The Occupation of Iraq: A Reassessment

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I. Introduction

The invasion and subsequent occupation of Iraq in 2003 provided a rare opportunity to examine the viability in the twenty-first century of a legal doctrine rooted in the military and political circumstances of the nineteenth century. The rarity of this opportunity is not a result of paucity of occupations, but of the prevalent disinclination of occupants to recognize their status as such. This article reflects on several key questions concerning the occupation of Iraq, not in an attempt to evaluate the occupants for their compliance with the law, but rather to study contemporary challenges to the law and possibilities for adaptations in the twenty-first century. The article addresses the beginning and end of the occupation in Iraq and potential pre- and post-occupation responsibilities (Part II), and examines the scope of authority of the occupants and of the UN Security Council in Iraq (Part III). Part IV concludes.

II. The Time Frame of the Occupation in Iraq

The Beginning: When Was Iraq Occupied?

Background: When Does Occupation Begin?

This seemingly straightforward question has proven to be quite complex. It has always been complex, but for different reasons. In the nineteenth century, the

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concern was that eager invaders would declare an area occupied prematurely. Because the law of occupation granted occupants control over key strategic resources, such as public property, invaders might be tempted to assert authority without actually controlling the area.³ But over the years, and most notably since the adoption of Geneva Convention IV, which imposed on occupants extended obligations over civilians in occupied territories, and several human rights conventions that added to those obligations, occupants found little interest in asserting their status as occupants. The derogatory connotation that the term “occupation” has gained, particularly during the second half of the twentieth century, added to this reluctance. Moreover, the asymmetric nature of many of the recent conflicts has provided another incentive for the occupant to act through intermediaries or otherwise minimize its contact with particularly violent indigenous communities. Therefore, while the drafters of the original text on occupation law were concerned about overly assertive occupants, today’s interpreters have to deal with occupants who try to evade this designation. With contemporary technology and weaponry that enables certain armies to control an area from a distance, a new challenge to the definition emerges.

Given the occupants’ increasing ability and prevailing interest to control an area but not its population, it is important to note that the governing legal definitions seek to preclude this option and insist on the protection of individuals. The Hague Regulations emphasize the territorial test,⁴ implying that whoever controls the territory has responsibility over the population, while Geneva Convention IV does not attempt a territorial definition, instead emphasizing the relations between the occupant and the “protected persons” who “find themselves . . . in the hands” of an occupying power⁵ as the relevant test.

Some confusion, however, arises from the second sentence of Article 42 of the Hague Regulations, which stipulates that “[t]he occupation extends only to the territory where such authority has been established and can be exercised.” This addition can at first sight be interpreted as suggesting that an occupant that manages to control only the land, but does not actually exercise authority over the civilian population, is freed from responsibility toward it. This reading is plainly wrong. It is wrong because the text was intended to exclude premature occupations, rather than to allow occupants to evade their responsibilities.⁶ It is wrong also literally, because the reference in “such authority” is to the first sentence of the article, which discusses authority over territory, not over the population in the territory.⁷ Finally, it is wrong because it lets occupants off the hook of responsibility toward the population. The better interpretation of the test for occupation therefore stipulates that occupation begins when the foreign army is in actual control over enemy territory, and is in a position to establish, if it so wishes, an authority of its own over the population. It is
irrelevant whether or not the army actually does so. By assuming control over the land the occupant assumes responsibility over the population situated on that land.8

The same confusion is reflected in some States’ military manuals. Whereas the German military manual accurately requires merely a potential to actually exercise authority,9 the US military manual insists that the test for occupation is that the “invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.”10 To add confusion, the British manual apparently contains an internal contradiction, as it appears to support both views. On the one hand, it stipulates that “the occupying power [must be] in a position to substitute its own authority for that of the former government” (paragraph 13.3), but later it indicates that occupation “depends on whether authority is actually being exercised over the civilian population.”11 In this confusing mist, the International Court of Justice (ICJ) adopted the “actual authority” test in the Armed Activities case.12 Except for one district, where actual authority had been established and hence was regarded by the Court as occupied, the ICJ accepted Uganda’s argument that in other areas it controlled only land, not people, and therefore did not “occupy” them.13 In other words, in the ICJ’s view, only direct authority over a population amounts to occupation. This is an unfortunate outcome.14 It is unfortunate from the perspective of the local population, which is left with no accountable government in charge. It is also unfortunate from the perspective of neighboring States that are weary of geographical areas left without responsible State authority. An invader that is unaccountable for what transpires in an area it dominates is likely not to internalize the dangers emanating from the invaded territory, and, as a result, that area may become a source of regional, if not global, instability.

The Occupation of Iraq by the United States and the United Kingdom

It is quite obvious that the initial planning for the invasion of Iraq did not include plans to establish military administration whose authority would derive from the law of occupation. Months before the invasion, which began on March 20, 2003, officials in the US administration had been divided on the applicability of the law of occupation. While some of them believed it was appropriate, others viewed the situation not as occupation, but as mere “liberation.”15 Even after parts of Iraq had already been occupied and Baghdad was falling, President Bush and Prime Minister Blair emphasized this liberating role of their coalition and envisioned “the formation of an Iraqi Interim Authority, a transitional administration, run by Iraqis, until a permanent government is established by the people of Iraq.”16 Military officials still refused to speak of occupation in the legal, rather than colloquial, sense, and maintained that “occupation” in the legal sense required taking over an area “with the intent to run the government in that area,”17 which, at the time, was
not the case for the coalition forces in Iraq. But British jurists had a different view from the start. In a secret memorandum from late March, the British Attorney General, Lord Goldsmith, wrote that the United States and the United Kingdom would be bound by the law of occupation, unless the Security Council passed a specific resolution.18

These differences of opinion were reflected in a gradually changing attitude on the ground. The initial institution entrusted with administering occupied Iraqi territory was the US Office for Reconstruction and Humanitarian Assistance (ORHA), established two months before the ground invasion.19 During the initial phase of the occupation, despite a late March Security Council resolution that had reminded coalition forces of an occupying power's responsibilities,20 the coalition forces made efforts to set up an indigenous Iraqi regime. On April 15, Coalition officials held a meeting with Iraqi representatives in Nasiriyah, in which a thirteen-point statement on the political future of Iraq was adopted.21 Together with a subsequent meeting, which took place on April 28 in Baghdad, these were part of “initial moves towards the establishment of a national conference, which could set up an interim authority and make progress towards constitutional change and the election of a new government.”22 But on April 16, only one day after the Nasiriyah meeting, without an explanation or a formal document setting it up,23 the head of the ORHA announced the establishment of the Coalition Provisional Authority (CPA). Another three weeks passed until on May 8 the UK and US representatives to the UN sent a letter recognizing their obligations under the Hague Regulations and Geneva Convention IV.24 L. Paul Bremer was appointed the US presidential envoy to Iraq on May 6 and the CPA Administrator on May 13.

The legal situation crystallized during the month of May as the occupying powers began seeking to establish their own government instead of setting up an interim Iraqi government. To do so they had to rely on authority under international law. While they did not explicitly acknowledge their status as occupiers, they impliedly acknowledged the applicability of the Hague Regulations and Geneva Convention IV to their actions in Iraq. Explicit recognition of occupation law came later, when the British Foreign and Commonwealth Office relied on it expressly,25 as did American legal advisors stationed in Iraq.26

Security Council Resolution 1483, of May 23, 2003, clarified the legal status of Iraq at the time. The Resolution “noted” the May 8 letter of the UK and US representatives, but continued to “recogniz[e] the specific authorities, responsibilities, and obligations under applicable international law of these States as occupying powers under unified command” (emphasis added).27 The Resolution further “[c]all[ed] upon all concerned to comply fully with their obligations under
international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.\textsuperscript{28}

But this was not meant to be a casebook example of occupation, because the occupiers sought a broad Security Council mandate that went beyond the scope of authority recognized by international law.\textsuperscript{29} The UN’s role was meant to widen the authority of the CPA, while being instrumental—but without formal authority—in offering humanitarian relief and assistance to the CPA in the reconstruction of Iraq and the establishment of institutions for representative governance.\textsuperscript{30}

Pre-occupation Responsibilities?
The traditional reading of the laws of armed conflict distinguishes between the hostilities and the post-hostilities phases. This distinction is also reflected in the different sections of the Hague Regulations. However, such a neat distinction can be questioned. As Dinstein notes, “it is impossible to pinpoint an instant marking transition from an extended foray to a fledgling belligerent occupation.”\textsuperscript{31} Instead, it is possible to recognize the simultaneous applicability of both \textit{in bello} and \textit{post bellum} norms with respect to the obligations an enemy army has toward the local population.\textsuperscript{32} Although it is beyond the scope of this article to explore this question in depth,\textsuperscript{33} it can be noted that the obligations toward the population in enemy territory arise even before the establishment of firm control over territory and population. Given contemporary technology and weaponry, on the one hand, and the proliferation of weak or failing indigenous regimes, on the other, the neat allocation of responsibilities between occupant and occupied based on physical control of territory (“boots on the ground”) does not serve humanitarian and global interests. It is necessary to impose legal restraints on any foreign power that effectively controls activity in a foreign area, even without having actual presence in the territory in the ancient form of full-fledged military administration. There is thus a need to redefine the rules of allocating responsibilities. The most sensible one would seem to be a rule that interprets authority as “power” (rather than “control” or “jurisdiction”), to be determined based on the consequences of the actual exercise of power in a given territory. A State that exercises its power in a foreign ungoverned or partly governed land will thus be regarded as bearing at least the basic obligations borne by an occupant.

This implies that pre-occupation obligations toward the local population need to be recognized, and they can derive, \textit{inter alia}, from the obligations under Geneva Convention IV toward people who “find themselves ... in the hands” of the invading army.\textsuperscript{34} It would be ridiculous to suggest, for example, that Article 49 of that Convention, which proscribes deportations of enemy civilians, would be inapplicable unless the area has been occupied.\textsuperscript{35} Similarly senseless would be the
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interpretation that only armies that actually substitute for the ousted government in a foreign territory are required to provide food and shelter to persons protected by Geneva Convention IV.

In the context of Iraq such questions were pertinent also to the failure to protect against looting. As in previous situations of invasions (e.g., Panama in 1989), widespread looting followed the invasion and occupation of Iraq. On April 10, 2003, only one day after the fall of Baghdad to coalition forces, looting was already in progress. But in Iraq the looting affected also art treasures and important archaeological artifacts. The National Museum in Baghdad, for instance, lost around 15,000 artifacts. Note that the Hague Convention on Cultural Property (1954) obliges State parties “to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties.” The Convention formally amplifies these duties during occupation, but they arguably apply also before the occupation stage.

The End of Occupation

When Does Occupation Cease?
The occupation ends whenever the conditions of Article 42 of the Hague Regulations are no longer fulfilled. Under the test of actual control, an occupation ends when the occupant no longer exercises its authority in the occupied territory. Under the test of potential control, the occupation ends when the occupant is no longer capable of exercising its authority. It is generally accepted that occupation continues as long as the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied area.

In other words, an occupation ends as a result of the armed return of the ousted government, an indigenous uprising or a unilateral occupant withdrawal or as part of a peace agreement. The “legal oddity” that is Article 6(3) of Geneva Convention IV does not affect the end of occupation. Although it stipulates that “the application of the present Convention shall cease one year after the general close of military operations,” it does not regard the area as no longer occupied, and considers the occupant as bound by significant portions of the Convention, as well as the Hague Regulations.

A rather problematic question arises when the occupant transfers authority to an indigenous government that has no link to the ousted government. The law looks at such transfers with suspicion, because the concern is that the indigenous government might not be representative of the indigenous population and might be nothing but a puppet regime of the occupant. It is also worried about the commitment of the indigenous regime to respect the rights of the occupied
This is the challenge of what Roberts calls “transformative occupations,” namely “occupations [that] aim at establishing a political order based on the principle of self-government.” In such occupations,

determining at what point one can say that the transformation has been achieved, and the government of the occupied territory is in a position to exercise the powers of sovereignty, is genuinely difficult. . . . Where what is involved is a gradual transfer of powers to the indigenous authorities as their capacity to govern is built up, there is bound to be an arbitrary element in fixing on a single date as the symbolic ending of the occupation.

Based on policy reasons and State practice, it can be said that “[t]he ultimate test for the legality of a regime installed by an occupant, is its approval in internationally monitored general elections, carried out without undue delay.”

The End of Occupation in Iraq

Although occupation is a matter of fact, its legal status can be subject to the determination of the Security Council acting under Chapter VII of the Charter as the ultimate arbiter of the law. Therefore, since Security Council Resolution 1546 stipulated that “by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty,” in the eyes of the law the occupation formally came to a close by June 30 despite the fact that the coalition forces were still exercising administrative authority in certain areas of Iraq.

The discrepancy between the UN declaration on the reassertion of full Iraqi sovereignty and the actual state of affairs derives from the fact that at that point in time the fledgling Iraqi government was the construct of the occupation authority and was yet to be endorsed by a valid act of self-determination. Such an endorsement, which ended the occupation not only from the formal perspective, occurred only after the interim government of Iraq assumed full authority.

Post-occupation Responsibilities?

If occupants may have pre-occupation responsibilities, they may be equally subject to post-occupation responsibilities to the extent that they continue to exert authority in the foreign territory. The previous occupant could also be responsible for ameliorating conditions it created in the previously occupied territory.

Traditionally, in post-occupation situations, when former occupants were requested by the newly installed governments to maintain some authority, such authority was deemed to derive from the sovereigns’ authorization, and hence was beyond the scope of the law of occupation. But this traditional view could be
revisited. There may be sufficient ground to argue that even while exercising author-
ity on the behest of an indigenous government, the entity that acts must comply with the international obligations to which it is bound. This is likely to be the case under international human rights law when the actor exercises authority over individuals who are under its control. This is also the case under international humanitar-
ian law that stipulates minimal standards of treatment under the national law of several countries.

Such a view seems to find support in two recent judgments, related to the British occupation and post-occupation practices in Iraq. In the Al-Jedda case, the House of Lords ruled that even if the United Kingdom had been operating in Iraq on the UN’s behalf (i.e., not as an occupant), it was still subject to its human rights obligations to the extent possible. As Lord Bingham noted, the United Kingdom could detain persons as authorized by the Security Council, “but must ensure that the detainee’s rights . . . are not infringed to any greater extent than is inherent in such detention.” The same logic could apply to the post-occupation forces present in Iraq. More recently, the United Kingdom maintained that after the end of formal occupation, the British Army was merely an “executor” of decisions of Iraqi courts. Since prisoners were detained and transferred by the United Kingdom at the request of the Iraqi courts, the United Kingdom argued it did not exercise “any recognised extra-territorial authority.” The European Court of Human Rights (ECtHR), however, refused to regard that relationship between the British and the Iraqi government as one that excludes the applicability of the European Convention on Human Rights (ECHR) and the Court’s jurisdiction. The gist of the idea is simple and convincing: acting under instructions of others cannot and does not relieve one of one’s international obligations.

III. The Authority of the Occupants in Iraq

The Transformative Nature of the Occupation

Aiming to create a market-based democratic Iraq, the occupying powers introduced major administrative and legislative changes. These changes related not only to public order and security, to the “de-Ba’athification of Iraqi society,” the overhauling of Iraqi criminal law and the judicial system, but also to areas often untouched during occupation, such as trade law, company law, securities law, bankruptcy law, and even intellectual property and copyright laws. The reasons usually given for these reforms were the need to promote human rights, efficiency, modernization and compliance with international standards. Because these reasons sometimes deviate from the traditional law of occupation, scholars referred to the occupation as "transformative." This section reviews some of the
more controversial changes introduced by the CPA. The subsequent section evaluates their compatibility with international law.

Among the many reforms taken by the occupants, it was the economic legislation that attracted the most criticism. Was it lawful, appropriate and needed to replace “all existing foreign investment law,” to rewrite securities law almost completely, to suspend all customs duties and tariffs, and to profoundly change corporation law in a way that allows foreign citizens to acquire membership in companies? The CPA sought to explain the motivation of these and other sweeping economic reforms by emphasizing indigenous endorsement. A key player in this indigenous participation was the Iraqi Governing Council, a “principal bod[y] of the Iraqi interim administration” established by the CPA on July 13, 2003. The CPA emphasized that it “worked closely with the Governing Council to ensure that economic change occurs in a manner acceptable to the people of Iraq,” and reiterated that the change was made “[i]n close consultation with and acting in coordination with the Governing Council.” In fact, the CPA attributed the foreign investment initiative to “the Governing Council’s desire to bring about significant change to the Iraqi economic system.”

The CPA also relied on the UN authorization as an independent source of authority. Practically all orders issued by the CPA contained a preambular paragraph stressing their consistency with the laws and usages of war, as well as with the relevant Security Council resolutions. The CPA additionally relied on the report of the Secretary-General, which concerned “the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth,” and often emphasized that it had “coordinated with the international financial institutions, as referenced in . . . U.N. Security Council Resolution 1483.”

Moreover, great efforts were made to show how the reforms would benefit Iraqi society. For example, the goal of foreign investment reforms was to “improve the conditions of life, technical skills, and opportunities for all Iraqis and to fight unemployment with its associated deleterious effect on public security.” The CPA saw itself obligated to “ensure the well being of the Iraqi people and to enable the social functions and normal transactions of every day [sic] life.”

The CPA didn’t stop there. Economic modernity, fairness, efficiency, transparency, predictability and independence were invoked as justifications for several reforms. Long-term policies were also mentioned: at one point, the CPA noted “the demonstrated interest of the Iraqi Governing Council for Iraq to become a full member in the international trading system, known as the World Trade Organization.”
The Lawfulness of the CPA Measures under International Law

The transformation of Iraq from a centralized dictatorship into a market-based democracy raised questions about the scope of authority of the CPA under international law. Some in the CPA really thought that the law of occupation allowed such wide-ranging reforms. But British officials differed. More generally, the British government distinguished "between direct positive acts of government and . . . the facilitation of plans and efforts of the nationals of the occupied territory for the development of governmental institutions," with only the latter being deemed permissible under occupation law. To make reforms that go beyond the law of occupation, they maintained, "further authority in the form of a Security Council resolution would be required." According to this view, with Security Council Resolution 1483 as the additional basis for the reforms, "the question of the UK’s responsibilities in respect of political reform is no longer governed solely by the law of occupation." Later the British discovered that they were expected to comply also with their international and European human rights obligations. As a consequence, in the occupation of Iraq there were three bodies of law—occupation law, human rights law and UN law—at play. This section analyzes the outcome.

Authority under the Law of Occupation

We begin with a succinct analysis of the scope of authority under the law of occupation. The request for authorization from the Security Council implies an acknowledgment of the limited authority granted to occupants under traditional occupation law. A textual reading of Article 43 of the Hague Regulations easily supports the conclusion that the occupant is bound by what Gregory Fox named "the conservationist principle." The call for conservation of the status quo ante bellum is reflected in the admonition that the occupant has but de facto authority (whereas the ousted government is still the “legitimate power”) in the restricted scope of authority “to restore, and ensure” public order and civil life, and in the obligation to respect the laws in force in the country “unless absolutely prevented.”

The term “unless absolutely prevented” was inserted during the First Peace Conference in 1899 to replace the term “unless necessary” at the insistence of the potentially occupied States to emphasize the occupant’s obligation to also preserve the status quo in the legal sphere. Whether this insertion was prudent is a different question. The restraint on the occupant’s authority necessarily creates a tension with its authority and obligation to ensure public order and civil life. This restraint was significantly diluted by Article 64 of Geneva Convention IV, which replaced the negative test of “unless absolutely prevented” with a positive authorization for the occupant, which “may subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its
obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power.” The duties of the occupant under Geneva Convention IV are far more numerous than those stipulated in the Hague text. The Geneva text envisions the occupant no longer as the disinterested watch guard, but instead as a very involved regulator and provider.98

Scholars in the post–World War II period readily conceded legitimate subjects for the occupant’s lawmaking other than military necessity. The welfare of the population was deemed a worthy goal for the occupant to pursue.99 Such an expansive view seems to be consonant with the prevalent view that the occupant is bound also by human rights obligations, and that in general it must “take measures to ensure respect for human rights and international humanitarian law in the occupied territories.”100

The parallel applicability of international and, for the British troops, European human rights law raises additional questions regarding the authority of the occupants and the adequacy of the conservationist principle. It is beyond the scope of this article to explore the questions concerning the applicability of international and European human rights law to occupied territories, and the relationships between occupation law and human rights law. Still, international treaty bodies and tribunals,101 as well as the majority of scholars,102 are of the opinion that human rights law applies to occupied territories. The consequences of this parallel application would seem to support a modification of the conservationist principle when changes are necessary to ensure the enjoyment of human rights by the occupied population.103

Reflecting on the occupation of Iraq as a “transformative occupation,” Adam Roberts noted that “occupying powers can justify certain transformative policies on the basis that these are the best way to meet certain goals and principles enshrined in international human rights law.”104 More generally, Roberts believes human rights conventions “can play an important role” in occupations, as they “may impose formal obligations on parties; be instrumental in political debate, as a basis for assessing the actions of external powers and local actors; provide legal procedures for taking action; or serve as one basis for pursuing transformative goals.”105 Other scholars accept this view with some insignificant nuances.

A particularly strong case can be made for extensive authorization to introduce significant changes in an occupied territory that had been governed by an unrepresentative regime that enjoyed little or no domestic support after being ousted by the occupant. The underlying premise of the law of occupation is, as was seen, that the legitimate power in the country retains the right to revert to its ante bellum position, unless it agrees to territorial changes. But when this power has already taken its last breath, or when its source of authority is contested by the indigenous population exercising its right to self-determination, the only legitimate power

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that seems relevant is the people itself and not the ousted regime. This is a situation where the “reversioner” is the people, and the occupant must take its interests and wishes, rather than those of the ousted regime, into account. Such an argument can support the dismantling of the Ba’athist regime, which is evident in the CPA’s first-ever legislative act, aptly titled “De-Ba’athification of Iraqi Society.” But it is important to keep in mind that even in such instances, reforms introduced by the occupant—as beneficial to the local population as they may be—are subject to the principle of self-determination. This principle may be “meaningful for the post-occupation society” only by refraining from making “overbroad systemic changes.”

It is noteworthy that the two occupants of Iraq did not wish to found their transformative occupation on their human rights obligations. In fact, they both rejected the applicability of human rights law in Iraq. The US government has claimed that the International Covenant on Civil and Political Rights does not apply outside its territory or during an international armed conflict. In the midst of the Iraq conflict, the United States expressed its “firm belief” that humanitarian law is a “well-developed area of law conceptually distinct from international human rights law,” and that the two cannot apply simultaneously. The United Kingdom, as a party to the ECHR, had to face numerous petitions in relation to the ECHR’s applicability in Iraq, and offered several reasons why it was not bound by that treaty—reasons that did not impress the British courts or the ECtHR.

**Authority under Security Council Resolution 1483**

Security Council Resolution 1483 provided the framework for the coalition’s actions in Iraq. On the one hand, it endorsed its authority over Iraq and the Iraqi people, and, on the other hand, it delineated the legal constraints and guidelines that this authority was bound by, namely “the Charter of the United Nations and other relevant international law,” and other “obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.” The President of the Security Council emphasized that the powers delegated by the Resolution “are not open-ended or unqualified,” and should be exercised “in conformity with the Geneva Conventions and the Hague Regulations.” Concurrently, however, the Resolution clearly endorsed the transformative course of action that the CPA embarked upon immediately. The occupants, referred to as the “Authority” in the Resolution, are
Furthermore, Resolution 1483 created a new position, the “Special Representative for Iraq,” which would be independent of the occupying power and whose tasks would include assisting the people of Iraq, coordinating the activities of the United Nations in post-conflict processes in Iraq and with international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and promoting the protection of human rights.

How should one read this Resolution? Does it endorse an expansive view of the law of occupation, or does it form an independent source of authority on the strength of Chapter VII law? Indeed, there are three possible interpretations of Resolution 1483. According to the first reading, the Resolution endorses an expansive reading, influenced by human rights law, of the occupant’s authority under the law of occupation. A slightly different interpretation of the Resolution would suggest that the expansive reading of the occupant’s powers applies only to the unique circumstances of Iraq as opposed to all other occupations. The third possible interpretation of the Resolution would be that the Resolution gave the occupants additional authority to transform Iraq that they would not have had otherwise. As mentioned above, at least British officials relied on the latter interpretation, having concluded that the law of occupation as such stopped short of granting them extensive authority.

In these authors’ view, Resolution 1483 relates, of course, only to the specific situation in Iraq, but at the same time it signals an endorsement of a general view that regards modern occupants as subject to enhanced duties toward the occupied population and therefore also having the authority to fulfill such duties. “The call to administer the occupied area ‘effectively’ acknowledges the several duties that the occupants must perform to protect the occupied population. It precludes the occupant from hiding behind the limits imposed on its powers as a pretext for inaction.” Indeed, an evolutionary reading of the law of occupation in an era heavily informed by human rights concerns cannot reach a different conclusion.

This interpretation is based not only on the Resolution or the evolutionary interpretation of the law of occupation. It is also based on the authority of the Security Council when acting under Chapter VII of the UN Charter. This authority is not limitless but subject at least to compliance with jus cogens. One of the central jus cogens norms is the right of peoples to self-determination. The law of
occupation internalizes a delicate balance between conflicting interests of occupant and occupied, and is heavily influenced by the effort not to alienate the indigenous people’s right to continue to exercise its right to self-determination. The law of occupation has always been intimately linked to the concept of national sovereignty. Indeed, the evolution of the concept of occupation can be seen as the mirror-image of the development of the concept of sovereignty. Therefore, authorizing an occupant to derogate from its responsibilities under the law of occupation and thereby limit and shape the political choices of an occupied sovereign people carries the danger of effectively infringing the right to self-determination, which might be beyond the authority of the Council.

Obviously, not every limitation of the right to self-determination is an impermissible infringement of a *jus cogens* right. There may be solid reasons to interfere in the exercise of the right to self-determination to ensure that the process is practical, inclusive and fair. It is also reasonable to argue that the Security Council is more trustworthy than the occupant to be entrusted with such a complex matter, and therefore it may be granted the authority to limit or influence the exercise of the right to self-determination to a greater extent than the occupant would, as is the case in territories directly administered by the UN. The Security Council is clearly less prone to bias than the occupant, if only because of its diverse composition and lack of immediate interest. It therefore makes eminent sense to recognize that the Security Council would have the authority under Chapter VII of the Charter to authorize the transformation of a regime under occupation beyond what the law of occupation would otherwise allow, but this could not be an unfettered discretion delegated to interested parties without monitoring them. If the Security Council wished to extend such an authorization to the occupant, it would have to remain closely involved, through ample supervisory mechanisms, effectively approving and reviewing the actual transformation process. Because such mechanisms were not employed in the case of Iraq, the CPA having acted with limited monitoring by the Council, one could understand its attitude either as carelessness that bordered on infringement of its *jus cogens* obligations or as a reflection of its general attitude toward the occupant’s powers under the law of occupation.

**IV. Conclusion: The Legacy of the Occupation of Iraq**

The occupation of Iraq raises a host of questions beyond the scope of a single article. In addition to questions regarding the timing of the occupation, pre- and post-occupation responsibilities, and the scope of authority of the occupant in transformative occupation, the occupation of Iraq gave rise to queries regarding the
definition of protected persons\textsuperscript{123} and the proper interpretation of Article 49 of the Fourth Geneva Convention,\textsuperscript{124} in addition to the proper treatment of detainees and the responsibility for their shameful abuse. The management by the occupants of public property, including natural resources such as oil and freshwater, was also subject to legal analyses.\textsuperscript{125} Overall it is almost astounding to observe how a nineteenth-century doctrine that during the last half century almost reached the stage of desuetude due to lack of adherence was suddenly revived in unanticipated circumstances. Critics could argue that its invocation was nothing more than an afterthought, a sort of “Plan B” that was put in motion after the effort to install a “genuine” indigenous regime failed. Nevertheless, the doctrine was there ready to be applied, flexible enough to be adapted to twenty-first-century contemporary circumstances and challenges, as well as current legal and political perceptions.

Resolution 1483 marks the first time the Security Council resorted to the concept of occupation to describe, authorize and delimit the authority of foreign troops in control of enemy territory. The recognition of the applicability of the law on occupations refuted the claim that occupation, as such, is illegal, and revived the neutral connotation of the doctrine, at least from a legal perspective. At the same time, the broad mandate recognized by the Security Council as pertaining to the occupants to transform Iraq into a market-based democracy, although commendable and probably lawful under UN Charter law, also tested the limits of the law of occupation and the Security Council’s own authority to shape the way the Iraqi people exercised their inalienable right to self-determination.

Notes


3. For this reason, “to extend the rights of occupation by mere intention, implication or proclamation, without the military power to enforce occupation, would be establishing a paper occupation infinitely more objectionable in its character and effect than a paper blockade.” DORIS APPEL GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914: A HISTORICAL SURVEY 56 (1949).

4. Regulations Respecting the Laws and Customs of War on Land, Annexed to Convention No. IV Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2227, reprinted in DOCUMENTS ON THE LAWS OF WAR 69, 80 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) (“Territory is considered occupied when it is 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”) [hereinafter Hague Regulations].

6. Suggestions in the Hague conference of 1899 to remove the second sentence had been rejected, as it was seen as crucial to the understanding of the first sentence. The Belgian representative insisted that the second sentence’s absence might lead to premature proclamations of occupation. See GRABER, supra note 3, at 60.

7. “Territory is considered occupied when it is actually placed under the authority of the hostile army” (authors’ emphasis).

8. See Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19) (separate opinion of Judge Kooijmans, ¶49) (“I am, therefore, of the opinion that it is irrelevant from a legal point of view whether [Uganda] exercised this authority directly or left much of it to local forces or local authorities. As long as it effectively occupied the locations which the DRC Government would have needed to re-establish its authority, Uganda had effective, and thus factual, authority” (first emphasis added)).

9. Federal Ministry of Defense of the Federal Republic of Germany, ZDv 15/2, Humanitarian Law in Armed Conflicts: Manual ¶526 (1992) (“[T]he occupying power must be able to actually exercise its authority” (first emphasis added)).


13. Id., ¶170.

14. See the critical comments of Judge Kooijmans in his separate opinion, supra note 8, ¶¶40–41.


16. Joint Statement by President George W. Bush and Prime Minister Tony Blair on Iraq, 1 PUBLIC PAPERS 328 (Apr. 8, 2003), available at http://usa.usembassy.de/etexts/docs/bush080403.htm (“The Interim Authority will be broad-based and fully representative, with members from all of Iraq’s ethnic groups, regions and diaspora. The Interim Authority will be established first and foremost by the Iraqi people, with the help of the members of the Coalition, and working with the Secretary General of the United Nations”).

17. United States Department of Defense News Transcript, Briefing on Geneva Convention, EPW’s and War Crimes (Apr. 7, 2003), http://www.au.af.mil/au/awc/awcgate/dod/t04072003_t407genv.html. When asked whether the United States was an occupying power in Iraq, W. Hays Parks, Special Assistant to the Army Judge Advocate General, replied: “Obviously, we occupy a great deal of Iraq at this time. But we are not, in the technical sense of the law of war, a military occupier or occupation force.”


20. S.C. Res. 1472, U.N. Doc. S/RES/1472 (Mar. 28, 2003). However, this Resolution was ambiguous and did not expressly say that the occupation had begun.
21. Plan Unveiled for Iraq (Apr. 15, 2003), http://www.abc.net.au/news/stories/2003/04/15/832822.htm. Principle 13 stated: “The Iraqi participation in the Nasiriyah meeting voted that there should be another meeting in 10 days in a location to be determined with additional Iraqi participants and to discuss procedures for developing an Iraqi interim authority.”


23. Roberts, supra note 15, at 610 n.12. It is not clear how the CPA was legally established. See Halchin, supra note 19, at 4.


29. See infra pp. 274–76. The two States sought to obtain a UN mandate in order to “evade legal difficulties if [they] sought to move beyond the limited rights conferred by the Hague Regulations and Geneva Convention IV to vary existing arrangements.” See Research Paper 03/51, supra note 22, at 16.


31. DINSTEIN, supra note 27, at 39.

32. This arguably applies also to questions concerning the rules of engagement, which are beyond the scope of this article.

33. See Eyal Benvenisti, The Law on Asymmetric Warfare, in Looking to the Future: Essays on International Law in Honor of W. Michael Reisman (Mahnoush Arsanjani, Jacob Cogan, Robert Sloane & Siegfried Wiessner eds. (forthcoming 2010)).

34. Geneva Convention IV, supra note 5, art. 4.

35. See the determination of the International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber in Prosecutor v. Naletilic & Martinovic, Case No. TT-98-34-T, Judgment, ¶ 221 (Mar. 31, 2003) (reasoning that “otherwise civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established”).


40. The Convention is relevant to the Iraq war assuming the Convention, which currently has 123 parties, is customary law. When the war began, the United States and the United Kingdom were merely signatories (US ratification came on March 13, 2009); Iraq was a party.


42. The occupant is required to “support the competent national authorities of the occupied country in safeguarding and preserving its cultural property” and “take the most necessary measures of preservation” (id., art. 5). Since lootings often erupt in the post-invasion, pre-occupation phase, it is sensible to give cultural property a higher degree of protection, usually pertinent in occupations, and oblige the invading power to actively secure art, archeology and similarly endangered resources.

43. For these conditions see pp. 263–64 supra, as well as the ICTY’s determination in Naletilić & Martinović, supra note 35, ¶ 215. See also Prosecutor v. Kordić & Ćerčić, Case No. IT-95-14/2-T, Judgment, ¶ 338–39 (Feb. 26, 2001).

44. The “one year after” rule probably never reflected customary law but was instead understood as a specific reference to the post-WWII occupations in Germany and Japan. Adam Roberts, Prolonged Military Occupation: The Israeli-Occupied Territories since 1967, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 44, 57 (1990) (“In general, the ‘one year after’ provision of 1949 must be viewed as a legal oddity”). Professor Bothe and his fellow authors say:

Article 6(3) of the Fourth Convention . . . was a special ad hoc provision for certain actual cases, namely the occupation of Germany and Japan after World War II. There is no reason to continue to keep in force such provisions designed for specific historic cases. In 1972 the majority of government experts expressed a wish to abolish these time limits.


45. This is clear from the text of Article 6(3) itself, which reads:

[in the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the]
following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143 [emphasis added].

In other words, occupation continues, but it is no longer subject to the entirety of the Convention.

46. See Geneva Convention IV, supra note 5, art. 154, discussing the relationship between the Geneva and Hague texts.

47. See, e.g., id., art. 47.


49. Id.

50. BENVENISTI, supra note 2, at 173.


52. DINSTEIN, supra note 27, at 273 (the occupation ended “only ‘notionally’”). While Sassoli agrees that this was the legal effect of Resolution 1546, he criticizes it and calls it a “dangerous precedent.” Marco Sassoli, Legislation and Maintenance of Public Order and Civil Life by Occupying Powers, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 661, 684 (2005).

53. It is hard to point at a specific time when that happened. The assumption of authority was gradual, just as the occupation did not end overnight. See Adam Roberts, The End of Occupation: Iraq 2004, 54 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 27, 46 (2005), discussing Iraq’s status after June 28, 2003 (“The Interim Government, while exercising a wide range of governmental decision-making powers, is constrained in key respects by its essentially caretaker character, the formal restrictions as regards ‘taking any decisions affecting Iraq’s destiny’, the limitations on its treaty-making powers, and its weaknesses in certain areas as compared to the position of external powers in Iraq”).


55. For example, coalition forces must respect Common Article 3 of the Geneva Conventions, as well as Article 75 of Additional Protocol I (both providing fundamental guarantees), as long as they continue to participate in an armed conflict.

56. American and British laws may bind American and British soldiers, respectively, even when the soldiers are stationed abroad. See Justice Barak’s reasoning in HCJ 393/82 Jama’it Askan Alma’amun v. Commander of IDF Forces [1983] IsrSC 37(4) 785, 810 (“Every Israeli soldier carries in his backpack the customary rules of public international law relating to the laws of war, as well as the basic rules of Israeli administrative law”).

57. R (on the application of Al-Jedda) v. The Secretary of State for Defence [2007] UKHL 58, ¶ 39 [hereinafter Al-Jedda case].

58. Al-Saadoon and Mufdhi v. United Kingdom, App. No. 61498/08 (admissibility decision), ¶ 79, http://www.echr.coe.int/eng (“The applicants were detained and transferred by United Kingdom forces solely on the basis of decisions taken unilaterally by the Iraqi courts”) [hereinafter Al-Saadoon case]. The ECtHR had determined that this argument was not “material” to the admissibility decision, and would be discussed in relation to the merits of the case. See id., ¶ 89.


60. CPA Order No. 64, Amendment to the Company Law No. 21 of 1997 with Annex A (Feb. 29, 2004).

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63. CPA Order No. 80, Amendment to the Trademarks and Descriptions Law No. 21 of 1957 (Apr. 26, 2004).
64. CPA Order No. 83, Amendment to the Copyright Law (Apr. 29, 2004).
67. CPA Order No. 74, supra note 61.
69. CPA Order No. 64, supra note 60.
70. CPA Regulation No. 6, Governing Council of Iraq (July 13, 2003). See also S.C. Res. 1511, ¶ 4, U.N. Doc. S/RES/1511 (Oct. 6, 2003) ("the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority"). The Governing Council was dissolved on June 1, 2004 (CPA Regulation No. 9, Governing Council’s Dissolution (June 9, 2004)) and replaced by the interim government of Iraq (CPA Order No. 100, Transition of Laws, Regulations, Orders, and Directives Issued by the CPA (June 28, 2004)).
71. CPA Order No. 39, supra note 66, pmbl.
72. Id.
73. Id.
74. As articulated by CPA Order No. 78, supra note 62.
76. CPA Order No. 39, supra note 66, pmbl.
77. Id.
78. See, for instance, CPA Orders No. 64, supra note 60; No. 74, supra note 61; No. 80, supra note 63; No. 83, supra note 64.
79. CPA Order No. 80, supra note 63.
81. Or as the Attorney General put it in late March 2003, "[T]he imposition of major structural economic reforms would not be authorised by international law." Kampfner, supra note 18.
83. Committee on Foreign Affairs Written Evidence, supra note 25 ("Whilst the introduction of democratic changes in government can not be imposed by the Occupying Powers, this does not affect the rights of the Iraqi people themselves to develop their own systems of government. It is therefore permissible for the Occupying Powers to play a facilitating role in relation to reforms genuinely undertaken by the people of Iraq themselves").
84. Id.
85. Id.
86. Fox, supra note 65, at 263.
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87. Hague Regulations, supra note 4, art. 43 ("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").

88. Benvenisti, supra note 1, at 646–47.

89. The occupant is required to ensure the humane treatment of protected persons, without discriminating among them, and to respect, among other things, the protected persons’ honor, family rights, religious convictions and practices, and manners and customs. Geneva Convention IV, supra note 5, art. 27. Additionally, it is required to facilitate the proper working of all institutions devoted to the care and education of children (id., art. 51), provide specific labor conditions (id., art. 52), ensure food and medical supplies to the population (id., art. 55), maintain medical services (id., art. 56), and agree to relief schemes and to facilitate them by all means at its disposal (id., art. 59).


91. Armed Activities case, supra note 12, ¶ 211.


94. Dinstein, supra note 27, at 113 (an occupant may repeal existing legislation that is inconsistent with binding norms of international law such as Geneva Convention IV), 115 (the occupant may legislate “at the behest” of the local population), 116 (the occupant has a “right to revise and even reform legislation in consonance with new developments”). Sassoli endorses an expansive authority to legislate and he does so with the local population’s best interests in mind. Aside from the usual exceptions to the conservationist principle, he supports occupant legislation that is “essential for the implementation of IHL [international humanitarian law]” and that realizes human rights law or maintains civil life (Sassoli, supra note 52, at 675–77). In his view,

[the occupying power . . . has an obligation to abolish legislation and institutions which contravene international human rights standards . . . ]. It may introduce only as many changes as is absolutely necessary under its human rights obligations and must
stay as close as possible to similar local standards and the local cultural, legal and economic traditions.

Id. at 676–77.

95. Roberts, supra note 15, at 620. One such scenario is when “the occupant and/or international bodies properly refer to human rights law as providing a legal basis for changing certain laws of the occupied territory, or even as setting goals for a transformative occupation.” Id. at 601.

96. Id. at 600.


99. Fox, supra note 65, at 277.

100. An alternative basis for the applicability of international human rights treaties in occupied territories would be the law of occupation itself. Article 43 of the Hague Regulations requires the occupant to respect “the laws in force in the country.” To the extent that international treaties, including human rights treaties, form part of the local law, the occupant is bound to respect them as well. Hague Regulations, supra note 4, art. 43.

101. That did not keep the CPA from taking human rights considerations into account—e.g., CPA Order No. 19, Freedom of Assembly (July 9, 2003) (“Determined to remove the unacceptable restrictions on human rights of the former Iraqi Ba’ath Party regime . . .”).


105. The government maintained that the ECHR was “intended to apply in a regional context in the legal space of the Contracting States.” Letter from Adam Ingram, MP, UK Armed Forces Minister, to Adam Price, MP (Apr. 7, 2004), cited in Ralph Wilde, The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq, 11 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 485, 488–89 (2005). On that basis, the United Kingdom argued that, although it was an occupying power in Iraq, it did not possess the needed degree of effective control for the ECHR to apply, and that there was no general doctrine of “personal jurisdiction” in relation to the ECHR. Al-Skeini and others v. Secretary of State for Defence [2004] EWHC 2911, ¶ 287 [hereinafter Al-Skeini [2004]]. Later, the United Kingdom maintained that its actions in Iraq were attributable to the United Nations, thereby absolving it of any responsibility under the ECHR (Al-Jedda case, supra note 57, at ¶ 3, ¶ 49).


109. Id., ¶ 5.
112. Id., ¶ 8.
117. BENVENISTI, supra note 2, at 213–14.
118. Benvenisti, supra note 1, at 623.
119. See also Yehuda Z. Blum, UN Membership of the “New” Yugoslavia: Continuity or Break?, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 830, 833 (1992) (“Yugoslavia has been suspended from the General Assembly, pending reconsideration of the matter by the Council . . ., in a manner not foreseen by the Charter . . .”).
121. While the United States and the United Kingdom were both occupants in Iraq and permanent members of the Council, their interests were balanced by the presence of other permanent members, most notably China and Russia.
122. The occupants were merely “encourage[d]” to “inform the [Security] Council at regular intervals of their efforts . . .” (S.C. Res. 1483, supra note 27, ¶ 24). There is no evidence of such regular notifications.
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