United Kingdom, Position on Applicability of Fourth Convention

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Extract from "United Kingdom Materials on International Law", *The British Yearbook of International Law LXIX* (1998), pp. 598-600]

The following observations were made by Mr M. Eaton, Deputy Legal Advisor, FCO, at an Experts' Meeting on the Fourth Geneva Convention on Humanitarian Law, held in Geneva on 27-29 October 1998:

Greatest problem in relation to implementation of the GCIV is that of refusal to recognise its applicability. As ICRC says "when confronted with situations in which the Convention should be applied, the States party to it almost invariably cite some grounds or other on which in their view it is not applicable".

Has also been rightly said "The law of belligerent occupation has had a poor record of compliance for most of the twentieth century. The principal problem has been the reluctance of States to admit that the law applies at all." This is not a problem of a single situation of occupation – it is a widespread and long observed phenomenon. But, since a particular current occupation situation has frequently been mentioned here, I wish to state that the British position on the *de jure* application of the Convention to the territories occupied by Israel after 1967 is well-known, and does not need to be rehearsed.

Unfortunately the question of applicability of GCIV is very frequently bedevilled and confused by that of title to the territory in question. If applicability of the law were dependent on the resolution of underlying questions of title it would almost never be applied.

In fact the law does not make it a precondition that the territory occupied must have belonged to the displaced sovereign prior to occupation. It might appear so from GCIV Article 2 (2): "The Convention shall

apply in all cases of partial or total occupation of the territory of an HCP, even if the occupation meets with no armed resistance."

But this is not the primary criterion for application. It is, rather, a residual role. The *primary* rule is in Article 2 (1): "The Convention shall apply to all cases of declared war or other armed conflict."

So if, during an armed conflict, a state takes military control of a territory it did not control before the conflict the Convention is applicable, whatever the underlying disputes about title.

To restate a very well-known, yet often not-respected, principle of IHL [International Humanitarian Law], the application of IHL is not concerned with the rights and wrongs and origins of the conflict. The sole question is, is there an armed conflict, international or internal? If so, the relevant rules of IHL apply. Of course, that question itself is not always easy to answer, but my point is that the application of IHL depends upon a factual situation of occupation. For the sake of the civilians caught up in the situation it needs to be applied notwithstanding legal arguments over status, whether of territory or of parties to the conflict. The drafters of the Convention did their best to exclude such arguments. It is sad that they are still used to justify its non-application.

If I may be permitted a personal reminiscence of the Protocol I negotiations in the Third Committee of the Diplomatic Conference of 1974-77 [...]: there was a proposal to characterise occupation as inherently wrong.

It was resisted by the Rapporteur, Ambassador George Aldrich of the USA, who recalled that his country, with France, the Soviet Union and the UK was an occupying power in Berlin and he saw nothing wrong in that. The proposal was promptly dropped.

So it is not occupation *per se* that offends against IHL (I leave aside other legal questions of use of force etc). It is refusal of occupants fully to apply the rules of IHL to the occupied territory as a matter of law. There is no particular weakness in the law, save that it is not applied.

To state this is easy. To put it into practice very hard, because neither the Fourth Convention nor Additional Protocol I sets up an independent arbiter to determine when they apply. It is not the job of the ICRC. The international community and HCPs individually or collectively, indeed, should say what they think. But ultimately it depends on the political will of the HCP concerned in any given situation of occupation.

Of course it is welcome when the Convention is applied voluntarily and *de facto* in situations where there is dispute as to its application *de jure*, even if such application is only partial. If civilians *in practice* are protected that is the most important thing. But it can never be a completely satisfactory substitute for *de jure* application, being both partial and dependent upon a consent which can always be withdrawn.

Finally, it has been suggested that the law of belligerent occupation is ill-suited to long-running occupations

of the kind we have seen relatively often since 1945, being essentially designed for temporary situations. There is some force in that. It is possible to pick out particular GCIV provisions which are hard to apply in a long-running occupation. But what do you put in its place? Any change which recognises a permanency to the situation, or gives occupying power greater power to make changes there, would tend to legitimize the substitution of the occupant for the former sovereign power.

So, once again it does not seem to my delegation that there is any need to embark on the difficult exercise of trying to agree new provisions to apply in long-running occupations. Better to apply the existing law, which is in our view elastic enough. None of the difficulties of application is insuperable.

(Text provided by the FCO)

Discussion

1. a. How does the Occupying Power justify the non-applicability of Convention IV? Is the dispute over title to the territory in question a defendable justification of the non-application of Convention IV? (GC I-IV, common Art. 2)

2. Would characterizing occupation as inherently wrong be a realistic solution?

3. Would third party determination on when Convention IV applies resolve the problem of classification? Has the determination been left to the political will of the occupying power concerned?

4. a. Should Convention IV be amended in order to adapt it to long-term occupation? Why or why not?

b. Do you agree that the existing law is “elastic enough” to cover both short and long-term occupation?

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