

Andrea Carcano. *L'occupazione dell'Iraq nel diritto internazionale*. Milano: Giuffr  Editore, 2009. Pp. XII-362.  38. ISBN: 9788814146350.

The renewed interest in the law of belligerent occupation probably reached its peak in 2009, when various monographs were published by distinguished authors as well as by younger scholars. The book under review originated from a doctoral thesis defended by Andrea Carcano at the University of Milan. His investigation focuses on the 2003 occupation of Iraq as the ideal test-case to verify whether the existing legal regime is adequate to address the challenges posed by present-day scenarios, including Afghanistan, Congo, and the Arab–Israeli conflict.

The book is divided into three parts. The first one comprises two chapters, which present respectively the legal framework of belligerent occupation and the other applicable norms of international law. Chapter I takes a historical perspective on the legal concept of occupation, which the author considers functional to the subsequent analysis for two main reasons: to investigate the underlying values guiding the development of the law of belligerent occupation; and to compare current theories regarding the role of the law in such a situation with similar arguments upheld in the past (at 13). Carcano identifies three epochs, which modelled different concepts of occupation. The first one is valid until the Modern Age and is influenced by the Roman law tradition: occupation is considered as ‘conquest and exploitation of the territory’. The modern notion of occupation, defined as ‘administration and effective control’, emerged during the 18th century, at the time of the consolidation of sovereign states in Europe. Whereas Vattel had already in theory identified the differentiation between sovereignty and private ownership, it was August Heffter, a century later, who first recognized the legal implications of the distinction between *occupatio bellica* and *debellatio* (at 24). Finally, the last model is that of the occupation as ‘transformation’: Carcano identifies it as ‘a military action aimed at the radical transformation of the political, social and/or economic order of the occupied territory’ (at 40). The Russian action in Bulgaria against the Ottoman Empire (1877–1878) is deemed one of the first examples of this category. The evolution traced in the first part of Chapter I is reflected within the process of codification of the law of belligerent occupation, from the Lieber code to the 1977 Additional Protocol I (at 47–71), which progressively aimed at protecting the legitimate sovereign, on the one hand, and alleviating the sufferings of the civilian population, on the other (at 69). The reference in this context to the UK occupation of Mesopotamia in 1914 offers an interesting insight into previous events in the same geographical area.

Chapter II gathers all the other norms of international law which are potentially relevant in a situation of belligerent occupation. It deals with three different issues: the legality of an occupation from a *jus ad bellum* perspective (at 76–83); the application of human rights norms (at 83–102), with a focus on the right to self-determination (at 102–107); the role of both General Assembly recommendations and Security Council decisions (at 107–113). As for the issue of the interaction between human rights and humanitarian law, the book individuates the criterion of complementarity and its relationship with the *lex specialis* rule (at 101). The analysis of concrete situations under the occupation of Iraq could have offered a more valuable perspective on the dynamics between the two branches of law in terms of convergence/divergence. As for the extraterritorial application of human rights law, one would have expected more emphasis on the *Al-Skeini* case before the House of Lords.

Chapter III (at 116) opens the second part of the book, addressing specifically the occupation of Iraq. Carcano explains the legal and factual reasons why the situation in the country after March 2003 could not be qualified as *debellatio*; he then assesses the existence of a belligerent occupation, on the basis of the criteria identified by Article 42 of the 1907 Hague Regulations. In his view, within the second half of April 2003, the states which had instituted the CPA (Coalition Provisional Authority), i.e., the US and the UK, were occupying powers in Iraq (at 132). The importance

of the commencement is made clear in the subsequent paragraph, which deals with the status and the obligations of the Coalition Force in Baghdad during the looting of 9–12 April 2003. The conclusion is that the US was already the occupying power in Baghdad at that time, though it is not clear whether the American forces were bound by Article 4(3) of the 1954 Hague Convention for the protection of cultural property in the event of armed conflict as a norm of customary law.

The chapter then focuses on the content of Resolution 1483 (2003). As regards the question whether the Security Council introduced express or implicit derogations from the law of belligerent occupation, one may infer from the author's analysis (at 151–159) that his answer is in the affirmative. The mandate entrusted to the CPA is then compared with the tasks provided by Regulation No. 1, adopted by the CPA the previous week. Finally, a paragraph is devoted to the legal framework for the exploitation of Iraqi oil.

Assuming that Resolution 1483 simply took into account the existing factual situation in Iraq and could not be interpreted in such a way as to legalize *ex post facto* the invasion and the occupation (at 163), Carcano nevertheless discusses the problem of the validity of the resolution itself, from the perspective of its compliance with *jus cogens* norms. He argues, first, that while Resolution 1483 might have derogated from a norm of IHL (i.e., Article 43 of the Hague Regulations), such norm does not possess peremptory character (at 167). Then, he makes the point that Resolution 1483 *per se* did not violate the right of the Iraqi people to self-determination: the Security Council, in the exercise of its primary responsibility under Article 24 of the UN Charter, could determine the steps towards the progressive enjoyment of the right to self-determination, in order to define an adequate balance with the aim of the maintenance of international peace and security (at 183–187); in his view, it is problematic how the CPA interpreted and implemented its mandate, because of the ambiguities of certain generic provisions in Resolution 1483. This is the content of Chapter IV, which is aimed at assessing the normative activity of the CPA as a tool for the transformation of Iraq.

The chapter contains a well-informed account of the initiatives taken by the CPA on the basis of Resolutions 1483 and 1511: the process of de-Baathification of Iraqi society; the measures 'to restore conditions of security and stability'; the administration and the reform of the judicial system; the administration and control of the detention centres; the transformation of the economic system; finally, the political and constitutional reforms. The main steps of this last process are identified. The point is made that Resolution 1511 marked a departure from the previous approach taken by the Security Council in Resolution 1483 (at 240); its involvement and active support for the political project carried out by the CPA is deemed problematic, particularly from the perspective of the right to self-determination of the Iraqi people (at 246). The author significantly stresses that the shaping of the political and constitutional future of Iraq resembled more a process of external determination.

Furthermore, Carcano argues that the activism of the CPA in the period May 2003–June 2004 went beyond both the mandate conferred on it by the Security Council and the obligations deriving from the law of belligerent occupation (at 276–280). Finally, he wonders whether the transformative project of Iraq could be considered legitimate in light of the previous cases of Germany and Japan, but concludes that such a comparison makes little sense, because the historical and normative context at that time was completely different.

The account of the events between 2003 and 2004 in Chapter IV is certainly accurate, though in some paragraphs the normative initiatives taken by the CPA are not adequately checked against the background of the key provisions of the law on belligerent occupation, especially Article 64 of the Fourth Geneva Convention. This is the case, for instance, in the analysis devoted to the reform of the judicial system, including the establishment of the Iraqi Special Tribunal.

Carcano's last main theme is the end of the CPA and the status of the Multilateral Force after the adoption of Resolution 1546. In Chapter V, the author concludes that the

occupation of Iraq did not terminate by the end of June 2004, since the adoption of the resolution did not constitute a decisive factor. On the basis of the content of Resolution 1546, the author defines the role and status of the Multinational Force in its relationship with the Interim Government, the UN Assistance Mission in Iraq, and, finally, the Iraqi people (at 298 ff). He observes that, although an invited force, the Multinational Force operated from a position of substantial independence from the Interim Government at that time. Moreover, the mandate of the Multinational Force and the length of its stay in Iraq depended on the will of the Security Council. In particular, he questions the validity of the invitation, because the Interim Government lacked internal sovereignty in terms of both independence and effective control and had not been able to gain significant legitimacy from the Iraqi people during the period (at 324–325). In the author's view, the situation changed after 7 April 2005, the last day of the Interim Government. The subsequent governments of both Jaafari and Maliki, due to the fact that they had been chosen by the Iraqi people, were 'sufficiently sovereign to legitimately invite the Multinational Force', which could no longer be considered an occupying power (at 329). IHL remained applicable given the existence of a conflict with the insurgents, but Carcano concludes that the presence of the Multinational Force, notwithstanding the limited sovereignty of the Iraqi governments, could not be qualified as a case of 'indirect occupation'.

The last part of the book comprises Chapter VI, which offers a series of concluding remarks on the role of the law applicable to an occupation in light of the Iraqi case. The author reaffirms the transformative nature of the occupation of Iraq, characterized by the innovative role of the Security Council. He stresses the controversial nature of the acts adopted by the Council after Resolution 1483, in particular as regards the realization of the right to self-determination of the Iraqi people. He makes the point that the Security Council should reconsider its role in similar future situations, in order to avoid incoherence between what it foretells and what it then authorizes or actually does (at 355).

The book testifies to the continuing interest of Italian scholarship in the law of belligerent occupation. It provides a useful contribution to the reconstruction of the Iraqi crisis between 2003 and 2005. The core of the investigation is the discussion of the normative powers of the CPA, but other questions remain unanswered. For instance, one would have expected the author to pay more attention to the issue of the hostilities in the occupied territory, i.e., the legal qualification of the acts of violence carried out by insurgent groups. Moreover, given the book's audience, it lacks a discussion of the legal regime applicable to the other troops present in Iraq, such as the Italian contingent which was deployed under the '*Antica Babilonia*' operation from July 2003.

It goes without saying that Carcano could not find a more delicate moment to publish his monograph: taking a definitive position on the long-term questions arising from such a controversial topic is no doubt a hard task. In addition, though aware of the publication of other relevant studies on the same subject in 2009, including the books by Dinstein<sup>1</sup> and Kolb and Vitè<sup>2</sup> (at 7), he unfortunately did not manage to take them into account throughout his analysis.

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<sup>1</sup> Y. Dinstein, *The International Law of Belligerent Occupation* (2009).

<sup>2</sup> R. Kolb and S. Vitè, *Le droit de l'occupation militaire: Perspectives historiques et enjeux juridiques actuels* (2009).