

The Law in Occupied Territories

*On January 1st, 2004, the US armed forces reached the end of the eighth month of occupation of the Iraqi territory ... After invoking some false excuses to attack Iraq (in particular the possession of WMD), Washington finally presented its military intervention as a war of liberation. This objective was not the only one, and it was certainly not the main one. Consequent to “*jus ad bellum*” (law for war declaration) comes “*jus in bello*” (war law). The later will be emphasized here. In this regard, Iraq has been an occupied territory for about one year and, the longer the occupation, the more difficult is it to comply with the 4th Convention because the occupying forces do slow down the normal development of the country, would it be only for being in there. This occupation has yet been agreed by though agreed by the Security Council through resolutions number 1483 dated May 22, 2003, ratifying the coalition provisional Authority and number 1511 dated October 16, 2003, awarding significant esteem and representational support to the interim government Council set up by the occupying forces.*

However we can only note the misunderstanding between the Iraqi population, persuaded to be under American or Western supervision with their forces confined in the vacation spots of the former government, and the occupying forces, relying on a co-opted and totally under control elite, persuaded that the most important part of their mission has been achieved. This situation is partially understandable because the law to be applied in Iraq by now (the 4th Geneva Convention ratified by both the opposing parties) is far from being enforced.

BY MICHEF DEYRA, HEAD OF THE IAG IN THE AUVERGNE UNIVERSITY, SENIOR LECTURER AT THE LAW UNIVERSITY OF CLERMONT-FERRAND



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1949 the Geneva law worked out much more accurate rules, intending to prevent the resurgence of WW II acts of barbarism.

A territory is occupied from the time when it is de facto placed under an enemy's authority, even without recourse to force. The actual territorial control of the area where civilian people are living is the criterion. When control is ineffective because of the opposing combatants, it will then be considered as an invaded territory where the rules to be applied are those of the battlefield. A war occupation is a provisional situation that doesn't lead to the disappearance of the occupied Nation, the sovereignty of which, even affected, remains, and the government of which, even in exile, has got a right to continue hostilities. After all is said, the rules set by the international humanitarian laws are in line with the logic of the UN Charter according to which acquiring territories through occupation is

After the minimum humanity standards of the 1907 4th The Hague Convention proved to be totally inefficient during both World Wars, in

unlawful. Thus, war occupation does not necessarily translate into sovereignty (Art 47 C IV). Therefore, it is necessary to sort out the issue of power sharing between the occupying and the occupied Nations. The matter will be, in priority, to take the necessary steps to maintain order and to protect the public life, and second, to protect its population against possible arbitrary decisions of the occupying forces.

Maintenance of Public Order

The occupying Power should maintain the laws of the occupied State, and more particularly its criminal laws, and the courts responsible to enforce them, unless security is at risk. If there are militias or groups of resistance and hostility from the civilian population toward the invader, security is quite likely to be jeopardized. In this case, the occupying Power will decree a criminal legislation to maintain order in the ruling of the territory, to protect property and the lines of communication of the occupying armed forces and administration. That legislation will be published and will offer all conventional guarantees, in particular the rules of non-retroactivity, of proportional sentencing, of petition for reprieve, of deduction of preventive detention, and of restrictions of the death penalty (only in case of espionage and sabotage having caused death and only if the criminal law of the occupied territory was making provision for such a sentence (Art. 68.2 C IV). Moreover, the detention of civilians is addressed as well.

It should take place in the occupied territory, with good conditions of hygiene, food, religious support, and medical care. It should also keep the prisoners in good health, with specific guarantees for women and children (art. 50 and 76 G IV), and should allow visits from the ICRC delegates limiting neither their frequency nor their duration (art. 143 G IV). The detaining of civilians, for pressing security reasons, obeys the very strict rules set by the 4th Convention (art. 79 to 141).

As for militias and organized resistance movements that are operating inside an occupied territory, they are to be considered as prisoners of war when captured, on condition that they are hierarchically organized, that they wear some distinguishing feature recognizable from a distance, that they carry weapons openly in combat actions and that they comply to the war laws and custom (art. 4.2 G III). The prisoners of war (including the most famous of them, Saddam Hussein) do not benefit immunity of proceedings for crimes that they

possibly committed, they can undergo cross-examination within the strict limits set by article 17 of the 3rd Geneva convention. In case of proceedings by the holder power, any prisoner of war should be put to trial in the same courts and along with the same procedures as for members of the armed forces of the holder power. Thus, a prisoner of war detained by the US forces can be court-marshaled along with the US criminal military law with the inherent basic freedom and impartiality guarantees.

To Protect the Population against Possible Arbitrary Decisions of the Occupying Forces

The protection of the civilian population, more particularly vulnerable to the actions of the occupying forces, is provided through three different mechanisms.

First, respect for the basic guarantees of humane treatment. To ensure respect for the rights of an individual detained by one of the warring parties, murder, torture, corporal punishment, mutilation, pillage, and any other brutalities are forbidden. On the same line, foreign nationals are authorized leaving an occupied territory unless national interests of the occupying power make absolutely necessary for them to stay. In such an event, there could be internment or placement under house arrest.

Second, the right to live as normal as possible. Actual administrator of the territory, the occupying forces have three obligations. Firstly, they have to facilitate a smooth running of the establishments in charge with children care and education or, if the local institutions are faulty, to provide the support or the education of those children (art. 50.1 C IV). Then, the occupying forces should maintain the medical and hospital establishments as well as public health and hygiene. The occupying forces can decide requisitioning on a temporary basis only and only if the needs of the civilian population are satisfied (art. 56 and 57 C IV). Finally, they should allow the ministers of religions to spiritually support their fellow believers, and the rescue organizations to hand over individual and collective assistance at times when the population does not get sufficient supplies (art. 55, and 58 to 63 C IV). The occupying power has to authorize neutral and impartial NGOs to check the level of supplies of the population and to let a free access to humanitarian aid. However it is in no way an excuse for the occupying forces not to feed the population.

freedom of speech

Third, respect of the allegiance of the population to the occupied Nation of which they are citizens. It is forbidden to transfer, to deport, or to establish outside the occupied territory the protected people, either in large numbers or individually (art. 49 C IV), and to establish nationals of the occupying Power in the occupied territory. Further, hostage taking and moral and physical coercion of civilians, in particular in view of getting pieces of information, are prohibited. Lastly it is also forbidden to recruit children in any organization or formation coming under control of the occupying forces, to force people having a job to join the occupying armed forces, to compel them to works that would force them into military operations (art. 50 §2 and 51 C IV).

Therefore, the occupying Power has to take the necessary steps to maintain order, and the occupied Power has to protect its population against possible arbitrary decisions from the occupying forces. If many measures, in particular those relating to human treatment and respect of the allegiance of the Iraqi people to Iraq, are properly applied by the occupying forces, the current situation in this country gives rise to two series of questions.

On one hand, those relating to the respect for individual rights, of civilians or of prisoners of war. The measures adopted by the provisional Authority of the coalition and by the interim government Council are giving cause for concern, more particularly in regard of the freedom of the judiciary power, freedom of speech and of association, freedom of movement, access to information in the proper language and

patrimonial disputes. In this matter the adoption of a provisional constitution on March 8 is not of a reassuring nature, and certainly not for ... Iraqi women. Will 25,000,000 Iraqi citizens approve what the 25 members of the interim council ? Further, the access of the ICRC to some prisoners of war is not made easier when delegates must visit all prisoners and confined people, in any detention place, and benefiting discussions without witness. And this, as often as the ICRC judges it necessary. Further, if prisoners of war can be transferred outside the country where they have been captured imply that they also could be detained in their own country. Following this hypothesis, even if nothing specific has been set by law, it would be logic to grant them the same right to family visits as the one granted to civilians protected under the 4th convention.

On the other hand, there are questions about public order. If the tyranny of the Baas party has come to an end, is it possible to view the interim government as legitimate ? Should we ignore the problems of food, gas, electricity, and gasoline supply ? Public health and security problems ? Unity of Iraq in a democratic regime with the Kurds divided in rival groups, Sunnits and Chiites divided in several schools of thought is wishful thinking. The balkanization that divides communities, tribes, clans, not to say the families themselves has lead to the death of hundred of civilians that are now deliberately targeted.

The United States declared in February that they would leave Iraq on June 30, 2004 and for lack of being able to organize free elections before hand, they will leave this country with a provisional constitution and a non-elected government that is not to be “the internationally recognized and representative government requested” by Resolution 1511. And it is this very resolution that establishes the multinational force under an American unified command to which the UN State members are called on to provide some support, to include military forces.

Strange paradoxes that can be solved neither through “jus ad bellum” nor through “jus in bello” !



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