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LAW OF OCCUPATION, *JUS POST BELLUM* AND RESPONSIBILITY TO PROTECT. SEPARATE OR COMPLIMENTARY TOOLS FOR RESTORING HUMAN RIGHTS ORDER AFTER MASS ATROCITIES?

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Abstract

Purpose Article compares three different mechanisms (law of occupation, *jus post bellum* and responsibility to protect) possibly applicable in the final phase and aftermath of hostilities where mass atrocities and other human rights gross violations occurred.

Design/methodology/approach Article consists of three parts. The first presents the content and scope of application law of occupation with the attention put on responsibilities towards occupied population. The second focuses on *jus post bellum* principles guiding just restoration of human rights order. Finally, the third part analyzes responsibility to protect doctrine within the framework of responsibility to rebuild the rule of law.

Research limitations/implications Research is limited to analyze (within the framework of relation between human rights and sovereignty) the scope of three tools used to prevent atrocities.

The relation between these two terms is crucial for the article's evaluation on applying law of occupation, principles of jus post bellum and responsibility to protect for restoration of human rights order.

Findings The whole article evaluates the role of law and principles of just war while dealing with mass atrocities and human rights law. This method helps to underline an effective solution for future conflict resolution and prevention. Responsibility to protect and *just post bellum* when executing the rules provided by the law of occupation constitute the only effective method used by international community to assist post conflict states in human rights capacity building.

Practical implications Article's main thesis is to point out that in extreme circumstances only a combined application of law of occupation, *jus post bellum* and responsibility to protect guarantees stable and constant human rights reconstruction in post conflict areas.

Originality/Value Article evaluates three different regimes under the criteria of their connection with human rights and state sovereignty. In doing so it finds the new way of their possible interconnection and proper way of complementary application. In relation to the previous researches it treats law of occupation, *jus post bellum* and responsibility to protect as interpretative guidance in bridging and strengthening the coexistence between two international values: human rights and sovereignty.

Keywords: law of occupation, *jus post bellum*, responsibility to protect, responsibility to rebuild, mass atrocities, human rights

Research type: research paper

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Introduction

The recent interventions and their aftermath raised a question of possible legal and social means to reach properly organized post conflict order based on human rights values. The lack of results has become evident especially in the context of Libya. Mass atrocities as the biggest human rights violations cannot be dealt with while using standard human rights protection mechanisms and procedures. There are different methods which may be applied as solution here – among them law of occupation and concepts of *jus post bellum* and responsibility to protect. All are the rules of different character and foundation. However, every aims to end hostilities or atrocities completely and fairly.

Through analyzing their content and main goals this article discusses the relation between the three methods. The first - law of occupation consists of binding legal norms applicable in every situation when a territory is actually placed under the authority of the hostile army. Every occupying power is legally obliged to restore and ensure, as far as possible, public order and safety. The second, *jus post bellum* is directed towards the restoration of public authority or the empowerment of domestic constituencies. It deals with the termination phase of conflict. Based on just war theories, not legal requirements as law of occupation, *jus post bellum* seeks to provide terms for the end of conflict through *inter alia* guidelines for the construction of peace treaties or continuous fighting prevention. The third – responsibility to protect doctrine by different means provides assistance in improving the capacity to protect populations from mass atrocities.

Article underlines the necessity of their complementary usage. It focuses on their common goals and explains in which manner they should be used to guarantee respect for basic human rights and people's peaceful development. The main thesis suggests that international community by applying them wisely can obtain greater fairness and sustainability in conflict termination and peacemaking.

1. Law of occupation

In order to define the law of occupation we must first deal with term occupation itself. Article 42 of the 1907 Hague Regulations (HR) by occupation understands a situation of a territory 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[1]. This covers only conflicts of international character. The present examples of such situations include *inter alia* occupation of the Gaza Strip, West Bank and East Jerusalem by Israel and occupation of the area surrounding *Nagorno Karabakh* by Armenia.

[1] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, available at: http://www.unhcr.org/refworld/docid/4374cae64.html [accessed 1 April 2013]

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Occupation is a factual state of affairs with its legal consequences. This state may be lawful – when the particular occupation is exercised within the scope of *jus ad bellum* as enshrined in the UN Charter[1] or unlawful - when it is against these rules. However, its legality does not influence the applicability of law of occupation. Common article 2 of the four Geneva Conventions establishes their application to any territory occupied during hostilities without determining the legal status of these hostilities (also in situations where the occupation of state territory meets with no armed resistance).

Law of occupation consists of regulations mainly enshrined in articles 42-56 of the 1907 Hague Regulations, articles 27-34 and 47-78 of the Fourth Geneva Convention[2] and is established in customary international humanitarian law[3]. These rules describe the relation between the occupant and occupied territory, its population and laws. The main rule obliges occupying party to *"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"[4].* Also, the occupant does not acquire sovereignty over the territory and must respect the laws in force in the occupied territory, unless they constitute a threat to its security or an obstacle to the application of the international law of occupation[5].

Occupation is based on the factual state of exercising authority over a territory by occupant not his mere presence[6]. In other words it is only a temporary situation, and the rights of the occupant last as long as the occupying power executes authority over a territory. The moment it withdraws from or is driven out of the territory the occupation ceases to exist. The occupation may also end with a transfer of authority to a local community whether and as long as from this moment it can freely execute its sovereignty over a territory.

Law of occupation provides occupied population with a range of rights which in any circumstances cannot be renounced even by the subjects of these rights[7]. Also article 47 of GC IV forbids concluding any agreements between the occupying power and the local authorities which can deprive the population of occupied territory of the protection afforded by international humanitarian law.

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1 Namely self-defence, collective self-defence and Security Council's action in response to threat to the peace, breach of the peace and act of aggression in accordance with articles 51 and 42 of the Charter. See: United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: http://www.unhcr.org/refworld/docid/3ae6b3930.html [accessed 1 April 2013].

2 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, available at: http://www.unhcr.org/refworld/docid/3ae6b36d2.html [accessed 1 April 2013]

3 For different examples of customary IHL rules applicable in the state of occupation see: Henckaerts, J.M. Doswald – Beck, L., Customary International Humanitarian Law, 2 volumes, Volume I. Rules, Volume II. Practice (2 Parts), Cambridge University Press, 2005.

4 Art. 43 HR.

5 Art. 55 HR names an occupying party merely as an "administrator", *supra* note 1.

6 Ferraro, T. Determining the beginning and end of an occupation under international humanitarian law; International Review of the Red Cross, Volume 94, Number 885, Spring 2012, p. 134.

7 Art. 8 GC IV.

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The main rules of the law applicable in case of occupation correspond with human rights established in international human rights treaties mainly ICCPR[1] and ICESC[2]. The civic and political rights protected by law of occupation include *inter alia* prohibition of collective or individual forcible transfers of population from and within the occupied territory as well as transfers of the civilian population of the occupying power into the occupied territory (art. 49 IV GC), prohibition of forced enlistment in the occupier's armed forces (art. 51); right to a fair trial (art. 71-76 IV GC). Within the framework of economic, social and cultural rights law of occupation provides populations with: to the fullest extent of the means available to it[3], the occupying power must ensure sufficient hygiene and public health standards, as well as the provision of food and medical care to the population under occupation (art 55 IV GC), prohibition of destruction, confiscation and reprisals and against private property (art. 53 IV GC). Also occupied population by general rules of IHL is free from arbitrary killing, tortures, corporal punishment, medical and scientific experiments and other acts of brutality (art. 32 IV GC).

Moreover, the simple existence of armed conflict and occupation does not exclude protection guaranteed by human rights regime. The coexistence of these two branches of international law is evident. Law of occupation as a part of international humanitarian law is a kind of *lex specialis*[4] to human rights law which must be applied both in peace time and war[5]. Occupying power bears responsibility under two legal regimes. Human rights in the time of occupation have their limits and some of them can be derogated. Law of occupation builds the framework of these limitations.

It may be argued that law of occupation governs three general areas. Firstly, it explains the question of sovereignty, secondly, it provides rules concerning civic and political rights of population under the occupation, thirdly it stipulates for the insurance of economic, social and cultural rights. The latter two are particularly important for the restoration of human rights order in the middle and after the occupation. As a legal mechanisms international humanitarian law and human rights law should be understood as a basic tool for the protection of populations suffering mass atrocities. Law of

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1 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.unhcr.org/refworld/docid/3ae6b3aa0.html [accessed 1 April 2013]

2 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: http://www.unhcr.org/refworld/docid/3ae6b36c0.html [accessed 1 April 2013]

3 „to the fullest extent of the means available to it" - typical limitation of the obligations towards realization of economic, social and cultural rights. It is worth to mention that economic, social and cultural right as enshrined in ICESC are younger than those from Geneva Conventions,

4 Among others prof. Sassoli discusses the usage of term lex specialis in the context of IHL and human rights law. See. Sassoli, M., Olson, L.M. The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts, International Review of the Red Cross, Volume 90, Number 871 September 2008.

5 Orakhelashvili, A., The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence? The European Journal of International Law Vol. 19 no. 1 2008 p, 161.

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occupation is a particularly adequate and sharp tool limiting states' authority (also intervening states) over the territory it occupies and its people. This tool needs an ethical manual to be properly and effectively used. Often, law of occupation is the first step in founding the human rights protection in places where the conflict and atrocities are still on. It should be applied in accordance with the principles of just war especially with a focus on the future *jus post bellum* issues which may rise right after the occupation ends.

2. *Jus post bellum* (Justice after war)

Jus post bellum as a more philosophical and at the same time complex idea covers the termination phase of war. *Jus post bellum* widens the classical just war theory based on two notions of *jus ad bellum* and *jus in bello*. G.J. Bass puts this issue within the three questions: the obligations to restore the sovereignty of a conquered country, the rights and obligations that belligerent states retain in the political reconstruction of a defeated power and obligations of victorious states to restore the economy and infrastructure of a defeated state[1]. Bass does not directly involve human rights arguments in his vision of post-conflict resolution. Quoting Burke's - "peace often means accepting a host of injustices"[2] - he disagrees with most human rights activists that there is no real peace without justice[3]. He argues that peace is sometimes more valuable than human rights themselves.

On the other hand as R.E. Williams and D. Caldwell point out: "the constraints grounded in traditional just war theory do not offer sufficient guidance for judging postwar behavior and that principles grounded in the concept of human rights are needed to complete our understanding of what constitutes a just war. A just peace exists when the human rights of those involved in the war, on both sides, are more secure than they were before the war"[4]. Human rights then should go in pair with justice[5]. They are complementary values which support each other during times of crisis. None of them prevails. Every conflict resolution stands on the gentle balance between what is right and what is just.

These ideas may be put in three terms already mentioned in a previous part: sovereignty, civic and political rights and economic social and cultural rights. Once again the relation between sovereignty and human rights is emphasized. Firstly, post conflict situation demands a clarity about sovereignty. Without it none human rights could exist. Sovereignty is a *sine qua non* condition of human rights order. This simplification also

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1 Bass, G.J., Jus post bellum, Philosophy and Public Affairs 32.4 (2004), p. 385.
2 Burke, E, Reflections on the Revolution in France (Oxford: Oxford University Press, 1993), p. 141.
3 Bass, G.J., op. cit., p. 405.
4 Caldwell, D., Williams, R.E, Jus Post Bellum: Just War Theory and the Principles of Just Peace; International Studies Perspectives (2006) 7, p. 309.
5 Ex. Walzer understands "doctrine of human rights" as central for just war theory. See: Walzer, M., Just and Unjust Wars: A Moral Argument with Historical Illustrations. 3rd edition. New York: Basic Books, 2000, p. xx-xxi.

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underlines the nexus between legal provisions and just war principles. Both seek to correctly organize purposes and conflict resolution methodology.

Among *just post bellum* principles five of them are predominant. These are: just cause for termination, right intention as to the peace terms, public declaration and authority over the peace terms (peace making transparency), differentiation between political and military leaders, and combatants and civilians and proportionality of peace terms[1]. The aim of these principles is to create a just consensus between the rights of winners and rights of defeated. As already mentioned this policy should take into account human rights dialogue between communities. This can include: punishment against the aggressor (two genres: compensation to the victim for losses incurred and accountability for war crimes), victim security system, civilians immunity from the consequences economic sanctions etc. This raises a question of combating impunity for gross human rights violations. Every population which suffered a mass atrocity should be given the right to know, the right to justice and the right to reparation[2]. These rights are of both individual and collective character[3]. Especially in post war phase, "if people have not been treated rightly during the war, it will make reconciliation (and at the same time human rights order – T.L.) vastly more difficult than if they had been afforded some respect"[4]

The sole policy of just war and *jus post bellum* is a mere explanation of how to organize things. This explanation however does not provide us with sharp and legally binding tools. It simply guides about the proper usage of already existing but also about the creation of new normative tools as for example responsibility to protect doctrine.

3. The responsibility to protect

In 2001 International Commission on Intervention and State Sovereignty prepared a report titled Responsibility to Protect[5]. This document presents a new approach to deal with mass atrocities around the world. It redefines the classic interpretation of sovereignty as a common responsibility of state itself and international community. According to authors State sovereignty is not a privilege. It means responsibility of legal and moral nature - the protection of its citizens from genocide[6], war crimes[1], crimes

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1 For more detailed description of these principles see: Orend, B., Justice after War, Ethics & International Affairs, Volume 16.1 (Spring 2002).

2 As in the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("Impunity Principles"), U.N. Doc. E/CN.4/2005/102/Add.1, February 8, 2005. available at: http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/2005/102/Add.1 [accessed 1 April 2013]

3 Lewandowski, T., The problem of impunity for serious violations of human rights, Wiedza Prawnicza, nr 1/2010, p. 37

4 May, L., After War Ends: a philosophical perspective, Cambridge University Press 2012, p. 225.

5 The Responsibility to Protect, International Commission on Intervention and State Sovereignty (Dec. 2001), available at http://responsibilitytoprotect.org/ICISS%20Report.pdf. [accessed 1 April 2013]

6 For the exact definition of genocide see: art. II of the UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: http://www.unhcr.org/refworld/docid/3ae6b3ac0.html [accessed 1 April 2013]

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against humanity[2] and ethnic cleansing[3]. If the state is unable or unwilling to fulfill this obligation, the international community shall assist or replace it in doing so[4]. Report examines the concept of responsibility to protect in three parts: responsibility to prevent, responsibility to react and responsibility to rebuild.

Through prevention both state and international community should address the root and direct causes of conflicts that put populations at risk. State must devote more resources to exhaust every option before military intervention. Democracy, rule of law, trust building and human rights approach - these are the possible methods of prevention.

If the preventing measures fail, international community must react through different legal, diplomatic, economic, social or security means[5]. Military intervention is *ultima ratio* here. It must respect the principles of: right intention (to halt or to avert human suffering), last resort (exploration of peaceful means), proportionality (minimum necessary to secure human protection objective) and reasonable chance of success[6].

The last component, responsibility to rebuild is not discussed as loudly as the preceding two. It is mainly caused by the common agreement on its necessity and importance. The problem is that every application of responsibility to protect is different and evaluated case by case. This goes also for responsibility to rebuild. What efforts should be taken to guarantee stable and permanent resurrection of the state of law? There are many approaches to this question. The Commission's report focuses on help with recovery, reconstruction and reconciliation[7]. However, the main feature of responsibility to rebuild is the creation of "human rights capacity" - a legal and moral capacity of states to execute their sovereignty in accordance with their international human rights obligations. The core obligation of assisting international community is to perform a responsible trusteeship over sovereignty of assisted state as long as it is necessary to reconstruct "human rights capacity". International community executes its

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1 War crimes - acts committed during an armed conflict that violate international humanitarian or human rights law as understood in Geneva Conventions and Additional Protocols.

2 Crimes against humanity – art. VII of UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.unhcr.org/refworld/docid/3ae6b3a84.html [accessed 1 April 2013]

3 Ethnic cleansing is not officially recognized as a distinct crime under international law, but entails a purposeful policy designed by one ethnic or religious group to remove, by violent and terror-inspiring means, the civilian population of another ethnic or religious group from certain geographic areas. Thus, ethnic cleansing is encompassed in crimes against humanity, which includes the forcible transfer or deportation of populations. Definition from ICRtoP's Toolkit on Responsibility to Protect, available at: http://responsibilitytoprotect.org/ICRtoP%20Toolkit%20on%20the%20Responsibility%20to%20Protect.pdf [accessed 1 April 2013]

4 See also: art. 138-140 of UN General Assembly, 2005 World Summit Outcome : resolution / adopted by the General Assembly, 24 October 2005, A/RES/60/1,
available at: http://www.unhcr.org/refworld/docid/44168a910.html [accessed 1 April 2013]

5 For the example list of such measures see: Bellamy, A., Mass Atrocities and Armed Conflict: Distinctions, and Implications for the Responsibility to Protect, The Stanley Foundation, 2011.

6 Responsibility to react [in:] The Responsibility to Protect, International Commission on Intervention and State Sovereignty op. Cit., pp. 32-37.

7 Responsibility to rebuild, idem, pp. 39-45.

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authority in the name and for the local community. This responsible trusteeship should be performed in accordance with law of occupation and *jus post bellum* principles.

The purposes of responsibility to rebuild should be devoted to human rights language. Economic and social rights are of particular importance here. International assistance should orbit around well organized health care, employment and education systems. This is where human rights fruitful environment is established. Responsibility to protect focuses on long term consequences and as such juxtaposes human rights of both generations.

Human rights capacity cannot exist without sovereignty. Responsibility to protect brings this idea to the surface of international policy and decision making. States could not expose themselves from critics about their human rights performance simply by depending on principle of sovereign equality and non-intervention. Responsibility to protect as such switches the notion of sovereignty from a privilege to responsibility, which turns the idea of humanitarian intervention upside down. Sovereignty goes in pair with human rights. Each state has legal and moral duties to respect, protect and fulfill human rights of its own people. These People are the subject of sovereignty and it is their collective right to have it executed in a manner that is compatible with their basic human rights.

Conclusions

Genocide, crimes against humanity, war crimes and ethnic cleansing as mass atrocities cannot be dealt with standard human rights mechanisms from both universal (UN Charter and treaty based) and regional systems. International community has limited sort of tools with which it can respond to these gross human rights violations. Often, the reaction of international community takes form of humanitarian intervention with a state occupation as a one mean of peace restoration. Such situation is unstable and brings a lot of difficulties while applying human rights standards.

Law of occupation, *jus post bellum* and responsibility to protect are three complementary tools to achieve a post conflict human rights order. Each presents similar purposes while being of different character. However, all three of them are evidently connected with human rights regime and altogether should be interpreted within its context. Firstly, law of occupation as part of international humanitarian law plays an important role in realization of basic human rights during a period of armed conflicts. It is applicable parallel to human rights regime. It provides the state parties with the exact legal framework as to the human rights application in the extreme situation of occupation. Secondly, *jus post bellum* as a part of just war philosophy focuses on the effective conflict resolution. Its main purpose is to guarantee long lasting peace. This peace, however, should not be achieved without respecting human rights of both victorious and defeated. *Jus post bellum* should be considered as a guidance when applying legal norms of law of occupation and human rights law. Finally, responsibility to protect combines legally binding norms of human rights and just war philosophy in one doctrine. Due to conflict of interest among the permanent Security Council members it

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has still not build its normative framework. However, its constant progress and evolution from a mere idea into a matter of international politics raise high expectations as to its future application. The main idea of responsibility to protect is to treat sovereignty as responsibility not as privilege. Human rights regime does not oppose sovereignty as such. It creates its conditions. States are not capable of denouncing their international obligations by shielding themselves under the aegis of sovereign immunity. Responsible sovereignty can establish and execute its "human rights capacity". International community is obliged to control its members' execution of responsible sovereignty. It shall treat law of occupation, *jus post bellum* and responsibility to protect as complementary tools while fighting with mass atrocities in the times of extreme crises. Complementary usage of these three systems facilitates establishing the prosperous transition where the relation between human rights and state sovereignty does not contradict but reciprocate each other.

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