

Living with the enemy: the ethics of belligerent occupation

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1. INTRODUCTION

- **The problem:** dilemmas of occupation
- **My focus:** rights and duties of belligerent occupants and occupied populations. Explaining the focus on rights and duties.
- **Central claim:** those rights and duties are in large part dependent on the moral status of the war which lead to the occupation – contra international law/the orthodox view.
- **Structure:** (a) setting out the orthodox view; (b) the case of unjust wars leading to occupation.
- **Background claims:** (a) a background theory of justice: all individuals have rights to the freedoms and resources which they need in order to lead a minimally decent life – in other words, fundamental human rights to basic civil and political liberties as well as to a sufficient amount of material resources. Correlatively, they are under a duty to respect and promote one another's fundamental interests, sometimes at the cost of their own interests. Thus, they are under a *prima facie* duty not directly to harm others for the sake of securing their survival. At the same time, there are limits to the sacrifices which they can be expected to incur for the sake of others. In particular, they cannot be expected to divest themselves of resources which they currently have if they would have a less than minimally decent life as a result. (b) a war is unjust *ad bellum* if it fails to meet the requirements of just cause, proportionality, reasonable chance of success, and last resort. I focus on cases where it is waged without just cause

2. THE ORTHODOX VIEW.

- **Defining belligerent occupation in IL (\neq *debellatio*, transformative occupation, etc.)**
 - (a) war is ongoing;
 - (b) the belligerent occupier (henceforth, Occupant) is taking part in that war;
 - (c) Occupant effectively exercises powers of government over the occupied territory (OT);
 - (d) Occupied has not consented to Occupant's control;
 - (e) Occupied's own government has merely been displaced or considerably weakened rather than annihilated, so that a trilateral relationship exists between Occupant, that government, and the civilian population of the occupied territory;
 - (f) a peace treaty has not yet been concluded between Occupant and Occupied.
- **Comments:** condition (c) and (d) need qualifying: re (c) the cooperation of local officials is necessary; re (d), the displaced sovereign sometimes consent to the occupation (e.g. France in 1940: it would be odd to say that France was not occupied in the North); re (e): there can be a quadrilateral relationship (when there is a national liberation movement alongside the displaced regime.)
- **The law of occupation** (Hague Regulations of 1907 and Fourth Gen Conv, 1949).
 - **Occupation belongs to *jus in bello*.** By implication: the rights and duties of occupying forces are the same irrespective of the moral status of the war which lead to the occupation.
 - **Occupant's set of rights, powers and duties:**

- Though Occupant is not sovereign, it enjoys powers of government – to issue and enforce legal directives in three cases: (a) if domestic laws violate the laws of war, (b) if law and order require new directives, and (c) as a means to bolster its own war effort. E.g.: security measures, laws aimed at meeting the acute needs of civilians (via rationing, for example), taxation laws for the purpose of defraying the costs of the occupation and meeting the needs of its forces.
- Duties (as well as rights) to preserve order and secure conditions for civic life. This include a duty to e.g. restrict occupied citizens' freedom of movement (e.g. curfew), to deem all resistant activity illegal as an unacceptable breach of peace.
- Rights to appropriate and requisition material resources – in some cases with no compensation due, in other cases against compensation. Requisitions cannot be used to meet the needs of Occupant's citizens back home, but can be used to meet the needs of its own forces in place in OT as well as to fund its ongoing war. A crucial issue: exploitation of natural resources.

- **Rights and duties of occupied populations:**

- Displaced regime remains competent to legislate provided its directives do not conflict with Occupant's.
- Occupied citizens: are not under a duty to Occupant to obey it (for the displaced regime remains sovereign) though they may cooperate with it; at the same time, they may not resist Occupant's lawful directives (e.g. a directive which makes it a crime to blow up its military convoys) particularly if their displaced regime has concluded an armistice with Occupant: the moral status of that regime is irrelevant.
 - Unease about the latter point: cf Walzer on guerrilla warfare in WWII (the case of French partisans.)
 - My view: I don't accept Walzer's point. The moral status of the war fought by Occupant over OT, and which lead to the Occupation, has a crucial bearing on the moral status of the latter.

3. OCCUPATION AND UNJUST WARS

- **The revisionist account of killing in war:** whether soldiers may kill other soldiers *in bello* largely depends on the moral status of their war *ad bellum*.
- **Application to the problem of occupation following an unjust war.** at time t_1 , A's regime orders A's army to invade B's territory without just cause. Suppose further that A has also wrongfully invaded the territory of another community, C. B's regime surrenders, and its leaders flee in exile. A's armed forces are occupying B's territory at t_2 , at the same time as A is still waging its war against C. *Ex hypothesi*, in so far as soldiers_A were fighting an unjust war against B at t_1 , they lacked the right to kill soldiers_B in prosecution of that war. By the same token, they lack the right to stay in B once the fighting has ceased at t_2 . A domestic analogy: Andrew, Ben, Charlotte. *Mutatis mutandis*: A's officials lack the moral power to issue directives aimed at safeguarding their own and other soldiers' safety; they also and no less clearly lack the moral power to raise taxes, requisition movable resources and use immovable property as a means to meet either their occupation-related needs or the demands of the unjust war which their regime is still waging against C. More clearly still, they may not enforce their (wrongful) directives by killing those who oppose them.

- **Objection:** If B's regime concludes an armistice with A and allows the latter to occupy OT, B's regime transfers its own power of government over OT to A's officials on our behalf and we thus acquire an obligation to those officials to comply with their directives.
Reply: (1) consent given under the duress of impending military defeat at the hands of an unjust aggressor cannot bind B's officials and citizens to A's officials; **(2)** B's officials can only transfer to A's officials rights which are ultimately vested in B's citizens. Accordingly, they cannot transfer to A's officials the right to levy taxes and requisition resources to promote unjust ends (in this instance, the pursuit of A's ongoing unjust war against C, since B's citizens lack that right in the first instance).

- **What about the duty to restore order and protect public life?** Occupant does in fact have the power to protect occupied civilians from one another (enforcement of criminal law) or to provide for their needs. However (this is crucial): occupied civilians do not owe *to Occupant* an obligation to comply. Rather, they owe that obligation to one another as fellow residents over OT. This is important: it implies that occupied populations under an unjust occupation do not owe any obligation to occupying forces not to resist their directives.

- **Two complex cases**
 - **Unjust occupation and just war:** suppose that A's occupation of B is unjust but that its war against C is just (ex: USSR/Baltic States from 1941 onwards.) May A requisition resources from B in this case? No: A should withdraw from B, which would free up resources to fight C. By not withdrawing and by pressing B into service, A would compound its initial wrongdoing towards them by depriving them of the material means they would need to resist. If A nevertheless proceeds with wrongful requisitions, must B comply? Perhaps they do: perhaps they owe it to A's *citizens* to help given that, if they don't, A's policy of not withdrawing forces from B will leave those citizens exposed to C. My view: B's occupied civilians are not under that obligation to A's citizens.
 - **From unjust to just occupation:** the case of Iraq, perhaps? The problem of moral hazard (not such a problem after all.)

- **Permissible collaboration and cooperation of officials:** may occupied populations collaborate, cooperate or engage with (unjust) Occupant? E.g.: selling stuff; helping occupying forces enforce (just) laws. Considerations which must be brought to bear:
 - (a) active participation in O's wrongful ends (helping in the commission of genocidal acts) v. cooperating with O to bring about justified ends (dealing with common murderers);
 - (b) balancing between short term interests of fellow occupied individuals v. long term interest in O's defeat;
 - (c) balancing between to refraining from helping fellow residents by resigning one's post and thereby not facilitating Occupant's wrongful attacks on third parties, as against helping one's fellow residents and thereby contributing to those third parties' predicament.

- **Engaging with occupying forces in a private capacity:** the harsh reality of an unjust occupation.