

# **RUAHA CATHOLIC UNIVERSITY (RUCU)**



## **FACULTY OF LAW**

### **A CRITICAL ANALYSIS OF THE LAW OF MILITARY OCCUPATION IN RELATION TO THE PEOPLE'S RIGHT TO SELF-DETERMINATION: A CASE STUDY OF TIBET.**

A Research Paper Submitted in the Partial Fulfilment of the Requirement for the Award of the  
Degree of Bachelor of Laws (L.L.B) of Ruaha Catholic University.

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## CERTIFICATION

The under signed certify that he has read and hereby recommend for acceptance by the Ruaha Catholic University a dissertation titled; **“A Critical Analysis of the Law of Military Occupation in Relation to the People’s Right to Self-determination: A Case study of Tibet”** in fulfilment of the requirements for the degree of bachelor of laws of Ruaha Catholic University.

Signed on.....day of .....2015

.....

Supervisor.

## **DECLARATION**

I, Victoria Mlowe, do hereby declare that this dissertation is my own original work and that it has not been to any other University for a similar or any other degree award.

Signature.....

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Date.....

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blessing them abundantly so that their spirit of inspiration to other people grow across borders and thus the word of God reaches his people.

## **DEDICATION**

I dedicate this work to my elder brother Fr. Melodious Mlowe whose prayers, moral and material support has been of significance to my life since childhood to this age and particularly he has encouraged and has enabled me to complete this work. May the good Lord reward you abundantly for your love to your siblings and for your heart of giving. I, also dedicate this work to my beloved guardians Bishop Norbert Wendellin Mtega, Les, Bron and Mr. Robert Thurnburg whose belief in me has increased my strength in facing different challenges in life and always aiming at winning.

## **ABSTRACT**

This research work is based on the assumption that there are certain provisions under the law of Occupation which gives mandate to the occupying power to act in the manner that hinders the right to self-determination of the population being occupied. This was so in the occupation of China towards Tibet in the 1950's which lead to infringement to the right of self-determination on Tibetans. In finding the truth of the above assumption, researcher employed both primary and secondary sources of data and the came up with the following findings;

That China which is the occupying power is given much power in the exercise of maintaining law and order towards Tibetans which is the occupied territory. This has effected the proper and rightful exercise of the right to self-determination towards the Tibetans.

The law of Military occupation vests much power to the occupying state to the extent that they can change the laws, amend and exercise any other form of legislative powers towards the occupied people. It also, gives mandate to prolonged occupation which this law does not regulate. This has been the case by the Chinese government which exercise unlimited power towards the Tibetans who have no locus stand on such infringement.

Therefore, the researcher recommends the following solutions to this problem;

That, the law of Military occupation be amended to by setting limitations on the use of force when the occupying power exercises law and order, thus the law should stipulate the reasonable amount of force to be used towards the occupied population. Also, the legislative power of Chinese state should be limited so that the rights to self-determination of the Tibetans are not be infringed.



## **LIST OF STATUTES USED**

The African Charter of Human and People's Rights of 1981.

The Brussels Declaration of 1874

The French Revolution of 1789

The Geneva Convention IV of 1949

The Hague Regulation II of 1889

The Hague Regulation IV of 1907

The International Covenant on Civil and Political Rights of 1966.

The International Covenant on Economic, Social and Cultural Rights of 1966.

The United Nations General Assembly Resolution, 217A

The Universal Declaration of Human Rights of 1948.

## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
AI	Amnesty International
DRC	Democratic Republic of Congo
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
PLA	People's Liberation Army
PRC	People's Republic of China
UDHR	Universal Declaration of Human Rights
UN	United Nations
USIA	United States Information Agency
WW	World War

## LIST OF CASES USED

*Democratic Republic of Congo (DRC) V Uganda*, ICJ GL NO.116, [2005] ICJ Rep168

*Naletilic and Martinovic case*, [2003], Case No. IT-98-34-T.

*United States V List (Wilhelm) and others*, Case No.7 (1948) 8LRT WC 34.

*Antzar Camp Case*, HC 593/82

*Cyprus v Turkey*, ECHR (App. No 25781/94).

*Loizidou v Turkey*, [1996] Application No.15318/89.

*Portugal v Australia*, [1995] ICJ Rep 90.

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## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1. BACKGROUND TO THE PROBLEM.

The Concept “Occupation” can be traced far back towards the origin of mankind as human beings were struggling to master their nature, thus quarrels resulted from enter fearing towards one’s territory became inevitable.

However, the early occupations were not actually considered as occupation befitting with the modern meaning of Occupation, that is “Military Occupation” but rather it was considered as a mere “conquest” as they were not involving the use of arms.<sup>1</sup>

The contemporary International law of occupation was framed over the course of deliberations among European governments during the second half of nineteenth Century. The debates between representatives of strong and weak powers on this matter dominated the conferences in Brussels of 1874 and the Conference in The Hague of 1899 whose goal was to formulate the laws of war through an International agreement.<sup>2</sup>

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<sup>1</sup> A. Sharon, *why is Israel’s Presence in the Territories Still “Called Occupation”?* Jerusalem Centre for Public Affairs, Jerusalem 2009, 5: historically, occupation was a conquest and enemy territory occupied by belligerent was considered as state property so that the occupier could use it in whatever manner and treat its inhabitants as he pleased

<sup>2</sup> E. Bevenist, *The International Law of Occupation*, Oxford University Press, New York 2011, 20.



The outcome enshrined in what is known as The Hague Regulations of 1899<sup>3</sup> which represented a delicate balance that both provided protection for a civilian population brought under the control of an occupant and safeguards the interests of the ousted government for the duration of the occupation.<sup>4</sup>

Situations of Military Occupations gained momentum specifically during the World Wars and their aftermath and thus became the concern of international eyes as result of the adoption of the Geneva Conventions<sup>5</sup> which developed both the Hague Regulations II of 1889 and The Hague<sup>6</sup> Regulations IV<sup>7</sup>. Geneva Conventions *inter alia* regulated situations of Military Occupation such as by defining powers, duties and rights of both the Occupying and the occupied powers.

On the other hand the origin of the People's Right to Self Determination can be traced far back for instance during the Declaration of Independence of United States of America (American Revolution)<sup>8</sup> which proclaimed that, "governments derived their just powers from the consent of the governed and that whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or to abolish it"<sup>9</sup>.

The concept of People's Right to Self-determination was further recognised during the French Revolution which marked the end of the monarchical principle which recognised

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<sup>3</sup> Hague Regulations II of 1899: P.M.R. Strik, *The Politics of Military Occupation*, Edinburgh University Press, Edinburgh 2012, Military occupation has been also recognised as a recurrent feature of recent history and a distinct feature in international law, most notably in The Hague Regulations of 1907 which remain in force today.

<sup>4</sup> *Supra*, Note 1.

<sup>5</sup> Specifically, Geneva Convention IV, 1949.

<sup>6</sup> P.M.R. Strik, *The Politics of Military Occupation*, Edinburgh University Press, Edinburgh 2012, 10. "there is somewhat less uncertainty about how to date the phenomenon, though still significance divergence. Some accounts simply take The Hague Regulations of 1907 as the starting point. . ."

<sup>7</sup> The Hague Regulations IV of 1907

<sup>8</sup> Declaration of Independence of United States of America Declaration of 4<sup>th</sup> July 1776.

<sup>9</sup> Google weblight.com, accessed on 22<sup>nd</sup> December, 2017.

“individuals and people as subjects of the King were objects to be transferred, alienated, ceded or protected as the interests of the King”.<sup>10</sup>

The essence of both these revolutions hinges on the consent of the governed to make government legitimate, specifically the American Declaration of Independence sought to manifest two radical propositions such as; first, that governments are created to secure the unalienable rights of the citizens, derive their just powers from the consent of the governed and second, that by this decision to make the government answerable to the governed.<sup>11</sup>

French Revolution further gained popularity during the Nationalists Movements of 19<sup>th</sup> Century and the beginning of 20<sup>th</sup> Century. It was also recognised during the Germany and Italy Unification<sup>12</sup>, during the Socialist Movements and during and after the World Wars<sup>13</sup> which resulted to the adoption of the UN Charter<sup>14</sup> which inter alia documented the People’s Right to Self Determination as a fundamental Human Right.

The case study of this research study “Tibetan Occupation” is the fundamental example as far as the Law of Military Occupation in one hand and the exercise of the People’s Rights to Self Determination on the other hand are concerned.

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<sup>10</sup> A. Cassese, *Self Determination of People's; A legal Reappraisal*, Cambridge University Press, New York 1995,11.

<sup>11</sup> J. Castellino, *International Law and Self Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post- Colonial National Identity*, Martinus Nijhoff Publishers, London 2000,11.

<sup>12</sup> Italy Unification of 1848-1870.

<sup>13</sup> First and Second World Wars.

<sup>14</sup> Art, 1(2) and Article 73.

Tibetan Occupation by China emerged in 1950. Tibetans inside its borders and across the world have never stopped believing that Tibet is a nation. After sixty years of Occupation Tibetans still resists China's Rule and defy its oppression<sup>15</sup>.

During the Occupation China captured more than a half of the Tibetan army men<sup>16</sup>. Moreover, it is reported that Tibet has been occupied and ruled over by China and the Chinese People's Liberation Army (PLA) since 1951 in a calculated and systematic strategy aimed at destruction of their national and cultural identities, to worsen the situation during the Chinese Occupation several deaths and destruction of many symbols of Tibetan religion life including temples and monasteries were the inevitable results, religion figures and other educated individuals were forced into re-education and severely maltreated.<sup>17</sup>

## **1.2 STATEMENT OF THE PROBLEM.**

The legal regime towards Military Occupation allows the Occupying power to exercise much control over the occupied territory such as to ensure public order and security within the Occupied territory<sup>18</sup>, the occupying power has also much legislative powers towards the occupied territory<sup>19</sup>, however it is questionable as to what limits does the occupying power has towards the occupied.

Moreover, in the absence of the clear limits of the Occupying power's power towards the Occupied population creates many unanswered questions as far as the right to self-determination of the people under occupied territory is concerned, some of these questions are such as can the

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<sup>15</sup> <https://freetibet.org>, accessed on 21<sup>st</sup> December, 2017 at 2:00 PM.

<sup>16</sup> Google weblight.com, accessed on 27<sup>th</sup> December, 2017 at 11:15 AM

<sup>17</sup> //sites. Google.com-accessed on 27<sup>th</sup> December, 2017 at 11: 30 AM

<sup>18</sup> Article 43 of Hague Regulations II of 1889.

<sup>19</sup> Article 49 of The Hague Regulation IV, 1949.

people under the occupied territory chose their own authority to determine their destiny in all spheres of life, or can the people under Occupied territory be able to express their fundamental right of freedom of expression and more important question which is not answered by the occupation legal regime is as to when the situation of Military Occupation is intended to last.

All the stated unanswered questions as far as the Occupation legal regime is concerned places the Law of military Occupation as an aid to the occupying power towards its oppression strategies to the occupied population, as the Tibetan case study will analyse.

### **1.3 LITERATURE REVIEW.**

The topic subject to this research is not a very novel topic as there are some authors who have tried a lot to add inputs as far as the development of the Law of Occupation in one hand and the People's Right to Self Determination are concerned. However, this study has passed through different writings and thus come up with its special area of focus, as analysed herein below: -

E. Bevenist defines the law of Military Occupation and the People's Right to Self Determination that it is concerned with: challenges to the Law of Occupation, the legal sources of Law of Occupation and the law of administration of occupied territories to mention few<sup>20</sup>.

Moreover, the author focused on some Occupations as case study such as Israel Occupation of West Bank and Gaza and Occupation of Iraq.<sup>21</sup>

As distinguished to the study by Benvenist, this study is basically focusing on making critical analysis of the applicability of the People's Right to Self Determination in situation of Military Occupation and specifically making Tibetan Occupation as the case of study.

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<sup>20</sup> E. Bevenist, *The International Law of Occupation*, Oxford University Press, New York 2011, 43.

<sup>21</sup> *Idem*.

In the book named *Politics of the Law of Occupation* by Strik analyses many things relating to the Law of Military Occupation such as the meaning of Military Occupation, forms of Military Governments and Occupation and Obligations thereof.<sup>22</sup> The author has also explained other aspects which are associated with the concept of military occupation, namely: sovereignty and occupation<sup>23</sup> and justice under occupation.<sup>24</sup>

On the other hand, this study is focusing on making critical analysis of the applicability of the People's Right to Self Determination particularly on the situations of Military Occupation while focusing on the case study of the Tibetan Occupation by China.

Also, among other things, Takahashi, wrote on the law of Military Occupation particularly on the meaning of Occupation and scope of its application, categories of occupation and the exclusion of applicability of the law of occupation<sup>25</sup>

However, this study is not only focusing on studying situations of Military Occupation but it is also going further by making a critical analysis as to the applicability of the People's Right to Self Determination in situations of Military Occupation with a case study of Tibet.

Moreover, A. Gross stated that the situation of Military Occupation, as opposed to this study does not make a critical analysis of the applicability of the People's Right to Self Determination in situations of Military Occupation which is the heart of this study, and on top of

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<sup>22</sup> *Ibid*,122

<sup>23</sup> *Ibid*,148

<sup>24</sup> P.M.R. Strik, *The Politics of Military Occupation*, Edinburgh University Press, Edinburgh 2012,10

<sup>25</sup> Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law*, Martinus Nijhof Publishers, Boston 2009, 1

that this study is also focusing on making critical analysis of the applicability of the People's Right to Self Determination while digging on the case study of Tibetan Occupation by Chinese.<sup>26</sup>

Moreover, Araia has made a general analysis as far as the applicability of the law of International Humanitarian law is concerned in situations of Military Occupation.<sup>27</sup>

On the other hand, this study is focusing on making critically analysis of the applicability of the People's Right to Self-determination in situations of Military Occupation particularly on the case study of Tibetan occupation by China.

The study by K. Nabulusi is focusing on making critical analysis of the applicability of the people's right to self-determination in situations of military occupation while focusing on the case study of Tibetan Occupation, as opposed to traditions of war which focused on examining traditions of war and situations of military occupation.<sup>28</sup>

Furthermore, Carcano explains the concepts relating to the law of military occupation such as the effects of occupation in particular to the occupied population and some of those effects as conquest and exploitation to mention the few.<sup>29</sup>

Moreover he has tried to elaborate the occupation in relation to the state sovereignty while focusing much on the case study of French Occupation of Rhineland of 1794-1801.<sup>30</sup> On top of that he has explained the development of International law applicable to an occupation.<sup>31</sup>

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<sup>26</sup> A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation*, Cambridge University Press, New York 2017, 17

<sup>27</sup> Y. Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, Leiden 2009, 3.

<sup>28</sup> K. Nabulusi, *Traditions of War: Occupation, Resistance, and the Law*, Oxford University Press, Oxford 2005,

<sup>29</sup> A. Carcano, *The Transformation of Occupied Territory in International Law*, Brill Nijhof, Leiden 2015, 17.

<sup>30</sup> *Idem*.

As opposed to the study of the above named author, this study is focusing on making critical analysis of situations of military occupation and their effects towards exercising people's right to self in particular to the occupied population, and this study is specifically done by making critical study of the military occupation legal regime in relation to the human rights legal regime particularly on the people's right to self-determination.<sup>32</sup>

Also, Shafir states that as far as the term Military occupation is concerned, there are many different ways which are used to define this term and while using Palestine case study he was able to define the term Military occupation.<sup>33</sup>

On the other hand, this study is not only focused on explaining the meaning of military occupation but also makes a critical analysis of the law of military occupation in relation with the people's right to self-determination.

Last but not least, Downs added some inputs as far as the law of military occupation is concerned on the study as he tried to explain situations of military occupations such as to when starts and their end and explain about the difference between military occupation and the armed conflicts.<sup>34</sup>

However, this study is focussing on not only studying the situations of military occupation but also making critical analysis as to their effects to the people's right to self-determination such as making analysis as to whether in situations of military occupation can

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<sup>31</sup> *Idem*, "In the 2<sup>nd</sup> half of the 20<sup>th</sup> Century under the influence of the UN Charter's quest to solve International Disputes peaceful, and the development of human rights law International law expanded considerably both in terms of the areas covered and the functions performed."

<sup>32</sup> *Idem*.

<sup>33</sup> G. Shafir, *A half Century of Occupation: Israel, Palestine and The World's Most Intolerable conflict*, University of California Press, California 2017, 10.

<sup>34</sup> <sup>34</sup> G. Downs, *Occupation and the Ends of War*, Harvard University Press, Harvard 2015, 10; V. Lowe et al, *The UN Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford University Press, New York 2008, 112.

people freely be capable to exercise their right to self-determination or not while digging deep on the legal frame work.

#### **1.4 HYPOTHESIS.**

It is assumed that the law of Military occupation in the International arena vests too much power to the occupying territory in maintaining peace and order, of which in turn leads to the infringement of the right to self-determination as portrayed in the case study of Tibetan occupation

#### **1.5 OBJECTIVE OF THE STUDY**

##### **1.5.1 MAIN OBJECTIVE**

The gist behind this study is to make a critical analysis as to the possibility in the exercise of the People's Right to Self Determination in situations of Military Occupation under the existing Occupation legal regime.

##### **1.5.2 SPECIFIC OBJECTIVE**

To find different solutions which will help to eliminate the problems that Tibetans are facing as a they are under China which is the occupying regime.

#### **1.6 SIGNIFICANCE OF THE STUDY**

This study is mainly of the following significant advantages, to wit: -

1. To raise public awareness on the subject of study.
2. To identify the lacuna in the Occupation regime *vis-a-vis* the People's Right to Self-determination, and thus to call for the international eyes towards its amendment.



3. To serve a reference for future researches on the area of study.
4. To encourage human rights activities in situations of Military Occupation specifically on Tibetans who are still under oppressive regime.
5. To increase researcher's personal knowledge.

## **1.7 METHODOLOGY**

### **1.7.1 PRIMARY SOURCES**

This study is intending to employ the use of International statutes such as United Nations Charter<sup>35</sup>, Hague Regulations and Geneva Conventions and case laws on the area of study as the Primary Sources.

### **1.7.2 SECONDARY SOURCES**

The intended secondary sources to be employed in this study are the literatures such as books, and journal articles relating with the subject of study.

### **1.7.3 SOURCES OF DATA COLLECTION.**

The Library of Ruaha Catholic University together with websites are intended to be employed as a secondary method of data collection, hence this research will limit itself to the use of secondary source of data collection which is the easier and accessible source to the researcher.

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<sup>35</sup> United Nations Charter, 1945.

## **1.8 SCOPE AND LIMITATION.**

### **1.8.1 SCOPE.**

This research study is intended to cover International law while focusing on both the Military Occupation legal regime and the People's Right to Self-determination legal regime with the case study of Tibetan Occupation.

### **1.8.2 LIMITATION.**

The researcher has faced the following challenges while conducting the research: -

1. Inadequate finance which has hindered the researcher to travel to the Chinese Embassy Dar es Salaam, thus failing to accomplish the interview with the Chinese Embassy personnel.
2. Inadequate literature for reference. During researching the researcher has faced this problem because there were very less hard copies to be consulted for the research thus, the researcher had to use Internet but still inadequate finance it was not easy to access.
3. Time limitation.
4. Novelty of the subject of study.

## **CHAPTER TWO**

### **THE CONCEPTUAL AND LEGAL FRAMEWORK**

#### **2.1 INTRODUCTION**

The previous chapter has provided the introductory aspects as far as the Law of Military Occupation in relation to the People's Right to Self Determination is concerned. Moreover, this chapter is giving a thorough analysis particularly on the Conceptual and Legal Framework as far as the Right to Self Determination in Situations of Military Occupation is concerned.

#### **2.2 MILITARY OCCUPATION.**

##### **2.2.1 MEANING OF MILITARY OCCUPATION**

The terminology Military Occupation has got no a general Universal agreed meaning as they are conditions of Military Occupation, the distinction between the international and domestic, between war and peace or at least active armed conflict and its cessation or between violence and the exercise of political authority, become fluid and uncertain. Given these peculiarities as well as the diversity of conditions in which Military Occupation has taken place,<sup>36</sup> thus, it is not surprising that doubt has been expressed about the definition and utility of the concept of Military Occupation.

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<sup>36</sup> P.M.R. Strik, *Supra Note* 18,10.

Moreover, the word Military Occupation is defined as the use of Military Power as an administrative tool.<sup>37</sup> According to the Black's Law Dictionary the word occupation means "the seizure and control of a territory by military force; the condition of territory that has been placed under the authority of a hostile enemy"<sup>38</sup>.

Generally, the term Military Occupation entails a situation of temporally control of a territory by another state that claims no right to permanent<sup>39</sup> sovereign control over that territory while the exact date of return of control does not need to be specified however the occupying power need not to stay indefinitely.<sup>40</sup>

### 2.2.2 SITUATIONS UPON WHICH OCCUPATION CAN BE SAID TO OCCUR.

It is not easier as a matter of combining scientific principles and conclusions to state categorically that on a certain territory Military Occupation has been established since there are some complex issues which need to be answered so as to state whether there is Occupation or not.<sup>41</sup>

However, the major test which is normally employed to ascertain as to whether Military Occupation has been established in a certain territory or not is the effective control test as stipulated categorically under Article 42<sup>42</sup> states that territory is considered occupied when it is

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<sup>37</sup> C.Matos & R. Ward, *Gender, Power and Military Occupations*, Routledge Publishers, New York 2012, 217.

<sup>38</sup> B.A. Garner, *Black's Law Dictionary*, West publishing Company, St. Paul 2004, 1109.

<sup>39</sup> A. Lenon & C. Eiss, *Reshaping Rogue States: Pre-emption, Regime Change, and U.S. Policy Toward Iran, Iraq, and North Korea*, The MIT Press, London 2004, 121. "the military occupation model under which victorious belligerents occupy the territory of a defeated country and **administer it for a period of time before turning power over to a successor government** . . ." (emphasis is mine)

<sup>40</sup> *Idem*.

<sup>41</sup> H. Cuyckens, *Revisiting the Law of Occupation*, Nijhof Publishers, Leiden 1948, 54.

<sup>42</sup> The Hague Regulations II, 1907.

actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised<sup>43</sup>.

Military occupation is also defined as a temporary control of a territory by a state or group of allied states that makes no claim to permanent sovereignty over that territory. According to him the intended duration of military occupation must be temporary and finite.<sup>44</sup>

The use of Article 42<sup>45</sup> as the standard for determining the existence of a situation of occupation has been confirmed in practice by the International Tribunals<sup>46</sup> and state practices as well as the literature on the subject.<sup>47</sup>

Moreover, it is insisted that the occupation needs to be effective so as to allow the occupant to fulfil the duties laid upon him by the law of occupation.<sup>48</sup>

Therefore, it is concisely agreed that in order to state confidently that on certain territory actually there is a situation of Military Occupation one must first ascertain that there are two powers present, which are the occupying and occupied power, and also it must be proved categorically that the occupant is in actual sense exercising effective control over the occupied territory.

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<sup>43</sup> Philipson, *International Law and the Great War*, Library of Congress, London 1958, 218. “ . . . and the consequences of occupation applies only to those places where such authority is established and can be exercised. . . obviously, then there can be no occupation of a particular locality unless the assumed authority be supported by a force strong enough to maintain it. Hence a merely temporary existence of such force is not sufficient; for as soon as it ceases with it.”

<sup>44</sup> Edelstein, *Occupation Hazards: Success and failure in Military Occupation*, Cornell University Press, London 2008, 3.

<sup>45</sup> *Supra* note, 42

<sup>46</sup> International Court of Justice (ICJ) Reports, *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 June 2004: ICJ Reports, ICJ *Armed Activities on the territory of Congo (DRC v. Uganda)* Judgement, 19 December 2005: and the *Nilotic Case*

<sup>47</sup> *Idem*

<sup>48</sup> *Idem*.

However, Occupation is not only limited by the exercise of effective and command over a certain territory as during the 2<sup>nd</sup> World War saw a series of invasions and occupations in particular by Germany which did not fit into a state of war or armed conflicts, for instance the occupation of Czechoslovakia was effected through coerced invitation and no hostility broke out between the two countries, another example is the German Occupation of Denmark which involved only sporadic military resistance which did not create a state of war or armed conflict.<sup>49</sup>

As a result of the emerging new kind of military occupation which basically does not require the existence of armed conflict lead to the contracting parties of the Geneva Convention IV<sup>50</sup> to elaborate Common Article 2<sup>51</sup> which extended the concept of occupation to both situations of non-recognised state of war and occupations meeting no armed resistance.<sup>52</sup> As the US Military tribunal at Nuremburg in the *Hostage trial* held that “. . . the state of occupation is not to be diminished by the fact that the partisans showed a capacity to control part of these countries at many times”<sup>53</sup> and further that it should not be necessary that the invading forces occupy every locality in the hostile area in order to establish a state of effective occupation”<sup>54</sup>

Justice Shamgar of the Israel Supreme Court in the *Antzar Camp case* <sup>55</sup> was of the opinion that the application of the law of occupation does not require the existence of belligerent effective occupation or the establishment of military administration on the occupied territory.<sup>56</sup>

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<sup>49</sup> E. Milano, *Unlawful territorial situations in International Law; Re concealing Effectiveness, Legality and Legitimacy*, Martinus Nijhoff Publishers, Boston 2006, 91

<sup>50</sup> Geneva Convention IV, 1949.

<sup>51</sup> *Idem.*

<sup>52</sup> E. Milano, *Supra* Note 35.

<sup>53</sup> *United States V. List (Wihelm) and Others*, Trial Judgement, Case No. 7 (1948) 8LR TWC 34.

<sup>54</sup> *Idem.*

<sup>55</sup> HC 593/82 Tzmel Adv. *Et al* v. (a) Minister of defense (b) Commander of the Antzar Prison.

<sup>56</sup> *Idem.*

Generally, as it is also opined by the International Committee of Red Cross<sup>57</sup> that the law on occupation applies to all cases of either partial or total occupation, even if such occupation does not encounter any resistance.

## **2.3 DIFFERENCE BETWEEN OCCUPATION AND OTHER RELATED CONCEPTS.**

### **2.3.1 DIFFERENCE BETWEEN OCCUPATION AND ANNEXATION**

Annexation as opposed to Occupation entails a long term territorial control by one power over the other weaker power while assuming the whole sovereign power over that other weaker power, taking possession of enemy territory through military force in time of war<sup>58</sup>.

Generally annexation can be defined to mean the act of adding, attaching or joining additional land areas within the boundaries of political subdivisions of a state.<sup>59</sup>

On the other hand Occupation entails to be an effective control of a territory and its population by the occupying power towards the occupied power which is intended to last over a certain period of time.<sup>60</sup>

Whilst the rights of occupation are limited, those of annexation are unlimited. The occupant is entitled for the time being to govern the territory occupied, to introduce his martial laws and modify the territorial law so far as the safety and the exigencies of his army imperatively demand it.<sup>61</sup>

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<sup>57</sup> International Committee of Red Cross, Unit for Relations with Armed and Security Forces, *The Law of Armed Conflict; Belligerent Occupation*, Geneva 2002, 6.

<sup>58</sup>H. Kelsen, *General Theory of Law and State*, Library of Congress, New Jersey 2009,214. "Traditional theory admits that annexation of a conquered enemy territory, whether of the whole(subjugation) or of part, constitutes acquisition of a territory by the conquering state if the conquest is firmly established."

<sup>59</sup> *Idem*.

<sup>60</sup> C.Matos & R. Ward, *Supra*, Note 28, 2

<sup>61</sup> C.Philipson, *International Law and the Great War*, Library of Congress, London 1958,10

### 2.3.2 DIFFERENCE BETWEEN OCCUPATION AND COLONIALISM.

As opposed to occupation colonialism is a more ambiguous concept as it may eventually lead to self-rule, albeit while perhaps continuing to serve the strategic interest of the former colonial power whilst under occupation the occupying power normally serve the interest of the occupied population and the occupying power does not assume self-control.<sup>62</sup>

The critical distinction between occupation and colonialism lies in how states define their goals in the occupied territory.<sup>63</sup>

The intended duration of colonial ventures is much more ambiguous than the clear temporary intention of Military occupation. A defeating feature of occupation is precisely that the occupying power rejects annexation as the ultimate goal.<sup>64</sup>

### 2.3.3 DIFFERENCE BETWEEN OCCUPATION AND CONQUEST.

Military occupation can simply be defined as a temporary control of a territory by a state or group of allied states that makes no claim to permanent sovereignty over that territory. According to him the intended duration of military occupation must be temporary and finite.<sup>65</sup>

On the other hand conquest implies the complete and permanent subjection of country occupied to the government of the occupying forces with the intention that this territory shall be incorporated into the domains of the new sovereign.<sup>66</sup>

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<sup>62</sup> C.Matos & R. Ward, *Supra*, Note 28, 2

<sup>63</sup> D.Edelstein, *Supra*, Note 41.

<sup>64</sup> *Idem*.

<sup>65</sup> D.Edelstein, *Supra* Note 41.

<sup>66</sup> C.Philipson, *Supra* Note 40.



## 2.4 PEOPLE'S RIGHT TO SELF DETERMINATION.

### 2.4.1 MEANING OF RIGHT TO SELF DETERMINATION

There is no consensus about the meaning of Right to Self Determination, it is argued that “Self-Determination is a thorny topic in International Law with remarkable contradictions in its usage, while the concept has been liberally used as a slogan of Universal application, its application always seems to be a rather complex matter with several obstacles. Its importance is well accepted and recorded yet its precise meaning has not yet agreed.”<sup>67</sup>

The right to self-determination as the right by which peoples freely determine their political status and freely pursue their economic, social and cultural developments.<sup>68</sup>

Self-determination is not a mere phrase; it is an imperative principle of nations which man will ignore at their peril.<sup>69</sup>

Self-determination is also defined as the determination by one self or itself without outside influence, freedom to live as one chooses, or to act or decide without consulting another or others<sup>70</sup>. The determining by the people of the form their government shall have, without reference to the wishes of any other nation, especially by people of a territory or former colony.<sup>71</sup>

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<sup>67</sup>N. Ghanea & A. Xathaki, *Conceptual Understanding of Human Rights*, Martinus Nijhoff Publishers, Leiden 2000.

<sup>68</sup> J. Summers, *Peoples and International law; How nationalism and self-determination shape a Contemporary Law of Nations*, Martinus Nijhoff Publishers, Boston 2007, 3.

<sup>69</sup> D. Moeckli et al, *Supra* Note 11, 335.

<sup>70</sup> J. Fisch, *The Right of Self Determination of Peoples*, Cambridge University Press, 2015, 40. “the right of self-determination of people is based on a twofold regulative idea. First and for most, it grants every people the right (but not the obligation) to form an independent state. And a pre requisite for this, it gives every individual the right to live in the state of one’s own choosing, by means of a free choice of people to which that individual wishes to belong”.

<sup>71</sup> R. Vashum, *Nagas’ Right to Self Determination*, Mital Publication, New Delhi 2000, 37.

Generally, the Right to Self Determination assumes the combination of all fundamental rights which allows people to choose or determine the whole of their aspects of life ranging from social, political, economic and cultural aspect<sup>72</sup> indeed these rights empowers people to abolish the power which seems to ignore these rights.<sup>73</sup>

Moreover, it is stressed that, Right to Self Determination is “a right with an *erga omnes* character and a right which must be respected *erga omnes*” as the same was held by ICJ in the case of *Portugal v. Australia*<sup>74</sup> that, the right to self-determination is one of the essential principles of contemporary International Law which has an *erga omnes* character such that every state has an obligation to protect and respect it.<sup>75</sup>

It is also important to note that right to self-determination is mainly categorised into two major types such as internal and external right to self-determination. Internal self-determination can be simply defined as “a people’s pursuit of their political, economic, social and cultural development within a framework of an existing state”.<sup>76</sup>

This form of self-determination is normally implemented inside the boundaries of the existing state hence it does not affect the territorial integrity of the state.<sup>77</sup>

On the other hand external self-determination is a type of self-determination which involves the formation of a new state, the integration, or association with a third party,<sup>78</sup>

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<sup>72</sup> J. Franklin & T. Lee, *Coping with a bad global Image; Human Rights in the People’s Republic of China, 1993-1994*, University Press of America, Boston 1997, 209

<sup>73</sup> *Idem*.

<sup>74</sup> (1995) ICJ Rep 90

<sup>75</sup> D.Raic, *State hood and the Law of Self-determination*, Kluwer Law International, Amazon 2002, 289.

<sup>76</sup> D.Moeckli et al, *Supra* Note 11,340.

<sup>77</sup> V.Gudeleviciute, *Supra* Note 48, 2.

<sup>78</sup> D.Raic, *State hood and the Law of Self-determination*, Kluwer Law International, Amazon 2002, 289.

“external self-determination may be exercised through dissolution of a state, the union or merger<sup>79</sup> of state and through secession of a state.”<sup>80</sup>

## **2.5 LAWS RELATING TO MILITARY OCCUPATION**

### **2.5.1 THE HAGUE REGULATIONS (HAGUE II, 1889 AND HAGUE IV, 1907)**

Hague Regulations II of 1889 and Hague Regulations IV of 1907 were the first multilateral treaties that addressed the conduct of the warfare.<sup>81</sup> Hague Regulation II<sup>82</sup> resulted from the 1<sup>st</sup> Hague conference (Hague Peace conference) of 1889 which aimed at reviewing the declaration concerning customs of war elaborated in 1874 by Brussels conference.

Moreover, it observed that the law of occupation developed as part of the law of war, and so it was shaped not only by concept and statehood but also by changing military need. Example The Brussels Declaration<sup>83</sup> allowed Occupying power armies to rely on the resources of the Occupied population to sustain their war effort. When requisitioning the private property of the occupant was expected to issue receipt so that the disposed owner would be able to claim a refund from the ousted government, but with the modern situations of military logistics in the 19<sup>th</sup> Century, armies were expected to rely more on their own resources(as stipulated by Hague Regulations of 1889 and 1907<sup>84</sup>).

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<sup>79</sup> Example of the union or merger is that of the Egypt and Syria in 1958 which formed The United Arab Republic,

<sup>80</sup> *Idem.*

<sup>81</sup> <https://thl-database.icrc.org>.

<sup>82</sup> Hague Regulations II, 1889.

<sup>83</sup> The Brussels Declaration of 1874.

<sup>84</sup> Benvenist, *Supra* Note 13, 2.

Moreover, Article 42<sup>85</sup> establishes the conditions upon which occupation can be said to have occurred namely: the territory should be under the actual control of the hostile army, occupation only extends to the territory where such authority has been established and can be exercised.

Furthermore, for the area to be regarded as being under military occupation, the area should have been previously the sovereign territory.<sup>86</sup>

Further, the 1907 Hague Regulations IV regulates the conduct of wars while respecting the laws and customs of war. The Hague Regulations IV is mainly cantered on the idea of preserving the balance between the occupied power and the occupying power while protecting and respecting the interests and right of the occupied population.<sup>87</sup>

Article 42<sup>88</sup> provides that a territory is considered occupied when it is placed under the authority of the hostile army. It further provides that occupation shall extend on the territory where such authority has been established and exercised. On top of that, the Regulations provide for the rights and obligations of the occupying power for instance Article 43 provides for the obligation of the occupying power to restore and ensure public order and safety at the same time respecting the laws in force of the country unless absolutely prevented.<sup>89</sup>

Moreover, under the Hague Regulations, the occupying power only becomes the trustee bound to serve the interests and benefits of the occupied population.<sup>90</sup>

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<sup>85</sup> The Hague Regulations, *Supra* Note 5.

<sup>86</sup> *Idem*.

<sup>87</sup> D. Raic, *Supra* Note 59, 117.

<sup>88</sup> The Hague Regulations IV.

<sup>89</sup> *Idem*.

<sup>90</sup> *Ibid*, 118.

### **2.5.2 THE GENEVA CONVENTION IV OF 1949.**

Geneva Convention IV<sup>91</sup> was drafted to supplement The Hague Regulations, such as Hague Regulations II<sup>92</sup> and Hague Regulations IV<sup>93</sup> which were proved to have failed to regulate war fare in both World Wars, as Article 154<sup>94</sup> clearly state the reason for the drafting of the Geneva Convention IV “In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.”

### **2.5.3 ADDITION PROTOCOL I TO THE GENEVA CONVENTION OF 1977.**

Article 1(3) of the Addition Protocol I to the Geneva Convention<sup>95</sup> states that the Protocol shall apply as a supplement to the Geneva Conventions of 1949.<sup>96</sup> Moreover, Article 1(4) provides that the Protocol shall apply inter alia in the alien occupation.

On top of that Article 75<sup>97</sup> provides the fundamental guarantees among others to the persons under the occupied territory such as to be treated humanely in all circumstances and to enjoy protection without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

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<sup>91</sup> Geneva Convention IV, *Supra* Note 1.

<sup>92</sup> Hague Regulations, *Supra* Note 42.

<sup>93</sup> The Hague Regulations IV, *Supra* Note 2.

<sup>94</sup> Geneva Convention IV, *Supra* Note 1

<sup>95</sup> Additional Protocol I to the Geneva Conventions of 1977.

<sup>96</sup> Geneva Convention, *Supra* Note 9.

<sup>97</sup> Additional Protocol I, *Supra* Note 74.

## 2.6 LAWS RELATING TO THE PEOPLE’S RIGHT TO SELF DETERMINATION.

### 2.6.1 THE UNITED NATIONS CHARTER 1945.

United Nations Charter which was enacted in 1945 to govern among other things relations among states and to regulate warfare, it also embodies the fundamental principle as far as human right is concerned, the People’s Right to Self Determination.<sup>98</sup>

Paragraph 2 of Article 1<sup>99</sup> categorically states the purpose and principles of the United Nations to include *inter alia* is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.<sup>100</sup>

Inclusion of the People’s Right to Self Determination in the United Nations Charter marks the Universal Recognition of the principle as fundamental to the maintenance of the friendly relations and peace among states.<sup>101</sup>

Furthermore, Article 55 of the Charter recognises that the basis of creating peaceful and friendly relations among nations is the respect for the principle of equal rights and self-determination of people.<sup>102</sup>

The principle of People’s Right to Self Determination as embodied in the United Nations Charter<sup>103</sup> entails that people within their sovereign states are free to determine their political status and freely pursue their economic, social and cultural development.<sup>104</sup>

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<sup>98</sup> United Nations Charter, 1945.

<sup>99</sup> *Idem.*

<sup>100</sup> *Idem*

<sup>101</sup> *Idem.*

<sup>102</sup> *Idem.*

<sup>103</sup> *Idem.*

Generally, the principle of People's Right to Self Determination in the perspective of the United Nations Charter encompasses the right of people to determine their own destiny.

### **2.6.2 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR) 1948.**

Universal Declaration of Human Rights<sup>105</sup> is said to be the mile stone document in the history of mankind, it was proclaimed by the UN General Assembly in Paris on 10 December 1948<sup>106</sup> as a common standard of achievements for all peoples and all nations. It sets out for the first time, fundamental human rights to be universally protected.

In the Preamble, Universal Declaration of Human Rights<sup>107</sup> states categorically that among the foundation of freedom, justice and peace in the world is the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.

These are principle basis of the People's Right to Self Determination derogation of which makes the whole concept of people's right to self-determination inoperative.

Moreover, Article 2<sup>108</sup> emphasises on the importance of respecting human rights without any kind of distinction, even without distinguishing the status of the territory such as whether occupied or otherwise. When it states,

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international

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<sup>104</sup> [www.unpo.org](http://www.unpo.org), accessed on 2<sup>nd</sup> January 2018 at 2:15 pm.

<sup>105</sup> Universal Declaration of Human Rights, 1948.

<sup>106</sup> United Nations General Assembly resolution 217 A

<sup>107</sup> Universal Declaration of Human Rights, *Supra* Note 54.

<sup>108</sup> *Idem*.

status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

### **2.6.3 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS OF 1966 AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF 1966.**

Both under the common Article 1<sup>109</sup>, specifically under paragraph 3 embodies right to self-determination as a right which allows all people to freely determine their political status and also to pursue their economic, social and cultural development.

Further, under paragraph of the common Article 1 provide categorically that, states including those having responsibility to administer non self-governing states are under obligation to promote realisation of the right to self-determination and to respect the same in conformity with the United Nations Charter.<sup>110</sup>

Moreover, the common Article 1(3)<sup>111</sup> obliges state parties to the Covenant to promote the realisation and respect of the right to self-determination as it provides that: “The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

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<sup>109</sup> Common Article to both The International Covenant on Civil and Political Rights of 1966 and the International Covenant on Economic, Social and Cultural Rights of 1966

<sup>110</sup> *Idem.*

<sup>111</sup> *Idem.*



#### 2.6.4 THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS.

This is one among the regional instruments as far as the people's right to self-determination is concerned. The African Charter on Human and People's Rights<sup>112</sup>, among other things regulates Human Rights in the African continent.

The African Charter specifically under Article 20(1) gives people under sovereign states right to self-determination<sup>113</sup> as it states that all people shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.<sup>114</sup>

Moreover, Article 19 of the charter<sup>115</sup> proclaims that "All people shall be equal; they shall enjoy the same respect and shall have the same rights" and it further adds that nothing shall justify the domination of people by another.

Therefore, even within the African continent, the people's right to self-determination is recognised as the fundamental principle of human rights upon which all people are vested with

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<sup>112</sup> The African Charter of Human and Peoples' Rights, adopted in 1981

<sup>113</sup> I.G. Shivji, *The Concept of Human Rights in Africa*, Mkuki na Nyota, Dar es Salaam 2000,99.

<sup>114</sup> *Idem*

<sup>115</sup> *Idem*.

## **CHAPTER THREE**

### **APPLICABILITY OF THE RIGHT TO SELF DETERMINATION IN SITUATIONS OF MILITARY OCCUPATION: CASE STUDY OF TIBETAN OCCUPATION.**

#### **3.1 INTRODUCTION**

On the previous two chapters this study has provided the general introduction while labouring much on establishing the legal and conceptual frame work as far as the peoples' right to self-determination in situations of military occupation is concerned.

This chapter is focusing on the discussion patterning to the applicability of the right to self-determination in situations of military occupation while centred on the case study of Tibetan Occupation by China.

#### **3.2 MAINTENANCE OF LAW AND ORDER BY THE OCCUPYING POWER AND ITS EFFECT IN THE EXERCISE PEOPLES' RIGHT TO SELF DETERMINATION DURING TIBETAN OCCUPATION.**

The Occupying power in situations of military Occupation is vested with the power of maintaining law and order under the auspice of Article 43<sup>116</sup> of the Hague Regulation IV<sup>117</sup> which states that the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as

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<sup>116</sup> J. Klabbers, International Law, Cambridge University Press, Cambridge 2013,214. “. . .a key legal provision which Benvenist refers to it as a sort of mini- constitution of the occupation administration”

<sup>117</sup>The Hague Regulations IV,1907

possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>118</sup>

Article 43<sup>119</sup> of the Hague Regulation IV<sup>120</sup> empowers the occupying power to take any measures possible so as to restore and ensure public order and safety.

However, there are some issues which neither the Hague Regulation IV nor the military occupation legal regime has managed to resolve them despite the grave violation of human rights resulted from the non-contested fact that the powers vested to the occupying power towards the occupied population are too much and are detriment to the rights of the people under the occupied territory hence the duty of maintaining law and order by the occupying power in the occupied territory cannot coexist with the peoples' right to self-determination.

This conception however contravenes the general notion that the Occupying power is only acting as the administrator of the territory and as such must abide by human rights obligations in its dealing with the individuals in the territory under its control<sup>121</sup>.

It is observed that, situation of military occupation of a certain territory is not intended to exist permanently, however it is awkward for the occupation legal regime to vest the occupying power with unlimited powers in the name of exercising or maintaining law and order to the occupied

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<sup>118</sup> *Idem*.

<sup>119</sup> *Supra* Note,214. “. . . a key legal provision which Benvenist refers to it as a sort of mini- constitution of the occupation administration”

<sup>120</sup> The Hague Regulations II,1907

<sup>121</sup> N. Lubbel, Human Rights Obligations in Military Occupation, International Review of the Red Cross, VI 94, No.885, 17.

territory, something which compromise the peoples' right to self-determination of the people under the occupied territory.<sup>122</sup>

Furthermore, "the principle of self-determination should be employed in conjunction with the principle of non-intervention in relation to the use of force."<sup>123</sup>

That is to say, the principle of the people's right to self-determination should not be affected by the use of force. More specifically, the occupying power should not resort to the use of force and subsequently denying right to self-determination to the occupied population.<sup>124</sup>

Moreover, the Vienna Declaration allows people living under alien domination or foreign occupation to take any legitimate action to restore their prior status and one of the legitimate action is by resisting the unjust occupying power.<sup>125</sup>

Article 2 paragraph 2<sup>126</sup> reads, "Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognises the rights of the people to take any legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as the violation of Human Rights and underlines the importance of the effective realization of this right."<sup>127</sup>

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<sup>122</sup> M.E. Battjes, *Art of War Papers: Protecting, Isolating and Controlling Behavior, Population and Resource Control Measures in Counterinsurgency Campaigns*, Combat Studies Institute Press, Kansas 2011, 12.

<sup>123</sup> *Ibid*, 3

<sup>124</sup> I. Brownlie, *Public International Law*, Oxford University Press, New York 2003<sup>6</sup>, 555.

<sup>125</sup> Vienna Declaration.

<sup>126</sup> *Idem*.

<sup>127</sup> *Idem*.

Generally, under the legal regime of military occupation, the use of force by the occupying power is not regulated, a thing which leaves the rights of the occupied population at the discretion of the occupying power.

It is a common fact that when a state exercises the right of external self-determination, the usual outcome is one of the following; independence, free association with some other state or integration with another state.<sup>128</sup>

However, due to the framing of occupation law regime any of the result of the exercise of the right to self-determination cannot be achieved as the law vests excessive power on the occupying power to control the occupied population.

Tibetan occupation by china is a good example of how the framing of the law regime of military occupation is a hindrance towards the achievement of the people's right to self-determination as the Tibetans faced challenges towards determining their political independence due to the fact that the exercise of any right and the right to self-determination in particular was determined by the occupying power.<sup>129</sup>

Moreover, It is observed that there is a lacuna in international legal regime in situations of transitional control of one state by another state such as situation of military occupation where by the occupying power in most cases denies the occupied population their legal rights in the name of maintaining law and order in the occupied territory.<sup>130</sup>

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<sup>128</sup> S. Halldorsdottir, *Tibet; Past, Present and Future*, 37.

<sup>129</sup> *Idem.*

<sup>130</sup> C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond*, Cambridge University Press, Cambridge 2008, 475.

On the other hand, there are of the similar opinion that obligation relating to security are the most difficult for the occupying power to exercise without compromising the rights of the occupied population as they relate not only to legal requirements, but to practical, even moral duties which are none regulated by the occupation legal regime.<sup>131</sup>

To worsen the situation, the occupation legal regime allows the occupying power to suspend or terminate local laws if their continued effect would jeopardize the security of the occupying forces, however this poses a great challenge as to whose interests should be protected, whether the interests of the occupying power or those of the occupied population.

But the occupation legal regime is framed in nature that it protects interests of the occupying power to the detriment of the occupied population as much powers are vested to the occupying power to the extent that even it may suspend or terminate the laws of the occupied territory something which is to the detriment of the right to self-determination of the people under the occupied territory.

In Tibetan Occupation China was reported to have employed excessive force to implement her policy of assimilation which was implemented in both the administrative and economic spheres which includes land reforms, establishment of People's Communes<sup>132</sup>.

However in the course of implementing this policy there were several unrest and uprising which caused massive killings to citizens who challenged the policy.<sup>133</sup>

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<sup>131</sup> G.S. Corn et al, *U.S. Military Operations: Law, Policy, and Practice*, Oxford University Press, New York 2016, 46.

<sup>132</sup> D.Bernstorff & H. Welck, *Exile as challenge: The Tibetan Diaspora*, Nomos Verlagsgesellschaft, Baden 2004, 55.

<sup>133</sup> *Idem*.

Thus, there are common views that Chinese Occupation of Tibet has resulted to the people of Tibet to have lost their right to self-determination.<sup>134</sup> Also, there is founded opinion that in the Tibetan Occupation by China since 1951 both principles: non use of force and the self-determination were violated.<sup>135</sup>

Generally, the controversial part *inter alia* of Article 43 is the phrase “. . .the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety. . .” by this provision it is obvious that the occupying power is vested with much power to the occupied territory and population since she can employ even the excessive force to the occupied population only in the name of ensuring public order and safety as the International law has not clearly determined as to what amount to the reasonable force which is to be applied to the occupied population, hence this lacuna has in most of the times lead to the much sufferings to the people under occupied territory including mass likings.<sup>136</sup>

### **3.3 APPLICABILITY OF HUMAN RIGHTS IN TIBETAN MILITARY OCCUPATION.**

Generally Human rights are inherent to any human being regardless of the status of the territory upon which he resides, and as far as this study is concerned human rights also applies to the people in the territory which is subjected under military occupation<sup>137</sup>.

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<sup>134</sup> *Ibid*, 57.

<sup>135</sup> R. Mullerson, *International Law, Rights and Politics*, Routledge London 1994, 82.

<sup>136</sup> Y.A. Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, Leiden 2009,98.

<sup>137</sup> G. Gilbert et al, *The Delivery of Human Rights: Essays in Honour of Prof. Nigel Rodley*, Routledge, New York 2011,219, “there is sufficient case law in support of applicability of human rights in situations of military occupation such as DRC vs Uganda, Loizidou Vs Turkey, and Cyprus Vs Turkey ECHR (App. No 25781/94).

Also, in support of the applicability of human rights in situations of military occupation it is stated that “in a state of military occupation, a state is in a position to secure human rights in the same way as in national territory.”<sup>138</sup>

Tibetan Occupation by China has evidenced grave breach of human right which are fundamental to the existence of the people’s right to self-determination. It is reported that in the Tibetan Occupation, the Occupying power China in breach of fundamental human rights has implemented the migration policy of Chinese population to Tibetan plateau, it is argued that the movement of large number of Chinese to Tibet violates international law because it contravenes legal norms regarding occupied territory<sup>139</sup> as Article 49<sup>140</sup> provides that “the occupying powers shall not deport or transfer parts of its own civilian population into the territory it occupies”

Further, the argument for the violation of human right is mainly focused on the fact inter alia that people’s right to self-determination entails that people within their community are free to determine all their spheres of life such as economically, politically, socially and culturally free from any external influence.

Thus, large movement of Chinese into Tibet practically affects Tibetan right to self-determination as they practically affected all of their spheres of life.

Moreover, Under the Chinese Occupation, the Tibetan people are denied most rights guaranteed in the Universal Declaration of Human Rights including the rights to self-determination, freedom of speech , assembly, movement, expression and travel<sup>141</sup>, not only that but also under the Chinese Occupation, China has been consistently using excessive military

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<sup>138</sup> H. Cuyckens, *Revisiting the Law of Occupation*, Nijhof, Leiden 1984,175.

<sup>139</sup> Human Rights in Tibet: An Asia Watch Report February 1988, Asia Watch Committee Washington, 17.

<sup>140</sup> Geneva Convention IV, 1949.

<sup>141</sup> <http://tibetoffice.org/tibet-info/invasion-after>, accessed at 12:20PM, 10<sup>th</sup> March, 2018



force something which has adversely resulted in wide spread human rights abuses<sup>142</sup> including multiple cases of arbitrary arrests, political imprisonment, torture and execution.

Credible reports on mistreatment and torture of detainees and political prisoners in Tibet are widespread, including beatings, shocks with electric batons, deprivation of sleep or food, exposure to cold and other brutalities. Human rights and humanitarian organizations are denied access to prisons and detention centers in Tibet<sup>143</sup>.

Prior to the Chinese Occupation of 1950, Tibet was a country steeped in religion. Religious practice permeated the daily lives of the Tibetan people and formed the social fabric connecting them to the land. Recognizing this, the Chinese focused on destroying this cultural base of the Tibetan people in the hopes of quelling dissent to their rule. In 1960 the International Commission of Jurists found “that the Chinese will not permit adherence to and practice of Buddhism in Tibet and that they have systematically set out to eradicate this religious belief in Tibet.”<sup>144</sup>

Grave violation of human right in general and the people’s right to self-determination<sup>145</sup> in particular in Tibet by China has been the concern of other states as in 1993 the United States of America President Clinton while passing the funding authorisation bill for the state department, the USA information Agency (USIA) and other related bodies, the Senate Foreign relation sub-

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<sup>142</sup> *Idem.*

<sup>143</sup> *Idem.*

<sup>144</sup> *Idem.*

<sup>145</sup> J. Audefroy, *Evictions: Enough Violence: We want Justice*, “by reason of the act of aggression and military occupation the Tibetan right to the exercise of self-determination has been denied. Since the military action 1949-50, Tibet has been under alien occupation and domination of People’s Republic of China (PRC) and has been administered with the characteristics of an oppressive colonial administration.”

committee required that the USIA establish an office in Lhasa Tibet for promoting discussion on conflict resolution and human rights<sup>146</sup>.

President Clinton openly and publicly raised the Tibet question with the Chinese President during his 1998 visit to China and appointed Gregory B. Craig as a special coordinator for Tibet<sup>147</sup>.

Moreover, The UN and major international human rights groups such as Amnesty International and Human Rights Watch (HRW) noted a sharp increase in the curtailment of freedoms and a range of human rights abuses in Tibetan areas following the Tibetan protests of 2008<sup>148</sup>

To show that America is much concerned with the human rights violation by China in Tibet, In March 1989 senate resolution “urges the United States to make the treatment of the Tibetan people an important factor in United States conduct of relations with People’s Republic of China<sup>149</sup>.

There are observations that “. . . population transfer threatens the survival of the Tibetans national, cultural and religious identity, and so constitutes a grave violation of their right to self-determination”<sup>150</sup>.

Generally, since the Chinese occupation of Tibet, the Tibetan population has endured severe and sustained human rights violations<sup>151</sup>, this is particularly evident on three levels,

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<sup>146</sup> D.Norbu, *China’s Tibet Policy*, Psychology Press New York 2001, 275.

<sup>147</sup> *Idem*.

<sup>148</sup> Y.Choesang, *Voice of an Exiled Tibetan: Hopes of freedom and struggle*, Amazon 2014, 1.

<sup>149</sup> Norbu, *Supra* Note 78, 275.

<sup>150</sup> M.G. Chitkara, *Human Rights: Commitment and Betrayal*, APH Publishing Corporation New Delhi 1996,

namely: constitutional provisions imposed by the People's Republic of China (PRC) limit the Tibetan people's freedom of speech, movement, political expression, and right to a free pass, PRC policies, such as the Western Development Project and forced urbanisation programmes for nomadic Tibetans, have caused environmental and social change, a disregard for judicial conventions, including the PRC's own judicial system, has led to significant and sustained abuse of human rights within sensitive Tibetan areas, including the imprisonment of Tibetans as prisoners of conscience or as political prisoners<sup>152</sup>.

In the other hand, on the view that human rights do not operate between the occupant and the enemy civilian in occupied territory. Along the same line Dinstein remarked that "the government of an occupied territory . . . is not the same as a state's ordinary government of its own territory **and that most peace time human rights are suspended in time of belligerent occupation.**"<sup>153</sup> (emphasis is mine).

### **3.4 THE EFFECT OF LAW MAKING POWER OF THE OCCUPYING POWER (CHINA) TO THE TIBETAN PEOPLE'S RIGHT TO SELF DETERMINATION**

Under the Auspice of Article 49 the occupying power is vested with the legislative power as it states, "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, **while respecting, unless absolutely prevented, the laws in force in the country**"<sup>154</sup> (emphasis is mine).

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<sup>151</sup> J. Becker, *Campaigning for Justice: Human Rights Advocacy in Practice*, Stanford University Stanford 2013, 192.

<sup>152</sup> Choesang, *Supra* Note 80,1.

<sup>153</sup> Y. Dinstein, *the International Law of Belligerent Occupation and Human Rights*, 1978, 116.

<sup>154</sup> The Hague Regulation IV

By the interpretation of Article 49 of the Hague Regulation IV<sup>155</sup> the occupying power is allowed to make, amend or even repeal the existing laws in the occupied territory and the test is only that the existing laws are hindering the occupying power to ensure public order and safety.

However, the Occupation legal regime has not provided any sufficient measure or test to justify the occupying power acts of legislating towards the occupied territory, but the only test which is not sufficient is that the occupying power is allowed to legislate if the existing laws are preventing the occupying to perform her duty of maintaining public order and safety.

However, the question which is not answered by the occupation legal regime is to whose interest the occupying power is required to protect are the interests of the occupying power or interests of the occupied population, and another question is if the occupying power is vested with the legislative power, will the right of self-determination of the people under the situation of military occupation be obtained?

In Article 43<sup>156</sup> there is a view that gives the occupying power a broader ambit of the legislative authority in occupied territories.

Article 64<sup>157</sup> is also alleged to have vested much legislative power to the occupying power to the detriment of the occupied population only for the reason of ensuring the security of the occupying power and security of the property of the occupying forces or administration as well as for the establishment of the lines of communications used by them this clear example of

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<sup>155</sup> *Idem.*

<sup>156</sup> Hague Regulation IV, 1907.

<sup>157</sup> *Idem.*

the imbalance between the interests of the occupying power and those of the occupied population by overweighting the interest of the occupying power.<sup>158</sup>

The law allows the occupying power to change the penal laws of the occupied country only in the name of safeguarding its own security which sometimes won't bring about security concerns but worse enough is that the occupying power is also allowed to legislate even on penal laws which its detriment goes to the root of curtailing freedom of the people under the occupied territory.

This in fact prevents people under the occupied territory from exercising their basic human right of self-determining their social, political and economic aspect of life since the penal laws enacted by the occupying power may limit such exercise.

Weill<sup>159</sup> is also of the view that the risk of abuse of possible extension of the occupying power's authority should not be ignored as it is the occupying power that decides whether a legislative act is necessary, and its interpretation is not subject to revision during occupation.

He further observed any legal reforms which are to be made to the occupied territory, the local population should much be consulted, and the major reason being that the local population is the one aware of their culture and needs be it politically, economically and socially.<sup>160</sup>

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<sup>158</sup> *Idem.*

<sup>159</sup> S. Weill, *International Law in Domestic Legal Orders: The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford 2014, 24.

<sup>160</sup> *Idem.*

Also, Occupiers are obliged to protect civilians by acting as trustees and reserving fundamental political and legal changes to future governments representing the occupied population.<sup>161</sup> They are only on the occupied territory exercising the sole purpose of maintaining the status quo of the territory.

Therefore, the occupying power's authority to change the penal laws of the occupied territories is contrary to the principle duty of the occupying power to the occupied territory, the duty of maintaining status quo.

Also, there is a view that the purpose of Article 43<sup>162</sup> is absurd as it vests much power to the occupying power while ignoring the fact that the occupation should be temporary and should allow the return of the territory to its own sovereign authority.<sup>163</sup>

Thus by vesting much legislative power to the occupying power unreasonably allows the prolonged occupation to the occupied territory.

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<sup>161</sup> K.E. Boon, *Obligation of the New Occupier; The Contours of a Just Post Bellum*, Loy International Law Review, VI 31, 104; <http://ssrn.com/abstract=1427355>(accessed 10<sup>th</sup> February,2015)

<sup>162</sup> Hague Regulation IV, 1907.

<sup>163</sup> A. Arato, *Supra* Note 98,24.

## **CHAPTER FOUR**

### **CONCLUSION AND RECOMMENDATIONS**

#### **4.1 CONCLUSION**

The previous three chapters have elaborated much on the general introduction, the legal frame work and indeed on the hurt of this study which is on the discussion as to the applicability of the people's right to self-determination in situations of military occupation while focusing on the case study of Tibetan Occupation.

The major reason for undertaking this study is premised on the need to understand as to whether the legal regime of the law of military occupation allows the exercise of the people's right to self in situations of military occupation or not, while focusing on Tibetan Occupation as the case study.

Further, the basic discussion of this study is on the effect of unlimited use of force by the occupying power to the occupied territory and the effect of un regulated legislative power by the occupying power to the occupied territory in relation to the exercise of the people's right to self-determination in the occupied territories.

In course of undertaking this study researcher employed the secondary sources of data and indeed the secondary method of data collection was undertaken which among others is the Library of the Ruaha Catholic University.

Despite the non-applicability of the primary sources the trustworthiness of the sources employed to undertake the study was adequately ensured as the employer only employed the trustworthy sources.

The heart of this study generally has focused on the discussion mainly on three aspects namely: Maintenance of Law and Order by the Occupying power and its effect in the exercise Peoples' Right to Self Determination during Tibetan Occupation, applicability of Human Rights in Tibetan Military Occupation and the Effect of Law making Power of the Occupying Power (China) to the Tibetan People's Right to Self Determination.

Thus, after conducting the critical study on the subject of study, the following are the observations found as far as the applicability of the people's right to self-determination is concerned; -

The powers of maintaining law and order which is vested to the occupying power under Article 49 of The Hague Regulation IV<sup>164</sup> is excessively unregulated as the occupying power has much power towards the occupied territory and its population only in the name of maintaining law and order.

This argument is due to the fact that the occupying power the occupation legal regime allows the occupying power to use any mean possible to maintain law and order without even regulate the use of force which is to be employed by the occupying power when exercising such duty, as a result the occupying powers normally used the lacuna in law to the detriment of the occupied population such as by employing excessive force which has been proved being to the detriment of the occupied population as in the case of Tibetan occupation.

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<sup>164</sup> The Hague Regulations IV, 1907



Moreover, this study has observed that the Occupation Legal Regime does not allow the adequate exercise of human rights to the people under the occupied territory, this is vividly from the fact that the occupation legal regime vests much powers to the occupying power which is to the detriment of the occupied population, for instance the occupation legal regime gives the unregulated powers to the occupying power in course of exercise his duty of maintaining law and order which allowed the occupying power to employ excessive force which in turn affects almost every kind of human right belonging to the people under the occupied territory such as freedom of expression, right to life and in generally right to self-determination.

On top of that, this study also observed that the legislative powers vested to the occupying is excessively unregulated as Article 49 of the Hague Regulation<sup>165</sup> allows the occupying power to make, amend or even repeal the laws present in the occupied territory only in the name of maintaining law and order.

However, these powers have no limitation, thus the occupying power can even make laws which are to the detriment of the people under the occupied territory and which are for the purpose of ensuring the existence of the occupying power within the occupied which in turn denies people under the occupied territory to exercise the inherent rights in general and their right to self-determination in particular.

Moreover, the occupation legal regime by vesting much powers to the occupying powers destroys the inherent fact that occupations are intended to be temporary but the occupation legal regime is created as to make the situations of occupations as the permanent phenomenon.

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<sup>165</sup> *Idem.*

## **4.2 RECOMMENDATIONS.**

After making critical study as far as the applicability of the people's right to self-determination in situation of military occupation is concerned, this study has come up with the following recommendations; -

That the military occupation legal regime should be amended particularly on the following aspects to wit; -

### **TO THE OCCUPYING REGIME**

The powers of maintaining law and order which is vested to the occupying power should be regulated such on the amount of force which is to be employed when the occupying power is exercising this power and not only allowing the occupying regime to use whatever means they can to restore the public order and safety as this would in turn deny people under the occupied territory to exercise their inherent human right in general and the right of self-determination in particular as observed in the case study of Tibetan Occupation.

Chinese and Tibetan governments should consider the welfare of the people and not only focus on what is beneficial to them. As it is aware that whenever there is a war the ones who suffer or loose life are the ordinary people. As it is the case in China. The Chinese occupying regime torture the Tibetans people and deny them their rights of worship, settle them into the barren land and deny them the right of settling into fertile land and feed their livestock.

### **TO THE LEGISLATIVE ORGAN**

The powers of the occupying power should also be regulated so that the occupying powers do not use the lacuna in law to legislate to the detriment of the people under the occupied

territory since the occupying power is only a trustee of the occupied population so whatever she does in the occupied territory and its population should be for the interest of the occupied population.

Also, the occupation legal regime should be amended so that the occupying power can only exercise their powers in the occupied territory only without affecting the origin status of the occupied territory in whatever sphere of life be it political, economic, social or cultural.

### **TO THE GENERAL PUBLIC**

The general public should raise voices towards such denial of rights in order to influence the law maker to change the law which in turn will be favourable to both the occupied and the occupying regime.

Also, different online institutions such as the Amnesty International should include sensitisation programs particularly in this section of Military occupation in order to raise awareness to people around the global that they have power to end any form infringement of rights that they face.

### **TO THE ACADEMICIANS AROUND THE WORLD**

Those in the academic field should, they should help the public to understand their rights under the International Instruments and even participate by giving examples on what should be done. They also have to write different publications both in soft and hard copies and supply to the public or organize seminars and different platforms to make the public aware of their rights and what they can do.

Academicians also should write to the legislative organs in the International arena and advise them on the way forward to solve the problems that arise out of Military occupation. From their inputs the Legislative organs are easily advised and find the way forward.

Therefore, the law of military occupation should be reformed by limiting the legislative powers of the occupying power within the occupied territory as it will allow the occupied population to exercise their human rights.

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