NON-BELLIGERENT OCCUPATION

By Michael J. Kelly*

I. WHAT CONSTITUTES NON-BELLIGERENT “OCCUPATION”?

There has been much written about belligerent occupations in the literature of international humanitarian law but very little on the category of the law of occupation which may be called non-belligerent occupation. Looking at the development of this branch of the law it is difficult to determine what the legal requirements were in relation to establishing the existence of a non-belligerent occupation but it would appear that the criteria were similar (in the case of non-treaty occupations) to that which applied to belligerent occupation. In a US government legal opinion dealing with its non-belligerent occupation of Cuba in 18991 the US appeared to look at the matter in terms of the effective authority of the previous sovereign having disappeared, there being no other effective authority in the territory and the military force being able to assert authority. This was sufficient to activate the rights and obligations that flow under non-belligerent occupation.2 There would seem to be no reason why the criteria would differ from what is required under the law relating to belligerent occupation with the essential elements being the effective control of territory in which the writ of the sovereign no longer runs. In this respect the analysis of the criteria for belligerent occupation by the authorities is equally applicable to non-belligerent occupation, with the Von Glahn formula3 in particular providing a logical reference point. Conversely the existence of a pacific occupation4 depended on the terms of the relevant agreement governing the presence of the forces in the foreign territory.


2 Ibid., 11-15.

3 Von Glahn summarizes the control test as follows, “as long as the territory as a whole is in the power and under the control of the occupant and as long as the latter has the ability to make his will felt everywhere in the territory within a reasonable time, military occupation exists from a legal point of view”. G. von Glahn, The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation 29 (1957).

4 Military occupations other than in states of war include occupatio pacifica or occupations by consent. The term “pacific” does not denote that the occupation is “peaceful” in the ordinary sense of the word, or that no force is used, but that it is in legal terms an occupation outside the context of a formal state of war, by treaty, invitation or acquiescence of the...
II. THE ROOTS OF NON-BELLIGERENT OCCUPATION – 1800-1873

By the time the Lieber Code was produced in 1863 there was already a blurring of the application of “belligerent” occupation principles by their extension to civil wars and internal conflicts as a standard of civilisation. Further complicating matters was the fact that during the nineteenth century there was a discernible trend towards the development of a State practice of occupation by military forces not in the context of states of war between sovereign States, something which had not been evident up to that time. This trend coincided with and was in fact driven by the age of European expansion through nationalism and imperialism, but also occurred in the context of the attempt by conservative forces in Europe to retard the democracy revolutions. The circumstances in which occupations of this kind occurred could be in pursuance of a treaty, for re-establishing domestic order in a country, or a deterrent move to defend a friendly government from internal or external enemies. Quite often it was to ensure compliance with international duties owed to the occupying State or to extract reparations and guarantees for the future, the territory being held as security, or to supervise the reparative arrangements. While not necessarily “peaceful” they were nevertheless, in the strict sense, not belligerent occupations and in some cases fell within the category of occupatio pacifica (pacific occupation) that is occupation by agreement. Raymond Robin summed up the discernible principles of these occupations as follows:

… 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.

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6 Ibid., 9-10.
7 Ibid., 237-38.