Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda): Reviewing the Concept of Occupation in International Humanitarian Law

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This note examines dicta of the International Court of Justice in the recent case of DRC v. Uganda, in so far as it relates to the concept of occupation in international humanitarian law. The question of when a territory is said to be under occupation is crucially important in order to determine the rights and obligations of various parties to the dispute. This was the first occasion that the ICJ clarified the concept of occupation, and this note discusses both the majority judgment, and the strong separate and dissenting opinions rendered in this case. It also seeks to discuss the merits of each approach and applies the same in the context of the Israeli-Palestine dispute.

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I. The Concept of Occupation

A. The Need for a Legal Definition

In the common sense of the term, and as the International Committee of the Red Cross views it, a territory is considered "occupied" when it is actually placed under the authority of foreign armed forces, whether partially or entirely, without the consent of the domestic government.[1] This concept is important in international humanitarian law (IHL) as rules of the latter apply in all situations where conditions of occupation are fulfilled,[2] regardless of the motives leading to such occupation or the legality of the occupation in international law.[3]

A comprehensive legal understanding of the concept of occupation and its prerequisites becomes important since there are manifold reasons why the State whose armed forces are present on another's territory would seek to deny the fact of occupation. First and foremost, occupation has concomitant obligations, under international humanitarian law, which the occupier may wish to avoid. A situation of occupation confers both rights and obligations on the occupying power which must be observed in occupied territory as enshrined in the Hague Regulations of 1907, the Fourth Geneva Convention of 1949 and certain provisions of the First Protocol of 1977 Additional to the Geneva Conventions of 1949.[4] Secondly, the status of occupation can legally justify violence as armed struggle in support of

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[1] *References to Key Legal Provisions Regarding the Occupation of Territory by a Hostile Power, and the Implications for People Protected by International Humanitarian Law*, *available at* http://www.icrc.org/Web/Eng/siteengo.nsf/htmlall section_ihl_ occupied_territory (last visited 30th April 2007).

[2] Common Article 2, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950.

[3] The legality is a question of *jus ad bellum*, which deals with whether the war was initiated on legally justifiable grounds, while humanitarian law deals only with *jus in bello*, or the body of law applicable in times of armed conflict which protects those not or no longer taking a direct part in hostilities and which regulates permissible means and methods of warfare.

[4] Some of the most important rules of IHL governing occupation state that the occupying power does not gain sovereignty over the occupied territory and cannot annex it; it is a temporary situation and the rights of the occupying power are limited to such period; and the occupying power must respect the laws in force in the territory, unless they constitute a security threat or an obstacle to the application of the IHL. The occupying power must take measures to restore and maintain, as far as possible, public order and safety, and ensure sufficient hygiene and public health standards, and the provision of food and medical care to the population under occupation. The population in occupied territory cannot be forced to enlist in the occupier's armed forces or furnish information about army and means of defence. Collective punishment, taking of hostages, reprisals against

self-determination against alien occupation.[5] The absence of this status would mean that the violence is equivalent to terrorism and therefore, illegal under international law.[6] Thirdly, as expressed by Israel, acknowledging occupation implies abandoning any claims on the territory, as laws of war do not permit annexation of occupied territory, and the occupier then gets cast in the role of a foreigner with no links to it.[7] Morevoer, there is a certain political stigma attached to the role of a belligerent occupier. Fourthly, withdrawal of troops by the occupying power may not mean that control is no longer being exercised over the territory[8] – the devolution of governmental authority may have only been to puppet governments.[9] Also, presence of occupying troops where governmental authority has been effectively delegated will not amount to occupation.[10] This implies that the definition of occupation must necessarily accommodate such possibilities as well.

In light of these reasons, a clear and definite legal definition of the concept in international humanitarian law is essential. The International Court undertook

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protected persons and property, confiscation of private property, pillage or the destruction of enemy property (unless absolutely required by military necessity during conduct of hostilities) is prohibited. These are embodied in Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 3 Martens Nouveau Recueil (ser. 3) 461, 187 Consol. T.S. 227, *entered into force* Jan. 26, 1910 [hereinafter Convention (IV)].

5 Though this right to resistance, or *jus insurrectionis*, is a controversial one denied by some, it is now generally admitted that the duty of obedience to an established and effective occupier ceases where the occupier himself has committed substantial violations of international law. I. Detter, The Law of War 181 (2000).

6 The Palestinians claim that *intifada* or armed struggle is seeking self-determination against the belligerent occupation of territories by Israel but Israel decries the repeated references to 'occupation' in the international community in relation to those territories as encouraging and legitimising terrorist activities. D. Gold, *From "Occupied Territories" to "Disputed Territories"*, *available at* http://www.jcpa.org/jl/vp470.htm (last visited 30th April 2007) [hereinafter Gold].

7 Gold, *supra* note 8. *See also*: Official Statement, Ministry of Foreign Affairs, Israel, *available at* http://www.mfa.gov.il&sitesearch=http%3A%2F%2F www.mfa.gov.il (last visited 30th April 2007).

8 *The War in Iraq and International Humanitarian Law*, *available at* http://www.hrw.org/campaigns/iraq/ihlfaqoccupationcited.pdf (last visited 30th April 2007).

9 D. Thurer, *Current Challenges to the Law of Occupation*, *available at* http://www.icrc.org (last visited 30th April 2007) [hereinafter Thurer].

10 Historical examples where an occupation was declared or widely presumed to have ended despite the continued presence of the occupier's forces are Japan (1952), West Germany (1955) and East Germany (1954). Here this happened as the treaties ending occupation were accompanied by others permitting the presence of foreign forces. Thurer, *supra* note 9.

the task of clarifying this concept as part of a judgment delivered on 19 December 2005, on Uganda's invasion of Congo.[11] Although a number of issues were dealt with in this case, this note is only concerned with the part of the judgment relating to the alleged 'occupation'. This was the first time the Court has attempted to define the concept of occupation. Hence, apart from the implications on the case at hand, this dicta is bound to have significant impact on any future controversies on the issue. This note will attempt to examine the facts of the cases and the differing approaches as seen in the majority judgment, which subscribed to a narrow view of the term, and the very strong separate opinion delivered by Judge Koojimans. The practical ramifications of the different approaches have been analysed with the help of the example of Israel and the Gaza Strip.

II. The View of International Court of Justice: *Case Concerning Armed Activities on the Territory of the Congo*

A. Background to the Case

The proceedings were filed in 1999 by the Democratic Republic of Congo (DRC) against the Republic of Uganda seeking relief and reparations for acts of armed aggression in their territory attributable to the latter. With specific regard to the issue of belligerent occupation, DRC contended that large areas of Congolese territory had fallen into Ugandan occupation during 1998, and the Uganda Peoples' Defence Force (UPDF) administered such occupation zone both directly as well as indirectly. The creation of a new province of Kibal-Ituri by the UPDF was cited as an instance to support the claim that Ugandan authorities were directly controlling the administration in such areas. Colonel Muzoora of the UPDF was alleged to have exercised *de facto* powers of a governor in that province.

Uganda disputed these claims by indicating that the numbers of its troops were too less to occupy the vast areas as claimed by the DRC, as they had less than 10,000 soldiers at the height of deployment. More importantly, Uganda claimed that its troops were confined to strategic locations such as airfields in order to decrease vulnerability to attacks by the DRC. Further, admitting the appointment of a governor in the province, Uganda emphasized that the step was a necessary interference in local administration keeping in mind the interests of the population

[11] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), International Court of Justice, 19 December 2005, available at* http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments /ico_judgment_2005 1219.pdf (last visited 30th April 2007) [hereinafter DRC v. Uganda].

and the sole instance of any authority being exercised by Uganda on Congolese territory. To bolster this argument, Uganda indicated that the officer responsible for this appointment had disciplinary measures instituted against him by his superiors.

In order to determine whether there was belligerent occupation, the facts had to examined by the International Court of Justice in light of the existing law on the subject which requires that the occupied territory be under "actual authority" of the occupying forces.[12] Unfortunately, the concept of "actual authority" itself has been the subject of continuous debate with two distinct approaches to the notion. Therefore, it was necessary for the International Court of Justice to elect one over the other.

B. 'Actual Authority': A Precondition for Occupation

Article 42 of the Hague Regulations, 1907 states: "Territory is considered occupied when it is *actually* placed under the authority of the hostile army. The occupation extends only to the territory where such authority *has been established and can be exercised* [emphasis added]."[13] Common Article 2(2) of the Geneva Conventions adds that the Conventions apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance. The relevant criteria distilled from the above would be that there must be an *exercise of authority* or *effective control*, over the *whole* or *part of the territory of another state*, whether or not there was armed resistance. Now one must turn to the question of what 'actual authority' entails.

One interpretation of the element of exercise of authority is that the situation of occupation begins whenever a party to a conflict is exercising some level of control over enemy territory. This would cover advancing troops even during the invasion phase of hostilities.[14] The International Committee of the Red Cross (ICRC) prefers to maximise protection of persons by considering that rules of IHL apply as soon as persons in the territory come under the control of the hostile forces when the scope of 'actual authority' is liberally interpreted.[15]

The narrower approach maintains that occupation begins once the party is in a position to exercise the level of authority over the territory required to

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[12] Article 42, Convention (IV), *supra* note 4.

[13] Convention (IV), *supra* note 4.

[14] This approach was suggested by Jean Pictet in the 1958 Commentaries to the Geneva Conventions. Thurer, *supra* note 9.

[15] Thurer, *supra* note 9.

enable it to discharge *all* the obligations imposed by the law of occupation.[16] This is the approach adopted by the military manuals of most States, for instance, the British Military Manual that the occupying power must be in a position to substitute its authority for that of the government of the territory.[17] Schwarzenberger also opines, "Effective occupation manifests itself by the establishment of adequate State machinery and the actual display of State jurisdiction" with the degree of effectiveness depending upon factors such as size of territory, extent of habitation and climatic conditions.[18] Here, IHL would not apply during invasion phases. Some look upon "invasion" as when enemy armed forces stay or fight on the territory without having established the authority necessary for it to be a case of occupation.[19]

C. The Majority Judgment

In view of the arguments presented by both Parties, the Court recognised that the determination of 'occupation' hinges on the understanding of authority as referred to in Article 42 of the Hague Regulations of 1907. It observed by the majority that in order to reach a conclusion as to whether a State, whose military forces are present on the territory of another State as a result of an intervention, is an 'Occupying Power' in the meaning of the term as understood in international humanitarian law, the Court must examine the sufficiency of the evidence which can prove that "the said authority was *in fact established and exercised* by the intervening State in the areas in question [emphasis added]".[20] The armed forces should not just be stationed in the territory but should also have substituted their authority for that of the local government.[21] The territorial limits of military occupation cannot be ascertained by merely joining the points where armed forces were present on a map, as was sought to be done by the DRC.[22] On facts, the Court acknowledged that there was occupation of the Ituri province but held that there was no evidence to show that the UPDF were in occupation of any other area. Though there were areas outside the Ituri province which were administered by Congolese rebel movements, the evidence to show that these groups were under the control of Uganda was lacking. Although the Court found evidence of administrative control of Kisangani airport, outside the province of Ituri, this

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[16] F. De Mulinen, Handbook on the Law of War for Armed Forces 176 (1987) [hereinafter de Mulinen].

[17] Thurer, *supra* note 9.

[18] G. Schwarzenberger, A Manual of International Law 122 (2000).

[19] De Mulinen, *supra* note 16.

[20] *DRC* v. *Uganda*, *supra* note 11.

[21] *DRC* v. *Uganda*, *supra* note 11.

[22] *DRC* v. *Uganda*, *supra* note 11.

was not enough to show that there was actual authority over the area and hence, there could be no belligerent occupation. However, the Court held Uganda liable for breach of its obligations under the law of occupation in the occupied territory of Ituri. The fact that there was a *de facto* governor of the Ituri province from the UPDF also affected the decision of the majority. It is thus clear that the implied rationale of the Court was that occupation exists only when a foreign military force is in day-to-day control of local administration. Mere control of key access points or nerve centres is not sufficient to show such control. The International Court of Justice seems to have thus approved the stricter approach to the interpretation of 'actual authority' in the concept of occupation.[23] At first glance, it is hard to find fault with the ruling as it is patently in conformity with the general long-standing conceptualisation of 'occupation'.

However, there are those who believe that this approach is not strict enough. A stronger opinion expressed separately by Judge Parra-Aranguren was that the court should also have taken into account the degree to which nominal Ugandan administrative control was hampered by geographical characteristics of the territory and the acts of the rebel militia as a precondition of occupation is that legally constituted authority should *actually* pass into the hands of the occupant.[24] He argues that the facts that a member of the UPDF was officially appointed as governor of Kibal-Ituri and the UPDF were in control of the capital of the province do not necessarily imply that the UPDF was in a position to exercise, and in fact did exercise, actual authority over the entire territory of the province.[25]

While admitting that the geographical features of the territory should be considered when attempting to measure actual authority, it appears that Judge Parra-Aranguren has overlooked the exact wording of Article 42 of the Hague Regulations of 107 which makes armed resistance irrelevant to the actual existence of the situation of occupation. Further, a State intruding in the territory of another rarely establishes complete administrative machinery with the degree of direct control one would expect in its domestic governance. 'Actual control' should be deemed equivalent to effective control and this is best instituted by maintaining control over pivotal centres which allow exercise of that control over a wide area with minimum expenditure of resources.[26] In that light, Judge Parra-Aranguren's

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[23] M. E. McGuiness, *Case Concerning Armed Activities on the Territory of the Congo: The ICJ Finds Uganda Acted Unlawfully and Orders Reparations, available at* http://www.asil.org/insights/2006/01/insights060109.html (last visited 30th April 2007).

[24] Separate Opinion of Judge Parra-Aranguren, *DRC* v. *Uganda, supra* note 11.

[25] *Id.*

[26] That a military government may allow segments of the local government to continue operating, subject to some amount of supervision, for administrative

test would fail in the face of military strategy and most situations of armed control would fail to meet the a strict criterion of occupation. As humanitarian law seeks to alleviate the sufferings of war for the protected population of the occupied territory, restricting the scope of its application will certainly not serve its purpose.

D. The Separate Opinion of Judge Koojimans: Rejecting Traditional 'Occupation'

Judge Koojimans argued for a more liberal approach to the understanding of occupation where the actual authority should be measured by the degree it prevents other governments from exercising control.[27] By this definition, control over nerve centres could amount to occupation, if there is no other entity exercising authority over the area due to the blocking of such important locations. He recognises, unlike Judge Parra-Aranguren, that at the time of the drafting of the Hague Regulations, the term occupation had not yet acquired its present-day pejorative connections and hence it was assumed that the occupant would establish its authority through some kind of direct and easily identifiable administration.[28] However, today it suits the purpose of the occupant to refrain from establishing its own administrative system while exercising authority through intermediaries and surrogates such as transitional governments and rebel movements.[29] Accordingly, he takes exception to the requirement imposed by the majority for the intervening State to have substituted its authority for that of the territorial power as an unwarranted narrowing of the criterion.[30] In his opinion, the more appropriate legal formulation would be that the territorial government should cease to exercise authority and the invading State alone should be in a position to maintain order in the territory.[31] Applied to the facts of the case, "by occupying the nerve centres of governmental authority - which in the specific geographical circumstances were the airports and military bases the UPDF effectively barred the DRC from exercising its authority over the territories concerned".[32] The decisive factor was the elimination of the authority of the DRC government. With regard to Judge Parra-Aranguren's opinion, Judge Koojimans considered it irrelevant that certain areas were under the control of rebel movements as such a situation was aided by Uganda's invasion. In effect, he said

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convenience and a strong preference for allowing local authorities to perform governmental functions has been seen in the history of occupation. M. N. SCHMITT, *The Law of Belligerent Occupation, available at* http://www.hrw.org (last visited 30th April 2007).

[27] *DRC* v. *Uganda, supra* note 11.

[28] Separate Opinion of Judge Koojimans, *DRC* v. *Uganda, supra* note 11.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

that *"it is irrelevant from a legal point of view whether [the occupant] exercised this authority directly or left much of it to local forces or local authorities. As long as it effectively occupied the locations which the DRC Government would have needed to re-establish its authority, Uganda had effective, and thus factual, authority. Its argument that it cannot be considered an effective occupying power, in view of the limited number of its troops, cannot therefore, be upheld".*

This formulation appears sufficiently flexible to deal with non-traditional forms of military occupation. The principle enunciated by the International Court of Justice is doubtless in accordance with the traditional notion of occupation but where the concept itself demands rethinking, it may fall short in delivering justice to the invaded population. Judge Koojimans' dissent then becomes important in indicating the path along which the law should ideally progress. Detractors of the opinion may complain that the proposition is too broad and would culminate in characterising any armed presence as occupation. However, one must note that it was only with regard to the specific geographical circumstances that Judge Koojimans concluded that control of airfields and other strategic locations amounted to preventing the invaded government from exercising control. In other situations not supported by similar conditions, it could require widespread control of administrative bodies on a daily and consistent basis to achieve the same result. Therefore, this interpretation is not actually as broad as it may appear at first sight and is quite capable of being applied as a general legal rule for the extent of authority 'occupation' will necessitate in humanitarian law.

The ramifications of Judge Koojimans' liberal delimitation of the boundaries of 'actual authority' in occupation can be understood if applied, in contradiction to the majority judgment of the International Court of Justice, to the scenario in the Gaza Strip after Israel's withdrawal in 2005. Although hailed as the end of Israeli occupation in the area by some, others still allege that it is under effective occupation as Israel controls its airspace and sea access. Since direct military control has ceased, applying the majority decision of the ICJ will imply that there is no Israeli occupation.

It is feared that the removal of troops and settlers will not end the occupation for the purpose of international humanitarian law as long as Israel retains significant control over the Gaza Strip which enables it to exercise 'key elements' of authority.[33] The geographical location of the Strip is such that Israel lies between the other Palestinian territory, the West Bank. Gaza is a coastal region and its land borders are surrounded by wire barriers erected by Israel. Consequently,

[33] A. Ahmed, *The Withdrawal Hoax in Gaza*, (Sept. 9, 2005), *available at* http://www.hinduonnet.com/fline/fl2218/stories/20050909005312800.htm (last visited 30th April 2007).

interaction with other Palestinian territories is restricted and regulated by Israel. The Strip also shares a small border with Egypt which the Israel.military continues to monitor by means of a checkpoint at Kerem Shalom where the Strip meets Egypt and Israel. Gaza was allowed three miles of territorial waters after which Israeli waters begin. Gaza will also require Israeli permission to build air or sea port facilities.[34] If these access points are seen as the 'nerve centres of authority' and essential for the Palestinian state to exercise its authority, application of Judge Koojimans' formula would lend legal support to this argument.

Clearly, by failing to reach a unanimous decision as to the interpretation of occupation in international humanitarian law, the International Court of Justice has added to the prevailing confusion surrounding the concept. Adherence to the majority decision, while simplifying matters, may not be uniformly acceptable in practice, especially in the face of such a convincing dissent. This problem is obvious in the scenario discussed above. It may have been possible for the majority to use the same rule, yet differ from Judge Koojimans' findings on the Ugandan occupation by considering that the evidence did not indicate that control of the nerve centres completely disallowed exercise of authority by any other entity. Unfortunately, the International Court of Justice chose to follow the more stringent approach which would lay a greater number of situations open to dispute as methods of aggression and exercising control change.

III. Conclusion

As methods and tactics of aggression and warfare evolve, our understanding of belligerent occupation will require urgent reconsideration. In order to achieve the aims of international humanitarian law, it would become crucial to judge the state of occupation by facts on the ground. The opinion of the International Court of Justice would have greatly contributed in the creation of a set of legal criteria against which such facts should be measured. The majority decision does attempt to do so yet ultimately adopts an excessively legalistic approach. Since the law of occupation is primarily concerned with the protection of non-combatants and the population of the occupied territory, this definition serves the purpose of IHL only to a very limited extent. Judge Koojimans' dissent is convincing enough to merit another look at the issue. Although the decision of the ICJ is noteworthy for having contemplated the issue for the first time, it has not succeeded in clarifying the concept but has made further discussion of the concept very necessary.

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[34] *Id.*