Administration of Territories by the United Nations: Is There Room for International Humanitarian Law?

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I. Introduction

The fundamental starting point of this conference is that peace operations represent a challenge to the implementation of international humanitarian law (IHL) for the simple reason that IHL was developed for states conducting hostile military operations against other states or non-state actors.

Administration of territories represents one subset of peace operations – continuation of second-generation peacekeeping (PK) where parties, typically prodded by outsiders, formally delegate to the United Nations (UN) authority for the implementation of a peace agreement – though it has also been extended to situations where final status and outcome are not sure, as with East Timor and Kosovo.

Thus, international territorial administration (ITA) should under this view represent a similar challenge – indeed, there is great resistance to saying that the body of IHL addressing occupation of territory is relevant to ITA. However, it is much more common to talk about application of human rights (HR) law than IHL.

My thesis today is that occupation and ITA have much more in common than we care to admit and thus that IHL has significant relevance for ITAs.

Apart from building on the observations of Shraga and Sassoli about peacekeeping operations (PKOs) generally, I’m not sure what’s left to say. Maybe, just pull the canevalas out for a more conceptual, less doctoral view of the problem.

II. What are the commonalities, and why are they ignored?

The first instinct is to contrast the two phenomena of occupation and ITA – one involves states, the other international organizations; one is coercive, the other consensual. But the reality of what actually happens on the ground is more important than formalities:

1. both involve intrusive involvement of foreign forces and civilians, affecting daily lives, local law and governing structures;
2. both face a range of reactions from the population, from outright welcome (even for occupiers, as in Northern Cyprus or Northern Iraq), to suspicion (even for ITAs, as with the Khmer Rouge or Kosovo Serb reactions to a UN presence). Thus it can’t be assumed that foreign forces will be greeted as liberators just because they wear Blue Helmets or are formally given power under a UN Security Council resolution – the population may just not care;
3. both involve a combination of military/security activities and civilian operations; and
4. as a legal matter, both must decide on what to do with legal norms from above
Security Council, IHL, international HR law – or below – state law – and must figure out how to reconcile them.

The reasons for the reluctance to see commonalities are:

1. aversion among those involved in ITA to thinking of themselves as occupiers, a tainted concept in contemporary international law;
2. the feeling of ‘insiders’ and ‘outsiders’ – that the multinational nature of ITAs and the Blue Helmet/Beret makes them a different species of foreign involvement than traditional occupation by states;
3. greater involvement in ITA of civilians within the UN and its member states, rather than the military; and
4. a resultant inclination to see only HR law and not IHL as applicable to their work.

Indeed, the relatively peaceful implementation of second-generation UN PKOs like Namibia, El Salvador, and Cambodia, all of which were precursors to bona fide administration of territories, suggested that IHL really would not come to play a role.

The commonalities have been seen in the military complexities arising in operations in East Timor and Kosovo – suddenly UN forces had to arrest and detain people. The UN position has been adjusted with the Secretary-General’s 1999 bulletin, which does not distinguish between UN administration and other forms of military actions by the UN – but it’s difficult to know the practical effect of this document, and it doesn’t cover forces delegated authority by the UN, which would include KFOR/SFOR while in UN-administered Kosovo. So, clearly, there are many unaddressed questions at this point.

III. Where is IHL most likely to play a role in ITAs?

a. Several roles for IHL

IHL has a direct application in situations where the ITA actually involves the use of military force by UN forces beyond police measures – where the ITA overlaps with a situation of international or, more likely, non-international armed conflict, such as situations in East Timor and Kosovo where IHL might have been directly applicable, even if the actual posture of the UN in these cases was somewhat ambiguous.

Ideally, of course, this is not what we want. The best ITA is one where there is significant resistance and any security measures can be taken in the form of police measures. Like Sassoli, I don’t want to deny textual difficulties but the functional approach he offers seems right and I suspect troop contributors recognize this, so de jure/de facto it is not really that important to me.

While the indirect application of the law of occupation, insofar as it may offer ideas for the administration of territory by the UN, may not be binding, the underlying assumptions of occupation law in terms of the balancing of the needs of the occupied and those of the civilian population may offer ideas for those involved in the administration of territory: Zwanenburg has shaken us.

There is one clear example in GCI’s provisions for detention in response to threats – where the law is considered as inspiration for policy rather than as a set of rules saying what’s permitted and prohibited. This is very important for the practicing lawyer.
It may also give some useful guidance on dealing with the needs of the civilian population. It may provide placed additional duties of conduct on the ITA in a way that human rights law does not place them on a government – more clear affirmative duties.

Each of these cases suggests that those involved in ITA need to know their IHL and not just the JAGs in the force contingents, but the Special Representative of the Secretary-General and his or her aides as well.

At the same time, IHL will not play much of a role regarding conditions for free and fair elections, disbursement of foreign assistance, accountability for past human rights violations, neutrality of the media, and probably it would not play much of a role in the repatriation of refugees.

**IV. Is there legal room for IHL given all the other sources of law governing ITAs?**

Whether IHL is directly or indirectly applicable to a UN operation, we know it is not the only body of law for these operations - mandates from the Security Council, international HR law, the law of international organizations (e.g. immunities of officials), and domestic law are also involved in a UN administration. Moreover, these different laws can actually conflict, as where HR law offers one set of norms for detention and IHL offers another; or, more relevantly, HR law says change the local law and IHL says preserve it.

One possibility is for IHL to be the main governing body of law – if the law of occupation is the starting point for all foreign occupation of territory, then why not build on the similarities, especially if the operation is under Chapter VII like Kosovo? So IHL would be applied as the default body of law.

The core of IHL does assume a fundamentally hostile starting point – there is no consent whatsoever to the presence of foreign troops by the sovereign nation. The pattern of ITAs has not complied with this assumption – Indonesia consented to UNTAET and Serbia to UNMIK/KFOR, after a fashion. Given the role of consent, even if it’s somewhat contrived, IHL seems like the wrong body of law to provide the default rules. On the other hand, I don’t want to rule out a truly unconsented administration of territory, although this seems more theoretical than real. In those cases, the ITA could be so much like a typical occupation that IHL should be the applicable body of law.

For ITAs as they currently operate, IHL will need to govern, but only to the extent that the UN’s control over the territory is seriously challenged through armed resistance. I am not sure whether this is identical with the criteria for a non-international armed conflict (NIAC) on the territory or parts of it, because the situation is somewhat different legally and practically if the UN is administrating the territory in the first place. Perhaps the UN, like a state occupier, should have authority to switch to IHL in situations short of non-international armed conflict as understood in common Article 3 or certain provisions in Additional Protocol II.

Whatever the exact threshold, I can’t see how the UN can be limited in its use of force to police actions per the MaCann case, when there is such resistance on the
territory it administers. I also don’t want to exclude the possibility of an international armed conflict as well, where a state – I am not sure if it’s a state where the UN operates or an outside state – somehow interferes with the work of the ITA.

There is always the possibility that the UN will shift to IHL too early – indeed the Ombudsman in Kosovo, and non-governmental organizations (NGOs), essentially criticized KFOR for doing this. This is a particular risk when the security arm of the operation is under a different authority from the civilian component, and it is unclear whether the former is controlled by the latter.

But the culture of ITA reduces my concerns that this will get out of hand – a culture in favour of human rights is very strong within those charged with ITA. Indeed, critics of ITA like Wilde might even suggest that IHL is more likely to protect the status quo in a good way, and avoid the problems of neo-trusteeship that he thinks ITA engenders.

As for the possibility of conflicts with other areas of law in cases of ITA, I can’t come up with some neat doctrinal map to deal with these conflicts as each situation is different in terms of the wording of the UN resolutions; so it is better to speak of practical guidelines:

1. if the UN Security Council has directed the UN under Chapter VII to administer territory in a way that is not consistent with IHL, that resolution must either control the interpretation of the IHL or, if truly irreconcilable, must override it. However, I think the possibility of the Security Council running afoul of *jus cogens* norms is more in the realm of academic speculation than actual Security Council practice. Perhaps there is a danger that the Security Council will pick a side in a way that IHL does not, but this is part of its special authority under the UN Charter, and political mechanisms on the Council will probably correct for the worst abuses;

2. to the extent that IHL norms conflict with those of HR law in terms of completing obligations, then IHL should be limited to those situations of serious security threats; otherwise HR law, as the law governing the normal order of state-individual relations, should be the controlling law; and

3. reliance by UN forces on IHL in some situations does not mean that all of IHL applies – for instance, if it’s relying on other aspects of IHL to address security situations but domestic institutions and laws are clearly incompatible with human rights norms, the UN should be able to change domestic law beyond what would be allowed under occupation law. This change to the status quo is especially defensible in the case of the UN because there is less risk that the UN’s changes will be part of an effort leading to annexation, whereas occupation law’s constraints on the occupier in this area are meant to preserve the status quo for the returning sovereign – one clear way that ITA differs from traditional occupation.
V. Conclusion

It is very hard to know what the future of ITA is at this point – Kosovo has left a pretty bad taste in just about everyone’s mouth - but chances are, it will come along again as new entities seek independence and the world does not know what to do with them.

IHL will never be at the core of ITAs, but the law of occupation is part of the fabric of law that will govern them, as the consent that lies at the core of ITAs can dissolve and cause ITAs to resemble a more traditional occupation. Those observing ITAs will worry about both too much application of IHL – giving the UN too much free reign regarding the use of force – as well as too little application of IHL – giving the UN too much free reign to change the status quo. These are legitimate worries, but I think my guiding principles can be a start towards addressing them.

In the end, pragmatism should be used in applying IHL, rather than attempting at complex doctrinal solutions that may be outdated before we know it.