Changing the Legal Paradigm of Liberation-Occupation

Jurist - Wednesday 14 March 2012 at 3:00 PM ETedited by Jonathan Cohen

JURIST Contributing Editor Chibli Mallat of the University of Utah SJ Quinney College of Law says that there is no true legal distinction between liberators and occupiers, and that because it does not look like there will be a treaty to distinguish the two soon, mixed tribunals will provide a productive intermediate step...

Yet another rampage killing in the Afghan morass by a rogue American soldier.

It brings up one early, angry memory in Iraq after Saddam Hussein. I was never so upset than after seeing a US military convoy patrolling the streets of Baghdad for the first time in late 2003. On the back of each armored vehicle was a stiff warning in crude and brutal Arabic "not to get close otherwise you," Baghdadi resident, "would be shot at without notice." Many were.

So that was liberation for Iraqis: liberating troops whose face you are not allowed to see, clogging up Baghdad amidst frightening car jams resulting from the rise of concrete walls allegedly securing the liberators, with a warning to stay away under penalty of death. Not to mention the arrogance of the Blackwater-style private security companies — generally formed of mercenaries with no education, no Arabic or Kurdish, getting salaries 20 times the local recruits, and four or five times the US army volunteers on the frontline. Blackwater killed 17 Iraqi civilians in September 2007. How many more unpunished killings were there in Iraq, and in Afghanistan?

I recall there was not much of an unrest then, in December 2003 in downtown Baghdad. US military and other coalition troops had been there for eight months, and the Baghdadis, after the Kurds, were tasting freedom in the wake of 40 years of Saddam Hussein's tyranny. At that point, talk of even two years of US army presence was considered excessive.

I have written elsewhere about the hubris of Paul Bremer, a man with a mentality like that of Henry Kissinger, who blocked the full political takeover of the Iraqi Governing Council in the hope of becoming US Secretary of State on the laurels of a pacified Iraq. It did not take long for the backlash. By April 2004, all hell had broken loose in the country, and the US had lost Iraq and its people

despite immense American sacrifices that Iraqis will acknowledge to date when they speak their mind.

Bremer would not listen, however, and Kofi Annan was fretting in the wings to get the UN in, very much in the way he is meddling in Syrian matters now, at a time when the UN (and the Arab League) maintained the best record of "doing business" with the tyrants ruling these countries. The quote is not invented. In 1998, Annan used these very words to save Saddam Hussein — watch for his optimism in doing business with Syrian President Bashar al-Assad this week.

There is a legal structural problem in all occupation-liberation whether it is under the auspices of the UN or a single country. The liberators always overstay their welcome. What happened in Afghanistan today is inevitable, and it happened early on in Iraq when US soldiers got apprehensive — was the mob greeting them or protesting? — and shot at the crowd. The spiral of mutual fear and trigger-happy soldiers soon got out of hand.

If this spiral is inevitable, what can a liberator with the best intentions do for the locals who have indeed appealed to you, like the Iraqis did then, like the Afghans under the Taliban (and now under small-time dictator Hamid Karzai), like the Syrians under Assad, to help them get rid of a monster who would not leave power?

There is no ready answer in international law. We are repeatedly confronted with a central problem with the concept of "occupation" under international law. It simply does not fit: Israelis occupy the West Bank, this has little to do with the US occupying Iraq. Indeed, the Palestinians would dream of an American or UN occupation if that would rid them of Israels. But how does one distinguish the two regimes? International law does not. My Harvard colleague, Noah Feldman, put it eloquently in his What We Owe Iraq. At a tumultuous meeting where the Saddam-appointed president of the Baghdad Bar Association was challenging the American judge Feldman was advising, he invoked Article 43 of the Annex to the Hague Convention of 1907, which requires the occupying power to take all measures in its power to restore *l'ordre et la vie publics* (order and public life). Surely a visit is needed to that suffocating category of international law, which essentially gives a blank check for the occupier to do what it sees fit.

The tyranny of inadequate international legal categories requires a full legal reflection, and an international treaty-making convention. This will not be happening any time soon, so we are stuck with an unworkable legal regime where liberators and occupiers are one and the same. Until the legal

advisors of democratic countries get their act together and start the ball rolling, we will continue to tinker at the edge.

Meanwhile, some amends to the present regimes are needed, as witnessed in the Afghan tragedy this week. This is not a first there — similar incidents have occurred in Iraq — nor will it be the last.

The short answer is that we need a new regime of occupation that makes the difference between liberating people and occupying them. Both *intent* and *practice* are essential: democracy came late as an argument to the invasion of Iraq in 2003, and I vividly recall a meeting with then-Under Secretary of Defense Paul Wolfowitz, a universalist democrat — as opposed to the Cheyne-Kissinger tradition of American superpower dominance within the same hawkish Republican tradition. The meeting took place on March 5, 2003, 10 days before the invasion which I opposed. My opening question to Wolfowitz, whom I knew cared for Iraqis almost as much as he did for Americans, was why the administration chose weapons of mass destruction as the argument to go to war. His answer was candid: that was the only common ground that could be reached amongst the various branches of the US government.

If the *intent* was to get rid of Saddam's weapons of mass destruction, it was particularly difficult to convince an Iraqi or an Arab audience to support the invasion when Pakistan and Israel had a huge arsenal of unchecked and unmonitored nuclear weapons. If the intent was to rid the Iraqis and the Arabs from Saddam's tyranny, then occupation would not do.

As for *practice*, delaying the Iraqi Governing Council from officially running Iraq (with the US army and armies of civilians helping through the transition) was a sure recipe for putting the occupiers on the defensive, whatever the democratic arguments around which the Bush administration eventually rallied.

So the short answer is not an answer at all. Occupation as a category is a key problem for liberators, but there is no ready alternative in international law. It must be constructed. Until then, one has to tinker within the dictated field and remedy some of the most glaring injustices of the system — like the legal shield that soldiers receive after their killing sprees under the regime of occupation.

The US military is understandably worried about their soldiers, whom they believe are risking their lives to help, despite the occasional rogue. They do not want them dragged before local tribunals. Fair enough. How then do you expect justice to be seen to be done if the victims are naturally

excluded from a trial that takes place thousands of miles away, in an obscure language, and under a military code they know nothing about?

It does not need to remain a black and white dilemma awaiting international lawyers to find an alternative to occupation. One temporary solution, which I proposed in 2008 to the Iraqi and US governments to save the now defunct Iraq-US Status of Force Agreement [PDF], was to temper the inflexibility of the US system of occupation by resorting to mixed tribunals in the country where the killing has taken place, with the judges being half local and half American or international. If the parity is too much for the US army, let the American judges be in the majority. Prime Minister Nouri al-Maliki would have accepted this then (now, however, he is in Arab dictatorship mode, like his colleague Karzai), but the US government was inflexible.

A mixed tribunal has many benefits and few drawbacks. The Mixed Tribunals of Egypt operated well for some 50 years, and Egyptian jurists who remember them still appreciate the quality of the rule of law they brought to the country. Although the situation is very different in Afghanistan today, a mixed tribunal is an occasion for the usually devastated local judiciary to share the respectable expertise of the US courts, including that of military judges. Nor does the trial need to be a military one necessarily. This would also teach a thing or two to US judges. Even if the mixed court splits down the middle, it is better than having the accused soldier whisked off thousands of miles away from the victims' families. Other than the lazy argument that "we are not equipped for this," I have not heard a single argument against the proposal. Unless of course the US government does not want justice to be done and seen to be done.

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Suggested citation: Chibli Mallat, *Changing the Legal Paradigm of Liberation-Occupation*, JURIST - Forum, Mar. 14, 2012, http://jurist.org/forum/2012/03/chibli-mallat-mixed-tribunals.php.