

Summary

Rebuilding war-torn States

Possible functions of occupying powers, international organizations and third States

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1. In practice, the state building efforts of external actors within war-torn societies focus on the core of essential state functions, i.e. on minimum standards of internally and externally consolidated statehood. Generally speaking, these minimum standards concern the security functions of a state, and its welfare functions, as well as the representative legitimacy of its governance.
2. In interpreting the requirements of Article 43 of the Hague Regulations concerning the Laws and Customs of War on Land (1907), and of Article 64 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1947), there needs to be a balance between the transformative post-war objectives of the occupying power, and the conservative interests of the occupied state and its population. Given that transformative objectives are often targeted against repressive regimes, the recent controversy regarding the legal restraints imposed on transformative occupations (*ius in bello*) mirrors the age-old controversy about the legal restraints imposed on just wars (*ius ad bellum*).
3. Article 43 of the Hague Regulations permits the occupying power to change or repeal local laws when military necessity so requires. On this basis, the suspension, abolition, or modification of local laws on elections, assemblies, and political parties is permitted under the international law of occupation (e.g., the prohibition in 2003 of the Ba'ath-Party in Iraq). The same is true for the abolition or reconstruction of security-sensitive institutions such as intelligence services and police departments.
4. The conservative approach of Article 43 of the Hague Regulations, in keeping up with the international legal order of the 21st century, aims at the protection of the local legal system, because the local population is familiar with it; and it aims at the protection of the local political system, because the local population has presumably chosen it. The modification of local laws so as to enforce the occupying power's political war goals, e.g. a sustainable regime change, contravenes the 'modern' spirit and purpose of Article 43 of the Hague Regulations. Political war goals, justified or not, do not have a bearing on the occupying power's duties under *ius in bello*. The fundamental principle – that the nature, origin and legal justification of an armed conflict (*ius ad bellum*) cannot affect the duty to comply with *ius in bello* – applies to *ius in occupatione bellica* also. (See Article 1, Fourth Geneva Convention; and the fifth paragraph of the Preamble to Additional Protocol I to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflict of 1977).
5. The introduction of a third legal corpus – *ius post bellum* – alongside *ius in bello* and *ius ad bellum*, is a challenging and increasingly popular academic mind-game. The *ius post bellum* concept aims at fostering the political post-war goals of all external actors – occupying powers, third states and international organizations – equally, by harmonizing the relevant legal framework in the light of the interests and needs of the international

community. However, international practice, for example the occupation of Iraq in 2004, clarifies that the legal regime governing transformative occupations is still covered by either *ius in bello*, or by more far-reaching authorizations by the UN Security Council pursuant to Chapter VII of the UN Charter.

6. Article 43, Hague Regulations, establishes the rebuttable assumption that occupying powers can best fulfill their tasks on the basis of local laws. If actual conditions in the territory indicate that the occupying powers cannot provide for an adequate social, economic, and cultural environment (*la vie publique*) on the basis of unchanged local laws, the legal assumption is refuted. This course of action is especially valid in the course of a prolonged occupation, given the changing needs of the population due to technical progress and altered environmental conditions.

7. Article 64, Fourth Geneva Convention, both specifies and amends Article 43, Hague Regulations. The occupying power's task – to provide for an orderly administration of the territory – has to be interpreted in the light of international good governance standards. Article 64 permits the introduction of a new legal framework in order to secure the accountability and efficiency of the public administration as well as its subjection under the rule of law.

8. As a rule, international human rights standards extend the occupying power's legal duties under humanitarian law and oblige the occupying power to secure the human rights conformity of its actions in the occupied territory. Article 43, Hague Regulations, and Article 64, Fourth Geneva Convention, permit human rights-related amendments to the local legal system.

9. *Ius in occupatione bellica* does not impose a legal duty on occupying powers to amend or redraft the local constitution; the local constitution does not legitimize the administrative and legislative power of the occupying power. The local constitution is nothing more to the occupying power than a body of local laws which has to be respected in accordance with Article 43, Hague Regulations, and Article 64, Fourth Geneva Convention.

10. As a general rule, restrictions imposed by the occupying power to the right to free elections are usually 'reasonable', pursuant to Article 25 of the International Covenant on Civil and Political Rights (ICCPR). In the case of a prolonged and stable military occupation, the occupying power's duty to gradually allow for political participation at the municipal level may emerge. Under these circumstances, the occupying power's legal duty to restore '*l'ordre et la vie publics*' pursuant to Article 43, Hague Regulations, evolves into the legal duty to restore political life in the territory.

11. General international law may prohibit governmental elections under the authority of the occupying power. This is valid in cases of partial military occupation, or in cases of total military occupation, when the legitimate local government is in exile. Whether permissible or not, if the occupying power organizes local elections, it has to observe international electoral standards, as set out in Article 25, ICCPR.

12. The limits of transformative occupations set by *ius in occupatione bellica* are set by the people's right to self-determination (Article 1, ICCPR).

13. Supposing that third states or organisations, flanked by foreign armed forces, engage in rebuilding institutions in a failed or highly fragile state, Article 43 of the Hague

Regulations and Article 64 of the Fourth Geneva Convention are applicable. If the fragile government has consented to the *in situ* efforts, special Status-of-Forces Agreements and technical agreements precede *ius in occupatione pacifica*, irrespective of whether the fragile state institutions have subsequently collapsed.

14. Customary rules of *ius in occupatione bellica et pacifica* apply to UN-peacekeeping and peacebuilding missions, if the UN forces exercise effective control over the territory. This applies to UN military missions with administrative powers, irrespective of whether the affected UN Member State has previously agreed to those powers. In any case, the Security Council has the legal power to overrule the legal restraints imposed by Article 43, Hague Regulations, and Article 64, Fourth Geneva Convention (Article 103, UN Charter). The Security Council must, however, observe the legal limits of its Chapter VII powers, especially its Charter-based human rights obligations; the people's rights to self-determination; and, in general, all *ius cogens* norms.