

Human Rights and Humanitarian Law in Occupied Iraq: Current Problems and Future Prospects

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Chair: Professor Conor Gearty

Christopher Greenwood

Thank you very much Mr Chairman. For one horrible moment when I came into this room and saw the advertisement for tomorrow's meeting I thought I was being expected first of all to talk about Whither America, a particularly difficult topic, especially since in one of the earlier flyers for the same meeting "whither" was spelt with only one H towards the ends rather than the one at the beginning as well [LAUGHTER].

I'm sure that the size of the audience does not in fact reflect a lackadaisical attitude towards exams but I can assure you, Mr Chairman, that my acceptance of your invitation had a lot to do with the fact that anything that gets me away from marking the exams must be regarded as a good thing.

Now in Classical Greek theatre, ladies and gentlemen, it was the custom before the heavy melodrama to have a little one act play and I am the little one act play this evening before the clash of titans of human rights law against the world's only superpower that is about to come before you. [LAUGHTER]

My task is simply to set the scene and I'm going to do so as I've been asked to in only ten minutes by making just four brief points about the general principles of human rights and humanitarian law in occupied Iraq.

Now, the first of those points is that the legal position in Iraq today has nothing whatever to do with the legality or illegality of the resort to force last year. Now that follows from two very well established principles, the first is that it's a general principle of international humanitarian law that the operation of the law of belligerent occupation, which is what we are principally concerned with here, applies irrespective of whether the occupation is lawful or unlawful; and secondly the application of human rights law is not dependent on or affected by the legality or illegality of any prior resort to force. If there were any room for doubt about that, however, it is I think removed by the fact that the Security Council after the use of force had taken place, after the principle military operations had taken place, passed Resolution 1483, which lays down a framework for the occupation of Iraq by the coalition authority.

So if you view the recourse to the force against Iraq last year as an illegal act of aggression that does not render the subsequent occupation of Iraq unlawful. Conversely if you think that the use of force against Iraq was legal, and that has always been my view, that fact does not confer any additional powers upon the coalition states or relieve them of the need to comply with any applicable principles of humanitarian law or the law of human rights.

Having said that, let's then turn to the question "What are the applicable principles of international law?" and I think they fall into three different categories and those three categories are my three remaining points for those of you who are keeping a scorecard of how far we're getting towards the end.

The first is the law of belligerent occupation, that area of the law of armed conflict, or humanitarian law, that regulates the situation when one state takes control of part of the territory of another in the course of armed conflict. And that law is to be found primarily in the Fourth Geneva Convention of 1949, customary international law, as codified in the Hague Regulations on the laws and customs of war on land of 1907, but not in additional Protocol of 1977, that text is not applicable to the current situation in Iraq because Iraq was not a party to the Protocol and therefore it didn't apply to the hostilities last year.

Now, the main principles of occupation law which have to be taken into account is at the starting point, is that an occupying power is not a liberal democracy. The law of belligerent occupation is based on the assumption that what you have here is a military regime who's primary concern is going to be the military concerns of its own security, and it is entitled to take action going far beyond that is normally permitted to a government under the day-to-day law of human rights in order to preserve the security of itself and its armed forces, but it certainly doesn't have an unlimited power in this regard. It has a duty to govern the occupied territory, simply sitting back and letting the mayhem carry on is not a legal option for an occupying power. It's not simply that it has a right to govern the occupied territory, it's got a legal duty to do so. Moreover it's duty is to do so while respecting unless absolutely prevented the laws in force prior to the start of the occupation.

Now that provision can be extremely difficult to apply where you have a prolonged belligerent occupation, as for example you have in Palestine or where you have an occupation which takes place after the complete collapse of the government of one of the warring parties and in circumstances where the occupying power is trying to bring about a reconstruction of the occupied territory, such as you have in these circumstances.

I just make two brief points about that. The first is that occupation does not affect sovereignty over the occupied territory. When you read in the press that on the 30 June this year the coalition states will be returning sovereignty to Iraq that is, with the great of respect, a massive misunderstanding. Sovereignty has never been anywhere other than with Iraq. What the occupation powers have is a temporary power of government or control over the occupied

territory, they don't have sovereignty and therefore they haven't got anything to return in that respect.

The second point is that the phrase "unless absolutely prevented" in relation to the governance of occupied territory and respect for the existing law in force has always been given a rather liberal interpretation. Now that's liberal with the smallest of small "L"s. For example, in the closing months of World War Two, the allied powers in occupation of parts of Germany took the view that they were absolutely prevented from applying Nazi racial legislation in force in Germany at the time that the occupation began and I think one would probably agree with that understanding of the law.

Let me turn from that to the second applicable body of law, or potentially applicable body, and that's the international law of human rights. Now the relationship between international humanitarian law, the law of war and international human rights law is the subject of many a learned PhD dissertation and an extremely useful topic to bone up for exams if you're in the process of doing so at the moment. It's been the subject of considerable controversy, there are some who take the view that once you enter into the world of armed conflict human rights law simply has no part to play at all. In other words, human rights law deals with situations of peace and normality, the law of armed conflict is the law that comes into operation once the fighting starts. That's the view which, for example, seems to have been attributed to the United States government in respect of proceedings in the intra-American human rights bodies connected with the Guantanamo detainees. In my view that kind of bright line approach is exceptionally difficult to reconcile with a number of considerations of law, particularly the fact that most human rights treaties contain express provision allowing states to derogate from them or rather to derogate from some of their provisions in time of war or other national emergency.

Well, if you can derogate from some provisions in time of war that suggests two things. First of all if you don't derogate the provisions are applicable; and secondly, if you can only derogate from some of the provisions the ones you can't derogate from apply in war in any event. Secondly, the American position over Guantanamo appears to me to be impossible to reconcile with the approach taken by the International Court of Justice in its advisory opinion on nuclear weapons. However opaque that opinion may be in some respects, it quite clearly applies or deals with the application of human rights law in time of armed conflict.

So I come to the conclusion that international human rights law is far from irrelevant to the situation once an armed conflict has begun. But having said that one has to ask the question whether human rights law will nevertheless apply in its entirety to downtown Basra as though it were Kettering or Wolverhampton and I think the short answer to that is no. First of all with the European Convention on Human Rights there is at least a question mark over how far it is applicable outside the European States. In the case of Bankovic some two years ago the Grand Chamber of the European Court of Human Rights unanimously decided that the Convention was not applicable to the bombardment by NATO states of targets in Yugoslavia during the Kosovo conflict. Now, on the other hand, the Court in Bankovic upheld an earlier decision in a case

called Loizidou which decided that the European Convention was applicable to Turkey's occupation of Northern Cyprus. But of course it's not quite clear what the rationale for the Loizidou case is in this respect. One of the grounds put forward in that case was that Northern Cyprus and its inhabitants were subject to the Convention before the occupation started and both the occupying power, Turkey, and the occupied state, Cyprus, were parties to the European Convention. Now that's plainly not the case in Iraq and it remains to be seen how far the relationship between Bankovic and Loizidou will be reconciled in the future. There may also be a difference between the situation in respect of occupied territory generally and the situation in respect of say prisoners detained by one of the occupying powers. The UN Human Rights Committee has recently taken the view in a general comment that the international covenant on civil and political rights is applicable in any event to the detention of prisoners from outside the territory party to the covenant.

The other question one has to ask about human rights law in Iraq is how far it can be applied in practice in a situation which is so radically different from the situation you find in any of the European states? And a last area of international law which has a bearing here is that laid down in the relevant Security Council resolutions, Resolutions 1483 and 1511 in particular and I've time for only one brief comment in respect of that.

Resolution 1483 authorises the governance of Iraq by the occupying powers, but in contrast to the situation in Kosovo it does so within the framework of the law of belligerent occupation. It doesn't, in other words, shunt the law of belligerent occupation to one side, though it does, in my view, in some respects prevail over it, for example, in imposing a duty to engage in the reconstruction of civil government within Iraq. Now that suggests that there is a degree of uncertainty about the scope and content of the legal regime that applies in Iraq. Let me make quite clear, I don't, however, think that that uncertainty makes any difference to certain fundamental questions and I conclude by saying that the photographs that have been in the press recently of the ill treatment of detainees, that ill treatment of the kind depicted in those photographs... that's both the photographs that are real and the photographs that are invented, ill treatment of that kind could not be justified under any regime of international law and that I think is a convenient point at which to leave it.

[APPLAUSE]