

PAKISTAN'S BELLIGERENT OCCUPATION OF KASHMIR & INTERNATIONAL LAW

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ABSTRACT

Human Rights law applies to peace time as Humanitarian Law applies to conflict scenarios. The Hague and the Fourth Geneva Convention prescribe rules for the treatment of occupied people and rights as well as duties/obligations imposed upon the belligerent/military government, legitimate government and occupied people. This paper will examine few of the multiple lacunae in those rules, as also the need for evolution in the law to provide for the ends of justice being served; not in theory but realistically.

Keywords: Geneva Convention, Humanitarian law, Kashmir, Occupied Territory, UN Charter.

INTRODUCTION

There is a basic duty of the Legitimate Government and Belligerent Military Government towards protecting the inherent Human Rights as well as Personal and Proprietary Rights of the residents of Occupied territory¹. This is true, idealistically. However, it is not natural for a belligerent who has invaded a territory of another, to care for the people of that territory. The belligerent commits mass murder, rape, arson and other human rights violations when it invades. This is evident in the case of Pakistan's invasion of India in 1947, when Pakistan burnt thousands of villages in Jammu and Kashmir after slaughtering the men, elderly, children and committing mass rape of its women. Besides, women were kept in camps in the town of Baramulla for 13 days while the raiders committed shameful acts in the camps, leaving an ineffaceable blemish on the town of Baramulla for the generations that followed.

In such scenarios of unimaginable torture and shame brought upon the successive generations of Pakistan Occupied Jammu and Kashmir till date, what can the legitimate Indian government do to redeem the lives and honour of its people, in occupied area, under the illegitimate government? There should be codified rules for the same.

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Pakistan Occupied Jammu and Kashmir is under Belligerent Occupation by a hostile military force that has been endured for the longest duration of any of the belligerent occupations in human history². Therefore it merits introspection upon some of the issues that are in dire need of resolution:

- i. The established International Humanitarian Law governing Occupied Territory;
- ii. The plight of Occupied people when there is no legitimate administrative entity to prevent uncontrolled torture perpetrated by the Belligerent force;
- iii. Whose duty is it to prevent such criminal acts when there is no notice taken by the international community, despite numerous distress calls by the occupied people?;
- iv. How long can International Law making agencies be oblivious to the fact that there is no stable established law in that regard?;
- v. What are the fundamental moral obligations of the legitimate government in such an eventuality?;
- vi. What are the other stark examples of Human Rights violations of Occupied people the world over?;
- vii. Duties and Obligations of the Belligerent Military Government in occupied territory – an overview and evolution of redundant rules in the concerned law;
- viii. Duties and Obligations of the Legitimate Government of Occupied Territory – an overview and suggested evolution of obsolete rules in the concerned legal framework;
- ix. Duties and Obligations of the residents of Occupied Territory – an overview and suggested evolution of impracticable rules in the concerned legal framework.

FUNDAMENTAL QUESTION

How can the legitimate government ensure human rights protection while its control over its own territory is aggressively prevented by the belligerent force? Further, what restraints must be imposed upon a belligerent force to ensure the prevention of Human Rights violation, which is generally in the nature of the belligerent?

WOES OF HOSTILE OCCUPATION

‘War Crimes’ are an appendage of the subject³, though it is not the main thrust of the issue when it comes to inadequacies in the law relating to aggressive occupation of enemy people⁴. Needless to say, violation of Humanitarian Law by the belligerent, while in occupation, and during the preceding invasion that led to the illegal occupation, is one of the more important legal aspects that needs to be addressed when it comes to alleviating the torment of helpless occupied people. Something that is much in need of evolution, when dealing with belligerent occupations, is the duties imposed upon occupied people in relation to the belligerent. It cannot be expected or demanded of forcefully occupied people that they yield with the same allegiance to the belligerent that they did in respect of their legitimate sovereign. Just as prisoners of war always try to escape from the enemy prison camp, it is human nature and morally sound to assume that the occupied people who are tormented by a belligerent occupant army will

endeavour to spark and uphold revolutions against the 'illegitimate government'.

As per the established principle of '*nullum crimen sine lege, nulla poena sine lege*' – there can be neither retroactive punishment for acts expressly criminal nor any concealed form of punishment for acts which are criminal by analogy. It is interesting to note here, that the legendary Nuremberg Trial expressly endorsed the policy that all acts which may be condemned by the value-judgements of all civilized men, punishable by every civilized municipal legal system are an exception to this fundamental rule. In fact, the Tribunal indicted and punished the leaders of the Third Reich, on the basis of the Pact of Paris⁵ and applied the principles of criminal law as per the U.N. Charter. The contention of the accused was that the U.N. Charter⁶ was not in force at the time the crimes were committed and the Pact of Paris did not prescribe any punitive sanctions for the enforcement of the provisions contained therein.

The judges that belonged to the victorious allied powers, further emphasised quite astutely, that to make an absurd assertion that it is unjust to punish for an innately inhuman acts (on the flimsy ground that there is no law in force prescribing punishment for the same) is itself an inhuman contention; which if upheld would be a gross travesty of justice.

In keeping with this line of thinking, certain issues need to be addressed in regard to occupied people, who are hostage to the tyrannical regime of a belligerent military government. Some of those issues are as follows:

1. The belligerent occupant may impose new taxes to meet the needs of the belligerent administration and the belligerent army;
2. The belligerent occupant may try and punish (which includes even the death sentence) persons who participate in sabotage of the occupant installations, espionage and any hostile activity towards the belligerent;
3. The belligerent occupant may compel the inhabitants to render services for repair of roads, buildings, etc. necessary either for facilitating the belligerent occupant administration or for the needs of the belligerent army.
4. The belligerent occupant has the power to damage and destroy immovable property of military character belonging to the State. This includes forts, etc. that may very well be heritage structures, which are part of the cultural treasures of the occupied people.

Belligerent occupation is naturally an extension of aggressive invasion. It is first and foremost the international crime of aggressive invasion that formed the basis, for which the U.N. Charter was drafted⁷. These above four rules, are among a large number of such others that hardly seem to produce the necessary deterrent effect imperative for evolving the universal prevention of the criminal act of belligerent occupation.

The said rules have been derived from extensive research and study of scholars and experts of international law. But law is dynamic in character and international law has matured to a level that these questions may be put forward. Experts ought to work together to derive some sort of legal code which may be applied to occupied people, that is both morally sound and politically feasible in practical application.

There needs to be a study to document the opinions of experts and record the laws and events, having a bearing on the subject (of contemporary relevance) that may just form a humble basis for further joint government partnerships towards the urgent imperative progress, with regard to alleviating the misery of belligerently occupied people the world over.

MATTERS YET TO BE ADDRESSED BY A UNIVERSAL DECLARATION OR CONVENTION

The Hague Regulations of 1907⁸, the Fourth Geneva Convention of 1949⁹ and the customary laws of belligerent occupation deal with this aspect of International Law. However, the United States has sort of rewritten the rulebook, by setting forth many adapted or completely innovative rules to be applied to Occupied Territory to suit the evolved conditions in the 21st Century, mainly after the U.S. operations in Iraq.

It has been universally accepted that Human Rights Legislation applies to peacetime administration just as Humanitarian Law applies to conflict scenarios. Belligerent Occupation of part of the territory of another is essentially an extension of a conflict scenario, which lacks an adequately definite and particularly codified law, that pertains to unrestrained denial of political, civil, cultural and inherent human rights of occupied people. This unabated abuse of occupied people is still not addressed by a Universal Declaration or Convention, which ensures prevention of this kind of massive intrinsic torture/injustice on an ongoing and recurrent basis.

Under International law, since the Occupant is only the temporary controller of the territory – not the sovereign; there is no authority vested in the Occupant to make changes in the institutions, legislation, regulations, administration, etc. other than those demanded by ‘military necessity’ or ‘public order and safety’. It is just assumed that belligerents will adhere to this golden rule in regard to the territory they have illegally occupied. But the sad reality is that most military governments violate this fundamental rule of International Law. What must be done in such circumstances to aid the suffering masses under the aggressive invader is yet to be addressed by established custom or more importantly by an international agreement. The rule that all erring Occupants will be dealt with when the legitimate government is eventually restored, does not even begin to offer any semblance of justice to the people occupied for the better part of a century, for instance in the case of India’s territory under hostile Pakistani Occupation in the areas of Gilgit, Baltistan, Mirpur, Muzaffarabad, as well as other parts of Jammu and Kashmir.

This effectually means that generations of occupied people live and die under a belligerent occupant’s tyranny. International law has yet to offer a solution to this very old, yet rather controversial question of what happens when the International Community particularly the U.N.O. allows an occupied people to be slave to an aggressive invader’s occupation for an arduously long duration. Should there be a time limit within which the U.N. should be lawfully required to address belligerent occupations? Should a case brought to the U.N. Security Council under any Article which does not prescribe enforcement measures, permit the Council to effectually enforce the resolutions or take action under Article 42 if the erring party fails to abide by the resolutions?

What if a belligerent alters their map to show that the occupied territory is actually their

legitimate territory like in the following case:

1. Pakistan's maps showing areas that do not belong to Pakistan as included illegally in Pakistani territory.
2. China's maps showing vast areas of foreign territory as Chinese territory.
3. Maps of Azerbaijan and Armenia border.
4. Maps of Ethiopia and Eritrea border.

The issue of the South China Sea is also pressing at this juncture. Furthermore, there is the issue of other countries like Indonesia that are trying to extend their territorial waters by extending their shoreline.

Then there is the issue of exploitation of natural resources of occupied territory for the benefit of civil energy supply to the belligerent's territory and for wealth generation by the belligerent government, to fill its coffers.

The Brussels Conference promotes the rule that the Occupant must respect the law in force in the Occupied Territory, which was legislated by the Legitimate Sovereign of that territory. This rule is almost always violated in practice. There must be stringent disciplining rules of International law, so that it becomes imperative that the belligerent adhere to this precept.

The Hague Regulations forbid the occupant from declaring extinguished, suspended, or unenforceable in a court of law, the rights of action of the inhabitants¹⁰. Cases dealing with this aspect should be inspected. For instance:

1. Porter v. Freudenberg¹¹
2. Ochoa v. Hernandez y Morales¹²
3. Raymond v. Thomas¹³

CONCLUSION

If the world is truly a global community then it is our duty to formulate legal theory to address the factual situations; not let factual situations be slave to 'no-longer-workable' legal theories. The writings of authors like Oppenheim, Lauterpacht, Starke, Schwarzenberger, Shearer, Stone, etc. should be widely researched and cross referenced. Military manuals like 'FM 27-5' of the U.S.A. should also be extensively referred to. American occupations of course expressly state that they are not belligerent. Belligerent occupation warrants inspection, for ensuring the human rights protection of the suffering people there. As per the rules pertaining to occupied people today, there is no distinction made between belligerent and humanitarian occupations – in terms of applying the rules of occupied territory. It is very essential to apply different rules to occupied people under a belligerent occupant, and those living under a humanitarian occupant. There is a vast difference in the way both people are treated, which makes it imperative that different law is applied to each people.

It is advisable, for sincere evolution of this aspect of law, to consult adept researchers like Nathalie Weizmann¹⁴, Michael M. Schmitt¹⁵ (UN Special Reporters on Arbitrary executions and torture in Occupied Territory), Sultan Shaheen¹⁶, Dr Shabir Choudhry¹⁷, Yoram Dinstein,

Rafay Bin Ali, Stephen Zunes and other renowned world experts on the Laws of War and Occupied persons.

International Case law, for example:

1. Thirty Hogsheads of Sugar v. Boyle, et al.¹⁸
2. Drewry v. Onassis¹⁹
3. United States v. Rice²⁰

and many others should be referenced for all aspects of Occupation²¹.

ENDNOTES

1. The Hague regulations were considered inadequate to protect occupied civilian population, therefore the 4th Geneva Convention was ratified. This came to be popularly known as the ‘Civilian Convention’.
2. Pakistani Belligerent Occupation of Indian territory is the longest ever occupation because it has lasted from 1947 till date and is still continuing. In international history of belligerent occupations it is recorded as the longest one.
3. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War was adopted on August 12, 1949.
4. The 4th Geneva Convention made many rules especially relating to belligerent occupation under Articles 27-34 as well as under Article 47, 48.
5. Officially known as the Kellogg-Briand Pact (1928)
6. Adopted in 1945
7. The Charter prescribes strict rules of non-intervention in the domestic jurisdiction of other nations as well as stringent rules prescribing for non-aggression towards other international States.
8. The Hague Regulations on Land Warfare under Article 42 to 56 protect civilian population on occupied territory.
9. The Geneva Convention IV (1949), relative to the protection of Civilian Persons in time of War, has made it clear that a belligerent occupying part of the territory of the enemy State, cannot annex that territory of that State; thereby making it well established that belligerent occupation does not entail transfer of sovereignty.
10. Article 23 (h) of the Hague Regulations.
11. (1915), 1 K.B. 857
12. 230 U.S. 139
13. 91 U.S. 712
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18. 9 Cranch 191.
19. 179 Misc. 578, 39 N.Y.S. (2d) 688 (1942).
20. 4 Wheat, 246; TM 27-250, p. 13.
21. These abovementioned three cases deal only with the commercial aspect of Occupation.