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Review of Eyal Benvenisti, *The International Law of Occupation* (2d ed., Oxford University Press 2012)

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Eyal Benvenisti. *The International Law of Occupation*. Oxford: Oxford University Press, 2nd edn, 2012. Pp. 416. £70. 00. ISBN: 9780199588893.

The first edition of Eyal Benvenisti's *The International Law of Occupation*, published in 1993, was the first thorough treatment of occupation law to appear in English in 30 years. Not since Gerhard van Glahn's volume of 1957 had a scholar comprehensively surveyed this critical area of law.¹ An update was long overdue. The seemingly clear rules of the 1907 Hague Regulations and 1949 Fourth Geneva Convention appeared to be receding in importance, as few states in the post-World War II period acknowledged their status as occupiers; Israel's prolonged occupation of the Palestinian territories challenged the assumption of occupation as a temporary phenomenon; few governments ousted in recent occupations went into exile to await a return to power, thus calling into question occupation law's focus on protecting the prerogatives of the 'de jure regime'; and occupiers had seemingly honoured the 'conservationist principle' – the limitation on an occupier's legislative authority most famously embodied in Article 43 of the Hague Regulations – mostly in the breach. States themselves provided little help in making sense of these and other developments. The discussions of occupation law in the US and UK military manuals, for example, had not been updated since the late 1950s.² With the striking exception of Israel in the Palestinian territories, occupation law appeared to be receding from relevance.

Now Benvenisti has published a second edition, adding almost 150 pages of text and several new chapters covering topics not addressed in the first edition. One is tempted to say that the second edition is even more overdue than the first. If the first edition sought to rescue occupation law from irrelevance, the second edition seeks to make sense of an explosion in state practice, judicial opinions, UN-sponsored activity, emerging cognate doctrines, and scholarly commentary, all of which have placed occupation law at the centre of some of the thorniest (and most politicized) debates in contemporary international law. Occupation law has certainly re-emerged as a first-tier topic for international lawyers, but some of its content borders on the incoherent. The second edition ambitiously seeks to systematize this venerable body of law suddenly embedded in a very different legal era from that of its origin.

One useful way to understand the need for a second edition, and the scope of the task Benvenisti has undertaken, is to set out the major developments in occupation law since the first edition. First and most important is the occupation of Iraq in 2003, to which Benvenisti devotes an entire new chapter. Iraq marked the first time since World War II that states had acknowledged their status as occupying powers and the first time the Security Council had pronounced in detail on their obligations under occupation law. The occupiers made extraordinary use of the legislative authority they granted themselves, reforming virtually every sector of Iraq's politics, law, and economy. The involvement of the UK meant that claims under the European Convention on Human Rights could at least be attempted, and were in several cases partially successful (a development discussed below). In Resolution 1546 the Security Council declared that the occupation would end on 30 June 2004, an exercise of legal fiat seemingly at odds with the factual determination usually thought to control the question whether an occupation continues.³ Of equal importance to these legal aspects of the occupation was the political controversy – and accompanying public scrutiny – that surrounded the Iraq episode. The outpouring of scholarly commentary on the reforms in occupied Iraq is the best evidence of its effect of bringing occupation law to the fore.⁴

¹ G. von Glahn, *The Occupation of Enemy Territory* (1957).

² U.S. Army Field Manual No. 27-10, *The Law of Land Warfare* (1956); British Command of the Army Council, *III Manual of Military Law – The Law of War on Land* (1958).

³ SC Res. 1546 (8 June, 2004).

⁴ See Fox, 'Transformative Occupation and the Unilateralist Impulse', 94 *IRRC* (2012) 237, at 240 n. 15 (collecting citations).

The second development is the rise of norms of democratic government and accompanying notions of how political power may be legitimately exercised. While the nature and scope of the ‘democratic entitlement’⁵ remain controversial, in the early 21st century one cannot argue that international law has remained indifferent to how national governments are selected. References to democracy and free and fair elections permeate a variety of legal regimes and have few evident competitors. For occupation law, traditionally focused on maintaining the political and legal *status quo* in the occupied territories, the idea that democratic transitions might be a desirable or even necessary goal of an interim occupation regime is a revolutionary notion. But nascent democratic norms may point to a different path, casting occupiers as lawful agents of political liberalization. In Benvenisti’s words, the ‘occupant that respects such [human and peoples’] rights and promotes their exercise should therefore not be regarded as violator but, to the contrary, as facilitator of the exercise of rights recognized by international law’ (at 349–350).

The third development is the rise of post-conflict reconstruction missions authorized by the Security Council, the subject of another new chapter. These missions have often engaged in wide-ranging political and legal reforms in the affected territories. In Kosovo, for example, which is the central case study in the new chapter, UNMIK exercised executive, legislative and judicial power, though not very effectively, to tackle ‘[t]he huge task of reconstructing Kosovo’ (at 281). This move to a collective form of intervention (and in some cases territorial administration) raises the question whether the UN missions should be constrained by occupation law. Benvenisti argues that simple fairness requires that they should; while missions like UNMIK were given broad political responsibilities they remained largely unaccountable for their actions. ‘[I]f states are subject to strict legal and institutional constraints with regard to their treatment of their own citizens, on what grounds should a body that exercises state-like functions be exempted from the same constraints in treating *foreign nationals*?’ (at 293).

The fourth development is jurisprudence holding occupiers accountable, under certain circumstances, for violating their human rights treaty obligations. While the extra-territorial application of human rights instruments has emerged from a number of legal sources, including the ICJ, the European Court of Human Rights has led in fashioning a test for whether individuals are subject to the ‘jurisdiction’ of human rights treaty parties that is remarkably similar to that determining the existence of an occupation.⁶ The possibility that occupiers might be obligated to institutionalize human rights guarantees in the legal system of the states they control – in the words of ICCPR, Article 2 to ‘adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant’ – has informed much of the recent literature on occupation law.

Finally, a series of developments have served both to clarify opaque aspects of occupation law and to raise its profile. These include a report of ICRC experts on the state of contemporary occupation law,⁷ a revised version of the UK Military Manual that takes into account the experience of the Iraq occupation,⁸ important scholarship on the origins of occupation law,⁹ several new

⁵ The phrase was coined by Thomas Franck: see Franck, ‘The Emerging Right to Democratic Governance’, 86 *AJIL* (1992) 46.

⁶ See, e.g., App. No. 55721/07, *Al-Skeini et al. v. UK*, Judgment, 7 July 2011.

⁷ International Committee of the Red Cross, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory* (2012).

⁸ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004).

⁹ See, e.g., Benvenisti, ‘The Origins of the Concept of Belligerent Occupation’, 26 *L and History Rev* (2008) 621.

treatises on the subject,¹⁰ and a general outpouring of scholarly commentary on the contemporary meaning of occupation norms.¹¹

Benvenisti addresses this revival of occupation law both by expanding chapters present in the first edition and by adding new chapters. A new introductory chapter reviews the multiplying sources of occupation law, which now include not only the Hague Regulations and Fourth Geneva Convention but norms on human rights, self-determination, use of force, and state responsibility, among others. A new chapter on the historical origins of occupation law draws on Benvenisti's own insightful scholarship on the subject.¹² Here he introduces a theme to be revisited throughout the book: 'the concept of occupation can be seen as the mirror-image of the concept of sovereignty' (at 21). A new chapter on how occupation is to be characterized addresses the spatial scope of occupation, its temporal scope, and the question whether forces other than the armies of other states can occupy a territory. The first edition's chapter on the treaty framework of occupation law has been replaced by a 40-page chapter on how an occupied territory is to be administered. This discussion includes the critical question (addressed further below) of an occupier's obligation to respect the legal *status quo* it finds in a territory.

From these historical and conceptual questions the book moves to a review of case studies. These are models of concise yet intellectually probing analysis. Benvenisti reviews the occupations of World Wars I and II, the latter providing an opportunity to revisit the arguments of Allied international lawyers as to why the reforms in occupied Germany and Japan were not incompatible with Article 43 of the Hague Regulations, which famously requires occupiers to respect the law in place unless 'absolutely prevented' from doing so. A chapter on occupations since the 1970s is updated to include Russia in Georgia, Uganda in the Congo, Turkey in Northern Iraq, and the end of the Indonesian occupation of East Timor. Further case study chapters review the Israeli occupation of the West Bank and Gaza, the US and UK occupation of Iraq, and the UN's administration of Kosovo. These chapters usefully venture well beyond the specifics of each episode and explore critical legal issues they raise. These include the effects of transferring administrative authority over a territory to a local entity (the Oslo Accords), the effect of Security Council authorization to reform legal and political institutions (Resolution 1483 on Iraq), and the susceptibility of non-state actors to regulation by occupation law (UN territorial administrations such as UNMIK). Following these case studies, another new chapter examines the effects of an occupier's actions in the post-occupation period. The analysis seeks to balance, on the one hand, the legitimate expectations of those who rely on changing legal circumstances during an occupation and, on the other, the maxim that no legal consequences should flow from an occupier's illegal acts. A final chapter, updated from the first edition, examines mechanisms to enforce the law of occupation. Much is new here, including a review of decisions of the ICJ, European Court of Human Rights, national courts, and oversight functions taken on by UN bodies.

Given that the first edition effectively predated the entire post-Cold War era, one might have expected Benvenisti to revise his central claim that occupation law has almost never functioned effectively, and certainly not in the manner envisaged by its foundational documents. The occupiers of World Wars I and II committed widespread atrocities and altered life in the territories to suit their political advantage. Occupiers after 1945 were less brutal but still dodged legal obligations by uniformly refusing to recognize their status as occupiers – despite their widespread ratification of the Fourth Geneva Convention. Benvenisti has not revised this claim, and his case for maintaining a continuing critical attitude toward the effectiveness of occupation norms

¹⁰ Y. Dinstein, *The International Law of Belligerent Occupation* (2009); Y. Arai-Takahashi, *The Law of Occupation* (2009).

¹¹ See Fox, *supra* note 3.

¹² Benvenisti, *supra* note 8.

remains a strong one: '[u]sing sophisticated and unsophisticated claims, most recent occupants avoided the acknowledgement that their presence on foreign soil was in fact an occupation . . . Careful analysis reveals that in all of the recent cases of occupation, except for the Israeli control over the West Bank (not including East Jerusalem) and Gaza, and Iraq (2003–04) the framework of the law of occupation was not followed even on a *de facto* basis' (at 201–202). Indeed, the Palestine and Iraq occupations stand as the only examples since World War II where occupiers have 'established a distinct military government over occupied areas under the framework of the law of occupation' (at 203).

But the arguable marginalization of occupation law is a much more complex phenomenon in Benvenisti's telling than simple law-breaking or law avoidance. As noted, Benvenisti links changes in occupation law to evolving notions of sovereignty: 'changes in the identity of the sovereign (the prince or the people) and its authority (unfettered discretion or subject to human rights limitations) indirectly led to changes in the law of occupation' (at 348). The evolution of occupation law thus cannot be separated from changes in norms limiting or reconceiving the legitimate exercise of political authority. One important example, which Benvenisti addresses at several points in the book, is the debate over humanitarian intervention. While formally a *jus in bello* question, the ability of an occupier to change the human rights practices of an ousted regime is necessarily linked to its *jus ad bellum* authority to use force to that end. '[W]here the existing political system cannot guarantee protection against governmental persecution and harsh abuses of human rights, the occupant may modify existing laws and institutions for humanitarian goals. The idea that under certain circumstances a genuine humanitarian intervention could effect, if necessary institutional or even territorial changes in the occupied territory is consistent with that claim' (at 191). Similarly, where an occupied population is entitled to self-determination the occupier necessarily becomes a party to the realization of that right. '[T]he intervening state, upon assuming control in the foreign territory, would face the choice between confirming to the laws of the ousted, repressive regime, or assisting the people it freed to exercise their right to self-determination' (at 198). Benvenisti suggests that where the right to self-determination is external, an occupier would not act unlawfully if it facilitated the territory's secession (at 198–199). If the relationship between states and their citizens is a constantly evolving set of principles, then one would certainly expect the relationship between citizens and a *de facto* regime that temporarily assumes control of a state to evolve as well.

This brings us to the central debate in contemporary occupation law and the single issue to which Benvenisti devotes most attention: the scope of an occupier's legislative authority. The occupation of Iraq is often described as 'transformative', and many have argued since 2003 that occupiers have developed the right, and perhaps the duty, to reform laws in the territory that fall short of international standards. This is particularly true where human rights are concerned. Many such commentators draw inspiration from the growing number of UN-authorized post-conflict reconstruction missions, which in many ways resemble occupations and have uniformly pursued liberal democratic reforms.

Article 43 of the Hague Regulations, in securing the legal *status quo* unless an occupier is 'absolutely prevented' from respecting the laws in force, conceived of the occupier as a *de facto* trustee with limited capacity to assume the law-making powers of the ousted *de jure* sovereign. But Benvenisti notes that occupation law has almost never viewed preserving the rights of the ousted regime as the sole interest to be served. From the beginning, three conflicting sets of interests have been present: those of the occupier in maintaining security, those of the ousted regime in securing the legal *status quo ante bellum* pending its return, and those of the local population (at 69). But even as the Hague Regulations were being drafted, the idea of the occupier as an impartial trustee was coming under pressure that would only increase over time. The rise of the modern welfare state inserted governments into national economic life. A heightened awareness of civil liberties, while slow in coming, both restrained the coercive measures available to

occupiers and required them to serve, in certain circumstances, as affirmative guardians of protected rights. And ousted regimes increasingly remained ousted at war's end, rendering protection of their interests somewhat pointless. Benvenisti notes that by the time of the Fourth Geneva Convention, the law had rather clearly changed its 'emphasis from the political interests of the ousted regime to the protection of the population in the enemy's hands' (at 72).

Benvenisti is unconcerned that these trends may fall foul of Article 43's 'unless absolutely prevented' dictum; that requirement, he argues, 'has no meaning of its own, since the occupant is almost never absolutely prevented, in the technical sense, from respecting them [existing laws]. This phrase becomes meaningful only when it is linked to the considerations that the occupants are entitled or required to weigh while contemplating the desirability of change *vis-à-vis* the interest in stability and respect for the status quo' (at 90). These 'considerations' are now substantial, drawing normative strength from the omnipresence of human rights in all areas of international law and the rise of notions of popular sovereignty. Thus, Benvenisti finds 'an obligation not to enforce local norms that are incompatible with the obligations to protect the human rights of the occupied population' (at 92). Even wholesale regime change to create democratic institutions can be proper, as he suggests was true in the case of the US intervention in Panama (at 184). Such changes can be formally justified under Article 43 as measures necessary to restore 'public order and safety'. But for Benvenisti the real touchstone is approval by the local population, which in an age of liberal democratic ascendance can effectively validate sweeping legislative reforms:

There can equally be situations where the ousted government has lost its right to revert to its prior possessions due to its own illegal policies toward the inhabitants of the occupied territory. The advent of human and people's rights has also modified that side of the sovereign-to-sovereign equation that has informed the law of occupation. The occupant that respects such rights and promotes their exercise should therefore not be regarded as a violator but, to the contrary, as facilitator of the exercise of rights recognized by international law. Because of the inherent suspicion of [an] occupant's intention, the legal validity of the arrangements it facilitated will depend on indigenous endorsement through free and fair processes [at 349–350].

Thus, while US-led regime change in Grenada in 1983 'constituted an infringement of the law of occupation', that violation was 'healed by the democratic process that took place on the island through which the public could express its endorsement of the new political system' (at 183). The transformative occupation of Iraq was deficient mainly because of insufficient popular consultation (at 272–273). Further, if popularly endorsed liberal reforms are legitimate for the duration of the occupation, they are also legitimate for the post-occupation period. The obligation to ensure public order 'also includes the duty to ensure that public order and civil life do not crumble once the occupant has left' (at 274).

None of this is to suggest that Benvenisti possesses a blind faith in the humanity of occupiers. International law should assume that 'an occupant which is left without external supervision would tend to advance its own interests, even at the expense of the interests of the occupied population' (at 318). Thus, 'a healthy suspicion in the occupant's motives should always inform a review of its policies' (at 349). The human rights protections of the Fourth Geneva Convention would proscribe an occupier's repressive acts. Benvenisti's carefully calibrated expansion of legislative authority is presumably meant to address a 'transformative' occupier that purports to advance individual rights and the rule of law.

Viewing occupation as, in part, an opportunity to promote liberal democratic governance is certainly in keeping with many trends in contemporary international law. But it runs counter to another: the multilateralization of all aspects of armed conflict, especially the post-conflict phase. Since the early 1990s the Security Council has authorized an extraordinary series of

missions to states emerging from (mostly) civil wars, missions that share much of the reformist ethos of transformative occupations. Benvenisti carefully reviews this record, focusing, as noted, on Kosovo where the Council issued perhaps its most far-reaching authorization for social change. If an opportunity exists to advance human rights, democratic governance, and the rule of law multilaterally, why expand opportunities to do so unilaterally by expanding the prerogatives of state occupiers? Armed with this authority, what incentive would an intervening state then have to seek Security Council approval for its transformative agenda?

More generally, if certain occupiers may acquire much of a *de jure* sovereign's legislative power, what separates occupation so-conceived from annexation? Benvenisti would surely reply that the line between those two ideas becomes a pointless formalism if, as he advocates, reform during an occupation is designed with substantial local input and then ratified in free and fair elections. 'Sovereignty' is now increasingly an idea of power vested in citizens, and it is their voice that would inform the legislative acts of occupiers and the government of a post-occupation state. No residual 'sovereign prerogatives' would be usurped in such a scenario.

This may well be the direction in which occupation law is headed, though apart from Iraq it is difficult to find cases in which unilateral occupiers have pursued liberal democratic transformations that are even nominally vetted with the local population. And perhaps the high bar Benvenisti sets for legitimate transformation would disqualify the acts of most reform-minded occupiers, thus leaving Council authorization under Chapter VII of the Charter the only possible option. But if, to paraphrase Richard Nixon, we are all democrats now, surely most occupiers will announce their intention to promote human rights and popular sovereignty – whether sincerely or not – as soon as they attain effective control of a territory. At that point, international law can either insist that they seek Security Council authorization despite their stated good intentions, or it can wait to see if they make good on their promises. A strong version of the conservationist principle would promote the former course. If that is no longer the law, as Benvenisti suggests, one hopes the latter course will turn out for the best.

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Anthony Cullen. ***The Concept of Non-International Armed Conflict in International Humanitarian Law***. Cambridge: Cambridge University Press, 2010. Pp. 219. £62.00. ISBN: 9780521760485.

The objective of Anthony Cullen's work is to 'remedy some of the confusion that exists surrounding distinctions that are used to differentiate between different types of non-international armed conflict' (at 3). He works towards developing a framework for the characterization of armed conflicts. The author is a research fellow at the Lauterpacht Centre for International Law and is participating in the joint British Red Cross and International Committee of the Red Cross project to update the collection of practice underlying the ICRC's study on Customary International Humanitarian Law.¹

Application of humanitarian law to non-international armed conflict is a timely subject in the present political context. One needs only to point to discussions about the so-called global war on

¹ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 2 Vols. (2009).