X

Liberation and Occupation: A Commander's Perspective

Fabio Mini*

One of the main challenges for the commander of a military operation outside his national territory is to deal with the international laws that should apply to the operation and the constraints his own nation may impose upon him. Such limits stem from political aims, diplomatic convenience, economic interest, international image, media opportunity, budget priorities, force structure and the national law jurisdiction applicable to the area of operations. For the commander of a multinational force the challenges are even greater because he is subject to additional constraints coming from the international organization he is working for, the international organizations he is working with and the national caveats each contingent of his force brings with them. The legal constraints influence his autonomy and command action during the conflict, but, most importantly, they affect post-war operations when he becomes the target of scrutiny—and often criticism. While the military code of conduct and the customs of war are embedded in military education and can help guide the commander's action, the legal constraints affecting war or peace support operations are sometimes ambiguous. The latter must be known and studied, with the support of legal advisors, but, unfortunately, they are largely neglected in military education and during the specific pre-deployment

_____

* Lieutenant General, Italian Army.

training. In many countries, the military education systems include them only in the formal program, but then they are skipped because there is something "more important" to do or they are left in the hands of boring lawyers that simply list the litany of what you cannot do.

In particular, in many Western war colleges or military academies no one teaches how to handle a post-war situation. Strategy and tactics refer only to combat situations. Management deals only with our own military organization and units. A little bit of management is devoted to civil-military cooperation (CIMIC), but because of the emphasis given to peace support operations rather than to post-war management, CIMIC is perceived more as a candy bar distribution initiative than a military methodology to control the post-war situation. Military control over civil institutions is a blasphemy for democratic armies and nowadays every nation and army pretends to be democratic. I am old enough to remember the warning posters of the occupying powers after World War II: "Tomorrow the distribution of food will be suspended" and "Public gathering is prohibited. Offenders will be arrested," signed Captain Charlie or Kurt or Martini. Nowadays captains are not even given the authority to ask questions and the generals who ask questions are not entitled to any answers. I also belong to the generation that planned for military control over civilian administrations in case of internal insurgency. I remember the plans to replace civil authorities, to exercise censorship, limit individual liberties and so on. Those times are gone and, we all hope, for good.

Our democratic system is strong and the military does not have to plan for the assumption of power. However, while war is still very much present and alive, we in the West have avoided and, at the same time, subverted the idea of war. During the last ten years we have avoided the reality of war. We invented operations "other than war"—humanitarian intervention, international police operations, peace support operations, with their aggregate of peacekeeping, peace enforcing, peace making, and so on. We invented hundreds of expressions in order to avoid the word "war" or to soften its meaning. In the United States and other parts of the world, e.g., China, there was the opposite phenomenon. The same word was largely abused and everything became a "war," including market competition, family quarrels and social endeavors. The result was again an illusion because when war resumed in its traditional form as confrontation and violence, often asymmetric and non-linear, many people did not recognize it. War on terror in many countries is still considered to be the equivalent of the war on inflation, or the war on corruption, or the war on drugs.

The "Global War on Terror" and its many forms suggest a vision of Star Wars, with the Empire striking back and Luke Skywalker saving the Galaxy or similar

fantasies, instead of inspiring the idea of a worldwide disaster. This substantial elusion has also disrupted our awareness about wartime responsibility; the consequence has been the separation of military operations from pre- and post-conflict management. Contrary to what was taught to junior officers at military schools fifty years ago, the armies of the democratic West today are told to limit themselves to combat operations. They are taught to deal with "army-like" threats and leave "internal" security problems to the civil authorities responsible for law enforcement. I have seen national caveats forbidding the employment of soldiers to quell public unrest. Subsequently, when they were caught in the middle of civil disorder, the soldiers did not know how to respond. There are many NATO nations that do not agree with the use of their soldiers in anti-crime, anti-extremism or even anti-terrorism roles. We all have seen our officers and professional soldiers witnessing, without taking action, the looting of national museums, public and private property, or ethnic minority assets; saying that they are not policemen.

The separation between military and civil powers is necessary, but not before the security situation is stabilized and real democratic and effective institutions, a functioning judicial system and reliable law enforcement resources are in place. Whoever rushes in to declare the end of military operations (or even the end of the war) and transfers the responsibilities for public order to immature local authorities or to inefficient international organizations or to puppet governments is not responding to security and reconstruction requirements, but only to nearsighted and narrow-minded political interests. Such a rush is conducive to instability, creates civil-military disconnects and increases risks for the forces in the area of operations. The fact of the matter is that modern military operations do not end with the cessation of combat. Victory is no longer defined just by successful military operations, if it ever was. The aims of modern operations are purely political and this is true down to the platoon level and lower. Therefore, until the political aims are achieved, victory cannot be declared.

Furthermore, the occupation of a foreign territory is not the end of an operation but the beginning of another phase of the same effort. Modern wars and operations are not undertaken to acquire territory or sovereignty. In particular, the annexation of a territory is no longer the aim of the modern Western democracies which tend, instead, to respect the integrity and the sovereignty of foreign countries no matter how mean their political regime and their social behavior might be.[1] Modern operations are undertaken more to further ideals and interests than for territorial acquisitions, even if that territory has valuable resources or can become a profitable marketplace. Therefore, the military have specific responsibilities that cannot be ignored by simply declaring the end of combat. This is especially the case in the absence of a safe and secure environment to support such

223

a declaration or if the same "victorious" forces are continuously suffering attacks. We cannot say that we have won the battle in the field against the opposition forces while the civil authorities have lost the battle to create a basis for democratization, peace, reconstruction, development and social enhancement. We all have lost our common war.

Unfortunately this artificial and hasty separation between supposedly military and civilian responsibilities is a critical factor in the failure of modern operations or, at least, leads to lengthy and inconclusive operations, delays, and a waste of money, time, effort and human lives. It leads the military to concentrate on military objectives with little concern for post-war problems related to possible side effects and so-called "collateral damage." In the meantime it gives the civilian authorities an alibi for their failure in reconstruction. They can put the blame on the military and use extensive war damage, the lack of internal stability and even popular unrest stemming from economic difficulties as an excuse. From the military standpoint, and under the influence of this civil-military "separation," the operations tend to be planned and executed to:

• Achieve absolute military supremacy even when it is not necessary. Today there are no symmetric threats that can challenge the US and Western military supremacy. There is not a lack of military power to cope, but an excess of power to manage. Terror is achieving some results only because it is not a military threat and because it is completely asymmetric. In addition, terror directly affects a political class and an international leadership largely unfit and untrained to cope with this problem.

• Make no distinction between combatants and noncombatants.[2] If war is mistakenly considered a "police operation" or a "humanitarian effort" there is no enemy but only a "criminal." However, dealing with a criminal is different from dealing with a "just enemy." Here begins the main contradiction of our times. While avoiding the idea of war and eluding its reality, the military forces still have training, ethics and procedures related to war—a classic, traditional, symmetric, old fashion, destructive war. Our armies are completely different from police forces. And rightly so. But many situations that militaries have to face are not that different from international law enforcement. In order to cope with this ambiguity, many military units attempt to change their ethics and code of conduct. Unfortunately, when the ethics of war change, the applicable rule of law changes as well and often with undesirable consequences. The majority of our soldiers know how to deal with the enemy, a traditional combatant, but do not know how to deal with criminals. So we tend to abuse the terms "criminal" or "terrorist" in order to enhance the aggressive behavior and determination of our

soldiers, but at the same time this lowers our ethical threshold. If the definition of enemy is unclear, "criminal" can become a potential enemy, even if legally belonging to the category of noncombatant.

• Destroy all infrastructure (factories, roads, power plants, bridges, communications, government facilities) with little concern for safeguarding essential infrastructure needed by the country to recover quickly. Some infrastructure is safeguarded but only if useful to the subsequent military occupation. This generally creates the impression that the "real aims of the war" are other than humanitarian undertaken in the pursuit of international justice.

• Selectively overthrow rogue regimes and dictators. There are many dictators and rogue regimes that do not "benefit" from our military attention. Instead, some of them benefit from our protection, while the current "bad guys" have, at times, conveniently been our best allies—all of them. This also gives an erroneous perception of the aims of war.

• Carry on preventive operations in the sense that they come first but do not prevent crises, losses or damages. In our Western terminology, "prevention" has assumed the meaning of crisis and war avoidance. A war to prevent another similar or worse war is not perceived as true prevention. It is an "anticipation" of an event whose necessity is not yet defined or proven—a scenario. Our societies, following a legalistic approach, do not accept war as a preventive measure and the use of force can be gradually applied only if balanced against a threat that is visible, immanent and imminent. Scenarios are not threats and worst-case scenarios cannot lead international policy as a matter of routine. In our legalistic approach, intelligence is not evidence. This set of perceptions further limits possible solutions and adds suspicion about the legality of the military use of force.

• Carry on operations in the complete absence of an achievable political and economical "end state." Here "achievable" refers to a result planned as an outcome of a pre-determined period of time and clearly allocated resources (including those for security). While democratization, liberty, rule of law, and reconciliation are good ideas and ideals, in areas where peoples have lived through hardship and economic or ideological slavery for centuries, they are not political end states "achievable" through a defined and predetermined foreign military intervention. That is why many military operations appear endless and useless.

• Show force and pursue humiliation both of the antagonist and the allies. If the enemy is a "criminal," the ethics of combat suffer and humiliation becomes a tool to exercise superiority. When humiliation becomes a tool, it is difficult to confine it to the enemy. It is also easily applied to allies and friendly forces. Refusing an offer of help because "this operation is too sensitive" or "too

technological," or "bound to secrecy" is perceived as a humiliation by many allies. Not sharing essential intelligence, abuse of the "blue eyes only" criteria and sharing uneven responsibilities can become a humiliation in the event of difficult missions and indefinite risk.

On the other hand, the transitional civil administrations (either under international or national and local control) that are so eager to intervene after the military operations, tend to:

• Apply the same set of measures to all situations and to every kind of local society. The drawers of the international planners seem to contain only one "road map" or one list of "benchmarks" or a single "eight-point plan," and these are used indifferently for East Timor, Kosovo, Palestine or Iraq. Hundreds of international experts are paid huge sums of money for their consultancy and then the output is the same plan over and over, often repeating the same mistakes and making some new ones because differences of social, cultural and economic environment are not taken into account.

• Establish a Western-style democracy regardless of its compatibility with the existing culture and development needs. Western-style democracy, which is based on the ideals of liberty and freedom of expression of the will of the people, is the product of two bloody and lengthy conflicts: the American and the French revolutions. In both cases, it took hundreds of years to attain the full benefits of democracy, and now this model, which is far from perfect and which requires the continuous checks and balances provided by the different branches of government and the ultimate control of periodic elections, is imposed on populations that neither understand the system nor really want it. Additionally, the main corollary of modern democracy, "the market democracy," has, in many cases, a devastating effect on immature, archaic or former socialist societies.

• Dissolve existing social institutions (welfare, health care, wages, local councils, family systems, etc.) with no acceptable or efficient alternatives. Often the existing network of institutions and set of customs is the only organizational glue surviving after the war. The people know where the hospitals are and what to do to get there. They know what belongs to whom and why. They know what is legal and illegal according to their own old set of rules. The rapid change of social structures and age old points of reference gives the impression, and sometimes the reality, of anarchy.

• *Divide et impera* (divide and rule). This principal is often applied when there are ethnic or religious differences within a society. Additionally, these differences are exploited when they exist among other States in the region. The result is that where the crisis stemmed from religious or social hatred, coexistence between

226

diverse ethnic or religious groups becomes impossible. In the meantime the basic social infrastructures are unified under the control of foreign powers and they soon prove ineffective.

• Change standards (legal system, standards of living, social relations) and disband existing organizations (army, police, judicial).

• Impose an ambiguous rule of law often based on alien law methodology and culture. For example, the Balkans used to have a mixed system of socialist and Roman law. The new international administration introduced many English common law–based regulations that were often perceived as unfair and frequently incomprehensible to local judges, lawyers and the people.

• Concentrate on aid and emergency assistance but not on sustainable development.

Lessons Learned

All the operations so far conducted by the international community, if seen as integrated efforts including pre-war, war and post-war phases, have demonstrated that they can fail, not because of military blunders or lack of power, but because of:

Dimensional Disconnect. The preparation and conduct of the war is global while the post-war management is local; or vice versa (unilateral war and multilateral post-war management). All operations since the 1991 Gulf War have required a global engagement. All nations have been asked to unite in the effort of war and subsequently for peace support operations. However, immediately after the fighting, all solutions of the crises have looked for divisions—the Dayton syndrome. The new imperatives have been divide, separate, cantonize, decentralize. In so doing, regional security actors have been neglected or seen as part of the problem but not part of the solution. In Afghanistan and Iraq, the trend of war was the opposite, but the multilateral post-war effort still does not include the regional forces and their responsibilities.

Elusion and Illusion. In this post–Cold War era, we have developed the belief that the use of military arms is humanitarian; we do not wage war, we ensure peace. We are good and we produce a "success story" every day. This irenic approach eludes the concept of war and produces many illusions that are present in the behavior of many military organizations and administrators. Their claims of successes are so evanescent and groundless that trusting them becomes a real risk.

Oversimplifications. Politics seems to have lost the sense of complexity it has always had and that made its management a real art. Instead of understanding complexity and elaborating new approaches to the problems, our political system has resorted to simplifications and often oversimplification. For example:

• Democracy means elections—the sooner the better. Huge and powerful international organizations are devoted to this mantra and rush entire populations that have never had a democratic system into elections. But who are the candidates? How are the rights and fair representation of minorities protected? During the crises, whoever gets in power normally has the support of guns or the protection of foreign forces. In both cases the "free" elections risk legalizing the change of power and strengthening the power of unknown entities or individuals.

• Freedom means free markets. Free market means free competition; but what about local economies that cannot compete? Local resources will never have the chance to grow independently. In many instances, local and international mafias will benefit from a market where everything has to be imported and where there are weak governments or collusive forces facilitating the evasion of taxes and controls.

• Free economy means a unified currency. The first step international monetary authorities take is to establish a convertible currency. But converting what? Coming from where? Acquired through what? What about money laundering?

• The managers of after-war periods tend to assume that the basics of the society hit by a crisis have not changed during the war. This is not only an oversimplification; nothing is less true. War changes almost everything, but in particular it changes the people. Before, during and after the war entire generations are lost because of the killed and missing in action, the wounded, the massacres and reprisals on civilians. Generations of "could be" fathers and mothers are lost. But during these periods, generations are also lost deprived of educational opportunities during the war. This compounds the inadequacy of the education they received from the previous regimes, and the ideological, racial, ethnic biases of their upbringing, biases reinforced by the vicious cycle of violence.

• We in the West tend to face the problems only when violence erupts. But in almost all instances it is already too late. We started dealing with East Timor in 1999, but the crisis started in 1975. The most dramatic genocide in the world (in terms of the percentage of the existing population) was perpetrated during that period and nobody seemed to care. Everybody knew that Marshall Tito's death in 1980 would start the dissolution process of Yugoslavia, but from 1980 to 1992 no

one seemed to care. NATO brought war to Yugoslavia during the Kosovo crisis in 1999, but the problem had started ten years before, in 1989, when Milosevic raised his nationalistic stance against the province. In those ten years, the Serbs took away the autonomy Kosovo had enjoyed since 1948, and the Albanian ethnic groups were forced out of the government and denied an adequate education; finally resorting to open violence. A Catholic priest in Kosovo once said to me: "it takes a lifetime to shape a man and 24 hours with a gun in the hands to spoil his life. All these kids that tasted the power of violence will never be the same." And those children that lived in constant contact with war relics, unexploded ordnance, landmines and under the protection of foreign military forces will never be the same. Generations that are supposed to reshape the future of the country are simply non-existent or wholly unprepared for the task. An international observer noted in Western Africa, "The sons are less educated and more violent than the fathers." This is an equally unfortunate truism in the Balkans, Afghanistan, East Timor, Somalia, Rwanda, Palestine, Iraq, and elsewhere visited by the violence of war. These are historical defeats for our society because the "fathers" were raised through colonialism, communism, extremism and fundamentalism—all manifestations of the "evil" from which we liberated them. The international community tends to replace every loss with temporary foreign manpower and in so doing they perpetuate the delay in recovering the lost generations. Finally, within these societies, there are also lost expectations, lost hopes, and lost ideals, and these losses aggravate the recovery plan.

• Reconstruction by the few. In all of the after-crisis periods a handful of international companies are given the task of reconstruction. Normally these companies belong to the same nations that "donate" the resources for reconstruction. The money basically returns to those who gave it. The local manpower is scarcely involved and since such companies are technologically advanced, their costs tend to be much higher than the average local standards. In periods of emergency, through so-called international community and then replacing the governmental structures that existed before the crisis is not ready to exercise control over the foreign money and over the reconstruction plans. Therefore the opportunities for speculation, profiteers, black market, crime, tax evasion and so on are great.

• Another maniacal effort immediately undertaken is "privatization." Former State-owned enterprises, cooperatives, farms, and industries are disbanded and thousands of workers laid off. The international administrators do not want to appear undemocratic and they immediately tend to shape the local economy according to free market models that it took centuries to develop. Almost

everywhere, this abrupt effort does not fit a situation where property rights are unclear, ethnic or religious divisions make it difficult to be fair, and where societal needs require labor occupation and not unemployment.

• Last but not least, intervenors intervene without defining the desired "final status" of the crisis area. It is a sign of hypocrisy and inefficiency to give hopes and fuel expectations that would be difficult to keep. It is also difficult to think that one model of society could work for every corner of the world. Furthermore, the delay of the realization of the final status in the absence of a strong, efficient, impartial and transparent administration supports the creation of failed States, quasi-States, rogue States and mafia States. The final status must be defined and agreed upon before the international intervention with clarity and courage. That status must be compatible with international standards but first and foremost must be compatible with the local and regional reality. No single hot spot can be dealt with in isolation from its environment.

Fire and Forget. This tendency is not new, but has regained conceptual support during the last decade. The military instruments are the only readily available and organized tools to turn to in emergency situations. The political imperative to "do something" (which is also a sign of political weakness) finds it easy to resort to military action first. Unfortunately, the lack of comprehensive planning of the pre-war, war and post-war phases and of any kind of holistic approach makes it also easy to identify the emergency circumstances, respond to the crisis areas and then forget them, leaving the military behind. Peacekeeping missions start in the spotlight of public support and emotion but very soon are neglected and forgotten.

Civil-military Relationship. Another lesson drawn from recent operations is that the relationship between the military forces and the non-military administration is always problematic, but it becomes a disaster when the international community or the sending States allow:

• Multiple chains of command.

• Different reporting lines (national, international, private).

• Different priorities, concepts of secrecy, concepts of reliability (vis-à-vis the locals).

• Different approaches: emergency vs. sustainable development, bureaucracy vs. results, local vs. regional, politics vs. administration, success story vs. true story.

• Uneven access to the political leadership and feedback. International organizations and corporations have much easier access to the "political masters"

than do the military commanders. Normally layers of political, diplomatic, economic, religious and other advisors screen the access of the military to the decision makers who, often unable to get the military assessment as it has been stated by the commanders, tend to take the wrong decisions or prefer the always "good news" stories those advisors want to present.

• Security not to be integrated in the development and reconstruction strategy. In the minds of many civil administrators and politicians, security is often confined to "armed protection." The international civil administrations do not like to see the military around or inside their briefing rooms. Peacekeeping is mistakenly seen as a pacifistic and idealistic effort and many international civilian peacekeepers (administrators) come from personal backgrounds of conscientious objection, anti-military activism, and other "noble" endeavors. Many, of course, know that without the military it would be impossible to cope with emergency situations, but many others think it would be better to leave the military home or, if military forces are absolutely necessary, to send them away as soon as possible once the initial emergency is in hand. Almost all these administrators do not include the military aspects of security in the plans they make—roads and bridges are rebuilt without considering defensive or military requirements; industrial complexes and plants are rebuilt and managed regardless of their vulnerability to internal and external sabotage; mines and minerals or other natural resources are left in the hands of engineers and managers totally unaware of security issues. Furthermore, the reconstruction plans do not consider the indirect effect a military presence has on local development and the indirect and direct protection of minorities and their patrimonial sites. This security factor is either taken for granted or completely missed. There is always a great push towards a so-called "de-militarization" or effort to diminish the presence of the military without having restored an effective security system. A reduction in the foreign military force is always a great confidence building measure, but it must undertaken only when accompanied by a real improvement in the security environment, and, most of all, the diminution of visible aspects of security must be balanced by invisible, but not less effective, measures of security (intelligence, deterrence, reassurance, reserve forces, civil-military cooperation, information campaign, psychological operations and military-to-military cooperation). Finally, the great value that the military-to-military relationships have in the regional context is very seldom considered. The occupying military forces are denied opportunities for regional or wider contacts with the military forces of the area on the assumption that a relationship with neighboring foreign forces could invade the realm of foreign policy. In this way a basic and effective tool of cooperation is often neglected.

The latest international operations have also demonstrated that nobody can act alone. No matter how powerful and strong a nation, the participation of allies and friends is always advisable and necessary. Coalitions of the willing are not enough if they exclude traditional partners or potential critics. Critics must be always involved and their views solicited and considered. Furthermore, the single-sided approach (the military wage war, civilians manage pre-war and post-war) creates further disconnects and a vacuum of power that is immediately filled by thugs, criminals and extremists. Without an integrated approach to pre-war, war and post-war operations, the transition periods, no matter how smooth or short, embed the seeds of failure for the entire operation. It is during these periods that the major contrasts between military operations and civil administration are most apparent and that both the military and civilian sides are most vulnerable. During the transitions the huge amount of money that international "solidarity" has poured into the crisis area cannot be controlled and these monies create enormous possibilities for criminal organizations and other profiteers. It is also during these transition periods that oversight of the local political system is reduced. Often a struggle for internal power delays political development.

The "Liberation Syndrome." It is often stated that modern military operations and wars are not waged just to defeat an enemy but to free a country or a population. Of course this is a true statement and it is the only appropriate motivation that a modern civilization can have to justify war against someone that does not pose a direct threat to the sovereignty of our countries nor possess the military capability or power in whatever form to threaten our basic security. But the aim of "liberation" cannot be misused or abused. Liberation is not a status granted by intervening foreign forces or freely claimed by insurgents, but it is acquired through a self-determination process guided by internationally recognized legal institutions. Self-determination is a fundamental principle of international law. The United Nations system is built on the concept of self-determination as expressed in the UN Charter. The inalienable right of self-determination stands as the very first article in the two treaties, the International Covenant of Civil and Political Rights[3] and the International Covenant on Economic, Social and Cultural Rights,[4] both adopted in 1976, which, together with the Universal Declaration of Human Rights,[5] comprise the International Bill of Rights. The right to self-determination may be claimed and asserted only by the legitimate representative of a people or nation. The realization of the right to self-determination, through the attainment of sovereignty and legal personality, is governed under international law according to the following recognized factual criteria of Statehood: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a

defined territory; (c) government; and (d) capacity to enter into relations with other States."[6] In addition to these factual criteria, recognition is an important factor in the granting of legal statehood. The General Assembly, responsible for admitting members to the United Nations, is the most authoritative forum for State recognition, although bilateral recognition by other States is also an important factor. However, the right to self-determination is not the same as an absolute right of secession from an established State. The territorial integrity and sovereign equality of States are also basic principles of international law recognized in the UN Charter and subsequent treaties. In the 1970 Declaration of Principles of International Law, the General Assembly affirms that every State must aid in the realization of the "self-determination of peoples" in accordance with the provisions of the Charter, but also that "nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair . . . the territorial integrity or political unity of a sovereign State."[7] Similarly, the 1961 Declaration on the Granting of Independence to Colonial Countries and Peoples affirms both the right of all peoples to self-determination and the principles of territorial integrity and inviolability of State borders.[8]

In the last decade, "liberation," more than an expression of self-determination of the poor and oppressed, has become a "syndrome" of the powerful. It has also created dangerous ambiguity in the role of belligerent parties and occupying powers. The misperception induced by the "politically incorrect" word "occupation" is greater than the reality, while the "good" word "liberation" fuels many misunderstandings. These include:

• Liberators are not occupants; they cannot behave like occupying forces

• Immediate liberation. In the minds of the liberated peoples they are free as soon as the liberating forces assume the control of the territory and come in contact with them. If small local irregular units happen to have contributed to the fighting, they become the heroes of the nation and the "freedom fighters." They demand immediate actions in removing the previous authority, freeing political prisoners or internees, arresting former officials, disbanding former State administrative agencies and State security organizations, including intelligence, law and order and administration. They expect the international community to allow freedom and rights not previously enjoyed. They expect that power will be transferred to them without any interference or delay.

• Another perception is that of those who were persecuted by the previous regime want the power too. They are martyrs. They want the leading positions and they want revenge.

• Then there is the perception of the liberating forces. In this modern age there are no longer wars for territorial control or annexation. Nobody wants to modify the existing borders. Therefore, unlike the occupying forces of the 19th century, the so-called liberation forces do not want to control the territory; they simply want to accomplish whatever objective was set and then go home as soon as possible. They want to transfer the power to whoever could free them from any continuing responsibility. The liberators do not feel additional responsibility towards the "liberated" and are not psychologically prepared to use force against them; even if the failure to do so would allow the thugs to come into power or if disbanding the previous administration would mean chaos for decades.

All this is very far from what the reality of the situation requires and far from what is anticipated by international humanitarian law (IHL). Liberation is a synonym of self-determination as far as the people or the nation that strive to attain independence are concerned and it is a form of external "aid" to such an endeavor when foreign forces intervene. However, no matter the purpose of the conflict, the status of occupation paradoxically provides a greater legal basis than any other justification for military presence and best ensures the protection and basic rights of the civilian population. Let us turn to the case of Iraq and see what occupation should imply.

The following analysis contains extracts taken from a paper prepared as part of the International Humanitarian Law Research Initiative.[9] While somewhat lengthy, it provides an excellent discussion of the principles of IHL in the context of the military occupation of Iraq.

> The Fourth Geneva Convention [1949] and the Hague Regulations [annexed to 1907 Hague Convention IV 1907] regulate the situation of belligerent occupation. They set forth a series of duties and obligations for the parties involved from Coalition forces to relief agencies and the Iraqi population itself. Their purpose is to ensure minimal protection of the civilian population and favor the stabilization of the security and living conditions in the territory under the control of invading forces.

> . . . .

> **What is an occupation?**

> The IHL follows a very practical approach in defining military occupation. It refers to factual control over a territory or a population. It does not require any form of declaration or intent of the invading forces. The motives for the presence of foreign military forces on the territory, be they liberation, self-defence, or enforcing pre-emptive doctrine, are irrelevant. . . .

234

What is the law of occupation?

From the point of view of IHL, civilians in occupied territories deserve and need particularly detailed rules of protection. . . . The civilians have no obligation of loyalty towards the occupying power, regardless of the motives of the invading forces. The only obligations they have relate to their civilian status, i.e., not to participate in hostilities. . . . [Because of that obligation, IHL prohibits civilians from violently resisting occupation of their territory and from attempting to liberate that territory by violent means.] [Conversely,] the occupying power is subject to a series of obligations pertaining to the administration of the territories it occupies and the population it controls as a substitute and caretaker for the national authorities.

When does occupation begin?

The criteria for the application of the law of occupation are relatively straightforward. The law of occupation applies whenever, during an armed conflict, a territory and its population come under control of the enemy of the State authorities previously controlling that territory. (See Art. 42 of the Hague Regulations and Art. 2(1) and Art. 4 of Fourth Geneva Convention.) The overriding concern of the IHL rules is to regulate the relationship between the civilian population and the invading forces as soon as the two are in contact, independently of the duration or motives of the military operations. In this context, even a military platoon occupying a village for a period of a few hours, has obligations to take care of the population (emergency health care, food and water supplies, etc.), not as a matter of charity but as a duty under the rules of IHL. The longer this occupation lasts, the more detailed the obligations become. In the case of Iraq, the fall of the regime certainly creates long-term obligations pertaining to all spheres of public services, from the maintenance of law and order, the administration of justice, the supply of food, water, and health services, and the administration of the Iraqi resources for the benefit of its people.

When does occupation end?

Occupation ends whenever one of the conditions of occupation is no longer met.

1. The international armed conflict has ended.

An agreement has been signed between the parties at conflict bringing to an end the armed conflict. In general, such agreement will involve the withdrawal of the occupying forces. There may be situations, however, where the former occupier will maintain a military presence in the country, with the agreement of the legitimate government under a security arrangement (e.g. US military presence in Japan and Germany). The legality of such agreement and the legitimacy of the national authorities signing it are subject to international recognition, whereby members of the international community reestablish diplomatic and political relations with the

national government. In this context, it is in the interest of all the parties involved to maintain a clear regime of occupation until the conditions for stability and peace are created allowing the re-establishment of a legitimate national government. A post-occupation military presence can only be construed in the context of a viable, stable and peaceful situation.

2. Foreign military forces have withdrawn from enemy territory or are no longer exerting control over the population of that territory.

In case of an ongoing conflict, the withdrawal of the forces also brings an end of the applicability of the law of occupation. It implies however that the enemy power has regained control over its population and territory. The mere withdrawal of troops from certain conquered places does not end or suspend the application of IHL rules if it leaves a vacuum of authority. The control of the territory and the legal duties involved remain in effect until the front lines have stabilized. Evidently, in the course of a military campaign where front lines can move back and forth many times and responsibility over the territory and population is unclear, the implementation of such rules can become impractical. However, in the case of the collapse of enemy forces, as in Iraq, the law of occupation applies to territories and populations entering into contact with invading forces, and remains applicable regardless of further tactical deployment of troops. In other words, there is no vacuum of authority or responsibility once troops have moved into a given territory. Obligations for the maintenance of law and order as well as all other obligations pertaining to occupying powers are applicable to the Coalition forces as soon as they drive Iraqi forces out of civilian areas.

In both cases:

• The hand-over of administrative functions to civil servants does not relieve the Occupying Power of its obligation;

• The set-up of government structures by opposition groups with the continuing military presence of Coalition forces does not fulfil the conditions for the end of the occupation. If changes to the Constitution are required, it can only be amended under its own provisions and procedures or, in exceptional cases, under applicable international law and procedures. Agreements concluded by the U.S. or the U.K. with local authorities of the occupied territory or changes introduced by Coalition Forces to Iraqi institutions or to the government of Iraq cannot deprive protected persons from the protection offered by IHL (see Article 47 of Fourth Geneva Convention).

• In all cases, the law of occupation applies until one year after the general close of military operations, and even beyond that date basic rules continue to apply, if the occupying power exercises the functions of government in the territory. (See Article 6(3) of the Fourth Geneva Convention.) In addition, Protocol I contemplates the

extension of the full application of occupation law until the termination of occupation. (See Article 3(b) of Protocol I.).

What are the obligations of the Coalition forces in Iraq?

• In principle, life in the occupied territory must be allowed to continue as normally as possible. The obligations of the occupying power can be summed up as permitting life in the occupied territory to continue without being affected by its presence. As authority has passed into the hands of the occupant, it becomes responsible for public order, safety and welfare in the occupied territory. IHL is strong in protecting the status quo ante, while weak in responding to new needs of the population of the occupied territory. The longer the occupation lasts, the more shortcomings of the regime established by IHL therefore appear. Only international institutions such as the U.N. or new local authorities established in conformity with the right of the Iraqi people to self-determination can establish a new political system in Iraq.

The legal implications of this approach are the following:

Regarding internal security, the maintenance of law and order and public welfare

• The occupying power's only protected interest is the security of the occupying armed forces; it may take necessary measures to protect that security, but it is also responsible to take all measures in its power to restore and ensure, as far as possible, public order and safety (see Article 43 of the Hague Regulations). In this context, while the U.S. is not responsible for every looting occurring in the territory it controls, it must exercise due diligence to avoid such looting. The claim that its forces are not sufficient in number or not appropriately trained is not a sufficient excuse;

• Similarly, the U.S. and the U.K. are responsible for ensuring public health and sanitation (see Article 56 of the Fourth Geneva Convention) and the provision of food and medical supplies (see Article 55 of the Fourth Geneva Convention).

Regarding the administration of justice

• Except concerning the protection of the occupying power's security, local laws remain in force (see Article 43 of the Hague Regulations and Article 64 of Fourth Geneva Convention) and local courts remain competent (see Article 66 of the Fourth Geneva Convention);

• Civilians may only be detained in anticipation of a trial or for imperative security reasons, which must be individually determined, allowing for a right of appeal (see Article 78 of the Fourth Geneva Convention). Such civil internees benefit from a very detailed protective regime under the Fourth Geneva Convention (see Arts. 79–135 of Convention IV);

• If civilians commit hostile acts, they may be punished under legislation introduced by the occupying power, but do not lose their civilian status. They may however lose their communication rights (see article 5(2) of Convention IV). Unless they directly participate in hostilities, they benefit from the protection of civilians against effects of hostilities (see article 51(3) of Protocol I.)

• In no case may a civilian be deported outside the occupied territory (see Article 49 (1) of Fourth Geneva Convention).

Regarding property and resources

• Except when rendered absolutely necessary by military operations, private property may not be destroyed (see Article 53 of the Fourth Geneva Convention) and it may only be confiscated under local legislation (see Article 46 of the Hague Regulations).

• The government previously controlling the territory can obviously no longer administer public property (other than that of the municipalities (see Article 56 of the Hague Regulations). Such property may therefore be administered by the occupying power, but only under the rules of usufruct (see Article 55 of the Hague Regulations). If Iraqi oil wells were government owned, the U.S. may administer them and sell the oil. According to some opinions, it may use the proceeds not only for the benefits of the local population, but also, similar to levies, to cover the cost of the occupation (but not of the whole war) (see Article 49 of the Hague Regulations).

As can be seen, the aim of liberation does not affect the status of occupation nor alter the relevant obligations. "Fire and forget" is not the kind of responsibility the IHL assigns to occupying powers. "Fight, pay and leave" is not what the civilian population can ask for. The criteria set by the law of occupation exactly fit the situation of Iraq.

Case Studies

Afghanistan. In the case of Afghanistan, the "liberation" by the Coalition was neither requested nor wanted by the Taliban regime that constituted the government of that country. The so-called "Northern Alliance" was not a resistance force but the remnant of a group of warlords opposing the unifying power of the Taliban. The Taliban regime, which itself pretended to "free" the country from the previous regime and the mujahideen under the banner of self-determination, was not recognized by the United Nations. In fact, after the Coalition's "liberation" the same warlord system of the mujahideen regime that preceded the Taliban has taken over local power, while the central government is able to perform a sort of loose control only over Kabul, and that thanks to the presence of US and NATO forces. During

the mujahideen regime there were around 28 warlords and now there are at least 32 war/drug lords.

Iraq. In the case of Iraq, there will be no liberation until the Iraqi people have effective, stable and legal (internally and internationally recognized) State institutions. Unfortunately, they have been prevented from liberating themselves from Saddam's regime. The assumed and promised popular revolution and participation in the "liberation" did not take place. It was a gross misperception and a mistake of evaluation on the part of many experts, worldwide renowned Islam scholars, intelligence agencies and naïf politicians. On the other hand, there was no attempt to organize the participation of the local population in the coalition operation was not organized, not foreseen and not even symbolically pursued. Perhaps the most widely remembered symbol of the end of the Saddam regime was the pulling down of the large statue in central Baghdad. But this was done by a US Marine, and the small crowd of Iraqis around it was chanting more for the sake of TV cameras than for joy. Most Iraqis had longed to liberate themselves from the Saddam regime, but were not given the opportunity to organize their own fight, not even at a symbolic level. Although coalition leaders brought with them Iraqis that were believed to be potential leaders, these had no political credibility; they were viewed as puppets of the Western forces that had imposed hardship on the Iraqis for too long. Because there was no participation by the Iraqi population, the people had no opportunity to rid themselves of regime propaganda and the atavist fear of the regime. They did not have the chance to understand the new situation and finally react.

Paradoxically, like any other peoples that did not have the opportunity to free themselves from their own dictators, the Iraqis are now freeing themselves from the "liberators"—the Coalition. Liberation and freedom must be earned through self-sacrifice and cannot simply be given to them for free by someone else. The status of "liberator" is not one recognized by international law and liberation by "liberators" is not a guarantee of democracy or humanity. The Jewish internees of the Nazi lagers gained their freedom through their own martyrdom; they were already free in the face of God and in the face of the international community when the Americans and the Soviets opened the gates of Auschwitz, Buchenwald, Dachau, etc. Nevertheless, they saw their liberators as angels regardless of whether those military forces belonged to a Western democracy or a Stalinist regime. The majority of Iraqis view the Coalition forces as liberators, but they know that this recognition does not give the Coalition any specific right over them, their resources, or their sovereignty.

The majority of Iraqis recognized the Coalition as an occupying power responsible for restoring and ensuring public order and safety, because they knew they

were incapable without that assistance of overcoming the resistance forces or even the criminal gangs that plagued their country. They were willing to postpone the establishment of their own freedom because of their lack of capability to maintain security. But if the occupying forces prove unable to ensure security or want to give up their own responsibility as occupying forces in order to appear "liberators," i.e., the good guys, they have no useful role to play and should leave. The people themselves have the right to free their own country. Therefore, from the legal point of view, a temporary consensual military occupation is better than an indefinite stay in the ambiguous status of liberators. Furthermore, as soon as the "occupiers" give up their legitimate status and want to become just "liberators," ignoring their responsibility to ensure security and freedom of movement, they can be seen as unlawful occupants, making the struggle for liberty, or self-determination, against them lawful and justified. That's why in the periods of immediate post-conflict, or even during the phase of active combat against rebels or insurgents, the status of occupants is better than any other funambulism, at least until security is guaranteed and civil institutions are able to control the internal situation. Until that moment, the coalition forces should retain the status of occupying forces and comply with their relevant responsibilities under international law. Liberation and occupation is not a matter of self-labeling, but of international obligation.

In the case of a coalition composed of belligerent and non-belligerent nations, the responsibility of ensuring respect for the norms of international humanitarian law as occupying forces resides with the individual nations even though the operational or administrative leadership has been assumed by or delegated to a leading nation. Although some national forces may not accept the rationale for the war, the status of occupation is independent from their acceptance or non-acceptance of that rationale. Their de facto control over part of a territory even by a small unit render the national forces responsible for the fulfillment of occupying obligations. In Iraq, it is likely that the so-called supporting nations (Italy, Poland, etc), when assuming the responsibility of a sector, implicitly assume the obligation of occupying forces even though that status is specifically recognized by the relevant UN resolutions only with respect to the United States and the United Kingdom. On June 28, 2004, the control of Iraq was formally handed over to Iraqi authorities. However, coalition forces have not changed or given up their de facto control of Iraqi territory. It is highly questionable whether the nominal control residing in the hands of the local authorities is sufficient to end the "occupation regime," but certainly it is not sufficient to amend the obligations that the coalition has towards the civilian population.

It is clear that in their formal new status of "invited" forces, the national forces in Iraq cannot have fewer obligations than they did when their status was that of

occupying forces. Furthermore, Iraqi forces have no power to control the security situation, lack intelligence and surveillance resources, and do not possess even the capability to adequately support the Coalition. In fact, the Coalition still has full control of the security instruments and their apparent status of "supporting" the local authorities is a fiction. As a matter of fact, the so-called "passage of sovereignty" (in reality, according to international law, Iraq never lost its sovereignty) to the Iraqis has added the Iraqis themselves and their immature, unprepared, ineffective security forces to the list of enemies of the criminals and the rebels. The early disengagement of Coalition forces from the obligations of occupation law, their desire to regain the fallacious status of "liberators," and their formal transfer of responsibility of security to the provisional local institutions has ended the regime of occupation and also the right of resistance that such law recognizes to the Iraqi armed groups.[10] But it has also relieved the civilian population from their duty to not engage in violent resistance to the occupation. The formal end of the occupation has paradoxically increased the risk of legalizing mass rebellion and fueling a civil war; the rebels can now clearly identify the Iraqi security forces either as collaborators of the unlawful occupants or as internal enemies.

Kosovo. In Kosovo, legally speaking, the war against the sovereign State of Serbia and Montenegro was waged by a regional security organization (NATO) in order to protect a minority legally and lawfully integrated into a sovereign State, but not to transfer to such ethnic group the sovereignty over the parts of Serbia, Albania and the Former Yugoslav Republic of Macedonia (FYROM) where they live. "Liberation" in this case and in this phase has the value of humanitarian protection and relief. That is why UN Security Council Resolution 1244[11] authorizing the NATO-led mission in Kosovo and the UN administration did not foresee any loss of sovereignty by Serbia and Montenegro.

The international administration of Kosovo that followed Operation Allied Force was often discussed both before and after the war with regard to its applicability to Iraq. Many experts and UN officials wanted to export the "Kosovo model" to Iraq. In fact several international officials and national military officials were transferred from Kosovo to Iraq in the early days of the invasion. I can testify from personal experience that among those international officials there were some good persons who had performed effectively, but there were others that had failed miserably during their tour in Kosovo. The suggestion of the "Kosovo model" for Iraq was a serious concern to all those who had lived through that painful, ongoing peacekeeping process. Kosovo has nothing to do with Iraq and the poor performance of the most prominent international organizations there did not justify any attempt to make a "model" out of it. The Kosovo model becomes even more

irrelevant when being exported to a completely different situation, culture, mentality and set of practical problems. The United Nations may have had little choice because other models were not available and the donor countries and the international organizations had somehow accepted the bureaucracy established in Kosovo. Because the different circumstances in Iraq were not understood, this decision was not very promising. Iraq required a new and clearly determined approach; the failure to provide that approach does not bode well for the future.

The United Nations imprimatur has great political value and good diplomatic value. Worldwide operations or initiatives cannot be effectively undertaken without the consent and the support of the United Nations. That said, in Kosovo, as in other missions it has undertaken, the United Nations proved completely ineffective and even dangerous when administering a country or a territory. Kosovo is a small spot in the Balkans; officially a province of Serbia. It has a territory of 10,000 square kilometers and a population of 2.1 million. United Nations Interim Administration Mission in Kosovo (UNMIK)[12] is, in effect, the governing institution in Kosovo and is responsible for running this province on behalf of the United Nations. A Special Representative of the UN Secretary-General (SRSG) is the highest international authority in that province. NATO, which brought war to Serbia-Montenegro because of the Kosovo humanitarian crisis, maintains Kosovo Force (KFOR), an international security force composed of NATO and non-NATO military contingents, in the province. The KFOR commander (COMKFOR) is the second ranking international official in Kosovo, but is not subordinate to the SRSG.

Personnel of the United Nations High Commissioner for Refugees (UNHCR) are still, as of the time this article is written, working in Kosovo. Their main humanitarian work is finished and they are reducing their staff and handing over some responsibilities to the civil administration, but they still provide assistance to the local minorities.

UNMIK is divided into four sections, which it calls "pillars," as follows:

• Pillar I, under UN management, is responsible for police and justice affairs.

• Pillar II (civil administration), also under UN management, is responsible for all aspects of organization of normal life; e.g., finance and payment, education, transportation, health, judicial affairs, UNMIK police, post and telecommunication, public utilities and many more.

• Pillar III, an institution run by the Organization for Security and Co-operation in Europe (OSCE), is in charge of media development, democratization, police training, and elections/registration.

• Pillar IV, run by the European Union, is responsible for reconstruction, trade and industry and public utilities.

The SRSG is responsible to the Secretary-General, but must report to a Contact Group of eight nations. In theater, a special supervisory mandate is given to the QUINT Nations (the missions in Pristina, Kosovo of the Federal Republic of Germany, France, Italy, the United States and the United Kingdom). In 2002, when I took over as COMKFOR, UNMIK had 16,000 personnel assigned to it and KFOR 32,000. In the period which followed, UNMIK was to slightly reduce its size, while I received the task to reduce KFOR to 17,000 personnel by the end of 2003. Other interlocutors included the staffs of the international non-governmental organizations (400 non-Kosovars and 3000 Kosovars) and the police force composed of 5000 international police officers and 5000 indigenous personnel.

From the international humanitarian law point of view, the NATO-led forces in Kosovo should not have the status of occupation forces. Serbia signed an agreement allowing the foreign military presence on its own territory. However, under the requirement to use whatever means "to establish a secure environment"[13] KFOR could have acted as a "de facto" occupant rather than a force "allowed" to be deployed there for a long time. This was prevented by the hurry the UN and NATO political authorities were in to declare the situation safe and secure. It is also peculiar that NATO and Serbia did not sign a status of forces agreement regarding KFOR. Instead, the immunity granted to the forces is regulated by the Framework for Provisional Self-Government in Kosovo issued by UNMIK itself.

When I assumed command of the Kosovo Force in October 2002 (three years after the war), I had the good fortune to be aware of most of my legal limitations because I had served as Chief of Staff of Joint Forces Command Southern Europe that had, during the previous two years, been responsible for all operations in the Balkans. I was also fortunate in that exactly ten years earlier I led a mechanized brigade in the very first phase of an operation against organized crime in Sicily. At that time, in the aftermath of the assassination of two magistrates, the local government institutions were unable to cope with the distrust of the population and were not effective in countering organized crime. The Italian Army undertook this operation with special police powers and deployed in Sicily for nine years before returning full control of the region to civilian law enforcement. When I assumed command of KFOR, I thought I understood all of the difficulties related to the relationship with civil administration and law enforcement. I was also convinced that NATO forces had "liberated" the Albanian population and that both the Albanians and the Serbs were under control. During the previous three years there were no incidents or deliberate attacks against KFOR and the official reporting always depicted some improvement.

On taking command, I was also immediately challenged by some unusual legal aspects of my mandate. The first meeting scheduled after bidding farewell to my

predecessor was with the Russian Representative at NATO who traveled from Brussels to Pristina for the sole purpose of complaining about the exclusion of a Russian liaison officer at some regular meetings with the Serbian Security Forces. The second meeting was with my Chief of Staff and the legal advisors to examine an official complaint presented by Amnesty International in reference to the alleged mistreatment of two Islamic diplomats by KFOR troops. The two diplomats had been arrested with clear evidence of conducting illegal activities while allegedly working for an Islamic NGO. I settled the dispute with the Russians in five minutes, but Amnesty International is not satisfied with the answer NATO provided with regard to the two diplomats and that issue remains open.

I soon discovered that the national caveats (the guidance provided by the participating countries with regard to their contingents), previously seen as "political gadgets" the diplomats like to play with, were directly affecting the mission of the contingents and limiting their rules of engagement. Some of them were also posing additional and unnecessary risks to our soldiers. For example, minimum use of force was allowed only in case of direct attack or hostile intent. The meaning of direct attack is clearly recognizable, but not so hostile intent. Generally speaking, the national caveats were clear, understandable and justifiable. More problematic was the interpretation of existing local law, the national law every soldier must respect, and international law.

Any concerns that I had with potential legal matters and dealing with the differing national caveats were insignificant when compared to the overwhelming practical problems associated with carrying out KFOR's responsibilities.

In exercising its responsibility for ensuring a safe and secure environment in Kosovo, KFOR had passed security tasks related to the protection of sensitive and patrimonial sites, border control, and freedom of movement, to local police forces. What I discovered after the first couple of weeks was that the situation was far from being safe and stable. The endless "successes" that contributed to the rosy picture were exaggerations, when they were not plain lies. In most cases, when real successes were reported, the following failures did not find their way into the reports. Security was sufficient only regarding KFOR self-protection. The ethnic hatred precipitating the war was still there and had worsened the situation of the minority, the Serbian population of Kosovo. The Albanian majority was conducting a steady "Albanization" of the province through blackmail, intimidation, assassination, and attacks on Serbian citizens and property.

In addition, the reconstruction program was behind schedule with no prospects of improvement. The final political status of Kosovo was not even being discussed. The relationship with Belgrade was a disaster, with daily clashes and insults between the SRSG and a Deputy Prime Minister of Serbia. The transition of power to

the provisional government was not implemented. The local Assembly was rioting and the ministers wanted only more cars, cell phones and bodyguards. Notwithstanding three rounds of democratic elections, there was not a functioning government. Politically motivated assassinations were a norm. Some extremists had organized riots, demonstrations and the export of violence to southern Serbia and northern FYROM.

Many of these security and governance issues stemmed from Kosovo's nonfunctioning economy. Unemployment impacted 80% of the population, crime infested every field of activity, the decentralization of powers to the municipalities had not even started, energy infrastructure was under constant sabotage, the judicial system was compromising with the thugs, the UN administration was thinking more about political games than "administration," extremists had taken over the control of legal parties and civil protection institutions, schoolteachers were on strike, and the miners were claiming their jobs. Kosovo was importing every item and not one single social system had been re-established. Energy production was below the average requirements for domestic electricity use. No industries, mines, or farms had been reactivated. The money poured into the province had already tripled the initial estimate for the full reconstruction. The results of this huge investment (US $9 billion, without counting the military expenses) brought some good news for housing and roads, but the rest was a disaster. Nobody knew where $8 billion of the $9 billion had gone.

War criminals were free to walk the streets and the International Criminal Tribunal for the Former Yugoslavia (ICTY), established by the Security Council to prosecute those who had committed war crimes during the ethnic conflicts of the 1990s, was afraid to indict the Albanians that committed crimes against humanity. The international police, composed of police officers coming from 80 countries, was largely ineffective and under continuous threat. Some of them were completely unaware of the local legal system, or of any kind of legal system for that matter. Corruption was widespread. The local police were not only ineffective but also involved in crime through clan and family links. Many of these officers were socalled "former freedom fighters" who believed this entitled them to claim certain privileges, but did not impose upon them obligations to carry out their law enforcement responsibilities.

The entire system was biased by a diffuse blackmail: "Do not upset the Albanian population. We liberated them." Kosovo not only was going nowhere; even worse, there was a real risk that is would become a mafia State. The dangers were, in fact, greater than they had been two years earlier. It was not more military and law enforcement forces that were needed, but a better and tougher use of a few forces against extremism, terrorism, crime, corruption and inefficiency. The huge

intelligence asset that existed in Kosovo was oriented towards the wrong threats. These resources were focused on a supposed military threat from the Serbian Army and completely overlooked and neglected the destabilizing power of the Albanian former freedom fighters in the region and in Kosovo. It was clear that the only threat to the safe and secure environment that KFOR was tasked to create and maintain came from within Kosovo and not from outside.

It was also clear that dramatic change was required. Within a few months, we started to arrest war criminals of any ethnicity indicted by the ICTY. Detention powers were used in a very discrete way and cooperation was improved with a weak judicial system that was relying on international and local judges. We started downsizing and changing methods of operations, allowing more cooperation with and support to the police, more participation in anti-crime operations, and increased utilization of the Over the Horizon NATO-led reserve forces. We built a comprehensive intelligence database and created a Joint Intelligence Operation Center, which incorporated all possible sources and all the intelligence agencies present in Kosovo. Within two months we were able to identify more than 5000 criminal links within the government, the political parties, the social institutions and within the organization supposedly in charge of civil protection. Nevertheless, it took our Joint Forces Commander (JFC) and the Strategic Commander six months to "socialize" a new assessment of the situation with NATO political authorities.

When the SRSG and I finally had the opportunity to present our views to the North Atlantic Council the facts on the ground had already proven the accuracy of our assessment. KFOR had arrested the first Albanians indicted by the ICTY while two members of the Kosovo Protection Corps, the civilian emergency service agency established by a 1999 UNMIK regulation, had just blown themselves up in a terrorist attack against a railway bridge. Attacks against the police stations had intensified, while we were able to disrupt a spring offensive in southern Serbia and FYROM through the arrest and detention of prominent extremists and criminals. Through cooperation with the judicial system, we were also able to put the detainees under judicial control.

Unfortunately, as of the time this article is written, all these efforts now seem useless. The fight in Kosovo is not over yet and inter-ethnic clashes erupted again in March 2004. Recently, the SRSG, a former prime minister of Finland, a gentleman and a highly respected politician, resigned. His frustration with the lack of results and goodwill on the part of all concerned led to this harsh decision.

The bottom line in Kosovo is that the seeds of a persistent, frustrating situation were planted:

1. In the pre-war period when trust was placed in and help given to the wrong persons and priority was given to the military campaign without integrating war and post-war requirements;

2. In the war period when the so-called freedom fighters were allowed to assume power with guns and perpetrate a sort of ethnic cleansing against the minorities; and

3. In the post-war period when the power of extremists was consolidated through illegal activities and "democratic elections." Furthermore, the UN administration was inefficient and plethoric; the international security forces were too indulgent towards the extremists, allowing them to become de-stabilizers and even criminal clans; and some nations and international organizations, still linked to the pre-war mentality of the extremists as victims, continued to assist them after the war by providing assistance and funding.

Conclusions

Because of a misperceived sense of "democratic" division of responsibility, military forces tend to be used as legitimate interpreters of the power of invasion, occupation and liberation only during combat operations. As soon as the fighting ends, or is artificially declared over, civilian authorities, with no understanding of the situation, assume decision-making responsibility. By the time local civilian rule is established and functioning, permanent damage has been done: pre-war structures have been destroyed by the war or no longer function, and the new structures are biased by compromise and corruption.

During planning in advance of an operation, it must be determined and made clear who will direct the civil administration during the war and in its immediate aftermath, to include the kind of social, economic and security system that will be put in place, how the regional framework will be affected and what to do in order to prevent destabilization.

In the last ten years we have tested the system to separate war from pre-war and post-war. We have identified the actors responsible for each phase as separate entities. And we have proven that the system does not work! Pre-war is the realm of politics and diplomacy, but the military could be used much more than as a tool of diplomacy (coercive diplomacy). The military consequences must be dealt with in this period by defining the potential risk for our forces and also the destabilizing effects of war on society.

War is the realm of the military, but political leadership has an important stake in its execution. Particularly, political leaders must respect the priority of military operations and ensure that each provides a political value that contributes to the

resolution of the crisis. What has to be avoided is the use of operations as a substitute for political action or to maintain ambiguity. Politicians cannot ask for short, surgical operations and then keep them going for years. They cannot camouflage war-like operations behind other names. Pre-war and war must be connected and have a unified political-military-diplomatic control center. The time for reaction during crises is becoming shorter and shorter not because threats are emerging overnight, but because the international community is very slow in acquiring the right intelligence, getting an honest and independent assessment, and then deciding what to do without indulging in bureaucratic politics. With fewer and fewer States maintaining standing armies, the preparation of the military instrument is becoming more difficult. In the meantime, military strategy and concepts are growing faster: the major risk of the pre-emptive war doctrine is that it requires military operations even before diplomacy is ready or has clear ideas on what to do afterwards. Early operations (pre-emptive) are at their extreme when anticipating the war before the enemy is recognised or before the friendly forces are ready or before the objectives are set. During the war, any political request to end military operations, or to pretend they have ended, before a reasonable level of security is achieved has to be, if possible, contested.

During the last ten years the post-war phase has been the most dangerous and unfruitful. Decision makers, both State and international, have applied the management model of *divide et imperato* to Bosnia and Afghanistan, and it is currently under discussion for application in Kosovo and Iraq. The international community has applied this Roman Empire rule in the most unhistorical way: it has been applied indifferently to enemies within occupied territories, and, most importantly, it has been applied to us and to our allies. The Romans used to divide everything that was too big and strong to handle as a whole, but they made sure they were able to control the separate pieces. For each situation, they had a tool to control it: force, money, favors, or corruption. Every tool was legitimate. Instead of using a variety of mechanisms, today the international community focuses on dividing entities without understanding it is losing any possibility of control. We have also divided ourselves by not only breaking alliances in order to form coalitions, but by dividing the leadership and the tools to exercise power.

We have established a substantial separation between civilians and the military, between the United Nations and national structures, between governmental and non-governmental entities, between NATO and the United Nations, between OSCE and the European Union, and so on. This separation has given birth to a myriad of chains of command, reporting channels, priorities and differing assessments. The results are that in all situations, from Somalia to Bosnia-Herzegovina, to Kosovo, to East Timor, Afghanistan and Iraq, international forces are not

controlling the situation. In fact, in the last ten years we have missed the main point: the three phases of pre-war, war and post-war are not separate. Any attempt to keep them separate is artificial and the gaps between them favor the destructive forces, allowing them to infiltrate and destabilization to prevail.

Another missed point is that conflicts are never limited to the hot spots. The reasons for crises are often very far from the time and space of the hotspot. We cannot hope to control a crisis just by pouring troops and missiles on the hotspot. We need to consider the regional balance and the international environment. We also have to consider the kind of side effects that can be expected in the medium/long term, and we must be prepared to cope with them. Nowadays, these side effects are rarely of a nature that the military can control. They are related to the economy, political balance, strategic resource management, social fields and, lastly, security.

The three phases of pre-war, war and post-war are connected by security. In each phase there is a subtlety, a slightly different aspect of security, which remains the prerequisite. In the pre-war period, security is mainly a stability problem. There is something that threatens it. During combat operations, security is mainly a primacy problem in order to gain control over destabilizing forces, including the people for whom we fight. After the war, security is mainly a self-protection and rule of law problem. Military forces have a prime role to play in every phase, but they cannot act in isolation or be separated from politics, diplomacy, administration and reconstruction. Some type of war cabinet must assume control over the crisis in the very early stages and provide oversight and direction, while respecting the unity of command. This war cabinet must also provide guidance on what to do before, during and after actual combat operations. No vacuum of power can be permitted, no transition can take place if the security requirements are not achieved, and no transfer of power can be executed if the political and administrative bodies are not ready to take responsibility. My suggestion is very simple, maybe even simplistic. War cannot be rushed into before all solutions are explored and attempts to peacefully solve the crisis are made. Politicians and diplomats must refrain from rushing into war "hoping" that it will solve the problem or just because "something has to be done."

In the pre-war phase, military forces have the vital role of preparing for war, while emphasizing to the politicians and diplomats that waging war is not a preferred option. Military leaders have a duty to highlight all possible options and their consequences, including the side effects on the economy, social system, regional and global assets. Military forces have a duty to prepare for short, intense operations that do not annihilate, and for a long, painful, uncertain and costly period of insecurity. They have to focus on strengthening their powers of deterrence, dissuasion, and "reassurance" more than their capability to destroy. Reassurance

has a focal point in the military because it has to be credible and flexible, but it comprises both economic aid and confidence building measures. The military have to be prepared to participate in the temporary territorial administration of foreign countries, under different cultural situations.

When operations begin, the military should use a reasonable excess of power to secure major objectives and defeat the enemy forces. They have to "manage" the excess of power and safeguard basic critical infrastructure needed for post-war operations and reconstruction. After major operations have been completed, they must be in control of those providing security and must guarantee the necessary framework for rehabilitation. They must not hand over control to so-called local police until security is re-established and stability ensured, until a judicial system is effectively functioning, until freedom of movement is re-established and generalized violence is extinguished. In this phase, the military have to resist the desire to declare their mission completed and depart, the wish of the politicians to claim victory and leave, the desire of the profiteers to transfer power to the civilian agencies or to the local clans, and the wish of the local population to have the military forces on the ground as a nice, money spending, non-interfering, gentle "close your eyes and open your wallet" organization. The military also has the duty to build regional security and therefore they have to engage all regional and international actors in projects that build regional or wider security. Security in this phase is not only self-protection or the fight against extremists. Security and stability also entail economic recovery, reconciliation, return of refugees, prosecution of war crimes, maintenance of law and order, an effective judicial system, employment, resources management, nation building and regional confidence. Security is also bringing maturity and social development to the system: you are not free and safe if you are hungry or humiliated.

Does accomplishing these things necessitate a long occupation under military rule? A difficult and extended period of responsibility for law and order and justice? A significant share of responsibility over a long and painful period of reconstruction? In some circumstances, perhaps. Until international law evolves and becomes more relevant to current circumstances, occupation law must be considered not as an instrument of invasion or prevarication, but as the only tool available to clearly assume responsibility for and obligations towards the civilian population. It is not the best tool we can ask for, but it is a rule of law that will not mean an endless sequence of uncertainty, lack of control, civil-military separation, instability, and deaths. It will not allow compromising with the thugs, becoming guilty by association, and pouring indefinite, infinite and unaccountable resources into a black hole and, consequently, supporting new failed States, rogue States, non-States, quasi-States and mafia-States instead of new democratic entities. It will

prevent spreading violence, destabilization, drugs and terror all over the world. It will mean a real unified engagement for a real liberation.

Notes

1. This is based on the principle of the "inadmissibility of the acquisition of territory by war." International law views occupation as a temporary status during which the occupier is obligated first to end the occupation as quickly as possible and second to safeguard the rights of the occupied population during the temporary period in which the occupation is maintained. Any move by the occupier to infringe on the rights of the occupied or change the status of the occupied land through, for example, annexation, confiscation of resources, population transfer, or destruction of civilian property, is illegal under the Geneva Conventions. *See, e.g.*, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 301 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

2. The legal status of combatants for the right to self-determination was defined by the General Assembly in 1973 according to the following principles: first, such struggles are legitimate and in full accord with the principles of international law; second, attempts to suppress struggles against colonial and racist regimes are incompatible with the UN Charter. Universal Declaration of Human Rights, GA Res. 217A, at 71, U.N. Doc. A/810 (1948); Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961). Such attempts themselves constitute a threat to peace and security.

3. Adopted Dec. 19, 1966, 999 U.N.T.S. 171, *reprinted in* 6 INTERNATIONAL LEGAL MATERIALS 368.

4. Adopted Dec. 16, 1966, 993 U.N.T.S. 3.

5. *Supra* note 2.

6. Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 19, 49 Stat. 3097, T.S. No. 881.

7. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, art. 2, GA Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971).

8. Universal Declaration of Human Rights, *supra* note 2.

9. The IHL Research Initiative is a project of the Program on Humanitarian Law and Conflict Research, an international research and policy program based at the Harvard School of Public Health. The discussion set forth above is taken from Military Occupation of Iraq: I. Applicability of IHL and the Maintenance of Law and Order, Apr. 14, 2003, *available at* http://www.ihlresearch.org/iraq/pdfs/briefing3423.pdf.

10. Occupied people have the right to resist the occupation itself, as well as the specific illegal practices of the occupier. However, it is beyond dispute that attacks on unarmed civilians— whether by an occupying army or an armed resistance group—always constitute a violation of fundamental human rights and can never be justified under international law.

11. SC Res. 1244 (June 10, 1999), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement.

12. Established by the Secretary-General under the authority provided by SC Res. 1244, *id.*

13. *Id.*, para 9(d).