

THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION

The customary law of belligerent occupation goes back to the Hague and Geneva Conventions. Recent instances of such occupation include Iraq, the former Yugoslavia, the Congo and Eritrea. But the paradigmatic illustration is the Israeli occupation, lasting for over forty years. There is now case law of the International Court of Justice and other judicial bodies, both international and domestic. There are Security Council resolutions and a vast literature. Still, numerous controversial points remain. How is belligerent occupation defined? How is it started and when is it terminated? What is the interaction with human rights law? Who is protected under belligerent occupation, and what is the scope of the protection? Conversely, to what measures can an Occupying Power lawfully resort when encountering forcible resistance from inhabitants of the occupied territory?

This book examines the legislative, judicial and executive rights of the Occupying Power and its obligations to the civilian population.

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YORAM DINSTEIN



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PREFACE

The present book is designed to serve as a companion to two preceding volumes dealing respectively with the *jus ad bellum* and the *jus in bello*: *War, Aggression and Self-Defence* (4th edn, 2005, CUP) and *The Conduct of Hostilities under the Law of International Armed Conflict* (2004, CUP). The international legal regime of belligerent occupation constitutes a segment of the *jus in bello*, complementing the compendium of norms governing the conduct of hostilities.

The study will address some fundamental quandaries associated with the regime of belligerent occupation, pertaining to the interrelationship between the Occupying Power, the displaced sovereign and the civilian population. But the text will equally deal with more commonplace questions with which this *materia* is riddled. How does belligerent occupation commence; how is it maintained; and how is it terminated? What is the rudimentary distinction between belligerent and other types of occupation? Who are the persons protected under belligerent occupation, and what is the scope of their protection? What is the interaction between the law of belligerent occupation and the law of human rights? What jurisdiction does the Occupying Power wield in the legislative, judicial and executive spheres? What specific legal safeguards are offered to the civilian population under occupation from capital punishment, collective penalties, deportations, detention, compulsory work, destruction or seizure of property, and other measures curtailing ordinary freedoms? Conversely, what measures can an Occupying Power lawfully resort to when encountering forcible resistance – and direct participation in hostilities – by embittered inhabitants of an occupied territory?

There is no intention to cover here issues germane to the following two important themes:

- (a) The treatment of internees in occupied territories, as distinct from the imposition of internment per se. The treatment topic calls for a comparative exegesis of the international legal rules governing the

different categories of civilian detainees in occupied territories; civilian detainees in general (i.e., in non-occupied territories); and prisoners of war. Such a disquisition will not be undertaken here.

- (b) Responsibility for breaches of the law of belligerent occupation and remedial measures, either in the form of the payment of monetary reparations or in that of individual accountability for war crimes, crimes against humanity and genocide. The book will be replete with references to war crimes and to trials of war criminals, but only with a view to confirming the existence of – or shedding light on – the law of belligerent occupation. We shall not go here into the intricate themes of enforcement and implementation of the apposite law.

The discussion will be of relevance to every occupied territory anywhere on this globe. Still, there are some concrete subject-matters (such as settlements or the construction of a security barrier) that are more characteristic of the Arab–Israeli conflict. The Israeli occupation of Arab territories, apart from being in progress (and likely to endure for some time), has a critical significance due to its unprecedented length of more than four decades. Scads of problems have cropped up as a consequence of this prolonged occupation, and the practical experience acquired (for better or worse) has been of incalculable value in assessing the interface between the theory and practice of belligerent occupation.

The author has the benefit of linguistic access to the Judgments of the Supreme Court of Israel, many of which are available only in Hebrew (although they have generally been excerpted in English in the *Israel Yearbook on Human Rights* and, in the more celebrated cases, have been translated in full in other periodicals). The sheer mass of these Judgments, and even more so the compelling issues that they probe, invite serious consideration. Whether one agrees or disagrees with the interpretation of international law offered by the Israel Supreme Court, its Judgments have become nonpareil signposts that no future decision-maker can afford to ignore.

Having said that, it would be a gross mistake to believe that the contemporary phenomenon of belligerent occupation is confined to the Arab–Israeli conflict. The former Yugoslavia, Iraq, the Congo, Eritrea/ Ethiopia and other volatile flashpoints have shown that belligerent occupation is by no means a side issue in the present-day scenery of armed clashes. Public attention may be riveted primarily to the Middle East, yet the legal enigmas – generated by the perennial military impetus to exercise effective control over parts of an adversary's territory in wartime – arise in all

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quarters of the world. This state of affairs is not likely to undergo much change in the years ahead. The notion that belligerent occupation will be rendered obsolete in the foreseeable future is no more than utopian dreaming.

Scholars and students of international law are often engrossed in the unique attributes of belligerent occupation. More pragmatically, belligerent occupation should draw the interest of members of the armed forces who may be called upon to come to grips with the administration of an occupied territory, a task with which (to put it mildly) they are not familiar. The only way to be mentally geared up for this daunting – and often unexpected – challenge is for military personnel to prepare themselves in peacetime for the possible eventuality of belligerent occupation. Officers in particular must be trained for the sort of mission accomplishment that has little in common with ordinary military feats, but is indispensable for a successful and law-abiding government of an occupied territory. It is to be hoped that the present volume will assist in such preparation and training, not only by identifying points of discord but also by suggesting modes of action that can be engaged in without supererogatory controversy.

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ABBREVIATIONS

ADA	Administrative Detention Appeal
<i>AFDI</i>	Annuaire Français de Droit International
<i>AJIL</i>	American Journal of International Law
<i>AYIL</i>	African Yearbook of International Law
<i>BJIL</i>	Berkeley Journal of International Law
<i>BFSP</i>	British and Foreign State Papers
<i>BJIL</i>	Brooklyn Journal of International Law
<i>BYBIL</i>	British Year Book of International Law
CFH	Criminal Further Hearing
<i>CHRLR</i>	Columbia Human Rights Law Review
<i>CLQ</i>	Cornell Law Quarterly
<i>CTS</i>	Consolidated Treaty Series
CWC	Chemical Weapons Convention
<i>CYIL</i>	Canadian Yearbook of International Law
<i>Car.LR</i>	Cardozo Law Review
Civ.A.	Civil Appeal
<i>Col.LR</i>	Columbia Law Review
<i>ECHRJD</i>	Judgments and Decisions of the European Court of Human Rights
<i>EHRR</i>	European Human Rights Reports
<i>EJIL</i>	European Journal of International Law
<i>EPIL</i>	<i>Encyclopedia of Public International Law</i> (R. Bernhardt ed., 1992–2000)
<i>GJIL</i>	Georgia Journal of International Law
<i>GWILR</i>	George Washington International Law Review
<i>GYIL</i>	German Yearbook of International Law
HCJ	High Court of Justice
<i>HILJ</i>	Harvard International Law Journal
<i>HJIL</i>	Heidelberg Journal of International Law
<i>HLR</i>	Harvard Law Review

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<i>IACHRJO</i>	Judgments and Opinions of the Inter-American Court of Human Rights
<i>ICJ Rep.</i>	Reports of the International Court of Justice
<i>ICLQ</i>	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israel Defence Force
IHL	International Humanitarian Law
<i>IJIL</i>	Indian Journal of International Law
<i>ILM</i>	International Legal Materials
<i>ILR</i>	International Law Reports
<i>ILS</i>	International Law Studies
<i>IRRC</i>	International Review of the Red Cross
<i>IYHR</i>	Israel Yearbook on Human Rights
<i>Int.Leg.</i>	<i>International Legislation</i> (M.O. Hudson ed., 1931–50)
<i>Is.LR</i>	Israel Law Review
<i>JCSL</i>	Journal of Conflict and Security Law
<i>JILE</i>	Journal of International Law and Economics
<i>KH</i>	Kovets Hatakanot (Secondary Legislation of the State of Israel [in Hebrew])
LOIAC	Law of International Armed Conflict
<i>LQR</i>	Law Quarterly Review
<i>LRTWC</i>	Law Reports of Trials of War Criminals
<i>LSI</i>	Laws of the State of Israel [in English]
<i>LSR</i>	Law and Society Review
<i>MJIL</i>	Michigan Journal of International Law
<i>MPYUNL</i>	Max Planck Yearbook of United Nations Law
<i>Mich.LR</i>	Michigan Law Review
<i>Mil.LR</i>	Military Law Review
<i>Minn.LR</i>	Minnesota Law Review
<i>NILR</i>	Netherlands International Law Review
<i>NTIR</i>	Nordisk Tidsskrift for International Ret
<i>PD</i>	Piskei Din (Reports of the Israel Supreme Court [in Hebrew])
<i>PG</i>	Palestine Gazette
<i>PSILR</i>	Penn State International Law Review
<i>RBDI</i>	Revue Belge de Droit International
<i>RCADI</i>	Recueil des Cours de l'Académie de Droit International
<i>RGDIP</i>	Revue Générale de Droit International Public