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Yoram Dinstein, *The international law of belligerent occupation*

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Reviewed by Konstantinos Mastorodimos

LL.B (Aristotle University of Thessaloniki, Greece), MAS (LL.M) in International Humanitarian Law, University Centre of International Humanitarian Law, Geneva (now Academy of Human Rights and Humanitarian Law), Ph.D candidate in International Law, Queen Mary College, University of London

mastorodimosk@yahoo.gr

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After the occupation of Iraq there has been a significant rise in the interest of the academic community for this area. Professor Dinstein is one of the leading experts on military occupation, as he has been writing on various aspects of this topic for more than forty years. Consequently this book is the fruit of a long-term experience and, up to a point, an accumulation of his previous writings. In addition, he's also in a unique position to have a first-hand idea on how belligerent occupation is exercised in practice and to have access to the judgments of the Israeli High Court of Justice.[1] The outcome is a comprehensive book which covers almost all aspects of the law of belligerent occupation: from the executive, legislative and judicial functions of the occupying power to the protection of people and property in occupied territory. There are also separate chapters on topical issues such as the interrelation between human rights and the law of occupation and the termination of occupation. The author deliberately avoids covering the treatment of internees in occupied territories as well

[1] At times the author stands particularly critical on the Court's treatment of several issues, such as those relevant to deportations or transfers from occupied territory, see pp. 164-166.

as the responsibility for breaches of the law and remedial measures, as it would demand a discourse which goes far beyond the specifics of belligerent occupation.

The author takes a classic view on belligerent occupation as he distinguishes with other forms such as post-surrender occupation, occupation after an armistice, pacific occupation and allied occupation. He also rejects the applicability of the law of occupation to non-international armed conflicts (p. 33-4), even by analogy, although it could be a useful tool for expanding the obligations of certain armed non-state actors.[2] Equally he rejects the applicability of the law of occupation to UN peacekeeping forces, due to their consensual character, although he accepts that with peace enforcement armies the situation might be different (p. 37).

With regard to the partial applicability of occupation law before occupation in the sense of article of 42 of the Hague Regulations,[3] as advocated for both the Hague Regulations[4] and the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War,[5] the writer "…does not deny that some Geneva norms, generally operative only during belligerent occupation, may become exceptionally applicable at an earlier stage" (p. 40). In addition the author does not seem to qualify as occupation the situation of a belligerent who has displaced the sovereign but does not fill in the vacuum of power; this situation would amount to occupation if the potential effective control test applies.[6] But even if this test is non-applicable, significant confusion seems to exist on when a piece of land within or adjacent to factually occupied territory does or does not come under the effective control of the occupying power; in the end much would depend on the prevailing circumstances at that time.

The author concurs, in principle, on the issue of human rights law applicability in times of conflict (p. 69), although he seemingly denies applicability of the International Covenant of Civil and Political Rights[7] (p. 70).[8] On the other hand he accepts that customary human rights law is not subject to extraterritoriality (p. 71), although this thesis does not seem to have any significant impact on the subsequent

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[2] Mastorodimos, K. (2009) 'The utility and limits of human rights law and international humanitarian law's parallel applicability' 5 *Review of International Law and Politics* 145.

[3] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907

[4] Feichenfeld, E.H. (1942) *The international economic law of belligerent occupation* (Washington, Carnegie Endowment for International Peace) p. 6.

[55] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Naletilic and Martinovic*, Trial Chamber Judgement, 31 March 2003, par. 221, Pictet, J.S. (ed.) (1952), *The Geneva Conventions of 12 August 1949: commentary* (Geneva, International Committee of the Red Cross) p. 60, Lavoyer, J.- P. (2004) 'Jus in Bello: Occupation Law and the War in Iraq' 98 *American Society of International Law Proceedings* 122, Roberts, A. (1984) 'What is a military occupation?' 55 *The British Yearbook of International Law* 253, Kolb, R. (2002) 'Etude sur l' occupation et sur l' article 47 de la IVème Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre: le degré d'intangibilité des droits en territoire occupé' 10 *African Yearbook of International Law* 292 and Doermann, K. & Colassis, L. (2004) 'International Humanitarian Law in the Iraq Conflict', 47 *German Yearbook of International Law* 301.

[6] For a more detailed overview of this test see Shavy, Y. (2005) 'Faraway, so close: the legal status of Gaza after Israel's disengagement' 8 *Yearbook of International Humanitarian Law* 374-7.

[7] U.N.T.S. No. 14668, Vol. 999 (1976), p. 171.

[8] The conjunctive interpretation of article 2.1 (within its territory and under its jurisdiction) would lead to a dead end situation with regard to human rights applicability in a military occupation: neither the territorial state has jurisdiction nor the occupying power acts within its territory.

discourse of substantive issues.[9] Generally speaking the *lex specialis* (that is international humanitarian law) would take precedence over human rights law; however "human rights law may also fill a gap in an occupied territory, when the norms governing belligerent occupation are silent or incomplete" (p. 84). This could prove particularly significant, since the personal scope of the Hague Regulations and the Geneva Convention IV is different, the first covering inhabitants and the second covering protected persons.

The discourse on hostilities in occupied territories is very interesting (pp. 99-108). The author notes the duality between the regime of occupation law and the rules on the conduct of hostilities. Seemingly he does not envisage that a non-international armed conflict could be taking place within an occupied territory and therefore treats such "combatants", which do not belong to a party to the conflict, as individuals. With regard to direct participation of hostilities, he supports the membership approach as the proper criterion on when a civilian can be targeted (p. 103). However this approach should mean, in light of equality of belligerents, that members of the army can also be lethally targeted at any time, unless they are *hors de combat*.

With regard to the legislative jurisdiction of the occupying power, Professor Dinstein, rightly makes the case that national laws cannot be used as a pretext to override the applicability of the law of occupation, citing especially the punitive property destruction in occupied Palestinian territory, which is effected through old local laws of the former Mandate Power (p. 114-5).[10] He also notes the need of military authorities during prolonged occupations to have more leeway in their legislative powers, so that they meet societal needs. Acknowledging though that "a professed humanitarian concern may camouflage a hidden agenda" (p. 120), he has opted for a test which would reveal whether the military occupier is genuinely interested in the welfare of the occupied community: the existence of a parallel statute back home (p. 121). Nonetheless such a test might also become the vehicle for veiled annexation, while it might not be suitable in light of the possible cultural differences between the occupied state and the occupying power. Moreover, it could also result in the degradation of human rights protection, depending on who the Occupying Power is. It might be more suitable to resort to the solutions opted by the international community (eg. its human rights organs); the subsequent adoption of such solutions by the occupying power would probably remove any doubts with regard to its motivations as well as the suitability of the adopted legislation.

The debate on settlers is certainly interesting. The author differentiates between state-induced transfers of settlers to occupied territory, which are prohibited, from private enterprises in this regard (p. 240-1). Nevertheless, apart from the cases of private lands owned from the era of the British Mandate, the purchase of private lands in long-lasting occupations might be suspicious. The harshness of living standards in occupied territory could have a tremendous effect on the decisions of land owners to sell their property, especially if it appears to be the only means for self-sustainment.

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[9] Obviously the lack of a point of reference for human rights law, comparable to the International Committee's of the Red Cross Customary Law Study on humanitarian law (Henckaerts, J.-M. & Doswald-Beck, L. (2005), *Customary International Humanitarian Law*, (Cambridge: Cambridge University Press, 2005)), is a major impediment for examining such impact.

[10] See also the interesting discourse on the interrelation between such measures and collective penalties and reprisals, at pp. 154-160.

Whether market value was offered is, then, irrelevant. Such cases could be an indirect way to invalidate the prohibition of article 49.6 of Geneva Convention IV.

The author stands also, rightly, critical on those earlier judgments of the Court which considered settlements as a part of the security needs of the occupying army (pp. 242-4), as this would "corrode its civilian status and expose it to lawful attacks as a military objective"- the debate on voluntary human shields is similar. And even if the construction of settlements has not lead at certain instances to violations of the rights to property, any insistence on security reasons as a justification for their existence is potentially dangerous for the life of settlers. As for the emphasis on their non-permanent nature, this appears to be a fallacy: in the long run the settlements will not only be a bargaining chip in the negotiation table, but they also have the potential to affect the final solution.

The treatment of the current status of Gaza is equally interesting. The author concedes that the occupation has not been terminated due to the unity of Gaza and West Bank as a single territory, the range of duties by Israel in accordance with the Oslo Accords and the unilateral claim of Israel that it would send its troops back whenever this is necessary to enhance its security (pp. 277-9). Yet under this peculiar regime, Israel is not able to perform many significant duties of an occupying power and part of its responsibilities have *de facto* passed into the ruling party in Gaza

If one could single out a reason why this book is worth reading is that it provides food for thought and the present review has only selected a fragment of the issues discussed. Regardless if one agrees or disagrees with the solutions advocated, it gives the incentive to search thoroughly on the topics addressed. Overall it constitutes a significant contribution on international legal discourse and due to the expertise of the author it is bound to be an influential manual on the law of belligerent occupation.