

UDC 341.223.14 (100)

V. P. Plavich

Doctor of Philosophic Sciences, PhD in Law, Professor
Odessa I. I. Mechnikov National University,
The Department of General Juridical Disciplines and International Law
Frantsuzskiy boulevard, 24/26, Odessa, 65058, Ukraine

V. S. Petrovska

Odessa I. I. Mechnikov National University,
Institute of Social Sciences,
The Department of International Relations
Frantsuzskiy boulevard, 24/26, Odessa, 65058, Ukraine

**LEGAL STATUS OF TEMPORARILY OCCUPIED TERRITORIES
IN ACCORDANCE WITH INTERNATIONAL LAW**

The article is dedicated to the issue of occupied territories. The authors study the evolution of the international law and how conventions and rules on occupied territories were adopted. The article contains extracts from conventions and protocols, which help to understand the phenomenon of occupation.

Key words: international humanitarian law, occupied territories, military occupation, status of occupied territories.

Problem statement. The evolution of the concept of occupation, the rules attached to it and the development of international law in general reflects all of the changes that were made in the track of historical events. Attempts have been made from the 18th century by international law to distinguish the difference between military occupation and territorial acquisition of a country. A clear distinction has since been established among the principles of international law after the end of the Napoleonic wars in the 19th century. These customary laws of belligerent occupation which evolved as part of the laws of war gave some protection to the population under military occupation of a belligerent power.

Analysis of recent researches and publications. Modern literature pays much attention to the problems of the occupation. We would like to mention the works of B. Clarke, O. Ben-Naftali, A. M. Gross, K. Michaeli, A. Wyrozumska. Nevertheless, there remain a number of unsolved problems and unsettled questions.

Paper purpose. The aim of this work is to define the notions of temporary occupied territories, determine the status of these territories and to respond to the following questions: what is the law of occupation, when does the law of occupation start to apply and what are the most important principles of governing occupation.

Paper main body. Firstly, we would like to provide a list of documents and normative acts that contain rules relating to military occupation: the Hague

Convention of 1907 further clarified and supplemented these customary laws, specifically within «Laws and Customs of War on Land» (Hague IV); October 18, 1907: «Section III Military Authority over the Territory of the Hostile State.»; the Fourth Geneva Convention in particular — Section III: Occupied territories; Protocol I, which was adopted in 1977 as an amendment protocol to the Geneva Conventions relating to the protection of victims of international conflicts, defined as «armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes»; doctrinal sources of judicial decisions (derived primarily from the International Committee of the Red Cross (hereinafter — ICRC)).

Articles 42 and 43 of the third section of the Hague Convention state that *«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. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country»* [2]

The regulations of the second article of the Fourth Geneva Convention, which took place in 1949, apply to any territory occupied during international hostilities. They also apply in situations where the occupation of a state territory is met with no armed resistance. The legality of any particular occupation is regulated by the UN Charter and the law known as *jus ad bellum*. The law of occupation is applied once a situation which factually amounts to an occupation takes place — whether or not the occupation is considered lawful.

Therefore, for law of occupation to become applicable, there is no factual difference whether an occupation has received an approval of the Security Council, what its initial aim is, or indeed whether it is labelled an «invasion», «liberation», «administration» or «occupation». As the law of occupation is primarily motivated by humanitarian considerations, it is solely the facts on the grounds that determine its application.

We argue that the legality of the phenomenon of occupation, as it relates to the function of managing the situation, is to be measured in relation to three fundamental legal principles: (a) sovereignty and title in an occupied territory are not vested in the occupying power. The roots of this principle emanate from the principle of the inalienability of sovereignty through actual or threatened use of force. Under contemporary international law, and in view of the principle of self-determination, sovereignty is vested in the population under occupation; (b) the occupying power is entrusted with the management of public order and civil life in the territory under control. In view of the principle of self-determination, the people under occupation are the beneficiaries of this trust. The dispossession and subjugation of these people violate this trust; (c) occupation is temporary. It may be neither permanent nor indefinite [3, p. 554– 555].

We further argue that the legality of occupation, in its function to create an orderly space that is nevertheless distinct from the normal political order

of sovereign equality between states, is to be measured by its exceptionality: once the boundaries between the normal order (i.e., sovereign equality between states) and the exception (i.e., occupation) are blurred, an occupation becomes illegal. The nexus between the two functions is clear: an occupation that is illegal from the perspective of managing an otherwise chaotic situation is also illegal in that it obfuscates the distinction between the rule and its exception. Yet, the distinction between these two forms of illegality is important; the former is grounded in the intrinsic principles of the law of occupation, while the latter is extrinsic to this law and delineates its limits [3, p. 556].

A clear distinction should be drawn between occupation and acquisition of a territory. Acquisition or invasion requires complete subordination on behalf of the vanquished conqueror, which is then followed by the end of the military conflict and the cessation of sovereignty of the defeated state and the elimination of its legal institutions. Occupation, contrary to the above, is characterized by the preservation of power structures of the defeated state (even in exile) and the continuation of resistance and military operations against the occupying state. The rules relating to the occupation do not apply to acquisition (invasion). Therefore, if the occupation of the enemy's territory is followed by complete and unconditional surrender and then by complete subjugation of the territory, the demise of the national military structures and the government, as well as the cessation of all forms of struggle against the occupational regime change, and the right of occupation is no longer applicable [4].

However, modern international humanitarian law is based around the principle that the occupational law cannot be applied exclusively in cases where occupation is a result of resistance against the aggressor. This thesis, in particular, was adopted as one of the decisions of the Nuremberg Tribunal. Responding to the argument put forward by the defendant, it was claimed that the German Reich was not bound by the law of military occupation (in regard to the territories captured by Germany). The Court ruled that the doctrine of conquest does not apply to the notion of aggressive war. «According to the Tribunal, there is no need to decide whether the doctrine applies to occupation... where occupation is a result of war or aggression.» Therefore if an occupation of a territory or part of it is preceded by war of aggression, it is not recognized by international law, since it opposes *ius contra bellum*.

The rules of international humanitarian law relevant to occupied territories become applicable whenever the territory comes under the effective control of hostile foreign armed forces, even if the occupation meets no armed resistance and there is no fighting [4].

The question of «control» calls up to at least two different interpretations. It could be taken to mean that a situation of occupation exists whenever a party to a conflict exercises some level of authority or control within a foreign territory. So, for example, advancing troops could be considered bound by the law of occupation within the initial phase of invasion of hostilities. This is the approach suggested in the ICRC's Commentary to the Fourth Geneva Convention (1958).

An alternative and more restrictive approach would be to say that a situation of occupation exists only once a party of the conflict is in a position to exercise sufficient authority over enemy territory to enable it to discharge all of the duties imposed by the law of occupation. This approach is adopted by a number of military manuals [4].

The main principle of international humanitarian law of military occupation is protection of those who are deprived of assistance from their own state. In this regard three basic legal issues exist.

An issue exists between international and municipal law (with municipal law being the law of at least two states— the occupied and the occupying) due to this institute being a part of international law.

A «mobility» problem lies in a situation where an occupational regime may be established or terminated in space and time depending on the course of unfolding events. In other words, due to rapidly changing circumstances, occupational law needs to be justified every time it is applied to a particular territory in a particular period of time.

There is also difficulty in applying law of military occupation. There is a huge amount of specific situations and unsettled single issues. Conventional rules of international humanitarian law are difficult to apply to certain contemporary circumstances — unknown at the time of the adoption of the convention. Moreover, economic and political relations present at the beginning of the twentieth century and at the time of the Hague Convention «Laws and Customs of War on Land», were absolutely different from ones present currently. An obvious fact, of course, is that literal interpretation and application of the convention is hardly practicable in present circumstances. The question, however, remains: how far may a ruler of a court or any other enforcement authority derogate from the acts of the convention?

Much of the Fourth Geneva Convention is relevant to protected persons in occupied territories and Section III «Occupied territories» is a section which specifically covers the issue. The following is stated: *protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.* [5]

Article 49 prohibits the forced mass movement of people out of or into the occupied state's territory. *Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.... The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.* [5]

The domestic law of occupying powers constitutes another source of legal obligations for occupying forces. Where there are a number of powers exercising control over adjoining geographical regions of occupied territory, differing domestic laws of the respective occupiers will create separate and distinct

obligations for each occupier. This may have a significant impact upon the overall administration of the occupied territory by creating different norms in different zones of occupation. For example, occupying troops from different states may be operating under different rules of engagement. Rules of engagement set out the permissible methods for conducting military operations, and reflect the obligations of the relevant state under both customary and treaty law. Whilst not laws in themselves, rules of engagement enunciate the legal obligations of the respective military forces.

One consequence of having occupation forces operating under different rules of engagement may be that procedures for dealing with crimes allegedly committed by soldiers from different states may vary significantly depending upon the nationality of the soldier under investigation. The domestic laws of the occupied territory itself constitute another applicable source of law. Municipal laws remain on foot during a military occupation unless suspended or repealed by the occupying powers. The occupier's discretion to repeal or suspend laws of the occupied territory can only be exercised in a narrow set of circumstances. They include the removal of a local law that: (1) violates fundamental human rights, (2) is inconsistent with the effective administration of justice, (3) is inconsistent with the maintenance of law and order or (4) is an obstacle to the application of the 4th Geneva Convention itself. Most domestic laws do not fall fowl of the above criteria, and therefore escape repeal or suspension during a military occupation. Finite resources and the desire to maintain the status quo are factors that influence occupying powers to maintain most existing laws. Clearly, minimal disruption to civil society is promoted by non-interference with local laws, and this in turn furthers the public order and security objectives of the occupying forces.

Occupying forces (like other persons present in occupied territory) are technically bound by local laws. None of the applicable treaties on occupation confer immunity on occupying forces from the jurisdiction of local courts. However occupying powers generally consider themselves to have such immunity. [1]

Protocol I (1977) («Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts») has additional articles that cover military occupation, but a great deal of countries, including the U. S., are not signatory to this additional protocol.

In the situation of a territorial cession as the result of war, the specification of a «receiving country» in the peace treaty merely means that the country in question is authorized by the international community to establish civil government in the territory. The military government of the principal occupying power will continue past the point in time when the peace treaty comes into force, until it is legally supplanted.

In most wars some territory is placed under the authority of the hostile army. Most military occupations end with the cessation of hostilities. In some cases the occupied territory is returned while in other cases the land remains under the control of the occupying power but usually not as a militarily oc-

cupied territory. Occasionally the status of presences is disputed by a party to the situation. Military occupation is usually a temporary phase, preceding either the restitution of the territory, or its annexation.

Conclusions. To sum everything up, the phenomenon of occupation is defined as the effective provisional control of a certain ruling power over a territory which is not under the formal sovereignty of that entity, without the volition of the actual sovereign. It is considered to be such according to the specificities of international law in regards to the notions of law of occupation. It should be noted that the qualification of the occupation as «illegal,» while it does not affect the continued application of both humanitarian and human rights law so as to avoid a legal vacuum and to offer protection to the occupied population so long as the illegal situation persists.

References

1. Clarke B. Military Occupation and the Rule of Law: The Legal Obligations of Occupying Forces in Iraq [Electronic resource] / B. Clarke. — Access mode: <http://www.austlii.edu.au/au/journals/MurUEJL/2005/8.html> (date of reference 23.05.15). — Title from the screen.
2. Laws and Customs of War on Land [Electronic resource] : Adopted by The High Contracting Parties on 18 October 1907. — Access mode: http://avalon.law.yale.edu/20th_century/hague04.asp#art41 (date of reference 17.05.15). — Title from the screen.
3. Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli. Illegal Occupation: Framing the Occupied Palestinian Territory [Text] / Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli // Berkeley Journal of International Law. — 2005. — Vol. 23. — Issue 3. — P. 551–614.
4. Occupation and International Humanitarian Law: Questions and Answers [Electronic resource] : International Committee of the Red Cross on 04 August 2004. — Access mode: <https://www.icrc.org/eng/resources/documents/misc/634kfc.htm> (date of reference 17.05.15). — Title from the screen.
5. The Fourth Geneva Convention [Electronic resource] : Adopted by International Committee of the Red Cross on 12 August 1949. — Access mode: <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/380> (date of reference 17.05.15). — Title from the screen.
6. Wyrozumska A. The Opinion by the Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland [Electronic resource] / A. Wyrozumska. — Access mode: <http://www.msz.gov.pl/resource/d93bc452-c276-4f5a-8551-a04464c6b202:JCR> (date of reference 17.05.15). — Title from the screen.

В. П. Плавич

Одеський національний університет імені І. І. Мечникова,
кафедра загальноправових дисциплін та міжнародного права
Французький бульвар, 24/26, Одеса, 65058, Україна

В. С. Петровська

Одеський національний університет імені І. І. Мечникова,
Інститут соціальних наук,
відділення міжнародних відносин
Французький бульвар, 24/26, Одеса, 65058, Україна

**ПРАВОВИЙ СТАТУС ТИМЧАСОВО ОКУПОВАНИХ ТЕРИТОРІЙ
ІЗ ТОЧКИ ЗОРУ МІЖНАРОДНОГО ПРАВА**

Резюме

Стаття присвячується праву військової окупації — інституту міжнародного гуманітарного права. Автори дають визначення даному феномену, досліджують питання про його джерела в міжнародному праві і правові наслідки окупації. Вони розглядають правовий режим, який впроваджується на території під час окупації.

Крім того, у статті містяться витяги з міжнародних конвенцій, що дозволяє визначити ступінь їх відповідності сучасним тенденціям розвитку цього міжнародно-правового інституту.

Ключові слова: міжнародне гуманітарне право, окуповані території, військова окупація, статус тимчасово окупованих територій.

В. П. Плавич

Одесский национальный университет имени И. И. Мечникова,
кафедра общеправовых дисциплин и международного права
Французский бульвар, 24/26, Одесса, 65058, Украина

В. С. Петровская

Одесский национальный университет имени И. И. Мечникова,
Институт социальных наук,
отделение международных отношений
Французский бульвар, 24/26, Одесса, 65058, Украина

**ПРАВОВОЙ СТАТУС ВРЕМЕННО ОККУПИРОВАННЫХ
ТЕРРИТОРИЙ С ТОЧКИ ЗРЕНИЯ МЕЖДУНАРОДНОГО ПРАВА**

Резюме

Статья посвящается праву военной оккупации — институту международного гуманитарного права. Авторы дают определение данному феномену, исследуют вопросы о его источниках в международном праве и правовых последствиях оккупации. Они рассматривают правовой режим, который вводится на территории во время оккупации.

Кроме того, в статье содержатся извлечения из международных конвенций, что позволяет определить степень их соответствия современным тенденциям развития данного международно-правового института.

Ключевые слова: международное гуманитарное право, оккупированные территории, военная оккупация, статус временно оккупированных территорий.