Chapter 17

Transformative Military Occupation: Applying the Laws of War and Human Rights

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Within the existing framework of international law, is it legitimate for an occupying power, in the name of creating the conditions for a more democratic and peaceful state, to introduce fundamental changes in the constitutional, social, economic and legal order within an occupied territory? This is the central question addressed here. To put it in other ways, is the body of treaty-based international law relating to occupations, some of which is more than a century old, appropriate to conditions sometimes faced today? Is it still relevant to cases of transformative occupation – i.e. those whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule? Is the newer body of human rights law applicable to occupations, and can it provide a basis for transformative acts by the occupant? Can the UN Security Council modify the application of the law in particular cases? Finally, has the body of treaty-based law been modified by custom?

These questions have arisen in a number of conflicts and occupations since 1945 – including in the tragic situation in Iraq since the US-led invasion of March–April 2003. They have arisen because of the cautious, even restrictive assumption in the laws of war (also called international humanitarian law or, traditionally, jus in bello) that occupying powers should respect the existing laws and economic arrangements within the occupied territory, and should therefore, by implication, make as few changes as possible. This conservationist principle in the laws of war is in potential conflict with the transformative goals of certain occupations.

This survey suggests that the law on occupations remains both viable and useful, and has proved reasonably flexible in practice. The article explores two particular ways in which potential conflicts between the conservationist principle on the one hand, and transformative goals on the other, may be mitigated. One is the application of international human rights law, which offers principles and

* This chapter is a product of research conducted under the auspices of the Oxford Leverhulme Programme on the Changing Character of War. A version appeared in American Journal of International Law, Washington DC, vol. 100, no. 3, July 2006.
procedures that can help to define the means and ends of an occupation. Another is the involvement of international organizations, especially the United Nations, that can assist in setting or legitimizing certain transformative policies during an occupation.

The existence of a possible legal justification for pursuing transformative projects in military occupations might be thought to have two consequences, but neither of them follows automatically from it. Firstly, it is no basis for general optimism about transformative occupations. Law may allow for certain possible courses of action, but that does not mean that transformative goals are always desirable or attainable. Only in exceptional circumstances are occupations likely to bring about a successful democratic transition in a society. There is ample ground for scepticism about the propositions that democracy can be spread by the sword, and that the holding of multi-party elections is in itself evidence that a society is moving beyond authoritarianism.¹

Secondly, a legal framework for a transformative project under the *jus in bello* does not mean that, under the *jus ad bellum*, there can be said to be anything approaching a general right of states to invade other sovereign states with the stated purpose of reforming their political systems in a democratic direction. Since at least the time of the French Revolution of 1789 there have been many visions and projects of democratic transformative conquest. In contemporary international law a transformative political purpose is not on its own a justified cause for intervention.

The question of whether there can be a justification of intervention on transformative grounds overlaps with the long-standing and contentious question of ‘humanitarian intervention’. There is a strong tradition of scepticism among international lawyers about whether, in the absence of a specific UN Security Council authorization, there can be said to be any ‘right of humanitarian intervention’.² However, there is scope for a nuanced view that allows for some possibility of humanitarian intervention even without specific Security Council authorization. In such a view, it is neither logical nor helpful to frame the consideration of interventions in humanitarian crises in terms of a general ‘right’ of humanitarian intervention. Rather, humanitarian intervention is an occasional necessity, in which the legal issues on both sides are finely balanced, and in which states taking military action must accept a degree of legal risk. If it were to be accepted along such lines that on rare occasions intervention on humanitarian grounds might be justifiable, even without explicit UN Security Council authorization,

¹ On the distinction between the external trappings of democracy, and political systems in which freedom is deeply entrenched, see especially Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W.W. Norton, 2003).

² Yoram Dinstein has been characteristically consistent, clear and unequivocal in denying the existence of such a right. See Dinstein, *War, Aggression and Self-Defence*, 4th edn. (Cambridge: Cambridge University Press, 2005), pp. 70–3, 90–1 and 315.