



The Use of Force during Territorial Occupation: A case study of State of Jammu and Kashmir and occupied Palestine Territory

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Abstract

It is well established that the provisions of International Humanitarian Law (IHL) regulates armed conflicts and guarantees protection to civilians. Similarly, certain protections are also available under laws, such as, International Law of Occupation (ILOC) and International Human rights Law (IHRL). However, we know that often an occupying power uses force against civilians in the course of and maintenance of its occupation? But what grounds they give for the justification of use of force is the matter of critical focus in this article. We analyze the case studies of the State of Jammu and Kashmir (J & K) and Occupied Palestinian Territory (OPT) to critically discuss the grounds of use of force under international law.

Key words: Human rights, International Law of Occupation, Kashmir, Palestine, use of force.

Introduction

In General, the phenomenon of use of force (UOF) has attracted attention of many scholars of legal arena. However, less material is available on use of force in an occupied territory. In practical terms,

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it is complex phenomenon because states are required to fulfill criteria established by the UN Charter and other International instruments for use of force. The occupying powers have also obligations to respect the international legal provisions. The question is that what is applicable legal framework for use of force in an occupied territory and to that end what are obligations of occupying powers in relation to protection of right to life and maintenance of public order and safety?

What are grounds and limits on use of force under international law? For answering this question, this article aims to address the phenomenon of use of force during occupation and analyses relevant laws. The article is divided into IV sections. Section I discusses the case study of J & K and OPT. Section II discusses that what the UN says about use of force during occupation. It traces applicable legal framework by analyzing relevant provisions of the UN Charter. It also describes grounds for use of force. Section III analyses the relevant legal normative framework of International Humanitarian Law (IHL) during occupation. Section IV describes that how use of force could be minimized, and how violence could be done away with. Finally, conclusions will be drawn up.

I. The case of J & K and OPT: Nature of use of force and occupation

i. Nature of Use of force in J & K

The State of Jammu and Kashmir (J & K) is one of the princely states before partition of sub-continent. However, J & K is under occupation by India since 1947. The UN has passed various Resolutions on Kashmir. More specifically under UNSC Resolution of August 13, 1948, and January 5, 1949 the right to self-determination of people of Kashmir is recognized.

Such resolutions proclaim for free and impartial plebiscite whereby people of J & K may determine their future status. Since 1947 Indian forces have committed gross human rights violation in Indian occupied Jammu and Kashmir (IOJK).¹ J & K is land of lakes, clear streams, green turf, herbals and magnificent trees, mighty mountains blessed by nature with breath-taking scenery and a glorious climate. J & K is considered as heaven on Earth.²

As far as the nature of use of force in J & K is concerned, it can be determined by taking into consideration certain acts of Indian forces especially from 1989 till February 2012 as follows:

Mr. Wajahat Habibullah in book *My Kashmir*³, lays out the intricate web of issues at "the root of the conflict: ethnicity, religion, national identity, friction between national and local government, and territory".⁴ As per report of Amnesty International March, 1992, "Widespread human rights violations in the state since January 1990 have been attributed to the (Kashmir) Indian army, and the Paramilitary Border Security Force and Central Reserve Police Force."⁵

Another report titled: "Pain in Kashmir: A Crime of War", jointly prepared by Asia Watch and Physicians for human rights mentions that: "Since January 1990, rape by Indian occupation forces has become more frequent. Rape most often occurs during crackdowns, cordon and search operations during which men are held for identification in parks or schoolyards while security forces search their homes. In raping them, the security forces are attempting to punish and humiliate the entire community."⁶ According to the reports of Asia Watch "The security forces have entered hospitals, beaten patients, hit doctors, entered operating theaters, smashed instruments. Ambulances have been attacked; curfew passes are confiscated".⁷

Since 1989, the situation in IOJK is quite alarming and purpose of security forces is only to alienate and reduce the population.⁸ In 2016, when young and popular local leader Burhan Wanni was killed, several crackdowns and violations have been committed. Various incidents and violations lead to UN action under which a report on violations committed by security forces in J & K prepared by UN Human Rights Commission (UNHRC) has been published.⁹ India has rejected the report and the UNHRC stated that it is a sign of disappointment. The UNGA and UNSC has not taken any action against such reaction.¹⁰ The Indian Government has also abrogated article 370 and 35A on 5th August, 2019 under which J & K was having special status. Several house arrests, destruction of property and human rights violations have been committed by threat or use of force.¹¹

As a result, such action of India has been condemned by people of Kashmir and Pakistan vehemently raised issue at UNGA and other forums and recommended to establish a commission of Inquiry against such violations.¹² In this respect, the UN urged India and Pakistan to "refrain from taking any unilateral action which might further aggravate the...situation". However, the UN Secretary-General, Antonio Guterres, also released a statement appealing for 'maximum restraint' and reiterating the UN's position that 'the status of Jammu and Kashmir is to be settled by peaceful means, in accordance with the UN Charter'.¹³

The UNOHCHR has issued first report on the situation in J & K on 14 June 2018. The excessive use of force by forces that led to casualties, killing and injuries. Civil society groups believe that a majority of the civilian killings recorded in 2018 were due to excessive use of force by Indian security forces against civilians.¹⁴ Thus it is important to highlight human rights violations as indicated in report so that the nature of use of force and situation may be ascertained.

Excessive use of force and Killings

According to the Jammu and Kashmir Coalition of Civil Society (JKCCS), around 160 civilians were killed in 2018, which is believed to be the highest number in over one decade. Last year also registered the highest number of conflict-related casualties since 2008 with 586 people killed including 267 members of armed groups and 159 security forces personnel.¹⁵ Taking note of OHCHR's June 2018 report, a number of United Nations Special Rapporteurs issued a joint communication in which they noted: "We regret that, from the information received, it does not appear that efforts have been made to implement the recommendations, including in relation to the repeal the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990; to establish independent, impartial and credible investigations to probe all civilian killings which have occurred since July 2016; to investigate all deaths that have occurred in the context of security operations in Jammu and Kashmir following the guidelines laid down by the Supreme Court of India; and to investigate all cases of abuses committed by armed groups in Jammu and Kashmir, including the killings of minority Kashmiri Hindus since the late 1980s."¹⁶

Use of Pellet Guns and Cordon and Search Operations (CASO)

The security forces in J & K have used excessive use of force and pellet-firing. As a result, many civilians died. The 12-gauge pump-action material in pellet guns is used as noted in OHCHR's June 2018 report.¹⁷ Several CAOS have been done and forces order all men to come out including children and women for an "identification parade in front of hooded informers". Such activity is dangerous and criticized.¹⁸

Torture and Gross Human rights violations

Under the International Covenant on Civil and Political Rights, 1966 torture is prohibited and states are obliged to ensure that no person is "subjected to torture or to cruel, inhuman or degrading treatment or punishment".¹⁹ Indian forces have committed persistent claims of torture in J & K.²⁰ Civilians in any case included occupation cannot be subjected to torture, degrading punishments and otherwise ill-treated.²¹

Arbitrary arrest and detentions have been taken place of people including individuals, members of civil society, women and children by authorities in J & K under the law the Kashmir Public Safety Act (PSA) 1978.²² This practice has been used to keep people arbitrarily in detention for several weeks, months, and, in some cases, years.⁹⁵ The Supreme Court of India has described the system of administrative detention, including PSA, as a "lawless law".²³

The implementation of laws i.e. The Armed Forces (Jammu and Kashmir) Special Powers Act 1990 (AFSPA) is a violation of the norms of International law. There is no system of accountability for controlling this law. According to Special Rapporteur, many journalists were detained and Kashmir-related content and accounts were suspended.²⁴ In terms of freedom of Assembly and Association, Jamaat-e-Islami (Jammu and Kashmir) a religious political organization was declared unlawful association by the Indian government under section 3(1) of the Unlawful Activities (Prevention) Act 1967 on 28 February, 2019.²⁵ It was previously banned in 1990.²⁶

It is important to note UNOHCHR recommendations that include: (c) "Establish independent, impartial and credible investigations to probe all civilian killings which have occurred since July 2016, as well as obstruction of medical services during the 2016 unrest, arson

attacks against schools and incidents of excessive use of force by security forces including serious injuries caused by the use of the pellet-firing shotguns" and h) "Bring into compliance with international human rights standards all Indian laws and standard operating procedures relating to the use of force by law enforcement and security entities, particularly the use of firearms: immediately order the end of the use of pellet-firing shotguns in Jammu and Kashmir for the purpose of crowd control".²⁷

These all incidents show that in J & K excessive use of force is carried out by Indian security forces. It is indeed in violation of the norms of International law. It needs special attention of International community to control the situation by implementing the UN Resolutions on the subject.

ii. Use of force in Occupied Palestine Territory (OPT)

The use of force in OPT is similar as in the case of J & K. It is important to note that 20.6% of Israel overall population has Arab descendants. In addition, there are about 278,000 Arab residents of occupied East Jerusalem and the Golan Heights. Due to occupation, the majority has refused citizenship of Israel, but maintains Israeli residency.²⁸ In opt, the actions of the Israeli forces have been condemned by UN in territory under its control for human rights violations.²⁹ The people of OPT especially Arabs have denied their basic right to life, freedom of expression, assembly constantly under attack by means of retaliation actions and counter-terrorism incursions, which often lead to targeted assassinations and administrative detentions.³⁰ People in OPT are deprived of their basic rights.³¹

Though it is well established that IHL apply both in occupations and in an armed conflict but violation of provisions of IHL is found. Under International law, the obligations of occupying powers is well defined but Israeli forces continue to violate such obligations in West Bank and Gaza Strip. Though Israel holds that provisions of Hague Regulations and GC-IV do not apply but these laws have force of customary international law (CIL) and are binding.³²

Amnesty International provides that: "The forces in OPT block access roads into it and use excessive force against protesters and bystanders and damage residents' property. Israeli forces have used tear gas against homes, sometimes injuring people inside – mainly by

the asphyxiating effects of tear gas – and have deliberately damaged property such as residents' water storage tanks located on rooftops. Israeli forces have also frequently attacked medics seeking to assist people wounded, human rights defenders and journalists who are present to monitor their behaviour or report on protests, including by firing tear gas canisters and rubber-coated metal bullets at them. The approach appears intended to intimidate people into not attending the protests".³³

The forces used excessive force against people in West Bank and Gaza because of demonstrations. Israeli forces have a long record of using excessive force against Palestinian demonstrators in the West Bank. In 1987 against Intifada (Palestinian's uprising against Israel's military occupation), Amnesty International and other organizations have documented a pattern of excessive use of force on civilians, children and women in OPT. As a result, many civilians died.³⁴

Article 6(1) of the ICCPR states that: "Every human being has the inherent right to life... No one shall be arbitrarily deprived of his life." Killings that result from unnecessary or excessive use of force by state agents constitute arbitrary deprivation of the right to life.³⁵ The UN Basic Principles on the Use of Force and Firearms, require that "law enforcement officials must not use firearms against persons resisting authority unless to prevent the perpetration of a particularly serious crime involving grave threat to life and only when less extreme means are insufficient to achieve that objective.

The UN Basic Principles on the Use of Force and Firearms and other provisions are very clear under which "Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process".³⁶ Palestinians affected by the apparently arbitrary or abusive use of force and firearms or their legal representatives have been denied meaningful access to an independent process, including judicial process, contrary to UN standards of law enforcement.³⁷ As per Principle 9 "Intentional lethal force should not be used except when strictly unavoidable in order to protect life". According to Principle 7 "arbitrary or abusive use of force must be punished as a criminal offence". Principle 5 provides that "If the use of force is unavoidable, they must always exercise restraint in its use".³⁸ The use of force must only be used for a lawful enforcement purpose.³⁹

In 2017, a report was prepared on three locations (al-Fawwar Refugee Camp in Hebron, Dheisheh Refugee Camp in Bethlehem, and Tuqu' Village in Bethlehem) where people are affected by use of force.⁴⁰ In August 2016, "al-Fawwar witnessed an unusually violent incursion by the Israeli occupying forces during which the residents were subjected to excessive use of force, particularly live ammunition. The raid, described by the Israeli army as an "operational activity to uncover weaponry,"⁴¹ resulted in the killing of a 19-year-old resident, at least 32 live ammunition injuries in the legs, and 20 other injuries. Search operations by the Israeli occupying forces occurred in at least 200 houses of the camp".⁴² All three case studies analyzed provide that serious violations of provisions of international law is there. As an occupying power, Israel is not fulfilling its obligations and using excessive force in OPT.⁴³

Ben-Naftali, Gross and Michaeli have highlighted three principles and established criteria regarding occupation in OPT and conclude that factual position by Israel is illegal. These are: (1) the sovereignty and title in an occupied territory cannot be vested in the occupying power since the principle of inalienability of sovereignty persists. International law states that sovereignty is vested in the population under occupation, based on the rule of self-determination;⁴⁴ (2) the occupying power should be entrusted with the management of public order and civil life of which the people under occupation are the beneficiaries and cannot be subjugated; and (3) the occupation must be temporary to be legal, which means it cannot be permanent or indefinite. As per above mentioned criteria, violation amounts to illegal occupation per se. The actions of occupying power demonstrate illegality.⁴⁵

Israel denied applicability of provisions of IHL in West Bank and Gaza as described by Scholars and officials.⁴⁶ The Supreme Court has found that such territories are under belligerent occupation.⁴⁷ Regarding applicability of provisions of IHL, the landmark Judgment of ICJ in its *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, states that:

"[T]he Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that

Convention when the 1967-armed conflict broke out. The Court accordingly finds that the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories".⁴⁸ This argument is also advanced by ICRC later.⁴⁹ It seems that Israel's argument on non-applicability of GC's and common article 2 to GC's is untenable and unsustainable.⁵⁰ Art. 2(4) of the UN Charter provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

In terms of use of force, basic principles of the UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations states, are also relevant. Principle 1 provides that: "no territorial acquisition resulting from the threat or use of force shall be recognised as legal".⁵¹ The actual authority established and use of force by authorities amount to an occupation. It is violation of the norms of international law. The phenomenon of occupation under international law is temporary. However, such prolonged nature of occupation itself is a violation of the norms of international law and CIL. The basic principles of UN also apply in such situations.⁵² As noted by ICJ in Wall's case that: "All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power". The Court has elaborated IHL and human rights obligations in detail. The Court has referred to UNSC resolutions including resolution 446 (1979) calling upon Israel, as the occupying power and resolution 465 (1980) which described "Israel's policy and practices of settling parts of its population and new immigrants in the occupied territories' as a flagrant violation' of the Convention".⁵³

David Kretzmer advanced the Court's view "on the security function of civilian settlement [...] paves the way for actions that are not compatible with the occupying power's fundamental duty not to use the occupation as a means of acquiring territory by use of force".⁵⁴ Thus as an occupying power, Israeli forces cannot use excessive force and basic human rights of the people in OPT cannot be denied or discriminated. The level of use of force is subject to law

and violence can be condensed by punishing those who are committing crimes against humanity and war crimes. The use of force can be minimized by taking special and progressive measures for protecting civilians in an occupied territory. The next section analyses the phenomenon of use of force in UN Charter.

II. The phenomenon of Use of force in UN Charter

One of the purposes of UN is to maintain International peace and security. It includes: “prevention and removal of threats to the peace, [...] the suppression of acts of aggression or other breaches of the peace, [...] and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”⁵⁵. The relevant provision of UN Charter is article 2(4) which states that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”⁵⁶.

This article prohibits use and threat of force. Thus under International law, use of force is prohibited as a general rule. ICJ has found violation of the prohibition on use of force by states in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v The United States of America)* ICJ Rep (1986) and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Rep (2005). However, force can be used for fulfilling purposes of UN. In this context, Chapter VII of the Charter explains circumstances in which state can use force against other state if (a) it is allowed by UNSC; and (b) it can be used in self-defense as a general rule. In terms of authorization by UNSC, article 39 of UN Charter states that: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” The UNSC has acted under this provision.

For instance, UNSC has authorized use of force on 17 March, 2011 by Resolution 1973. On 17 March 2011, the UNSC, acted under Chapter VII of the UN Charter, and authorised member states “to take all necessary measures [...] to protect civilians and civilian

populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.” In terms of self-defense, under article 51 of UN Charter, states may resort to use force in self-defense if territorial integrity or political independence of concerned state is threatened. The principles on self-defense will be discussed in section II of the paper.

Another example is the case of Iraq in which intervention was made and force was used to restore International peace and security in March 2003. In that area, force was used on the basis of non-compliance of Iraq and threats.⁵⁷ The basis of intervention was also UNSC resolution No: 1441⁵⁸ under which force was used to maintain international peace and security.⁵⁹ The USA was unable to intervene or use force without affirmation or authorization of the UN.⁶⁰ In the text of Resolution, the phrase “*restore* peace and security,” is used which signifies reestablishment of situation. The phrases “*establish* peace and security” or “*maintain* peace and security” are not been used.⁶¹ The words used in Resolution 678 are thus exception to the general rule as envisaged in article 2(4) of the UN Charter. In short, article 2(4) prohibits use of force against states in General. Thus the narrow interpretation of exception to the general rule is followed in Resolution 678.⁶² Along with UN Charter the provisions of instruments of IHL and customary international law (CIL) also regulate use of force. This discussion necessitates determining grounds for use of force.

Grounds for Use of force: Is approval of UN necessary?

While interpreting provisions of UN Charter, grounds for use of force include: (a) Authorization from UNSC; and (b) states may act in self-defense if they fulfill criteria of self-defense. Intervention can be made, or force can be used if there exist threat to peace and security. Also, as a consequence of gross human rights violations force may be used against enemy. Humanitarian Intervention can also be made subject to certain conditions. Past experiences show that states have intervened into other states and argued self-defense as justification for such intervention. However, it is not necessary that such justification may always be true.⁶³ Such interventions have typically; such interventions emerged on violations of the norms of international law.⁶⁴ While unnecessary force or cause of excessive damages as a consequence of use of force is prohibited. The

requirement for use of force is subject to the approval of UNSC as enumerated in UN Charter. The opinion of majority of members of UNSC has to be taken for use of force.

For instance, NATO's intervention in Kosovo is considered as illegal because requirements are to be fulfilled by party for invoking intervention in other state. Without permission, intervention or use of force is prohibited.⁶⁵ States are not allowed to take law in their own hands and are required to take consent of UN and its organs. Similarly, in an occupied territory, the occupying powers are also required to abide by the provisions of IHL, ILOC and IHRL. Unnecessary use of force is strictly prohibited and cannot be justified merely on the basis of self-defense or for achieving military objectives. Indeed, lives of civilians in an occupied territory are important and cannot be ignored.

Thus the UN Charter in general prohibits use of force save as (i) where authorization of UNSC in order to maintain peace and security has been taken by state; and (ii) where state using force for inherent right of individual or collective self-defence provided under article 51 of the UN Charter.⁶⁶ Thus the approval of UN is necessary. It is necessary to examine principles of international law on second ground, namely, self-defense because normally the doctrine of self-defense is used by states to justify their unlawful actions. The next section describes relevant IHL law on use of force.

III. Normative Frameworks: Limits of IHL on Use of force

It is important to note that the phenomenon of the use of force is regulated primarily by UN Charter (as discussed above). Also the provisions of instruments of IHL and its principles are relevant. The use of force is permitted if imminent threat of injury or death exist or in self-defense. It can also be used for preventing grave crime or to arrest a person who resists against authority; presenting endanger and hiding himself for preventing escape.⁶⁷ However, in all situations, necessary and proportional use of force is permitted and principles of IHL must also be taken into consideration by states.

IHL is designed specifically to regulate armed conflicts. The provisions of IHL focus on (i) enforcement of law; and (b) conduct of hostilities, after commencement of armed conflict. The criteria of application of norms of international law are different in these two scenarios. The provisions provides that member of armed forces,

irregular forces and civilians taking part in hostilities are lawful targets in IAC. It also extends to occupation as well.⁶⁸ The provisions of IHL recognize use of force for conduct of hostilities.

The persons who are lawfully combatant can kill under IHL but according to law. For such purpose, members of armed forces are trained and ordered. They are required to use force for military objectives including persons and objects. However, such attacks are limited to valid military objectives.⁶⁹ The persons who use force must make clear distinction between civilians who do not take part in hostilities and lawful targets. Force cannot be used against civilian property in general. While using force, the principle of proportionality may also be considered by the occupying powers.⁷⁰

For conduct of hostilities, use of force is regulated by legal instruments and principles under IHL in armed conflict. The relevant provisions of use of force are found in Hague Regulations of 1907, Geneva Conventions and Additional protocol-I. The parties are required to use feasible precautions if they intend to use force for achieving military objectives or fulfilling a mission. However, necessary force is allowed. Same is in the case of Occupation in which the occupying powers are required to use less force and lessen casualties or destruction of civil objects.

The core principles of IHL are following: (i) The principle of Necessity which signifies that force can be used in exceptional circumstances; (ii) The principle of distinction requires that objects and civilians may be distinguished, and force can be used only for military objectives. Cause of harm to civilians is prohibited. The right to choose means and methods of warfare is not unlimited; (iii) The principle of proportionality requires balance and military advantage over civilians is prohibited; and (iv) The principle of humanity requires that rights of civilians who do not take active part must be protected in all respects. Under IHL, Persons affected by armed conflict and deprived of their liberty (through arrest, detention or internment) benefit from the fundamental guarantees set out in Article 75 of Protocol I additional to the Geneva Conventions.⁷¹

IHL has settled these principles on the basis of humanity and not everything is allowed during war. For instance, under article 44(1) of AP-I combatants who fall in the hands of enemy are considered as Prisoner of War (POWs). Under Article 4 of GC-III requires that

POWs may be treated humanely in all circumstances. Similarly under article 13 of GC-III, POWs may be treated in accordance with law. If enemy surrenders, use of force against it is prohibited.

IV. Use of force in Occupation: How UOF could be minimized?

There is no uniform definition of occupation and it is a complex term. It is different from the term invasion. Hague Regulations of 1907 do not distinguish between invasion and occupation. In general, under article 42 of Hague Regulations of 1907, the term occupation is defined as territory is considered to be occupied when it is actually placed under the authority of the occupying power. It means that actual authority established by the occupying power and effective control over area is treated as compulsory elements for occupation.

There is no uniform definition of military or illegal occupation under international law. However, the criterion for military occupation is same as in ordinary occupation. It is important to note that mere occupying area based on use of force or by other means is considered as illegal or forced occupation. The bulk of ILOC reveals that the any kind of occupation established by force or by other unlawful means is prohibited. In terms of distinction between occupation and invasion, Hostages case is somewhat relevant in which distinction of both terms is drawn up.

The Court has stated that: “The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant’s control is maintained and that of the civil government eliminated, the area will be said to be occupied”.⁷²

Thus occupation implies establishment of authority in occupied territory and Article 42 and 43 of Hague Regulations explains it. The question of effective or physical control by the occupying power is highlighted by ICJ in *Democratic Republic of the Congo v. Uganda Case Concerning Armed Activities on the Territory of the Congo*, which states that: mere physical stationing of troops at airport did not “allow the Court to characterize the presence of Ugandan troops stationed at Kisangani Airport as occupation in the sense of Article 42 of the Hague Regulations of 1907”.⁷³

Along with provisions of Hague Regulations, the provisions of IHRL also apply in an occupied territory. The ICJ has elaborated that legal regimes of IHL and IHRL apply together though IHL acts as *Lex Specialis* in times of War in *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons Case*.⁷⁴ The ICJ has categorized application of IHL in IHRL in Wall's case and held that "there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law".⁷⁵

During occupation, the situation is more complex and considered as hybrid conflicts". It is because it "oscillates between periods of armed conflict and periods of relative calm".⁷⁶ However, in this situation, the occupying powers exercise sole authority to maintain public law and order and safety in occupied territory and they have obligation under law. It is difficult task in practical sense. However, the cooperation of the occupied is also relevant in this situation. The occupying power may policize with the local population in order to achieve its military objectives.⁷⁷ In case of occupation, the occupying powers may use force and conduct hostilities against organized resistance movements. It is also evident from the case of Iraq.⁷⁸ However, the occupying powers may assume functions of (i) enforcement of law; and (ii) conduct of hostilities, simultaneously. These are governed by different legal measures and standards.

For enforcement of law in occupied territory, the military forces may take actions for achieving their objectives on the basis of necessity. These actions may include: searches, arrest and detention, checking for identity at barriers and checkpoints, dispersing riots and enforcing curfews. Although these actions are taken by ordinary forces in a state, in the case of occupation, military forces may engage themselves in these activities, but such involvement must conform norms of international law in all respects. For conduct of hostilities, which is more complex than law enforcement, if agent of occupying powers kills innocent or civilian in occupied territory then such actions are accountable and subject to investigation.⁷⁹

The requirement of law is that if the nature of attack is severe or there exist threat by organized armed group then the occupying power may use force against such groups for achieving their objectives. However, such groups must meet the criteria of

combatant. Mere use of force on unorganized groups or who do not fulfill legal criteria of combatant is prohibited. In this regard, the ECtHR, in *Al-Skeini v. United Kingdom* has stated that the activities of UK shall be treated under the European Convention because UK has exercised authority in occupied territory of Iraq through its soldiers.⁸⁰

Thus it means that application of the norms of IHRL in particular is significant to consider during armed conflicts and occupations. The occupying powers are required to abide by these norms. It is questionable that do the occupying power use force for security purposes in an occupied territory? In practical terms, it is difficult to control action of the occupying power during armed conflict. However, such actions must comply the requirements of the law.

The Occupier's Authority and Limitations

Despite use of force is permitted in exceptional and necessary cases, the occupying powers are under obligation to respect and protect rights of the occupied and in particular maintain law and order. It is because the occupying powers possess authority and not sovereignty of occupied territory. The authority established is temporary.⁸¹ IHL considers that, during hostilities, combatants and those who take active part in conflict are lawful targets. If military force is using means and methods of warfare according to law, then casualties caused by them may not amount to war crimes or crimes against humanity in armed conflict. But if such attacks are carried out only based on hatred or retaliation then military forces are accountable and liable for their actions.

In principle, attacks on civilians are prohibited. However, attacks can be carried out by military forces for achieving their military objectives. Necessary Use of force can be used subject to the nature of target.⁸² The occupying powers have duty to carry out functions which are in the interest of occupied. The occupying powers are required to protect those who do not take part in conflict. Under IHL, GCIV poses obligations and limits on the occupying powers to respect and protect interests of the occupied at all levels. For instance, the occupying powers are required to avoid murder or torture of civilians. Similarly, humane treatment must be given to all.⁸³

Even the occupying powers are required to respect property rights. For instance, private property can be confiscated only when it is “absolutely necessary by military operations”.⁸⁴ The occupying powers are required not to target public or cultural places. In short, the occupying powers are required to act in accordance with the provisions of law and not vice versa. The provisions of international law do not allow the occupying powers to take law in their own hands or misuse temporary authority.

During military operations, necessary force can be used if target is confirmed. Unnecessary force cannot be used against civilians or occupied during military operations and such actions are not justified. Though the occupying powers have authority to maintain law and order in occupied territory, but it does not mean that they can do whatever they want. Each and every action of the occupying powers must fulfill the basic requirements of law in an occupied territory.⁸⁵ The use of force could be minimized by following provisions of international law by occupying powers. As per article 42 of Hague Regulations, the occupation is temporary phenomenon. In all cases the rights of the occupied cannot be taken away by occupying powers.

Minimized Use of force and Preventive Measures

Under article 2 (4) of the UN Charter “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. Hence not only the use of force is prohibited but also the threat of using force is prohibited too.⁸⁶

Under International law states have obligations regarding use of force including the following:

1) an obligation to provide an adequate legal and administrative framework limiting the use of force to the maximum extent possible;⁸⁷ 2) an obligation to train law enforcement officials in non-lethal methods of arrest and techniques;⁸⁸ and 3) an obligation to plan the operation so as to avoid recourse to lethal force as much as possible and, under certain circumstances, to provide self-defensive equipment and less-than-lethal weapons in order to allow a differentiated use of force.⁸⁹ There are also preventive obligations such as: 1) the duty of commanders to take measures to prevent

breaches of IHL by members of the armed forces under their command,⁹⁰ and 2) the obligation to disseminate IHL, which implies an obligation to provide adequate training and rules of engagement to armed forces so that they respect IHL.⁹¹ In terms of limits on use of force in Self-defense, Under ICCPR, deadly force is prohibited and no person can be "arbitrarily" deprived of life.⁹² Under ECHR there is limit on the use of force and right to life cannot be taken away.⁹³ For limiting use of force the ICJ in its *Legality of Nuclear Weapons* Advisory Opinion noted that: "a use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law"⁹⁴ [namely, the distinction between civilian and military targets].⁹⁵ Kofi Annan, Secretary-General of the United Nations at the time of the 2003 Iraq conflict, has written: "No principle of the Charter is more important than the principle of the non-use of force as embodied in Article 2, paragraph 4 Secretaries- General confront many challenges in the course of their tenures but the challenge that tests them and defines them inevitably involves the use of force."⁹⁶

Conclusions

From the preceding discussion, it is concluded that use of force is prohibited under international law in principle. However, under the provisions of the UN Charter, it is well established that necessary force can be used in certain circumstances. For that purpose, the authorization of the UNSC is necessary and it is also evident from Iraq and Libya's cases. States may act in self-defense if their political independence or territorial integrity is endangered.

The principles of self-defense revealed that states are required to fulfill criteria for acting under self-defense and it may be used exceptionally and in necessary situations. The applicable legal framework of use of force is UN Charter and instruments of IHL. The provisions of IHRL are also relevant especially for protection of rights of people during occupation. The provisions of both bodies of law converge in occupied territory in certain situations. In terms of occupied territory, the article has revealed that the occupying powers may use force by taking into consideration principles and provisions of International law. International law limits use of force

and requires the occupying powers to use it in necessary circumstances.

The principles of necessity, distinction, proportionality, humanity and precaution must be taken into account. In case of attack, sound grounds must be there and purpose should be specific to military objectives. The occupier's authority is temporary and may not be mixed with sovereignty of the occupied territory. The occupying powers are not required to misuse endowed authority by virtue of which protection must be given to all on the basis of humanity. The protection of life of civilians is ensured by the provisions of international law in the case of occupation. While maintain public order and safety, necessary force may be used and use of excessive force is prohibited. In all respects, the rights of those who do not take part in hostilities or those who are civilians are protected under International legal provisions.

In J & K and OPT the excessive use of force is in violation of the norms of international law. The occupying powers in J & K and OPT are required to promote, protect and fulfill human rights of people by all means and in all situations. The right to self-determination of the people of J & K as recognized by UN must be implemented. The international community may play its effective role for protection of rights of people in J & K and OPT.

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