

The Security Council and The Law on Occupation: Resolution 1483 on Iraq in Historical Perspective

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I. Introduction

The Security Council's recognition of the presence of US and UK forces in Iraq as occupation subject to the law of the Hague Regulations and the IV Geneva Convention¹ is a rare and significant event in the history of the troubled law on occupations. A rich body of laws developed during the late 19th Century and early 20th Century, and honored more by its breach since then, is set in motion to face contemporary challenges. Despite fundamental changes in law, politics and society, the basic concept of occupation retained its efficacy. This essay reviews the embattled history of the law of occupation, and assesses its contemporary status in light of the recent Security Council Resolution no. 1483 with respect to the occupation of Iraq.

II. A Retrospective: The Changing Concept of Occupation

(1) The Hague Conception: The Disinterested Occupant

The delegates to both 1899 and 1907 Hague Peace Conferences conceived occupation as a transient situation, for the short period between hostilities and the imminent peace treaty, which would translate wartime victories into territorial or other concessions by the defeated side. The 1870-1871 Franco-Prussian War probably provided a prototype of the envisaged occupation: military victories led to the

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¹ Resolution 1483 of 22 May 2003.

occupation of French territory, part of which was conceded to the Prussians in the subsequent peace treaty of 1871. This conception was part of a more general theory of war in the nineteenth century, in which war was seen as a legitimate match between professional armies. Civilians were left out of the war, and kept unharmed as much as possible, both physically and economically. This was the message that found a succinct expression in the famous statement of King William of Prussia on August 11, 1870: "I conduct war with the French soldiers, not with the French citizens." The limited scope of war also implied limited exhaustion of resources, especially given the expectation that the victor could recoup its expenses from the vanquished party through the forthcoming peace treaty.²

This entrenched conception of war was combined with the political and economic philosophy of that period: *laissez-faire* was the prevailing economic and even moral theory, shared by all the powers. This theory implied minimal intervention of the government in economic life. There were minimal regulatory mechanisms of transactions and other uses of private rights, and the initial entitlements were the ultimate factor in social and economic activity, inspiring a deep reverence for private ownership.

The minimalist conception of war and the war effort made possible a conception of a *laissez-faire* type of government even in wartime. The assumption was that the separation of governments from civilians, of public from private interests, would also hold true in times of war. There was not supposed to be any unmanageable conflict between the French citizens and the Prussian king. Therefore for nineteenth-century politicians and legal scholars, there was nothing problematic about recognizing the occupant's power to prescribe measures for the purpose of restoring

² On the Hague conception of the law see Eyal Benvenisti, *The International Law of Occupation* (1993), Chapter 2.

and ensuring public order and civil life, and to utilize public property. Based on the then-prevailing notions of the proper role of central governments and assumptions as to the short duration and nature of war, giving these powers to the occupant did not seem to raise any grave concerns on the part of societies susceptible to occupations. The potential occupants were deemed to act impartially vis-à-vis the local population, with whom they would have no conflict. The relevant Hague Regulations of 1899 and later 1907, in particular Article 43 that delineated the occupants general goals and authority envisioned peaceful coexistence between the local population and the enemy's army, with minimal interaction and friction. The separation of interests provided room for a simple balancing principle of disengagement: the occupant had no interest in the laws of the area under its control except for the security of its troops and the maintenance of order; the ousted sovereign was ready to concede this much in order to ensure maintenance of its bases of power in the territory against competing internal forces and in order to guarantee the humane treatment of its citizens. This solution was not only well founded in theory; it was supported by the practice of the nineteenth-century occupations. These occupations were of relatively short duration, during which occupants, by and large, retained existing legislation as much as possible.³

It is therefore not surprising to note that these were the representatives of the weaker countries, those most susceptible to being occupied, who wanted to assign these powers but also to impress these duties upon occupants, who otherwise, they thought, might choose not to get involved in matters concerning the civilian population of an occupied territory. It seems safe to assume that the weaker parties to

³ Graber, D. *The Development of the Law of Belligerent Occupation 1863-1914*, 268-70 (1949). The author mentions the pledge made by the Prussians during their occupation of France to reestablish the prewar order and not to modify existing legislation unless military necessity required otherwise. The author also cites both German and French textbooks that affirm that the Prussians abided by their pledge. *Id.* at n.37.

the 1899 and 1907 Hague Peace Conventions, more than the major powers, wanted to enlarge the scope of the occupant's duty toward the local inhabitants, thus ensuring their ability to return as quickly and as much as possible to their regular daily life.⁴ It was not expected at that time that the occupant would have any self-interest in regulating those social functions. Consequently, no one raised the possibility of the occupant's intervention in these areas to further its own policies. International scholars still viewed the likely motives of the occupant to be short-term military concerns, not impinging upon the local civil and criminal orders.⁵ Indeed, military necessity was deemed by many as the sole relevant consideration that could "absolutely prevent" an occupant from maintaining the old order.⁶ Under the prevailing *laissez-faire* view, the occupant was not expected, during the anticipated short period of occupation, to have pressing interests in changing the law to regulate the activities of the population, except for what was necessary to the safety of its forces.

(2) Challenges to the Hague Conception

The Modern State The advent of the twentieth century and the ever-increasing regulation of the markets and other social activities by central governments, especially during and after hostilities, turned the duty imposed on the occupant into a broad grant of authority to prescribe and create changes in the life of the occupied economy

⁴ See Eyal Benvenisti, *The International Law of Occupation* (1993), at p. 10.

⁵ The occupant was not expected to introduce legal changes in the civil and criminal laws. Military necessity, a recognized justification for legislation by the occupant, did not seem to be linked with those areas. See the description of the opinion of the numerous commentators of that period in Graber, *supra* note 3, at 123-25, 132-34, 143-45.

⁶ See the many citations in Schwenk, *Legislative Powers of the Military Occupant under Article 43, Hague Regulations*, 54 *Yale L.J.* 393 (1945). See also Greenspan, M., *The Modern Law of Land Warfare* (1959), at 224 ("if demanded by the exigencies of war"), but Greenspan adds that "[t]hose exigencies may, in fact demand a great deal," and gives as an example the elimination of undemocratic and inhumane institutions. Bothe, M., *Belligerent Occupation*, 4 *Encyclopedia of Public International Law* 65 (1982), at 66, is a modern voice advocating this strict interpretation.

and society. The modern conceptions of the role of the state, both in the Western world and in the socialist countries, made it "difficult to point with much confidence to any of the usual subjects of governmental action as being *a priori* excluded from the sphere of administrative authority conferred upon the occupant."⁷ It is easy to demonstrate that the occupant must do much more than to preserve status quo. With the cessation of actual hostilities, a new era begins, "human existence requires organic growth, and it is impossible for a state to mark time indefinitely. Political decisions must be taken, policies have to be formulated and carried out."⁸ Indeed, the term "l'ordre et la vie publics," in an interesting historical twist, was soon invoked by the occupants to justify their extensive use of prescriptive powers.⁹ The duty was transformed into a legal tool extensively invoked by occupants in those areas in which they wished to intervene.¹⁰ At the same time, if it was in the occupant's interest to refrain from action, it could invoke the "limits" imposed on its powers.¹¹

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.¹² In addition, especially in light of the oppressive laws that the occupants found in Nazi Germany, some scholars have argued that at times moral arguments, and not only technical difficulties, could be

⁷ M. McDougal and F. Feliciano, *Law and Minimum World Public Order* 746 (1961).

⁸ M. Greenspan, *supra* note 6, at 225.

⁹ The occupation of Belgium by Germany in 1914-18. *See, e.g., Grahame v. Director of Prosecution*, [1947]. AD Case no. 103, at 228,232 (Germany, British Zone of Control, Control Commission Court of Criminal Appeal) ("[L'ordre et la vie publics] is] a phrase which refers to the whole social, commercial and economic life of the community."). The Israeli High Court of Justice has also subscribed to this view. On the decisions of Israeli courts in this direction, *see* Benvenisti, *supra* note 4 Chapter 5.

¹⁰ McDougal and Feliciano, *supra* note 7, at 747 ("Occupants did in fact intervene in and subject to regulation practically every aspect of life in a modern state which legitimate sovereigns themselves are generally wont to regulate.")

¹¹ This has been the position of the British occupation government in post-World War II Tripolitania, where the former denied desperate requests of the local inhabitants to ameliorate their conditions.. For a discussion of that occupation, *see* Benvenisti, *supra* note 4 Chapter 4..

¹² Lord A. McNair and A. Watts, *The Legal Effects of War* 369 (4th ed. 1966). 30 Debbasch, O., *L'occupation militaire* (1962), at 172.

considered as preventing an occupant from respecting local laws and, in fact, requiring change.¹³ With the enlargement of the legitimate subjects for changes came a more positive view regarding change in principle. Scholars in that postwar period, all writing from a Western perspective, were less averse to changes to be introduced by the occupant. Thus, some interpreted "absolutely prevented" as meaning "necessity," or simply asked for a "sufficient justification" to change the law.¹⁴

Lack of Neutrality Many, if not most occupants during the twentieth century did not live to the perhaps naïve assumption of the law, concerning the impartiality of the occupant vis-à-vis the population under its control. My analysis of occupations shows – and this should not be surprising – that social decisions taken and implemented in occupied territories were never incompatible with outcomes sought by occupants. Often these outcomes proved detrimental to the occupied country. The account of the major occupations immediately before and during World War II shows that all the major powers failed to apply the Hague Regulations in most of the foreign territories that came under their control. The ousted governments, from exile or upon their return, also accorded little respect to the law of occupation.

Among the bases that the Allies used to claim inapplicability of the Hague Regulations were official recognition of governments other than the acting ones as the lawful governments (in the British occupations of Ethiopia and Madagascar),

¹³ See, e.g., McDougal and Feliciano, *supra* note 7, at 770 (The Allied occupants of Germany "may fairly be said to have been 'absolutely prevented' by their own security interests from respecting, for instance, the German laws with respect to the Nazi Party and other Nazi organizations and the 'Nuremberg' racial laws."); similarly, Greenspan, *supra* note 6, at 225 ("If, in those circumstances [of complete German surrender], the victors are not 'absolutely prevented'..., from respecting those institutions, then those words have no sensible meaning.").

¹⁴ Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 Israel Yb. Hum. Rts. 104,112 (1978) ("absolute prevention means necessity"). Feilchenfeld, E. *The International Economic Law of Belligerent Occupation* (1942), at 89.

agreements with local elements (in the American occupations of French North Africa and Italy), and claims of sovereign powers in a post-surrender occupation (in Germany and Japan). To these claims one should add some outright violations of the Hague Regulations: the illegal attempts by Britain and France to fragment Libya and the transfer of the province of Tigray to Ethiopia. Finally, I should mention some questionable policies in that handful of occupations where the occupants did invoke the law of occupation. These policies range from almost complete inaction (by Britain in Tripolitania) to extensive modifications of the status quo in policy decisions concerning taxation and even procreation (as in Venezia Giulia, Italy). These different policies point to a self-serving approach rather than a structured method for treating occupied territories. Against this background it would have been surprising if a government that had been ousted during the war and resumed control after its end were to pay any attention to the prescriptions of the Hague Regulations.

Conflicts between Sovereigns and Ruled Initially, the administration of the occupied territory was expected to protect two sets of interests: first, to preserve the sovereign rights of the ousted government, and second, to protect the local population from exploitation of both their persons and their property by the occupant. But in a possible case of conflict between the ousted government and the local population, the occupant was supposed to prefer the interests of the government. Thus, it also had the duty to protect local institutions against indigenous forces that might call for structural changes in the internal body politic. The occupant was expected to fulfill a positive role by filling the vacuum created by the ousting of the local government, and by maintaining its bases of power until the conditions for the latter's return were mutually agreed upon. The local population was similarly under a duty to abide by the

occupant's exercise of authority. Similarly the occupant was granted the power to possess and administer property belonging to the occupied state, subject to the duty to "safeguard the capital of these properties and administer them in accordance with the rules of usufruct."¹⁵ As much as this article prevents the occupant from destroying or depleting national resources, it tries to keep other indigenous aspirants from making use of them.

This pact between elites was extremely important to the more powerful participants in the Hague Conferences, such as Austro- Hungary, Russia, the Ottoman Empire and the colonial powers. Indeed, the predominant aspect of this concern is underlined by the one exception to the duty to establish a regime of occupation: the situation of *debellatio*. The doctrine of *debellatio* asserts that if the enemy state has totally disintegrated and no other power is continuing the struggle on behalf of the defeated sovereign, then occupation transfers sovereignty. As stated by Ernst Feilchenfeld, "If one belligerent conquers the whole territory of an enemy, the war is over, the enemy state ceases to exist, rules on state succession concerning complete annexation apply, and there is no longer any room for the rules governing mere occupation."¹⁶

The exception of *debellatio* vividly illustrates the fact that the only relevant political interests (as opposed to economic and social interests) in the Article 43 regime were those of the state elites, not of its citizens. In this sense, the law on occupation promised reciprocal guarantees of political continuity, and thus, at least to a certain extent, rendered the decision to resort to arms less profound.

¹⁵ Article 55.

¹⁶ Feilchenfeld, *supra* 14, *id.*; Stone, J., *Legal Controls of International Conflicts* (1954), at 696 n.13; Schwarzenberger, G., *International Law – The Law of Armed Conflict* (1968), at 167

In fact, the Hague law became even a pretext to reestablish colonial rule in the South East Asia colonies, which had attained "independence" during the Japanese occupation. From 1943 to 1945, the law of occupation served as a perfect legal justification for the restoration of the colonial regimes and other dependent territories of the Allies in the Far East, despite the sometimes violent opposition of considerable parts of the local population. The Hague law explained why the Europeans could return to those colonies as the sovereigns whose titles remained intact.¹⁷

Avoidance State practice during and immediately after World War II did not demonstrate commitment to the Hague law on occupations. At the same time that the International Military Tribunal in Nuremberg described these rules as being declaratory of customary international law,¹⁸ most occupants devised claims for the law's inapplicability or stretched its prescriptions thereby reducing constraints on their discretionary powers. It became clear that it was no longer possible to expect the occupant to perform the function of the impartial trustee of the ousted sovereign or the local population; it was no longer feasible to demand that the occupant pay no heed to its own country's interests.

(3) *The Geneva Conception: Humanitarian concerns Take Precedence*

¹⁷ In the wake of the Japanese retreat and before the Allies could resume authority, new indigenous nationalistic governments declared their independence: the Republic of Indonesia (August 17, 1945), and the Republic of Viet Nam (August 18, 1945): see Benvenisti, *supra* note 4, at 97. Moreover, the law of occupation proved very useful to the reoccupants, who invoked it in order to allow the military administrations wide discretionary powers unencumbered by constitutional restraints. *See, e.g.*, for example Donnison's account of the British decision to apply the law of occupation as the legal basis for their authority in Burma, Donnison, F., *British Military Administration in the Far East 1943-46* (1956), at 35-40

¹⁸ International Military Tribunal in Nuremberg, *The Trial of the Major War Criminals* 65 (1947). The International Military Tribunal for the Far East (1948) viewed the Hague Regulations as "good evidence" of customary international law. *In re Hirota*, [1948] Annual Digest Case no. 118, at 366.

The challenges outlined in the previous section supported the effort to redefine the law on occupations as part of the 1949 Diplomatic Conference in Geneva, aimed at rewriting the laws of war in reaction to the atrocities committed during World War II. Negotiations over the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War exposed disagreements between contemporary occupants of the Axis territories who were interested in the occupants' having as much latitude as possible, and the smaller countries, many of them with fresh memories of the predicament of occupation, who adamantly opposed an expansive view of occupants' powers.

The Geneva law differs from the Hague law in three important aspects, both based on the experiences of the preceding war. The first fundamental difference between the Geneva and the Hague laws is the changing focus from the political interests of the ousted regime to the protection of the population in the enemy's hands. This is the general concept of the Fourth Geneva Convention, apparent in its title: to provide for humanitarian treatment of civilian persons under occupation, without reference to the mode of governance in those territories. This convention delineates a bill of rights for the occupied population, a set of internationally approved guidelines for the lawful administration of occupied territories. This effort is quite distinct from that of the Hague Regulations, which strove to cater to the interests of the governments involved in the dispute. This leads to several basic policies set forth in the Convention. First, the Geneva law on occupation envisions attempts to disregard the law on occupation by denying the status of the area as subject to foreign occupation. The Convention refrains from criticizing such attempts.¹⁹ Article 47

¹⁹ There is no implied recognition of the legality of such changes. The Red Cross's commentary asserts that "the reference to annexation in this Article cannot be considered as implying recognition of this

provides instead that the duties of the occupant shall remain as such notwithstanding any purported changes in the legal status of the area.²⁰ As the ICRC Commentary explains, "[t]he main point, according to the Convention, is that changes made in the internal organization of the State must not lead to protected persons being deprived of the rights and safeguards provided for them."²¹ Thus, the practices that loomed large during the war, such as the creation of new "states," the appointments of new "governments," and the annexations or other changes of territorial boundaries, would not affect the applicability of the convention. Nor would the passage of time render the convention inapplicable: Article 47, as well as most of the other articles in the section dealing with occupied territories, continues to be effective "for the duration of the occupation."²²

The second difference relates to the structure of the occupant's duties and powers. The duties of the occupant under the Fourth Geneva Convention are numerous. It is no longer the disinterested watch guard, but instead a very involved regulator and provider. It 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 (Article 27), to facilitate the proper working of all institutions

manner of acquiring sovereignty."Pictet J. ed., Commentary: The Fourth Geneva Convention (1958). at 276. This conclusion is enhanced by the continued applicability of the Hague Regulations, as provided by Article 154.

²⁰ Article 47 states:

Inviolability of Rights: Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as a result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory

²¹ "[T]he text in question is of an essentially humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the state as such."

Pictet, *supra* note 19, at 274

²² Article 6 para 3.

devoted to the care and education of children (Article 51), provide specific labor conditions (Article 52), ensure food and medical supplies of the population (Article 55), maintain medical services (Article 56) and agree to relief schemes and to facilitate them by all means at its disposal (Article 59). To facilitate these duties, the occupant is granted wide legislative powers under Article 64.²³ Although this Article is entitled "Penal Legislation: 1. General Observations," it addresses all types of legislation.²⁴ Under the second paragraph, the occupant "may. ...subject the population of the occupied territory to *provisions* ..." (my emphasis). These provisions can be of a penal character, but they could also be of administrative and even civil character, as long as they are essential to the promotion of the ends that the occupant is empowered and obliged to attain under the convention.²⁵ The transformation from Watch guard to almost a full fledged administrator is reflected also in the relaxation of the need to respect existing law. Article 64 retains little of Hague's Article 43's strong bias

²³ Article 64 of the Fourth Geneva Convention states:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offenses covered by the said laws.

The Occupying Power may, however, 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, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

This article is followed by six more articles (65-70), which prescribe more specific limits on the legislation in penal matters.

²⁴ The Red Cross commentary explains that express reference was made only to penal laws, and not to the civil law, simply because the penal laws "had not been sufficiently observed during past conflicts; [and] there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution." (Pictet, *supra* note 19, at 335). This explanation could hardly satisfy the reader of previous chapters: the infringements of international limitations concerning the occupant's legislative powers extended during the war also, if not primarily, to non-penal legislation.

²⁵ Legislative history suggests that the drafting committee could not achieve unanimity on the question of whether or not to add the restrictive adjective "penal" to the noun "provisions" in the second paragraph of Article 64. The committee submitted two versions to a vote, and a majority preferred the removal of the adjective "penal." See Benvenisti, *supra* note 4, at 101-02.

against modifying local law. The negative test of Article 43 ("unless absolutely prevented"), is replaced by a positive authorization for the occupant who "may subject ... to provisions which are essential to enable..." him to exercise its functions.²⁶

The final fundamental difference between the Hague and the Geneva conceptions of the law, is the lack of any reference to the utilization of public property. The Hague Regulations offer clear guidelines in this matter. It distinguishes between private and public property, and also between movable and immovable public property.²⁷ Articles 53 and 55 allow certain uses of public property by occupants, but immunizes private property from confiscation. In contrast, the Geneva law remains silent on these issues. It does not address the issue of public property. It does protect private property against pillage and reprisals against private property (Article 33), but does not protect against confiscation, say, for public purposes. One could say that the limited treatment of this subject is an outcome of the specific humanitarian scope of the Geneva Convention,²⁸ but this would not explain why the Hague's protection against the confiscation of private property was not reiterated in the Geneva text. Thus, there is a reason to infer that it was the 1949 text reflects the interests of the occupants of that time to ensure wide discretion in their use of public and private resources to rebuild the post war economies in the occupied areas.

(4) *Challenges to the Geneva Conception*

Similar to the life of the Hague law, the Geneva law was challenged by subsequent occupants and by emerging new concepts.

²⁶ This significant relaxation of the need to respect existing law was an outcome of a serious argument in the drafting committee. See Benvenisti, *supra* note 4, at 102-03.

²⁷ Articles 46 (private property), 53 (public movable property) and 55 (public immovable property).

²⁸ See *supra* text to notes #

Human Rights A strong claim for upholding human rights in occupied territories has been advanced since the 1970s. Despite resistance to this idea based on doctrinal purity,²⁹ this claim was widely accepted. This position has been espoused by the UN General Assembly,³⁰ by the UN Human Rights Committee,³¹ and by the European Court for Human Rights.³² That human right law may complement the law of occupation in specific issues seemed a widely accepted proposition. What have been less clear were those areas of potential conflict between the norms. To what extent, for example, may the occupant limit or withhold political rights of the occupied population. Civil and political rights receive extensive treatment in human rights instruments, yet are ignored by the Fourth Geneva Convention and the Additional Protocol I of 1977. Realistically, one cannot expect occupants to endanger the security of their forces for the purpose of allowing local residents to enjoy political rights that are usually granted in democracies in peacetime. If the political process is lawfully halted for the duration of the occupation, the suspension of political rights would seem to be a sensible consequence. In the interplay between the conflicting interests,

²⁹ when armed conflict erupts, most "peacetime" human rights are temporarily superseded by the humanitarian laws of war. See, e.g., Y. Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law in Human Rights in International Law* 345, 350-52 (T. Meron, ed., 1985) (most human rights exist in peacetime but may disappear completely in wartime); I. Pictet, *Humanitarian Law and the Protection of War Victims* 15 (1975).

³⁰ *Basic Principles for the Protection of Civilian Population in Armed Conflicts*, General Assembly Resolution 2675 (XXV) December 9, 1970. The first "basic principle" for the protection of civilian population states: "Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict." The vote was 109 to 0, with 8 abstentions.

³¹ See the Human Rights Committee's Concluding Observations concerning the Israeli report, 18/08/98 (available at <http://www1.umn.edu/humanrts/hrcommittee/israel1998.html>): 10. [...] the Committee emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2, paragraph 1, for the actions of its authorities. The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises effective control." See also, in the same vein, Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories* 26 *Is.L.Rev.*, 24 (1992).

³² *Loizidou v. Turkey* 23 EHHR 513 (1996) (merits) (the European Convention on Human Rights applies to occupied Cyprus).

the law of occupation concedes that certain civil and political rights will from time to time be subjected to other concerns. Ultimately, as in other cases, the occupant is required to balance its interests against those of the occupied community. Thus, as hostilities subside, and security interests can permit, the occupant could be expected to restore civil and political rights. Under such circumstances, the human rights documents may well serve as guidance for reestablishing civil and political rights in the occupied territory.

Self Determination During the 1970s, and in the context of the Palestinian struggle against Israeli occupation of the West Bank and Gaza, military occupation has been likened to colonialism and other forms of subjugation. Accordingly, the struggle against foreign occupation was claimed to be a legitimate exercise of the right of peoples to self-determination. Several documents explicitly included occupations among the unlawful modalities of governance, similar to colonialism and apartheid.³³ The Charter of Economic Rights and Duties of States of December 12, 1974,³⁴ provides:

1. It is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practice such coercive policies are economically responsible to the countries, territories and peoples affected, for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

³³ An important exception is the consensual Definition of Aggression (General Assembly Resolution 3314 (XXIX) of December 14, 1974). Article 7 refers to the right of peoples under "colonial and racist regimes or other forms of alien domination" to self-determination. There is no explicit mention of occupation.

³⁴ Article 16(1) of General Assembly Resolution 3281 (XXIX) of December 12, 1974.

2. No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force.

And General Assembly Resolution 3171 (XXVIII), Section 2,

"[s]upports resolutely the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural resources."³⁵

Similar references to occupations as tantamount to colonialism and apartheid are found in Article I (4) of the 1977 Additional Protocol I to the Geneva convention and in the 1979 International Convention against the Taking of Hostages.³⁶

The claim of the lawful struggle for self-determination described above, coupled with the notion of illegal "foreign occupation" could seem to import major qualifications if not a revolution in the law of occupation. The accumulation of the abovementioned documents could be interpreted as asserting that if a state is constituted according to the principle of self-determination, its occupation, being an infringement, albeit a temporary one, of its people's right to freedom and independence, would seem to be illegal per se.

Although the relevant documents lack explicit reference to the illegal occupant's powers in such a situation (except for the denial of its right to utilize the country's natural resources), it would follow from the negative attitude toward it that the occupant's powers would be largely curtailed. Moreover, according to the same rationale, if a state is not constituted according to the principle of self-determination, its current government merits no respect, and the removal of such a government subsequent to invasion and the institution of a new government that conforms with the

³⁵ 28 UN GAOR, UN Doc. A19400 (December 17, 1973).

³⁶ UN Doc. A/C.6/34/L.23, reprinted in 18 ILM 1456 (1979). Article 12 (12) provides that acts of hostage taking committed in the course of struggles against those regimes are not governed by that convention.

principle of self-determination are warranted. The creation of Bangladesh would seem a good example of this latter rule. Such a view would render the law of occupation as we have come to understand it irrelevant.

It is suggested, however, that this was not the true meaning of those texts. The references to illegal "foreign occupation" should not be interpreted as advocating a virtual end to the temporary modality of government known as occupation. Rather, they should be viewed as aimed at occupations that use this modality as an indefinite grant of power, and refuses to negotiate for its withdrawal. Indeed, such an occupant abuses its powers and might taint its continuing presence in the occupied territory with illegality.

Avoidance, Again... The great majority of post World War II occupations honored the law on occupations by its breach. Using sophisticated claims, almost all recent occupants avoided the acknowledgment that their presence on foreign soil was in fact an occupation. Careful analysis reveals that in post World War II cases of occupation, except for the Israeli control over the West Bank (not including East Jerusalem) and Gaza, the framework of the law of occupation was not followed even on a de facto basis. No occupant in the past three decades has established a temporary military government that could effectively balance the conflicting interests of the occupant and occupied, nor did any occupant (except for Israel, on a de-facto basis) invoke the Hague Regulations or Fourth Geneva Convention to justify its measures. The various UN-supported humanitarian interventions or peace-enforcement operations that took place since the 1990s (former Yugoslavia, Somalia, Haiti, Mozambique, Angola, Western Sahara, and East Timor) failed to recognize the applicability of the law of

occupations, despite their focus on restoring and ensuring public order and civil life.³⁷ The shunning of the Hague and the Fourth Geneva Convention rules by most occupants was reflected in contemporary legal discourse, which, by and large, failed to apply them to the recent practices. . This avoidance of recognition of occupation status served as a major stumbling block to international scrutiny of the conduct of most occupants. With the notable exception of Adam Roberts,³⁸ the bulk of scholarly discussion regarding occupation was centered on Israeli practices.

III. The Significance of the Security Council Resolution on Iraq

The occupants in Iraq, The United States of America, the United Kingdom “and Coalition partners” did not explicitly acknowledge their status as an occupying power, nor did they invoke the Hague Regulations or the IV Geneva Convention. Instead, they declared their mission in Iraq *inter alia* using concepts and even language taken from those two instruments. The Letter from the Permanent Representatives of the UK and the US to the UN addressed to the President of the Security Council of May 8, 2003³⁹ communicates their pledge to “strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq,” and outlines specific goals and mechanisms to attain them. The Security Council, in its Resolution 1483 of May 22, 2003, “noted” this letter but continued to “recogniz[e] the specific authorities, responsibilities, and obligations under applicable international law of these states as

³⁷ For an in-depth analysis of the applicability of the law of occupation to UN-supported peace-enforcement operations in general and the operation in Somalia in particular see Michael J. Kelly, *Peace Operations* (1997).

³⁸ Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 *AJIL* 44 (1990), at 73

³⁹ Documat numbered S/2003/538.

occupying powers under unified command”⁴⁰ (my emphasis). It explicitly “[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” (Article 5).

The Resolution revives the law on occupation from its slumber. For the first time in its decade-old history of peace enforcement and restructuring efforts, the UN resorts to the concept of occupation.⁴¹ Moreover, this recognition of the applicability of the law refutes the claim that occupation as such is illegal. Instead, it revives the neutral connotation of the doctrine. Necessarily, and despite some language to the contrary in previous General Assembly Resolutions,⁴² struggle against the occupation regime will not be a lawful exercise of popular sovereignty.

According to the law on occupations, and as acknowledged in both the occupants’ letter and the Security Council’s Resolution, the demise of the Iraqi regime did not affect the sovereignty and territorial integrity of Iraq. This confirmed instead the demise of the doctrine of *debellatio*, which would have passed sovereign title under such circumstances to the occupant.⁴³ On the other hand, the total collapse of the Iraqi regime carried significant legal consequences. Instead of restoring that regime’s institutions and respecting its laws, the Iraqi people is encouraged “freely to determine their own political future and control their own natural resources,... to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender” (Preamble).

The continued applicability of human rights in the occupied territory is recognized in a somewhat convoluted way. The Security Council creates a new

⁴⁰ United Nations S/RES/1483 (2003).

⁴¹ See supra text to note #.

⁴² Supra notes ##

⁴³ See supra text to notes ##.

position, called “Special Representative for Iraq,” whose role is to assist the people of Iraq through reporting regularly to the Council on his activities under the resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, (Article 7). The Special Representative is independent of the occupying power (the “Authority” in the language of the Resolution) and is required to act in coordination with the Authority. It is one of the Special Representative’s goals to “promot[e] the protection of human rights.”(Article 7(g)), whereas the Authority has no similar duty, at least not explicitly. Instead, the Authority is “[c]all[ed] upon ...

consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;” (Article 4)

The occupants undertook in their letter to the Security Council to “act to ensure that Iraq’s oil is protected and used for the benefit of the Iraqi people.” The Resolution reiterates this goal with its decision that

“all export sales of petroleum, petroleum products, and natural gas from Iraq following the date of the adoption of this resolution shall be made consistent with prevailing international market best practices, to be audited by independent public accountants reporting to the International Advisory and Monitoring Board ... in order to ensure transparency, [and that] all proceeds from such sales shall be deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted;” (Article 20).

The Resolution can be seen as the latest and most authoritative restatement of several basic principles of the contemporary law on occupation: Occupation as such

does not amount to unlawful alien domination that entitles the local population to struggle against it; sovereignty inheres in the people, and consequently regime collapse does not extinguish sovereignty; the occupant must act “effectively” to promote the “welfare” of the occupied population if not their human rights, and to create condition for the people’s establishment of a new political institutions based on their free will, which will also ensure “equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender.” (preamble). In the meantime, the occupant is fully entitled to utilize public resources for that purpose. An important innovation in the Resolution is the setting up of monitoring processes to oversee the occupant’s measures.

IV. Conclusion: The Law of Occupation Today

The occupation of Iraq required international lawyers to retrieve an old doctrine that during the last half century almost reached the stage of desuetude. Suddenly, its utility became evident. But the old doctrine needed an overhaul to bring it up to date with contemporary legal and political perceptions. The consequences of the downfall of the domestic regime had to be revised, the relevancy of human rights law had to be taken into account, a reiteration of the nature of the occupation as an effective de facto regime was required and finally, a recognition of the authority to utilize publicly owned resources for the benefits of the local population was called for.

This essay demonstrated that the basic tenets of the old law on occupation withstood the test of time and changed circumstances, perceptions and expectations. It is to be hoped that the goals set out in Security Council Resolution 1483 materialize fully. Besides the obvious potential benefits to the Iraqi people, a satisfactory

implementation of the Resolution will help relieve the doctrine on “occupation” of its derogatory connotation.