *The International Law*…, at p. 159.

the United Nations as a violation of the UN Charter on sovereignty, territorial integrity, and political independence.[147]

In this type of occupation, the mandate of the Occupying Power is:

> *... to create conditions which would enable the civil branch to assume ascendancy in the affairs of civil government and to preserve peace and order in the meantime. In attaining this end the force was to utilize the laws in force in the territory at the time of the arrival of the occupying force, supplemented by the military orders that were necessary to secure order. These military orders do not have the status of legislation in the sense that they are only in effect until civil administration is resumed.*[148]

3. Armistice Occupation/Consensual Occupation

Another type of occupation could be such that resulted from an armistice concluded between enemies.[149]This is referred to as armistice occupation. An Armistice occupation is the occupation of enemy territory resulting from war pending the conclusion of a peace treaty.[150] Where armistice is concluded, it could be general or local, and it may involve a temporary or complete cessation of hostilities.[151] The occupation is sometimes referred to as "mixed occupation, or *occupatio mixta – bellica pacifica*..." Examples of this are the occupation of Western Thrace by the Allied in 1918 and occupation of part of Hungary by Serbian troops from 1918 to 1921.[152]

---

[147]See United Nations General Assembly Resolution (UNGA Res ES-6/2 (14 January 1980) UN Doc A/RES/ES-6/2 on Soviet Intervention; UNGA Res 34/22 (14 November 1979) UN Doc A/RES/34/22 on the situation in Kampuchea; UNGA Res 38/7 (2 November 1983) UN Doc A/RES/38/7 on the situation in Grenada; UNGA Res 44/240 (29 December 1989) UN Doc A/RES/44/240 on Effects of the military intervention by the United States of America in Panama on the situation in Central America

[148] Kelly, M.J., 'Non-Belligerent Occupation'..., at p. 22-23

[149]Benvenisti, E., *The International Law...*, at p. 3. Citing the agreement between the Allied and Germany over the control of Rhineland in 1918. Dinstein also cited instances of Occupation involving the territories of some Allied territories (France, Belgium, the Netherlands or Greece) by the other Allied Countries (like US and UK) with the agreement of the former for the purposes of liberating them from Nazi.

[150]*Idem* at p.48.

[151] Roberts, A., 'What is Military Occupation?'..., at p. 266

[152]*Idem*

The applicability of HR and GCs to armistice occupation has been widely accepted but that some modifications might be incorporated in such agreements.[153] Some are however of the view that the occupation being consensual is not governed by the law of occupation.[154] One of the proponents of this view is Stein who notes that:

> *Section III appears to apply expressly only to the typical case of a belligerent occupation where one belligerent has overrun a part of the territory of the opposing enemy belligerent, where the fighting is still in progress and no armistice agreement has been concluded. Section III did not give rise to any generally accepted rules which would govern other types of occupation, such as the occupation continuing after or effected by virtue of an armistice agreement.*[155]

This argument may be accepted when it stops at the non-conclusion of armistice between the belligerents. The requirement that fighting must be in progress before occupation subject to the HR and GCs could be established is overlooking history as well as current situation. Strictly speaking, there is no fighting presently taking place in the Occupied Palestinian Territory. In any case, The Hague Regulations and Geneva Convention do not require fighting to be in progress before occupation could exist.

The position taken by the previous British and United States manuals may be more in line with the international conventions. These manuals considered Section III of The Hague Regulations to apply not only to a belligerent occupation *stricto sensu* but also to any type of armistice occupation, except such as may have been modified by the provisions of the armistice agreement.[156] Even in this situation however, since the conclusion of the armistice was effectuated by force which tainted the validity of the consent, it is suggested that Hague Regulations should apply.

---

[153] *Ibid* at p. 267

[154] Dinstein, Y., *The International Law*…, at p. 36.

[155] Stein, E., 'Application of the Law of the Absent Sovereign in Territory Under Belligerent Occupation: The Schio Massacre' (1947-1948) 46 Michigan Law Review at p. 347

[156] See British Army Manual of Military Law, Amendments (No. 12) (1929) para. 286; US War Department Basic Field Manual, Rules of Land Warfare, para. 265d(1940) 29 (FM 27-10)

With respect to consensual occupation, however the situation may be different. This is because military forces of a State could be in the territory of another State in pursuance to an agreement. Where such exist, the relationship is governed by such agreement and not law of occupation.[157] This situation is however likely to vary depending on the circumstances.[158] Some authors have gone further to say that even if such forces exert some elements of "authority over society of maintaining public order, they do not *ipso facto* become occupations."[159]

Although the prevailing view is that the law of occupation does not regulate consensual occupation, there could be a dramatic change of events which could have a decisive effect on the applicable law to such situation. In other words, a consensual occupation can turn to a belligerent occupation and becomes subject to the law of occupation. This may happen in several instances for example where the troops outlived the given consent; or they went beyond the consent or there is dramatic/fundamental change of circumstances;[160] or where the agreement for the stationing of the troops was obtained by duress,[161] or situation where the competence of the central government granting the consent is in doubt arising from the loss of effective control of most of the State territory.[162]Sassòli had however expressed doubt on whether "simple disappearance of legal basis for a foreign military presence makes the law of armed conflicts applicable".[163] A situation would be considered occupation if "an identifiable foreign military command structure" exists and "actually exercising authority in the territory".[164]

Considering the rising relevance of self-determination principle, what could be said of a situation where consent was given by the central government against the will of its population or where by agreement it was decided by both the foreign State

[157] UK Ministry of Defence, *The Manual of the Law*..., at p. 275
[158] Roberts, A., 'What is a Military Occupation'..., at p. 277
[159]*Idem* at p. 298
[160]Dinstein, Y., *The International Law*…, at p. 31. See also the *Armed Activities* Case at p. 292. The case of South Africa in Namibia was cited by Roberts as example.
[161] Roberts, A., 'What is Military Occupation?'..., at p. 298
[162] Arai- Takahashi, Y., *The Law of Occupation* …, at p. 9
[163]Sassòli, M., 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) EJIL at p. 689.
[164] Roberts, A., 'What is a Military Occupation'..., at p. 277

and the host Government that the conflict is internal? Roberts had given a graphic illustration of this situation typical of Afghanistan, he stated:

> *Take, for example, a deeply divided and weak country, facing civil war. It has an unpopular government with a clear external ideological orientation, which invites in a sympathetic superpower ally. That ally then largely dominates indigenous political developments, and there are even allegations that it had complicity in the assassination of the embarrassingly unpopular head of the government which had invited it in. It also gets deeply involved in counter-insurgency operations against the regime's opponents.* [165]

In situations like this, Roberts concluded that "[t]he international element in such conflicts appears to be so marked that the better developed body of international law governing international armed conflicts and occupations may well be viewed as applicable."[166]

States are at liberty to conclude agreements with other States however with respect to the agreement at issue, article 7 GC IV provided that it shall not adversely affect the situations of protected persons as regards the rights conferred by the Convention and such persons shall benefit from the concluded agreements so long as the Convention is applicable to them except where the agreement provided for a more favourable measure. Similarly, article 47 GC IV guarantees the protection of the rights of protected persons by obliging the non-deprivation in whatever circumstance of the benefits of the Convention. An agreement concluded by the threat or use of force is void.[167]

As Consensual Occupation can come into effect at the beginning, it could also come afterwards.[168] This situation takes place where an initial occupation was belligerent[169] but subsequently a genuine and effective consent was given to the 'previous' occupying power. A very recent example is the case of

---

[165] Roberts, A., 'What is a Military Occupation'..., at p. 278

[166] *Idem*

[167] Article 52 of the Vienna Convention on the Law of Treaties, 1969

[168] Bothe, M., 'The Beginning and End...,' at p. 31

[169] Bothe termed this situation as "supervening consent" (see Bothe, M., "The Beginning and End...,' at p. 31

Iraq in 2004. According to Bothe article 47 of GC IV does not exclude this possibility.[170]

4. Occupation in "Denial"

Discussion under this section is not intended to create a separate category type of occupation but to discuss the recent practice of States in typical occupation situations where due to some reasons, the States are not willing to recognise their actions in foreign States as amounting to occupation. Discussing this issue is considered important because denying the existence of occupation is a tendency which "is not likely to disappear".[171]

The denial has a long history and examples of this situation are the practice of Japan in the so-called republics where though Japan was party to the Hague Conventions but refrained from invoking or indicate its willingness to respect them.[172] Israel has consistently denied the applicability of the Geneva Convention to the Occupied Palestinian Territories though it had agreed to apply the humanitarian provisions of the Conventions. Iraq in the 90s had rejected that its invasion in Kuwait is a case of occupation, Indonesia refused to accept that it actions in East Timor amounted to Occupation and similar position was taken by the Soviet Union in the case of Afghanistan and by China in Tibet.[173]

The IHL approach to occupation is that it is factual and predicated on the existence of control exerted or exercised over a territory and this determination is not dependent on the acceptance or proclamation of the occupying or occupied Power. If the situation which exists is that of occupation on the basis of criteria discussed, responsibility for the observance of that law is by that fact imposed on the occupying power.

Scope of Occupation

This section briefly introduced the extent to which rights of belligerent occupation can be exercised temporally and geographically. This is important because, the HR merely

---

[170] Bothe, M., 'The Beginning and End...,' at p. 31

[171] Benvenisti, E., *The International Law*…, at p. 6

[172] *Idem* at p. 63

[173] See Benvenisti, E., 'The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective' at p. 12<www.tau.ac.il/**law**/members/benvenisti/articals/amos.doc>accessed on 16 July, 2015

provided that a *territory* "is considered occupied..." without defining the term *territory*. Ascertaining the scope of such territory considered occupied as well as the time when such occupation has come in place is fundamental to the application of the law of occupation.

Territory has been taken to embrace "all the land, internal waters and territorial sea, and the airspace above them, over which a party has sovereignty."[174] The geographical scope of occupation has been limited by article 42 HR to only areas where effective control is established thereby excluding areas where intense fighting is still taking place, occupier's territory as well as situations of mere invasion where the invading forces are only bound by the rules relating to conduct of hostilities.[175] The definition "is closely intertwined with the question of the scope of application *ratione materiae* of the law of occupation".[176]

Temporal Scope

On the basis that there can be no two sovereign in a single territory, earlier treatises considered the commencement of occupation when a part of a territory comes under the power of the enemy.[177] This effectively means that successful effective control of a territory by an enemy activates the application of the law of occupation and the situation continues with the continuance of effective control.[178] Similar criteria applies regarding the end of occupation "elle s'oriente au même critére: le droit d'occupation cesse d'être appliqué des que les forces étrangéres n'exercent plus leur autorité sur le territoire en question."[179]

Temporally, there are two theories on when occupation commences: the traditional theory and the functional theory. Traditionally, invasion phase and actual occupation have been distinguished. It was considered that the law of occupation does

[174]Aust, A., *Modern Treaty Law and Practice* (Cambridge, Cambridge University Press 2007) at p. 48.
[175]Schwarzenberger, G., 'The Law of Belligerent Occupation: Basic Issues' (1960) 30 *Nordisk Tidsskrift Int'l Ret*, at p. 20
[176] Arai- Takahashi, Y., *The Law of Occupation*..., at p. 6
[177]Bluntschli, J.K., *Das Moderne Voelkerrecht*…, pp. 303-307 (see Graber, D.A., *The Development of the Law...*, at p. 52)
[178] Arai- Takahashi, Y., *The Law of Occupation*... at p. 16 that the Hague Regulations "takes a purely factual approach to the temporal scope of application of the law of Occupation."
[179]Kolb, R., 'Etude sur l'occupation et sur l'article 47…' at p. 289

not apply during the invasion phase of the hostility as the troops do not have effective control of the territory.180 Hence invasion is only considered as a prelude to belligerent occupation.181 It was defined as:

> *[o]occupation of foreign territory during the course of on-going war, and where effective and continuing control over held areas has not yet been established. The enemy government's administration remains in a state of disorganisation, with no new military administrative structure on behalf of the Occupying Power to replace it. Martial law governs.*[182]

Under the traditional theory, a situation will only be characterised as that of occupation when the enemy forces are in the position to exercise such control as would be sufficient to enable them discharge all the obligations imposed by the law of occupation in the occupied territory.[183] This theory places reliance on the wording of article 42 HR and it viewed occupation from the perspective that the enemy government in the occupied territory has been rendered incapable of exercising its authority in the area occupied and the occupying power is in a position to substitute its authority for that of the former government.[184] Article 42 HR was therefore not considered operational during the invasion phase.[185] Under the functional theory (also known as flexible approach occupation), only some level of control over the enemy territory is required to be established.[186]

---

[180] This seems to be the view of Dinstein at p. 38-45 citing the following: US Department of the Army, Field Manual, *The Law of Land Warfare* 138 (FM 27-10, 1956); *Hostages trial* (List *et al*.) (US Military Tribunal, Nuremberg, 1948) 8 LRTWC 34, at p. 55-6; *Prosecutor v. Naletilic'* et al (ICTY, Trial Chamber, 2003), (IT-98-34) para. 217; *Prosecutor v. Tadic* (ICTY, Trial Chamber) (1997) 36 ILM 908 at 925; Schwarzenberger, G., *The Law of Armed Conflict (vol. 2) International Law as applied by International Courts and Tribunals)* (London, Stevens & Sons. 1968) at p. 184. See also Roberts, A., 'What is a Military Occupation'..., at p. 256

[181]Mallison, W.T. and Jabri, R.A., 'The Juridical Characteristics of Belligerent Occupation...,' at p. 188

[182] Gerson, A., 'War, Conquered Territory and Military Occupation in the Contemporary International Legal System' (1977) 18(3) Harvard International Law Journal, at p. 528

[183] Current Challenges to the Law of Occupation <http://www.icrc.org/web/eng/siteeng0.nsf/html/Occupation-statement-211105> accessed 15 July 2015. See also ICRC's Commentary to article 6 GC IV; *Prosecutor v. Rajic'* (ICTY, Trial Chamber) (1996) 108 ILR 142 at p. 161

[184] See UK Ministry of Defence, *The Manual of the Law*..., at p. 275.

[185] Gerson, A., 'War, Conquered Territory and Military Occupation...,' at p. 533

[186] Current Challenges to the Law of Occupation

Functional occupation was on the basis of the wording of article 6(1) of GC IV. Which provided that the "Convention shall apply from the outset of any conflict or occupation mentioned in Article 2". This provision according to the proponents of the theory is wider than article 42 HR probably because it has not been restricted by the conditions present in article 42.[187] Under the theory, advancing troops could be considered to be in situation amounting to occupation once they are in a foreign territory and have come into contact with the civilian population.[188] Functional occupation is predicated more on humanitarian concerns and has the objective of ensuring that no gap exist between the invasion phase and the commencement of occupation during which civilians falling into the hands of foreign forces find themselves without legal protection.[189]

Several views have been expressed on the difference between invasion and occupation. In this respect, the opinion of a French writer Longuet,[190] American Military Manual of 1914,[191] and Oppenheim have been noted.[192]Longuet was of the view that invasion merely "supposes that an army has penetrated enemy territory, but that it is not yet uncontested mistress of any part of the territory".[193]Longuet considered that occupation replaces invasion "when the defending troops, despairing of holding their lines, retreat to seek new battle-fields further".[194] According to American Military Manual 1914 a territory is merely invaded when there are still resistance,[195] while to Oppenheim, invasion must be coupled with holding temporary possession of the enemy territory.[196] Indeed article 6(1) of GC IV had removed any doubt with respect to the treatment of civilian on the difference between

<http://www.icrc.org/web/eng/siteeng0.nsf/html/Occupation-statement-211105> accessed 15 July 2015. see also ICRC's Commentary to article 6 GC IV

[187]Pictet, J.S., *Commentary on the Geneva Convention*..., at p. 60; Roberts, A., 'What is a Military Occupation'..., at p. 253.

[188]*Idem*

[189]*Ibid*. See however a contrasting view taken by the UK Ministry of Defence, *The Manual of the Law*..., at p. 276

[190] In Longuet, F., *Le Droit Actuel de Ia Guerre Terrestre* (Montpellier 1900) at p. 120

[191] See Graber, D.A., *The Development of the Law...*, at p. 68

[192] Oppenheim, L., International Law, vol II (1st ed. London1906) at p. 169.

[193] Graber, D.A., *The Development of the Law...*, at p. 68

[194]*Idem*

[195]*Ibid*

[196]*Ibid*

invasion and occupation since the Convention applies from the outset of conflict or occupation under article 2 common to the Geneva Conventions.[197]

Functional occupation finds support in the decisions of a trial chamber of ICTY in *Prosecutor v. Naletilic´and Martinovic´* where it was posited that under the HR actual control or authority of a territory is required whereas under GC IV, law of occupation applies as soon as individuals fall into the hand of the occupying power.[198] Most military manuals however, adopted article 42 HR definition.[199]

As little detailed as the commencement of occupation is, there is no much support however regarding its ending as per treaty provision. Article 6(3) of GC IV merely stated that the Convention shall cease to apply one year after the "general close of military operations" and that a number of provisions (containing some right which Kolb describes as "le noyau dur d'ordre public de la Convention"[200]) will continue to apply until the end of the occupation. The continued applicability of these provisions is for the purpose of protecting the population of the occupied territory's vital rights.[201] Determining the general close of military operation is a question of fact and it referred to in an armed conflict when the last shot was fired,[202] or as suggested the final end of all fighting between and among all the parties in the conflict.[203] The provision of article 6(3) of GC IV has been subject of criticisms. For example, it was considered that:

---

[197]Mallison, W.T. and Jabri, R.A., 'The Juridical Characteristics of Belligerent Occupation...,' at p. 189

[198]*Prosecutor v. MladenNaletilic and VinkoMartinovic*, (Judgment) ICTY IT-98-34-T (31 March 2001) paras. 219-221.

[199] See for example British and United States Military Manuals

[200] Kolb, R., 'Etude sur l'occupation et sur l'article 47...,' at p. 315.

[201] Gasser, H.P., 'Protection of the Civilian...,'at p. 283. (Dinstein, Y., *The International Law* …, at p. 281

[202] This is the opinion of the Rapporteur of Committee III in the Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A p.815. (see Pictet, J.S., *Commentary on the Geneva* Convention..., at p. 62

[203]*Ibid*. according to Pictet, it was considered that one year after the close of hostilities, the authorities of the Occupied State will almost always have regained their freedom of action to some extent; communications with the outside world having been re-established, world public opinion will, moreover, have , some effect."

> *Article 6(3) of the Fourth Convention of 1949 was a special ad hoc provision for certain actual cases, namely the occupation of Germany and Japan after World War II. There is no reason to continue to keep in force such provisions designed for specific historic cases. In 1972 the majority of government experts expressed a wish to abolish these time limits.*[204]

Indeed, if the law is to be effective it needs to be in tune with developments taking place. It is true that certain historical facts are relevant in assessing situations and could provide further support for the future but since IHL is a unique category of law which is predicated on the protection of lives, it needs to consistently position itself in line with current circumstances. However, the one year rule was not without justification. The ICRC's Commentary on GC IV stated that:

> *One year after the close of hostilities, the authorities of the occupied State will almost always have regained their freedom of action to some extent; communications with the outside world having been re-established, world public opinion will, moreover, have some effect. Furthermore, two cases of an occupation being prolonged after the cessation of hostilities can be envisaged. When the Occupied Power is victorious, the territory will obviously be freed before one year has passed; on the other hand, if the Occupying Power is victorious, the Occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified.*[205]

The ICJ has had the opportunity to interpret the one year rule in the *Separation Wall* opinion and it focussed on the "military operations leading to the occupation". The ICJ concluded that since the military operations leading to the occupation of West Bank have ended long time ago only such provisions as have been stated under article 6 are applicable to the OPT and not the entire GC IV.[206] In its assessment, the Court seemed to have been misguided by taking the position that the one year commences upon the general close of military operations leading to the

---

[204] Bothe, M., Partsch, K.J. and Solf, W.A., *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague, Martinus Nijhoff Publishers 1982), at 59, para. 2.8.

[205] See Pictet, J.S., *Commentary on the Geneva* Convention..., at p. 63.

[206] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, [2004] ICJ Rep para. 125

occupation which seems to be not in line with the wording and the intention of the provision. This view was criticised that the Court has committed "the most serious error":[207]

Article 6 in fact provides that insofar as occupied territories are concerned, application of the Convention "shall cease one year after the general close of military operations," not on the "general close of military operations leading to the occupation," as asserted by the Court.[208]The problem is "[a] premature celebration of the general close of military operations poses a danger to the civilian population, inasmuch as it reduces the scope

of protection that the population enjoys under the Convention"[209]. This may however be supplemented by the application of human rights law in the territory.[210]

If the ICJ's opinion is considered accurate the effect is that it would result to an undesirable consequence for the inhabitants of any territory subject to prolonged military occupation,[211] because it will deprive them of the full range of protection provided under IHL.[212] Relying on article 31 of the Vienna Convention on the Law of Treaties on the interpretation of treaties, Imseis commented:

> *On its face, the ordinary meaning of the terms of Article 6 reveals that it is concerned with the existence or nonexistence of military operations per se as the test governing the continued applicability of the whole of the Convention in such circumstances. It does not encumber itself with additional qualifiers on the existence of military operations that would necessarily circumscribe (in this case, temporally circumscribe) the applicability of the Convention in toto, such as "leading to the occupation."[213]*

The one year rule does not however, apply to parties to AP I,[214] which under its article 3(b) took a different position analogous

[207]Imseis, A., 'Critical Reflections...,' at p. 105
[208]*Idem* at p. 106
[209]Dinstein, Y., *The International Law*…, at p. 283
[210]*Idem* at p. 282
[211]Imseis, A., 'Critical Reflections...,' at p. 103
[212]*Idem* at p. 107
[213]*Idem* at p. 106
[214] UK Ministry of Defence, *The Manual of the Law...*, at p. 278

to the intention of article 42 HR.[215]Article 3(b) provided for the continued applicability of the Convention and the Protocol until the termination of the occupation. The "abrogation of the "one year after" rule may reflect in part the proper desire of the international community to maintain the full applicability of the law on occupations to areas occupied by Israel since 1967."[216] The additional Protocol I did not provide for a determinant of when the occupation will end.

Geographical Scope

Regarding the extent of the space in the foreign territory, the hostile army can only exercise authority over the territory they occupy and over which the inhabitants are vanquished or reduced to submission.[217] Similarly, the occupation of principal towns of a province does not include possession of towns and forts in the province except where the intention is to appropriate the whole territory which is not under the control of the enemy.[218] Occupation is about effective control in land areas and once that is secured it extends to the adjacent "maritime areas and suprajacent airspace",[219] but it is excluded from being applied to "land areas cut off from the occupied territory" like such lands which are inaccessible.[220] While on internal and territorial waters, article 88 of the 1913 Oxford Manual of Naval War posited that occupation "exists only when there is at the same time an occupation of continental territory..."[221] Under this therefore, there is no occupation of internal or territorial waters except where there exist at the same time occupation of land in the occupied territory.

A closely related question is whether having supremacy over the airspace of a State could amount to occupation. It would be considered that the control over air space fail short of the requirement of actual control.[222] It is true however that in this age of modern technology where a State has the capacity to dispatch and station aircrafts in space could have potential effect on the control of what goes around on land, it would be difficult to

[215] Arai- Takahashi, Y., *The Law of Occupation*:..., at p. 17
[216] Roberts, A., 'What is a Military Occupation'...,' at p. 272
[217] Graber, D.A., *The Development of the Law...,* at p. 42-3.
[218]*Idem* at p. 43
[219]Dinstein, Y., *The International Law*…, at p. 47.
[220]*Idem* at p. 46
[221]*Ibid* at p. 47
[222] Gasser, H.P., 'Protection of the Civilian...,' at p. 274

establish a limit and the nature of the actual control such a State has over a territory. There is however a view which holds that the law of occupation extends to wherever the power of the occupant reaches which may therefore include the space but this was considered a vague statement.[223]

The scope and limitations of the powers of the occupier has been described under article 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.*

The limitations under this article extends not only to the institutions established by the occupying power but also to the national institutions of the occupied State otherwise the article will be "almost meaningless as a constraint upon the occupant" as this will empower the Occupier to "operate through extraterritorial prescription of its national institutions."[224] This is notwithstanding the territory subject to occupation was not initially that of a recognised State under international law.

The above position is necessary since the main objective of GC IV is the protection of civilians against the effects of war as opposed to military operations.[225] An interesting argument is that of Israel which though had ratified GC IV since 6 July, 1951 considers that the Convention is not applicable *de jure* to the Occupied Palestinian Territories on the basis that the wordings of article 2(2) of GC IV applies only to a territory of a High Contracting Party of which neither the West Bank nor Gaza satisfied the requirement.[226] This argument was rejected by the ICJ in its advisory opinion in 2004 when it posited that the Convention is applicable to such territories irrespective of their prior status

[223] Graber, D.A., *The Development of the Law...,* at p. 52

[224]Benvenisti, E., *The International Law....,* at p. 19

[225]Momtaz, D., 'Israel and the Fourth Geneva Convention: On the ICJ Advisory Opinion Concerning the Separation Barrier' (2005) 8 Yearbook of International Humanitarian Law, at p. 348

[226]Sassòli, M., and Bouvier, A., *Un droit dans La guerre?*Vol. 1 (Geneve, CICR 2003) at p. 10S8.

before the conflict and subsequent Israel's occupation.[227] What activates the application of the Convention is the existence of armed conflict between High Contracting Parties whether or not a state of war is recognised by one of them and that a territory is occupied in the course of such conflict,[228] which the situation in the OPT has satisfied.

Occupation in Disputed Territory

Instances abound where invasions and occupations were carried out in territories whose status are not clearly settled, or may even occur in territory subject to "competing claims".[229] This type of situation is very contentious and complex. From a historical perspective, disputes relating to a territory have often preceded or accompanied military occupations especially in the 21st century.[230] Instances of this are for example the Kashmir, Spratly Islands, and Nagorno-Karabakh. An interesting example is that of the claim by Japan against the Soviet Union of the islands of Habomais, Shikotan, Kunasir, and Iturup which came under the control of Soviet Union in 1945.[231] Japan had consistently maintained the Soviet Union to be in occupation of these territories, a claim which the Soviet considered baseless and regarded the islands of having formed part of its territory.[232] When for example Kuril Island was invaded by the Russian Forces in August, 1945, the entire population of the Island consisting of 17, 000 people were expelled until 1946.[233]

Another instance is that of Falkland Islands between United Kingdom and Argentina. Argentina considered its invasion and occupation of Falklands in April, 1982 as reclaiming its national territory which it laid claims since 1863 but which is rejected by the inhabitants and is considered by the United Kingdom as its self-governing overseas territory.[234] The central

---

[227] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion, [2004] ICJ Rep para. 101

[228] *Idem* para. 95

[229] Roberts, A., 'What is a Military Occupation'..., at p. 279

[230] *Idem*

[231] *Ibid*

[232] *Ibid*

[233] See <http://en.wikipedia.org/wiki/Kuril_Islands> accessed on 3 August 2015.

[234] See <http://en.wikipedia.org/wiki/Falkland_Islands> accessed on 3 August 2015.

question is whether the law of occupation applies to these types of territories. It must be noted that this is somewhat a complex situation especially the fact that answering this question involves both *ius ad bellum* and *ius in bello* issues. Some would argue that The Hague Regulations and Geneva Conventions are not applicable to these territories on the ground that they are not a territory of a hostile State or the territory of a contracting party.[235] This view is however, no longer tenable in the light of the ICJ Advisory Opinion in the *Wall* Case as posited above. In this complex situation, it would be most appropriate if the State exercising actual control is prevented "from challenging the applicability of the law of occupation on the basis that its control remains within its territorial boundary".[236]

It is true that neither the Geneva Conventions nor Additional Protocol I provided for a solution with respect to the final status of a disputed territory. Article 4 of AP I merely provided that "...Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question." AP I left the final status of a disputed territory subject to occupation to be determined by other means. This is appropriate because IHL is not a law for the settlement of *ius ad bellum* issues; it is about providing protection to individuals. Hence the above article could be described as a measure necessary to ensure that persons in such territories are not left without protection under the circumstances, this is notwithstanding the unsettled question on the status of the territory. Under IHL however, the law is settled that territorial sovereignty cannot be acquired by the occupying power on the basis of its *de facto* control and in any case, the relevance of self-determination cannot now be forgotten; the civilian population in these territories have a right to prior consultation on the future of the territory.[237]Until final status of the territory is decided, relevant provisions of the law of occupation should continue to apply.

Conclusion

[235] Roberts, A., 'What is a Military Occupation'..., at p. 279. This was also the view of Israel in the *Wall* Case

[236] Arai- Takahashi, Y., *The Law of Occupation*:..., at p. 8

[237]See *Western Sahara,* International Court of Justice, Advisory Opinion [1975] ICJ Rep. 12

This article attempts to briefly discuss the concept of belligerent occupation under IHL through the prisms of perspectives by notable authors in the field. It traces belligerent occupation's historical legal regulation and the various legal regimes through which the international community have made efforts to regulate the unfortunate situation where force is used against or in the territory belonging to another State. The different types of occupation and the manner in which these occur suggested that a clear understanding of the situation is required such that situation or certain individuals in a State are not left without adequate legal protection. It is hope that this modest clarification of the concept, its nature and legal regulation will further advance the understanding of those who are interested in specializing in IHL and specifically on the law governing belligerent occupation.