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# UNDERSTANDING TRANSITIONAL ADMINISTRATION UNDER INTERNATIONAL LAW

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## ABSTRACT

The study acknowledges this situation as "transitional administration" in a broader term just to connote the transitory nature of such administration in context of time, administering actors and their purposive character under international law. It is important to note that these perceived end results of such administrations have always been heavily influenced by the temporal undercurrents of dominant rationalities and objectivities of world politics. This paper engages itself with these rationalities and objectivities in order to unravel their biases. While doing so, the study uses the framework of international law.

## 1. INTRODUCTION

This paper attempts to understand various techniques adopted by international law to deal with the phenomena where administration of a territory is carried out by foreign actors to achieve some desired ends at politico-economic levels. The history of international law has presented before us various examples where such administrations were theorized to either protect the existing or build new order in concerned territories. The various specific manifestations of administrative practices like, mandate and trusteeship system, law of occupation, administration of some territories by League of Nations and complex UN administrative missions are some of the examples of such administrations.

The study acknowledges this situation as "transitional administration" in a broader term just to connote the transitory nature of such administration in context of time, administering actors and their purposive character under international law. It is important to note that these perceived end results of such administrations have always been heavily influenced by the temporal undercurrents of dominant rationalities and objectivities of world politics. This paper engages itself with these rationalities and objectivities in order to unravel their biases. While doing so, the study uses the framework of international law.

The various incidences of transitional administration throughout the history of international law can be classified under four different heads. These are first, colonization and decolonization; second, international law of belligerent occupation; third, some anomalous arrangements and the UN Peace Operations after the Second World War. The purpose is to understand them with their underlying rationalities and to present more informed and democratic picture of such forms

which have long lasting impacts. It is needless to say that this specific compartmentalization is not a strict differentiation and there are cases where more than one understandings could be applied. However, the study prefers this way of manifestation and understands them one by one to unravel their clear picture that may prove helpful in understanding any prospective enterprise of such nature.

## 2. COLONIZATION AND DECOLONIZATION

Colonialism could be discussed as a form of transitional administration that advocates for a particular set of pattern of development considered legitimate enough to get followed by all states of the world. In the sense, colonialism and decolonialism is the trend where both these opposite ideas have been realised almost for the same end i.e. to cherish some pattern of development as a norm of international society of states. This part studies the mechanism adopted by international law or rather shaping of international law to get this end result materialised in legal sense.

Colonialism emerged as a political philosophy where recognition of 'otherness of others' did not preclude the writers of international law from prescribing the common achievable goals that transgressed such otherness. This had been done firstly, by assimilating 'others' in a common legal framework of natural law and then, secondly, by prescribing such natural rights, that though common to all but restricted to some due to capacity related disabilities for 'others'. Thus, much quoted author of international law, Francisus de Vitoria, while recognizing the rights of Native Americans advocated abrogation of such rights for the goals of spread of Christianity, trade and unhindered journey in favour of Spanish colonialists. He observed that:

> "[T]he continent of America upon its discovery was not territorium nullius because the Indians were the veritable owners, private and public of their lands; and the Spaniards acquired by their discovery no further title to the lands to the barbarians than would have accrued to the barbarians had they discovered Spain. The fact that they may have been sinners or infields did not prevent them from being veritable owners in the same way as Christians, and their rejection to the Christian faith after it had been preached to them did not give the Spaniards a right to occupy their lands … [however] if the Indians hindered the preaching of the Gospel or obstinately refused the Spaniards such natural rights as the right to trade with them and to journey in their lands, then the Spaniards, as a last resort, had against the Indians all the rights of war, and might take possession of their lands. He [Vitoria] suggested with hesitation that, if the Indians were not capable of forming a State, then in their own interests, the King of Spain might acquire sovereignty over them in order to raise them in the scale of civilization, treating them charitably and not from his personal profit."[1]

Thus, Vitoria's writings establishes the traditions of natural legal equality that put both Spanish and Americans at par, and also justifies the usurpation of native sovereignty by Spain for the reason to transform the Native Americans so that they can realise their potential of equality with the Spaniards. It seems that he idealises the particular cultural system, makes it universal and then imposes it on other cultural forms in a shape of cherished normative structure, any opposition of which attracts punishment under international legal realm. This construction of the relationship between the Spaniards and the native Indians has adorned the Spanish with an additional moral edge that permitted them to intervene in Indian's affairs to make them liberate from the yoke of Indian traditions and champion their cause.[2]

From above discussion, it is probably clear that the writings of the well acclaimed first scholar of international law have advocated two important conceptual points for the international law. Firstly, it establishes the natural legal traditions in international law that put both Spanish and American sovereignty at par and treats them as equal. Secondly, he then idealizes the Spanish practices as the manifestation of natural rights and permitted the use of force whenever these practices were hindered. In this way, Vitoria has attempted to universalize the Spanish practices as standard norm while recognizing the statehood of the Americans

This natural legal equality of the states has been discussed by the contemporary authors though in a different way but always with a motive to either secure or protect their trade concessions or other rights in colonial societies.[3] Thus, it could be argued that contemporary framework of natural law of the nations was mostly used or created to serve the political and economic interests of the then existing colonial masters. This form of thinking continues to inform then

[1] M. F. Lindley, (1926), The Acquisition and Government of Backward Territories in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion, London: Longmans Green and Co. Ltd., p. 12

[2] Antony Anghie, (2004), Imperialism, Sovereignty and the Making of International Law, Cambridge: Cambridge University Press, p. 22.

[3] C H Alexandrowich (1967), An Introduction to the History of Law of Nations in the East Indies, Oxford: Clarendon Press, pp. 41 – 60.

existing colonial relationship till the emergence of positivism in the legal discourse of Europe that marginalised the natural legal equality of the colonies and put them on the peripheries of international law.[4]

Emergence of positivism in international legal discussions has constitutive effect for the usurpation of almost any kind of legal personality for the colonies. It has advocated the international law as law among European Christian civilisation and other forms of civilization were rendered outside from this monopolistic club.[5] This has changed the nature of discussion about the colonial relationship. The relationship that was previously discussed in a framework of common legality was started to be addressed as an issue that mainly concerned to the individual colonial master and had nothing to deal with international law properly.

However, international legal mechanism was invoked in the colonial relationship probably first time at the Berlin Peace Conference of 1885 when European peace was threatened by the competing colonial claims.[6] It was feared that the material gains of the previous days would be jeopardised heavenly in the absence of any broader understanding among European powers as to their blind colonial race in Congo basin. The outcome of this conference is important for the notion of transitional administration mainly for two reasons. Firstly, it underscores some yardsticks, like freedom of religion and conscience and prohibition of slave trade[7], through which the individuals of the Congo basin should be treated. These yardsticks were termed as civilising mission. And secondly, it propagated the realisation of this goal of 'civilising mission' with the means of 'commercial liberty'.[8] Thus the future of colonialism was first time deliberated through international law, though in nebulous form and in restricted territorial unit of Congo basin.

After Berlin conference the next occasion when international legal mechanism was used to solve the problem of colonial possessions was the termination of the First World War. After the First World War, the question of the fate of colonial possessions of the defeated power became the main issue of dispute among Allied powers. Various proposals ranging from fully fledged acquisition, internationalisation and to returning them to their previous colonial masters were mooted during the peace conference of Versailles. It was feared that this new contention about the fate of colonies would become a cause of another European war. However, to tackle these issues, the then existing international society invented a new mechanism known as 'Mandate System'.

This system was introduced through article 22 of the League's covenant that considered the colonies of defeated powers were "inhabited by people not yet able to stand by themselves under the strenuous conditions of the modern world" and thus provides that "the well being and development of such peoples form a sacred trust of civilization".[9] To achieve this end, tutelage of such people was entrusted to the advanced nations.[10] The territories were assigned to respective states mainly in accordance with their existing occupied positions and various secret treaties.[11] The territories under this system have been classified under three categories, namely class A, B and C mandates according to their stage of development in respect of political and economic advancement.[12] Thus, international legal technique was used to put the colonies on the unilateral path of linear development where some were advanced and some were backward.[13]

This spirit and ideal of "trust of civilization" to guide the mandate territories towards the realization of self government and ultimate sovereignty was also kept in the Charter of the United Nations with the name of Trusteeship system. Apart from the trusteeship system, the ideal of self government was also emphasized by the UN Charter through the provisions on the Non Self Governing Territories.[14] With the passage of time, all the trust territories and most of the non self-governing territories got independence.[15]

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[4] Antony Anghie (1999), "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law", Harvard International Law Journal, Vol. 40:1, pp. 1-80.

[5] R P Anand (2008) New States and International Law, 2nd edition, Delhi: Hope India Publications, p. 22.

[6] Meir Ydit, (1961) Internationalized Territories : From the Free City of Cracow to the Free City of Berlin, Leyden: A.W. Sythoff, pp. 24 – 27.

[7] General Act of the Conference of Berlin Concerning the Congo, 1885, articles 6 and 9. Available at http://africanhistory.about.com/od/eracolonialism/l/n_BerlinAct1885.htm

[8] Ibid, Article 10. Also see Antony Anghie (2004) n.2, p. 97.

[9] Article 22(1) of the Covenant of the League of Nations, annexed to H Duncan Hall (1972) *Mandates, Dependencies and Trusteeship,* New York: Kraus Reprint Co., pp. 293-294.

[10] This was done through the agreement between League Council and any particular advanced state. This agreement is called as mandate agreement and the state in favour of which the colonies were allocated were known as mandatory

[11] Quincy Wright, (1968) *Mandates Under the League of Nations,* New York: Greenwood Press Publishers, pp. 26-27, and 43.

[12] Article 22(3) of the Covenant of the League of Nations, n.9.

[13] Antony Anghie (2004), n. 2, p 148.

[14] UN Charter, Chapters XI, XII and XIII.

[15] Simon Chesterman (2004), You the People: The United Nations, Transitional Administration, and State-Building, New York: Oxford University Press, pp. 38-44.

## 3. INTERNATIONAL LAW OF BELLIGERENT OCCUPATION

International law of belligerent occupation provides a framework of administrative rights and duties to the occupying powers in occupied territory. This branch of law started to get shape mainly after the Congress of Vienna and came in the concrete treaty form in Hague Regulations IV of 1907. The basic crux of this law was mainly two important legal points. First, to protect the territorial sovereignty of western European states during war pending the final settlement through peace agreement and secondly, to protect the idea of sanctity of private property during the time of war and peace. [16] To this end, it prescribes various do's and don'ts for occupying forces in order to balance the legitimate choices of military necessity and humanitarian and economic security for the concerned population. Thus, this is a form of transitional administration where foreign actors are supposed to observe various restraints on their power while performing administration of the occupied territory.

Occupation of any territory is a factual condition and international law recognizes its existence on any territory when such territory "is actually placed under the authority of the hostile army". [17] It does not displace or transfer sovereignty unless same has been ceded to the occupant through treaty of peace. [18] It seems that the laws of belligerent occupation considered a priori existence of sovereignty in the occupied territory and the respect of such sovereignty and its inalienability by the use or threat to use force is the basic doctrine around which the development of this branch of law took place. [19] It is also important to note that the need of prior existence of sovereignty in the occupied territory rendered this branch of law mostly inapplicable for the colonial territories. [20] Thus, it has developed mainly to protect the European territorial sovereignty till the wave of decolonisation has swept the globe in post charter period.

It is in essence a temporary condition in which the belligerent occupant enjoys limited power and he is not entitled to treat the country as its own territory or its inhabitants as its own subjects. [21] Thus the belligerent occupation of any territory only gives a temporary *de facto* power that is based on existing factual situation in favour of the occupant for the security of its own forces and for carrying daily administration of the occupied territory on temporary basis. [22]

The exercise of this *de facto* and temporary power of the occupant is limited and governed by the international law. [23] The occupying power only administers the territory on behalf of the legitimate sovereign and thus his status is similar to be that of a trustee to preserve status quo ante bellum. [24] So, it can be argued that the occupying power becomes "administrator rather than sovereign and this implies that his law making power is more limited and ... his law making powers could be exercised only where it was a matter of military necessity ... and not merely where the occupier considered it expedient to do so." [25]

It is important to note that despite all these safeguards, the experiences of the both World Wars have shown that the Hague Regulation was failed to order the occupant's behaviour.[26] It has been done through various self serving understanding of these laws by occupants and also by invoking various technical loopholes in the law like, occupation

[16] Julious Stone (1959), Legal Controls of International Conflict, London: Stevens and Sons Limited, pp. 693-694.

[17] Article 42 of the Hague Regulation IV 2007.

[18] Lord McNair and A.D. Watts (1966), The Legal Effects of War, Cambridge: Cambridge University Press, p. 368- 369. Also see, Siobhan Wills (2006), "Occupation Law and Multy-National Operations: Problems and Perspectives", The British Yearbook of International Law,77: 256-332, p. 257; Morris G. Shanker (1952), "The Law of the Belligerent Occupation in the American Courts", Michigan Law Review, 50(7): 1066-1083, p. 1069.

[19] Eyal Benvensti (2004), The International Law of Occupation, Princeton: Princeton University Press, p. 5-6. Also see, Morris Greenspan (1959), Modern Law of Land Welfare, Berkely: University of California Press, pp. 217- 218. Also see, H. Lauterpacht (ed.) (1952) Oppenheim's International Law a Treatise: Disputes, War and Neutrality, Vol. II, London: Longman Group Limited, pp. 436-437. Jean S Pictet (1958) Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva: The International Committee of the Red Cross, p. 275.

[20] Yutaka Arai-Takahashi (2012), "Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation", International Review of Red Cross, vol. 94 (885), p. 78.

[21] Lord McNair and A.D. Watts (1966), n. 18, p. 369.

[22] Simon Chesterman (2004), "Occupation as Liberation: International Humanitarian Law and Regime Change", Ethics and International Affairs, 18(3): 51-64, p. 52. Also see, Lord McNair and A.D. Watts (1966), n. 18, p. 369 ; H. Lauterpacht (1952), n. 19, p. 437.

[23] Hilaire Mc Coubrey and Negel D. White (1992), International Law and Armed Conflict, Aldershot: Datrmouth Publishing Company Limited, p. 283; Also see, Felice Morgenstern, (1951), "Validity of the Acts of Belligerent Occupant", The British Yearbook of International Law, vol. 28, p. 293.; Lord McNair and A.D. Watts (1966), n. 18, p. 369; Julious Stone (1959), n. 16, p. 694.

[24] Adom Roberts (1984), "What is Military Occupation?" The British Yearbook of International Law, vol. 55 : 249- 305, p. 295.

[25]Rowe, P. (1987), Defence: The Legal Implication, Brassey's Defence Publishers, p. 184, Quoted in Hiliary Mc Courby and Negel D. White (1992), n. 23, p. 283.

[26] Eyal Benvenisti (2004), n. 19, pp32-106.

by treaty of peace and the doctrine of *deballitio*.[27] In most of the occupations of these wars like, occupation of Belgium by Germany, occupation of Rhineland during First World War and occupation of Germany and Japan after second World War, these techniques have been used by the occupying powers to evade the strict applicability of the Hague laws of belligerent occupation.

To tackle these issues, international law has made two important developments after the Second World War. In the realm of treaty law, the Fourth Geneva Convention of 1949 specifically mentions the applicability of these laws in all cases of partial or total occupation "even if the said occupation meets with no armed resistance". [28] And at the front of customary law, the developments in the UN Charter era have made the applicability of the doctrine of *deballitio* obsolete. [29] Thus as if now the rules of Hague Regulation IV and Geneva Convention IV must be applicable in all sorts of the occupation and even the sanction of such occupation by the United Nations does not change the legal regime applicable to such factual situation. [30] The applicability of this body of laws does not depend upon lawfulness or unlawfulness and morality or immorality of the occupation.[31]

Furthermore, the law of occupation has also been declared as customary principle of international law by Nuremburg tribunal. [32] The International Court of Justice has also described it as intransgressible principles of international customary law and hence states that these principles are "to be observed by all states whether or not they have ratified the conventions that contain them". [33] The International court of Justice has also understood some of the occupant's obligation in respect of the occupied territories as *erga omnes*[34] obligations. [35]

In its advisory opinion of July 9, 2004, on the Legal consequences of the construction of a wall in the occupied Palestine territory, the International Court of Justice confirmed the applicability of human rights laws such as Covenant on Civil and Political Rights 1966, the Covenant on Economic, Social and Cultural Rights 1966 and the Convention on Rights of Child 1989 to the occupied territory. [36] Furthermore, the application of the human rights laws in the occupied territory has also been upheld by the International Court of Justice in its judgment in the Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda). [37] Thus, it seems that this set of laws has acquired the status of the peremptory norms of international law. [38]

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[27] Deballitio is a factual condition that is also called subjugation and it "refers to a situation in which a party to a conflict has been totally defeated in war, its national institutions have been disintegrated, and none of its allies continue militarily to challenge the enemy on its behalf. In such a situation the defeated state is considered not to exist any longer. Thus the territory of the previous entity is not occupied, the Hague Regulations are inapplicable, and the victorious power is entitled to annex it or otherwise assume sovereign powers over it." See, Eyal Benevenisti (2004), n.19, p. 92.

[28] Geneva Convention Relative to the Protection of Civilian Persons in time of War of August 12, 1949, article 2 para 2.

[29] Eyal Benvensti, (2004), n. 19, p. 95.

[30] Loukis G. Loucaides (2004), "The Protection of the Right to Property in Occupied Territories", International Comparative Law Quarterly, 53(3): 677-690, p. 678.

[31] Lord McNair and A.D. Watts (1966), n. 18, p. 371. Also see, Knut Dorman and Laurent Colassis, "International Humanitarian Law in the Iraq Conflict", available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/Section_ihl_occupird_territory

[32] International Military tribunal (Nuremberg) judgment and sentences, 1 October 1946, published in 1947, The American Journal of International Law, 41(1): 172-333, pp. 248-249. Also See, H. Lauterpacht (1952), n. 19, p. 234; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, (1996), ICJ Reports, p. 258, para. 80. Also see, Marco Sassoli (2005), "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", European Journal of International Law, 16(4): 661-694, pp. 663 and 681.

[33] Legality of the threat or use of Nuclear Weapons (1996), n. 32, p. 257, Para. 79. Also see, Vincent Chetail (2007), "The Contribution of the International Court of Justice to International Humanitarian Law", in Benarji Chakka and Larry Maybee (eds.), International Humanitarian Law A Reader for South Asia, New Delhi: The International Committee of the Red Cross, pp. 506 – 514.

[34] Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), (1970) ICJ Reports, p. 32 Para 33-34. To know more about ergaomnes obligations, see, Jochen Abr. Frowein (1997), in R. Bernhardt (eds.) Encyclopedia of Public International Law, Vol. III, Amsterdam: Elsevier Science Publishers, p. 757.

[35] Legal Consequences of the Construcion of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (2004), ICJ Reports, p. 199, para 157. About international humanitarian law, the court observes: "these rules incorporate obligations which are essentially of an erga omnes character"; Also see, Eyal Benvenisti (2004), n. 19, p. xvii.

[36] Ibid, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (2004), pp. 191-192, para 134.

[37] Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), (2005), ICJ Reports, p. 60, Para 178.

[38] Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, (1951), ICJ Reports, p. 23. Also see, ICTY, Prosecutor v. ZoranKupreki (Case No. IT-95-16-T) Trial Chamber Judgment of 14 January, 2000, p. 203, Para 520. To know opposite view see, David J. Scheffer (2003), "Beyond Occupation Law", American Journal of International Law, 97(4): 842-860 p. 843. Robert Kolb (2008), "Occupation in Iraq since 2003 and the power of the UN Security Council", International Review of the Red Cross, 90(869): 29-50, pp. 46- 47.

It is important to note that despite all the safeguards against alteration of politico economic structure of the occupied territory, the occupation of Iraq by Coalition Provisional Authority (CPA) has shown this law has been observed more in breach than compliance. Long lasting interference in the political and economic sphere of Iraq has been made by the occupying powers. The rational of most of the changes falls beyond the scope of occupation laws. [39]

### SOME ANOMALOUS ADMINISTRATIVE ARRANGEMENTS AFTER WORLD WAR I

After the First World War, various arrangements have been made mostly for European territories where the link between sovereignty and sovereign rights has been broken. The examples of the League of Nations involvement in the administration of Saar basin, Free city of Danzig and Upper Silesia, Memel Harbor Board and Leticia show realist structures of transitional administrations. [40]

## 4. UN TRANSITIONAL PEACE OPERATIONS

In post Charter period, the United Nations has involved in various kinds of territorial administrative activities throughout the world. These activities were invoked in various kinds of politico legal situations that inform the broader framework that may include activities relating to decolonisation, peaceful transfer of control, conducting elections, facilitating peace processes and response to state failures. This part of the study discusses these involvements of the United Nations in brief just to understand them in their broader political framework. [41]

Most of these administrations were constituted either by the UN General Assembly resolutions or Security Council resolutions. These administrations were aimed mainly to five categories of tasks.[42] These were first, the decolonisation process leading to independence (Namibia and East Timor), second, temporary administration pending peaceful transfer of control to an existing government (Papua, western Sahara and Eastern Slavonia) , third, temporary administration pending the holding of elections (Cambodia), fourth, interim administration as a part of ongoing peace process (Bosnia & Herzegovina and Kosovo), and fifth, de facto administration for basic law and order in the absence of governing authority (Congo, Somalia and Sierra Leone). Apart from these cases, the United Nations was also involved in reconstruction activities in Afghanistan and Iraq that is normally discussed as "light footprint" approach.[43]

These operations were mostly tailor-made to suit the needs and demands of the particular situation. However, UN engagements after the end of the cold war in the territories of Kosovo and East Timor indicate towards the erstwhile civilizing missions during colonial days. The involvement of the UN in the transitional administration always reflects the running undercurrents in the international legal thoughts and strategies.

## 5. CONCLUSION

All the discussed trends of transitional administration represent the thematic development or variations that informed the making of international law from time to time. Earlier wave of colonialism was affected by natural legal tradition in international law that ultimately advocated for spread of colonialism for the sake of some goals like, free trade and spread of civilization that were cherished to be universally applicable through the globe. Emergence of positivism further secured the compliance to these goals by placing colonies out of the realm of international legality. This creation of exclusionary identity of international subjects amounted to the categorisation of the laws of belligerent occupation in a restrictive manner that put colonies outside its protection.

After the First and Second World Wars, the emergence and manifestation of doctrine of self-determination was channelized through the mandate and trusteeship systems so as to put native nationalist energies on a continuous chain of development where some ideals had already been prescribed. Other forms of transitional administrations of the time of the two world wars were mainly aimed to realist need of maintenance of peace in European order. Most of the forms of transitional administrations up to the cold war period that have been mentioned under the heading of UN Transitional Peace Operations were seemed not to provide any specific form of politico economic development but they exhibit different kinds of outcome depending upon the realist politico economic scenario existing at the relevant time.

[39] David J Scheffer (2003) n. 38, pp. 842-860.
[40] Simon Chesterman (2004), n. 15, pp. 18-25.
[41] These broader frameworks to understand the United Nations involvement in territorial administrative activities was taken from the Simon Chesterman (2004), n.15, pp 57-87.
[42] Ibid, p. 57
[43] See, Carsten Stahn (2008) The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond, Cambridge: Cambridge University Press, pp. 348-380. Also see, Simon Chesterman (2004), n. 15, pp. 88-97.