

Promoting the Rule of Law Through the Law of Occupation? An Uneasy Relationship

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Abstract

A core objective of the law of occupation has traditionally been that the occupying power should heed rule of law standards in the administration of the occupied territory. Less clear is whether it should also seek to inculcate rule of law standards into the local government. To be sure, the pertinent rules of the law of occupation provide for far-reaching competences of the occupying power. However, given the predominately negative, security-focused and conservationist nature of the occupier's powers, its involvement in the "rule of law transfer" business should not be overrated. While it is true that two major post-1945 developments, i.e. international human rights law and the involvement of the UN Security Council, have contributed toward broadening, recalibrating, and dynamizing the applicable legal standards in situations of occupation, it is nonetheless crucial to resist the temptation to concede, in the name of promoting the rule of law, too much legislative leeway to the occupying power. Thus, the question whether, and to what extent, the law of occupation mandates the occupying power to engage in promoting the rule of law in the occupied territory, calls for a differentiated, and cautious, answer.

A. Introduction

When Ernst Fraenkel published his “Military Occupation and the Rule of Law” in 1944,¹ World War II was still raging in Europe and beyond. By studying the post-World War I occupation of the Rhineland from 1918 through 1923, he sought to contribute to “[...] understanding the problems that will confront a future occupation regime”.² He felt that the traditional law of occupation was not equipped to deal with the challenges of the imminent post-World War II occupation of Germany.

Interestingly, the lens through which Fraenkel chose to look at occupation was the concept of the rule of law, “[...] one of the basic elements of western civilization”.³ Against this background, he asked “[...] whether a principle that is applicable to national governments, exercising their powers by virtue of national laws, is not also applicable to the regimes of foreign governments that exercise their powers by virtue of international law”.⁴

This question is directed, on the one hand, to the occupying power in the sense that it should itself heed rule of law standards in the administration of the occupied territory (e.g. maintaining the local court system, providing for effective law enforcement or respecting fundamental fair trial and due process guarantees). This has traditionally been one of the core objectives of the international law of occupation.⁵ Less clear is whether the occupying power, on its part, should seek to inculcate rule of law standards into the local government. That such *mission civilisatrice* is within the remit of the powers, or even obligations, of the occupying power is subject to considerable doubt.

To be sure, Article 43 of the *Hague Regulations* (HR)⁶ and Article 64 of the *Fourth Geneva Convention* (IV GC)⁷ provide for far-reaching competences of the occupying power⁸ that may also include promoting the rule of law in the

¹ E. Fraenkel, *Military Occupation and the Rule of Law. Occupation Government in the Rhineland, 1918-1923* (1944).

² *Ibid.*, ix.

³ *Ibid.*, x.

⁴ *Ibid.*, x.

⁵ See, e.g., Y. Dinstein, *The International Law of Belligerent Occupation* (2009), 132-145.

⁶ *Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, Art. 43, available at <https://ihl-databases.icrc.org/ihl/WebART/195-200053?OpenDocument> (last visited 13 December 2018).

⁷ *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Art. 64, 75 UNTS 287.

⁸ For a more detailed analysis of these provisions see B. II.

occupied territory. Yet, given the predominantly negative, security-focused and conservationist nature of the occupier's powers (B.), its involvement in the "rule of law transfer" business should not be overrated, at least as far as the law of occupation in the strict sense, i.e. as an element of international humanitarian law, is concerned.

It has become common, however, to underscore the relevance of two major post-1945 developments⁹ – international human rights law (C.) and action by the United Nations Security Council (D.) in situations of occupation or similar situations – with a view of arguing in favor of broadening, recalibrating, and dynamizing the applicable legal standards under the label of a law of occupation in the wider sense. This has the potential of greatly increasing the occupying power's rights and obligations to act as a rule of law transferor vis-à-vis the local population and administration. There are indeed sound reasons to follow such an approach, but, as will be shown, also significant risks and pitfalls and therefore limits to such undertaking.

Thus, the overall question underlying the present contribution, namely whether, and to what extent, the law of occupation mandates the occupying power to engage in promoting the rule of law in the occupied territory, calls for a differentiated and cautious answer (E.).

B. Is the Promotion of the Rule of Law Outside the Remit of the Law of Occupation?

As has already been mentioned, promotion of the rule of law does not sit easily with the traditional setup of the law of occupation. This can be explained by the generally negative approach of the law of occupation (I.), its focus on the security of the occupying power (II.) as well as its conservationist character (III.). When delving into these aspects in the following, it will also become manifest, however, that rule of law promotion is not in itself alien to the law of occupation.

I. Negative Approach

The traditional law of occupation is chiefly concerned with stipulating prohibitions vis-à-vis the occupying power, e.g. the prohibition to force the inhabitants of the occupied territory to furnish information about the army of

⁹ See, e.g., A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 *American Journal of International Law* (2006) 3, 580, 589; E. Benvenisti, *The International Law of Occupation*, 2nd ed. (2012), 9, 12-15.

the other belligerent or about its means of defense (Article 44 HR), to compel those inhabitants to swear allegiance to the occupying power (Article 45 HR), to confiscate private property (Article 46 HR), to resort to pillage (Article 47 HR) or collective punishment (Article 50 HR), or to seize, destroy or willfully damage the property of institutions dedicated to religion, charity, and education as well as of works of art and science (Article 56 HR).¹⁰ This negative approach reflects the renunciation of the old doctrine that acquiring effective control over a territory was considered a sufficient legal basis to assert a right of conquest and obtain full sovereign rights over it, and its replacement by the doctrine of *occupatio bellica* characterized as “[...] a temporary state of fact arising when an invader achieves military control of a territory and administers it on a provisional basis, but has no legal entitlement to exercise the rights of the absent sovereign”.¹¹

Also, the *Fourth Geneva Convention*, while endorsing the concept of a comparably more active occupying power,¹² still focuses on prohibitions. Accordingly, the occupying power shall not, for instance, deprive protected persons in the occupied territory of the benefits of the Convention (Article 47 IV GC), prevent other nationals from leaving the occupied territory (Article 48 IV GC), deport or transfer protected persons to the territory of the occupying power or its own civilian population into the occupied territory (Article 49 IV GC), compel protected persons to serve in its armed forces (Article 51 IV GC), create unemployment (Article 52 IV GC), destroy real or personal property belonging individually or collectively to private persons, public authorities or social or cooperative institutions (Article 53 IV GC), alter the status of public officials or judges in the occupied territory (Article 54 IV GC), apply retroactive or disproportionate laws to the occupied population (Article 65, 67 IV GC) or impose the death penalty against the occupied population except in cases of espionage, serious acts of sabotage or killings, with the further proviso that these

¹⁰ See also corresponding prohibitions in *Actes de la Conférence réunie à Bruxelles, du 27 juillet au 27 août 1874, pour régler les lois et coutumes de la guerre*, 27th August 1874, Art. 3, 36-39, 4 *Nouveau recueil général de traités* (1879-1880), 219 [Brussels Declaration].

¹¹ N. Bhuta, ‘The Antinomies of Transformative Occupation’, 16 *European Journal of International Law* (2005) 4, 721, 725; for a historical account of the development see *ibid.*, 724-733.

¹² As to the drafting history see, e.g., Roberts, *supra* note 9, 587-588; see in particular the analysis of the relationship between Article 43 HR and Article 64 IV GC in M. Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, 16 *European Journal of International Law* (2005) 4, 661, 669-670; Benvenisti, *supra* note 9, 95-102; Y. Arai-Takahashi, ‘Law-Making and Judicial Guarantees in Occupied Territories’ in A. Clapham, P. Gaeta & M. Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (2015), 1421, 1422-1423.

acts were punishable by death before the occupation began and that juveniles may never be subjected to capital punishment (Article 68 IV GC).

This *status negativus*,¹³ however, is not without limits: Firstly, many of the aforementioned prohibitions are qualified inasmuch as they accept restrictions in case these are “[...] rendered absolutely necessary by military operations” (Article 53 IV GC), due to “imperative military reason” (Article 49 IV GC), “imperative reasons of security” (Articles 62, 78 IV GC) or the like. Secondly, provisions such as Articles 50 and 55 to 59 IV GC require positive action on the part of the occupying power with respect to children, the food and medical supply of the occupied population, medical and hospital establishments and services, public health and hygiene in the occupied territory as well as in regard to relief schemes and consignments in favor of the population under occupation.¹⁴

II. Relative Focus on the Security Interests of the Occupying Power

As already indicated, the security interests of the occupying power pose a limit to (many of) its negative obligations under the law of occupation. In addition, according to other provisions, the occupying power may use its prerogatives “[...] for the needs of the army or of the administration of the territory in question” (Article 49 HR) or “[...] for the needs of the army of occupation” (Article 52 HR). Hence, the law of occupation accepts positive intervention on the part of the occupying power mostly when its own military or security interests are at stake.¹⁵

Yet the law of occupation also takes into account the interests of the local population. When the aforementioned Article 49 HR allows for the levying of money contributions in the occupied territory “[...] for the needs [...] of the administration of the territory in question”, the existence of such administration is also to the benefit of the population under occupation. Furthermore, Articles 50 and 55 to 59 IV GC, as referred to above, call for the occupying power’s action with respect to food and medical services. Moreover, Article 49 IV GC authorizes the occupying power to undertake total or partial occupation of an area “[...] if the security of the population [...] so demand[s]”.

The two most interesting, and therefore most discussed, provisions are Article 43 HR and Article 64 IV GC. According to the former, “[t]he authority

¹³ See G. Jellinek, *System der Subjektiven Öffentlichen Rechte*, 2nd ed. (1905), 87.

¹⁴ See in a similar vein *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, Art. 69-71, 1125 UNTS 3, 35 – 36.

¹⁵ See notably Sassòli, *supra* note 12, 673-674.

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”.

To start with, this provision is of negative character insofar as it generally obliges the occupying power not to change the laws in the occupied territory but for a rather strictly crafted exception clause (*arg.* “unless absolutely prevented”). If this requisite is met, however, the occupying power has the positive obligation to “restore and ensure”, as the English text puts it, “public order and safety”. When considering the (solely authentic¹⁶) French version of Article 43 HR,¹⁷ the provision still manifests the characteristic security focus of the law of occupation, but it also makes clear that the occupying power, beyond its responsibility for “*l’ordre public*”, has a broader mandate to restore and ensure “*la vie publique*” i.e. public or civil life in a broader sense.¹⁸ Thus, occupation law’s security focus has always been relative, not absolute in nature.

This becomes even clearer when analyzing Article 64 IV GC which was adopted half a century after Article 43 HR, with a view of, to a certain extent at least, widening the scope for changes in the existing local legislation¹⁹:

“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 offences covered by the said laws.

¹⁶ See D. Schindler & J. Toman, *The Laws of Armed Conflict*, 4th ed. (2004), 56.

¹⁷ Speaking of “*l’ordre et la vie publics*”.

¹⁸ See Sassòli, *supra* note 12, 663-664, also referring to Baron Lambermont, the Belgian representative at the negotiations for the 1874 Brussels Declaration, who considered this phrase to encompass “*des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours*”. See *Grahame v. Director of Public Prosecutions, British Zone of Control, Control Commission Court of Appeal*, Case No. 103, 26 July 1947, 14 *Annual Digest and Reports of Public International Law Cases* (1947), 228, 232: “*l’ordre et la vie publics*” [is] a phrase which refers to the whole social, commercial and economic life of the community”. See in a similar vein Arai-Takahashi, *supra* note 12, 1425-1426; Benvenuti, *supra* note 9, 78-79.

¹⁹ See in particular the analysis of the two provisions in *supra* note 12.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil 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.”

The main duty of the occupying power, under the first paragraph, remains negative, i.e. to respect the penal laws of the occupied territory. Yet, such laws may be repealed or suspended, not only if “absolutely prevented”, but in more generous terms.²⁰ By not only offering the security of the occupying power as a justification to act, but also the proper “application of the present Convention”, the operational range of the occupying power is considerably widened, since it can in principle draw on every interest recognized in the Convention to justify its pushing back of the existing local penal legislation.

This is confirmed by the analysis of the second paragraph of the provision, which deals with the legislation in the occupied territory in general and is phrased in positive terms. The three grounds for creating new law for the occupied population, which are offered by it to the occupying power, are, on equal footing, the (already familiar) security interests of the occupying power, the fulfillment of the occupying power’s obligations under the Fourth Geneva Convention, and the maintenance of the orderly government of the occupied territory.

When assessing this rather broad authorization, it becomes obvious that rule of law issues are not beyond the remit of the law of occupation.²¹ This already holds true for Article 43 HR, where it may be argued that the concept of “civil life” can be drawn upon to justify (moderate) rule of law transfer, e.g. by

²⁰ See notably Benvenisti, *supra* note 9, 95-96, with further references.

²¹ See also UK War Office, *The Law of War on Land, Being Part III of the Manual of Military Law* (1958), 145 according to which an occupying power may repeal or suspend laws if in the occupied territory there is no “adequate legal system in conformity with generally recognised principles of law”; see, in a similar vein, UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), 284: “The occupying power should make no more changes to the law than are absolutely necessary, particularly where the occupied territory has an already adequate legal system.”

abolishing discriminatory laws.²² More boldly put, “[i]n modern understanding, ‘public order and safety’ means a guarantee of the rule of law [...]”²³

This idea applies with even more force to Article 64 IV GC. Fulfilling its duties under the Convention means that the occupying power must take care of a whole range of rule of law-related issues, including negative duties such as not to alter the status of public officials or judges in the occupied territories (Article 54 IV GC), but also positive responsibilities such as ensuring the existence of a functioning (penal) court system which applies non-retroactive and proportionate laws (Articles 66, 67 IV GC) or respecting fundamental fair trial and due process guarantees (Articles 71 to 73 IV GC).²⁴ Moreover, this is reinforced by the express inclusion of the occupying power’s responsibility for the “orderly government” of the occupied territory into the Convention. While these provisions primarily address the administration set up by the occupying power, it is not a far-fetched thought to also apply such rule of law standards to the existing local courts. After all, Article 64(1) IV GC states that the courts existing in the occupied territory shall continue to function in respect of the pertinent penal law provisions “[s]ubject [...] to the necessity for ensuring the effective administration of justice”.

Hence, in spite of the law on occupation’s relative focus on its own security, the occupying power also has responsibilities in terms of promoting the rule of law, authorizing, and even obliging it, if need be, to subject the population of the occupied territory to new legal provisions, i.e. to legislate in favor of the rule of law although the existing law in the occupied territory points in another direction. One might even find it useful to address these obligations “in modern parlance” as a “duty of good governance”²⁵ incumbent on the occupying power. This would typically include the maintenance and, if necessary, the establishment of an adequate normative order, an adequate administrative apparatus, a functioning court system, effective law enforcement, etc.²⁶

²² As to this example see Arai-Takahashi, *supra* note 12, 1426.

²³ M. Bothe, ‘The Administration of Occupied Territory’, in A. Clapham, P. Gaeta & M. Sassòli (eds), *The 1949 Geneva Conventions. A Commentary* (2015), 1455, 1469.

²⁴ See in this regard also common Article 3(1)(d) of the *Geneva Conventions*; Articles 99-108 and 130 last sentence of the *Third Geneva Convention*; Article 75, paragraphs 3-8 of the *First Additional Protocol*; as well as Article 8(2)(a)(vi) of the *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3; see also Arai-Takahashi, *supra* note 12, 1433-1434, 1438-1450 in this regard.

²⁵ Bothe, *supra* note 23, 1467; see also *ibid.*, 1462-1463.

²⁶ See *ibid.*, 1467.

Thus, the promotion of the rule of law complements the safeguarding of the occupying power's legitimate security interests as an additional objective of the law of occupation – if one does not want to make the further argument, merging the two objectives as it were, that promoting the rule of law in the occupied territory is in itself a major contribution to the occupying power's security since it will typically raise the legitimacy and stability of the occupier's administration in the eyes of the population under occupation.

III. Conservationist Character

A third characteristic of the law of occupation is its conservationist character.²⁷ As the occupying power is not the territorial sovereign, but only enjoys temporally limited powers over the occupied territory, this body of law seeks to preserve the legal position of the ousted sovereign as well as its nationals who are now under foreign occupation.²⁸ Against this background, the law of occupation is reticent, even hostile vis-à-vis any attempt on the part of the occupying power to alter the legal status of the occupied territory or population beyond the necessary minimum.²⁹

Article 47 IV GC is emblematic of this approach: “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 the 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.” In addition, the aforementioned Articles 43 HR and 64 IV GC also testify to the

²⁷ See Roberts, *supra* note 9, 580, referring to the “conservationist principle”; see also Sassòli, *supra* note 12, 668 (“the conservative approach of [international humanitarian law] towards belligerent occupation”); Bhuta, *supra* note 11, 726: “[...] the fundamental principle of occupation law accepted by mid-to-late 19th-century publicists was that an occupant could not alter the political order of territory”; Bothe, *supra* note 23, 1460 (“[...] continuity of the pre-existing legal system (conservationist principle, *principe de stabilité juridique*)”).

²⁸ Benvenisti, *supra* note 9, 69-70; see also Roberts, *supra* note 9, 585: “temporary trusteeship”. As regards the occupier's role as a (mere) *de facto* administrator of the occupied territory see notably J. S. Pictet (ed), *Commentary on the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War* (1958), 273.

²⁹ See Roberts, *supra* note 9, 582: “The assumption that, the occupant's role being temporary, any alteration of the existing order in the occupied territory should be minimal lies at the heart of the provisions on military occupation in the laws of war.”

law on occupation's interest in conserving, as far as possible, the *status quo* in the occupied territory.

Three developments qualifying this analysis deserve to be highlighted. To start with, in particular in the post-World War II law of occupation, there has been a notable shift from the interests of the ousted sovereign to those of the population under occupation, not the least under the influence of the principle of the self-determination of peoples.³⁰ Hence, in the triangle of interests³¹ between the occupying power, the ousted sovereign, and the occupied population, which the law of occupation has always sought to manage, the interests of the latter have been accorded increasing relevance over the last couple of decades.³² Inasmuch as the needs of the local population so require, the occupying power is justified, and even obliged, to pursue a more activist approach, even though this might interfere with the ousted government's interest in the maintenance of the *status quo* and run counter to the traditional ideal of an occupation characterized by the "[...] minimal necessary interaction [...]"³³ between the occupying power and the population under occupation. As the "lodestar guiding the law of belligerent occupation [...] is the principle that the civilian population of an occupied territory must benefit from maximal safeguards feasible in the circumstances",³⁴ the ICRC Commentary to the *Fourth Geneva Convention* already noted that "[c]ertain changes might conceivably be necessary and even an improvement [...] [Article 47 IV GC] 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."³⁵

³⁰ See Article 1(2) of the *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI; common Article 1 of the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 5, and of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, 173.

³¹ See Dinstein, *supra* note 5, 1; Benvenisti, *supra* note 9, 69.

³² See the *dictum* from Judge Hardy Dillard's Separate Opinion in *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports 1975, 12, 116, 122: "It is for the people to determine the destiny of the territory and not the territory the destiny of the people." See further O. Ben-Naftali, "A la recherche du temps perdu": Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of a Wall in the Occupied Palestinian Territory Advisory Opinion', 38 *Israel Law Review* (2005) 1-2, 211, 221: "Although previously owed to the ousted political sovereign, the contemporary concept of self-determination, which vests [...] sovereignty in the people themselves [...] decree[s] that such trust is owed to the occupied population."

³³ Benvenisti, *supra* note 9, 70.

³⁴ Dinstein, *supra* note 5, 286.

³⁵ Pictet, *supra* note 28, 274; see also Arai-Takahashi, *supra* note 12, 1428.

The second issue is the experience of the Allied occupations immediately after World War II, notably that of Germany. The Allies were eager to avoid the impression that their military and administrative presence was legally based on, and therefore limited by, the framework set by the *Hague Regulations*. Various justifications were relied upon in this regard: that, due to major security issues and the very nature of the Nazi regime, the Allied powers were “absolutely prevented” from maintaining the existing system of government,³⁶ that Germany’s political and military institutions had completely disintegrated by May 1945, and that, for lack of any government-in-exile or any kind of resistance on behalf of Germany, there was a situation of *debellatio*³⁷ or that, by virtue of Germany’s unconditional surrender, the Allies vested themselves with the powers of the German government and erected an occupation régime *sui generis* on this basis.³⁸ Thus, the restrictions entailed by the traditional law of occupation should be avoided and a fundamental reshuffle of the German political, economic, social, and legal system should become possible. There was consensus among the Allies that only such complete turnover of the structures existing in Germany would permit a truly new start, notably a comprehensive and ambitious “rule of law program”.³⁹ It is crucial to have this precedent in mind not merely as a matter of historical curiosity, but because the current debate on human rights-informed occupation policies⁴⁰ considerably draws, explicitly or implicitly, on Germany’s (and, for that matter, Japan’s) post-World War II occupation.

³⁶ Roberts, *supra* note 9, 587, fn. 22.

³⁷ See A. Roberts, ‘What is a Military Occupation?’, 55 *British Yearbook of International Law* (1984) 1, 249, 268-269; Benvenuti, *supra* note 9, 162; Sassòli, *supra* note 12, 672.

³⁸ Also the text of the Berlin Declaration of 5 June 1945, 68 UNTS 189, 190, according to which the Allies announced that they had assumed “[...] supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal, or local government or authority”, can be read in this regard.

³⁹ See Proclamation No. 1 by the Supreme Commander of the Allied Forces, General Dwight D. Eisenhower, dating from September 1944, announcing that “[w]e shall overthrow the Nazi rule, dissolve the Nazi Party and abolish the cruel, oppressive and discriminatory laws and institutions which the Party has created”, as well as Law No. 1 on the “Abrogation of Nazi Law”, Law and Orders of Military Government Complete Collection up to June 30th 1945, 3 which sought “to eliminate from German law and administration within the occupied territory the policies and doctrines of the National Socialist Party, and to restore to the German people the rule of justice and equality before the law [...]”.

⁴⁰ See C.

Third, occupation's conservationist character is further challenged by the phenomenon of long-standing occupations, such as the already half-century old Israeli occupation of the Occupied Palestinian Territory (OPT), but also the decades-long Moroccan and Turkish military presences in Western Sahara and Northern Cyprus. The traditional law of occupation was modeled on rather short-term occupations of several months or years, but not for protracted occupations that give rise to additional challenges, notably in view of the developing needs of the population under occupation.⁴¹ As has been stated by the Israeli Supreme Court already at the beginning of the occupation of the OPT, "[l]ife does not stand still, and no administration, whether an occupation administration or another, can fulfil its duties with respect to the population if it refrains from legislating and from adapting the legal situation to the exigencies of modern times."⁴² According to such reasoning, limiting oneself to simply preserving the *status quo* cannot be considered a viable option in situations of long-standing occupation. In this regard, it has, for instance, been submitted that the exceptions to Article 43 HR should be interpreted more extensively the longer an occupation regime lasts.⁴³

It is generally agreed that these developments have a dynamizing effect on the contemporary interpretation of the law of occupation. As has been stated, "[r]ecent practice [...] seems to suggest that there are reasons to shift the emphasis from maintaining the status quo to [...] especially the duty of good governance".⁴⁴ Going beyond gradual approaches, the aforementioned developments have motivated some scholars to conceive of novel approaches to the law of occupation. One of the most prominent concepts in the present debate is that of *transformative* occupation,⁴⁵ posing the question whether "[w]ithin the existing framework of international law, [it is] legitimate for an occupying power,

⁴¹ See, for instance, the controversy regarding the introduction, in 1975, of a value added tax in the OPT (analogous to that in Israel) which was justified as an equalizing device, i.e. to augment the free flow of goods and services between Israel and the OPT; Supreme Court of Israel, *Abu Aita et al. v. Commander of Judea and Samaria et al.*, HCJ 69/81, Judgment of 5 April 1975, 37(2) PD 197; see the discussion in Dinstein, *supra* note 5, 128.

⁴² Supreme Court of Israel, *The Christian Society for the Sacred Places v. Minister of Defence*, HCJ 337/71, 26(1) PD 574, 582.

⁴³ See R. Kolb, *Ius in bello. Le droit international humanitaire des conflits armés* (2002), 186; Arai-Takahashi, *supra* note 12, 1425; Bothe, *supra* note 23, 1462-1463, 1467.

⁴⁴ Bothe, *supra* note 23, 1462.

⁴⁵ As regards the term see Roberts, *supra* note 9, 580; Bhuta, *supra* note 11, 721; A. Carcano, *The Transformation of Occupied Territory in International Law* (2015); see also D. Scheffer, 'Beyond Occupation Law', 97 *American Journal of International Law* (2003) 4, 842, 847, fn. 18 (and *passim*): "transformational".

in the name of creating the conditions for a more democratic and peaceful state, to introduce fundamental changes in the constitutional, social, economic, and legal order within an occupied territory”.⁴⁶

It is fairly obvious that such a dynamic and activist take on the law of occupation can hardly be based on the provisions of the *Hague Regulations* and the *Fourth Geneva Convention*, as discussed above. At the same time, the said academics would claim that theirs is not only a project *de lege ferenda*, but reflects actual legal transformations in international law. In this regard, they commonly refer to the impact of international human rights (C.) as well as of the Security Council’s involvement in situations of occupation and post-conflict administrations (D.) on the international law of occupation. Against this background, it may be asked how these two phenomena can be reconciled with the account of the international law of occupation in the strict sense given above and to what extent they have contributed their share to promoting rule of law transfers in situations beyond the traditional law of occupation.

C. The Impact of International Human Rights Law

Much ink has been spilled on the question of the relationship of international humanitarian law and international human rights law.⁴⁷ Already Fraenkel envisaged the application of “an international bill of rights [...] to an occupation regime, at least after the purely military phase of the occupation has ended”.⁴⁸ As early as 1968, the UN General Assembly adopted a resolution

⁴⁶ Roberts, *supra* note 9, 580; see also Scheffer, *supra* note 45, 849, pleading for an expanded scope of permissible action if the occupied population requires “[...] revolutionary changes in its economy (including a leap into robust capitalism), rigorous implementation of international human rights standards, a new constitution and judiciary, and a new political structure (most likely consistent with principles of democracy) [...]”.

⁴⁷ See, for instance, L. Doswald-Beck & S. Vité, ‘International Humanitarian Law and Human Rights Law’, 33 *International Review of the Red Cross* (1993) 293, 94; T. Meron, ‘The Humanization of Humanitarian Law’, 94 *American Journal of International Law* (2000) 2, 239; R. Provost, *International Human Rights and Humanitarian Law* (2002); H. Krieger, ‘A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study’, 11 *Journal of Conflict and Security Law* (2006) 2, 265; D. Droegge, ‘The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’, 40 *Israel Law Review* (2007) 2, 310; A. Orakhelashvili, ‘The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism or Convergence?’, 19 *European Journal of International Law* (2008) 1, 161; Roberts, *supra* note 9, 590-595, with further references.

⁴⁸ Fraenkel, *supra* note 1, 205.

on “respect for human rights in armed conflicts”.⁴⁹ Subsequently, in 1970, the General Assembly defined, as a “basic principle” to be applied for the protection of the civilian population, that “[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict”.⁵⁰ Irrespective of whether one considers the *lex specialis* approach championed by the ICJ⁵¹ as an appropriate description of this intricate relationship, there can be no doubt today that international human rights law is in principle also applicable and relevant in situations of armed conflict, including in situations of occupation.⁵²

In particular, the ICJ has not only held that the *International Covenant on Civil and Political Rights* does not cease to apply in times of war, except by operation of the derogation clause in its Article 4,⁵³ but has explicitly stated that this covers situations of occupation and encompasses other international human rights instruments, such as the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child* (including its *Optional Protocol on the Involvement of Children in Armed Conflict*) as well as the *African Charter on Human and Peoples’ Rights*, i.e. the *Banjul Charter*.⁵⁴

In addition, it has become common to highlight the relevance of international human rights law in terms of legal interpretation. This means that the law of occupation should be read in the light of, and in conformity with, international human rights law. Such a call for the harmonious interpretation of the two bodies of law can be based on Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* according to which, when interpreting an international treaty

⁴⁹ GA Res. 2444 (XXIII), UN Doc A/RES/2444, 19 December 1968.

⁵⁰ GA Res. 2675 (XXV), UN Doc A/RES/2675, 9 December 1970.

⁵¹ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 240, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 178, para. 106 [ICJ, Wall Opinion]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, 242, 243, para. 216.

⁵² See also the pertinent statements of international human rights courts and bodies; *Loizidou v. Turkey*, ECtHR Application No. 15.318/89, Judgment (Preliminary Objections) of 23 March 1995, para. 62; *Ilaşcu and others v. Moldova and Russia*, ECtHR Application No. 48.787/99, Judgment of 8 July 2004, para. 312; *Salas and others v. United States*, IACHR Case No. 10.573, Report No. 31/93, para. 6. See, however, Benvenisti, *supra* note 9, 14-15, who refers to the US and Israel as persistent objectors in this regard.

⁵³ See the references *supra* note 51.

⁵⁴ ICJ, *Wall Opinion*, *supra* note 51, 180, 181, paras. 111-113; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, 243, 244, para. 217.

(such as the *Hague Regulations* or the *Fourth Geneva Convention*), “any relevant rules of international law applicable in the relations between the parties” shall be taken into account. The relevance of this principle of “systemic integration”⁵⁵ for the proper construction of international humanitarian law becomes particularly obvious when considering Article 72 of the 1977 *First Additional Protocol* according to which its provisions shall be “additional [...] to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict”.

In addition, there is consensus among all international human rights courts and treaty bodies that international human rights treaties, by virtue of their *telos* of not only protecting, but promoting human rights,⁵⁶ should be considered “living instruments”⁵⁷ and should therefore be subject to dynamic or evolutive interpretation.⁵⁸

It is quite obvious that, when combining the two approaches, the conservationist character of the law of occupation tends to be complemented, and superseded, by the dynamizing force of human rights interpretation.⁵⁹ Thus, the potential for human rights to promote the rule of law⁶⁰ may help a great deal in opening up the rather reluctant attitude of traditional occupation law vis-à-vis rule of law transfers on the part of the occupying power.⁶¹

⁵⁵ See, e.g., O. Dörr, ‘Article 31: General Rule of Interpretation’, in: O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, 2nd ed. (2018), 604; C. McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’, 54 *The International and Comparative Law Quarterly* (2005) 2, 279.

⁵⁶ See, e.g., Preamble of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, 222: “[...] maintenance and further realization of Human Rights and Fundamental Freedoms”.

⁵⁷ *Tyrer v. United Kingdom*, ECtHR Application No. 5856/72, Judgment of 25 April 1978, para. 31; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion, 1 October 1999, IACtHR No. 16, OC-16/99, para. 114.

⁵⁸ See E. Bjorge, *Domestic Application of the ECHR. Courts as Faithful Trustees* (2015), 131-133, with further references.

⁵⁹ See in particular the analysis in Roberts, *supra* note 9, 595-601; Benvenisti, *supra* note 9, 74-76; Arai-Takahashi, *supra* note 12, 1426-1427.

⁶⁰ See, e.g. Articles 6-11 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A(III), UN Doc. A/RES/3/217 A, 10 December 1948; Articles 14-16 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR]. It is worth noting in this context that Article 75 of the First Additional Protocol on “fundamental guarantees” is directly derived from the ICCPR; Roberts, *supra* note 9, 591.

⁶¹ See Benvenisti, *supra* note 9, 102-103.

In particular, the Human Rights Committee has stated:

“Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.”⁶²

In addition, the *European Court of Human Rights* has activated the rule of law-promoting potential of Article 6 ECHR when requiring Turkey, as the occupying power in Northern Cyprus, to try civilians accused of acts characterized as military offences before courts warranting the necessary guarantees of independence and impartiality.⁶³ While such a call can be relatively easily be reconciled with the law of occupation, in other cases the human rights-induced activity may well go beyond what would traditionally be demanded, and accepted, by the law of occupation, e.g. in instances where “Convention rights would clearly be incompatible with the laws of the territory occupied”.⁶⁴

This result is corroborated by the fact that, whereas the traditional law of occupation is primarily negative in character, it has become common to conceive of international human rights law not only as a source of negative obligations (duty to respect), but of a whole series of positive obligations (duty to protect and

⁶² Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16. This notably includes the right of access to a court of law in case of criminal proceedings, the right to be presumed innocent as well as the right to *habeas corpus*.

⁶³ *Cyprus v. Turkey*, ECtHR Application No. 25781/94, Judgment of 10 May 2001, paras. 358-359.

⁶⁴ UK House of Lords, *Al-Skeini and others v. Secretary of State for Defense*, [2007] UKHL 26, para. 129, where Lord Brown acknowledges that the occupant’s obligation to respect Article 43 HR might be in conflict with its obligations under the ECHR and offers the example of the existence of Sharia law in the occupied territory.

to fulfill).⁶⁵ Hence, the States, under whose jurisdiction⁶⁶ territories and persons fall (and this notably includes occupying powers⁶⁷), are positively obliged to create and maintain a certain rule of law standard in the occupied territory, irrespective of whether the previous government took care of such human rights obligations.⁶⁸ Hence, an otherwise careful and sober analysis of the occupant's prerogatives concludes that the occupying power

“[...] has an obligation to abolish legislation and institutions which contravene international human rights standards. [...] Today, an occupying power has a strong argument that it is ‘absolutely prevented’ from applying local legislation contrary to international law. Human rights [...] often require the state to take positive (including legislative) action. Thus, one may even go so far as to allow the occupying power to adopt new, additional laws that are genuinely necessary to protect international human rights law.”⁶⁹

⁶⁵ See in this regard, for instance, W. Kälin & J. Künzli, *The Law of International Human Rights Protection* (2009), 96-98.

⁶⁶ See Article 1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 as well as Article 1 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171; in regard to the latter see ICJ, *Wall Opinion*, *supra* note 51, 178, paras. 108-111.

⁶⁷ See e.g., in regard to the UK occupation of Iraq, *Al-Skeini and others v. United Kingdom*, ECtHR Application No. 55721/07, Judgment of 7 July 2011, paras. 138-140, 143-150.

⁶⁸ In view of the fact that the major part of the afore-mentioned international human rights guarantees is customary in nature, such obligations even exist widely independently of whether the territory in question falls in the territorial scope of application of international human rights treaties.

⁶⁹ Sassòli, *supra* note 12, 676; however, he adds in *ibid.*, 677: “As long as local legislation falls within [the] latitude [left by international human rights law to the State on how to implement it], an occupying power may certainly not replace it”; see further Pictet, *supra* note 28, 336 noting that occupying authorities may not change local legislation “merely to make it accord with their own legal conceptions”. In a similar vein, see Bothe, *supra* note 23, 1462: “The duty to maintain the pre-existing law of the territory could not require the Occupying Power to violate human rights.”; *ibid.*, 1469: “In modern understanding, ‘public order and safety’ means a guarantee of the rule of law, and therefore of human rights.” See also (arguably more carefully) Benvenisti, *supra* note 9, 75: “the occupant’s authority to rule as well as to modify the law is now subjected to human rights obligations, which arguably mandate the obligation to maintain basic demands of a system based on the rule of law.”

Going even further than that, some scholars would distill from the body of international human rights law – in a somewhat constitutionalist perspective – the insight that all (including international) law exists *hominum causa*, i.e. for the sake of human beings.⁷⁰ When applying such a hermeneutic approach to the law of occupation,⁷¹ the interests and well-being of the population under occupation become an even more urgent responsibility of the occupying power, justifying and demanding sweeping interventions into the law existing in the occupied territory. Against this background, the characteristic traits of the traditional law of occupation, as identified above, tend to lose any restraining effect on the authority of the occupying power, as long as its action appears necessary to promote the local population's well-being.

The far-reaching impact of international human rights law on the law of occupation has been addressed by a broad range of scholars, opting for varying degrees and intensities of such impact.⁷² Some have even sought to reflect this reality by coining neologisms such as “humanitarian occupation”⁷³ or the “humanization of humanitarian law”.⁷⁴ That international human rights law (including the pertinent case-law of international human rights courts and bodies⁷⁵) has had a substantial effect on the law of occupation cannot be denied. Thus, the significant rule of law-promoting potential of international human rights informs the law of occupation in the strict sense and adds to the

⁷⁰ See Hermogenianus, *Iuris epitomae*, Liber I, Dig. 1.5.2: “*hominum causa omne jus constitutum est*”. See, in this respect, *Prosecutor v. Duško Tadić*, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 97: “A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well [...] [I]nternational law, while of course safeguarding the legitimate interests of States, must gradually turn to the protection of human beings.”

⁷¹ As has been done for the concept of sovereignty; see notably A. Peters, ‘Humanity as the A and Ω of Sovereignty’, 20 *European Journal of International Law* (2009) 3, 513 as well as the commentary in A. T. Müller, ‘Sovereignty 2010: The Necessity of Circling the Square’, 4 *Vienna Journal on International Constitutional Law* (2010) 4, 624, 635-640.

⁷² See the references in Benvenisti, *supra* note 9, 13, 74-76, 102-104; Dinstein, *supra* note 5, 69-88.

⁷³ G. H. Fox, *Humanitarian Occupation* (2008).

⁷⁴ Meron, *supra* note 47.

⁷⁵ See in this regard notably Benvenisti, *supra* note 9, 74; see further the references *supra* notes 52, 62-63, 67.

(if somewhat limited) rule of law transfer potential of the latter, as identified above.⁷⁶ This notably holds true in case of long-standing occupations.⁷⁷

At the same time, one should resist the temptation of taking the dynamism and transformative power of international human rights law too far, lest the wisdom underlying the restraining of the powers of the occupying power be lost. To be sure, already under “normal” circumstances, the State is not only the prime guarantor of human rights, but also the greatest threat to these very same human rights. This truth applies with even greater force when a population is confronted with an occupying power which will virtually always be guided by interests that are alien to the occupied territory and population. The ideal of the benevolent and humanitarian occupier can easily prove a dangerous illusion. Not only remote instances of occupation, but more recent and persisting situations of occupation (e.g. Crimea, Iraq, Northern Cyprus, the Occupied Palestinian Territory, the Western Sahara) provide abundant, and painful, proof for it. This should serve as a powerful reminder for the soundness of the traditionally cautious approach with respect to the construction of the occupier’s prerogatives, also in the light of international human rights law.

D. The Impact of the Involvement of the Security Council

In the relevant debate, quite a few commentators have shared these concerns and notably referred to the 2003 occupation of Iraq by the United States and the United Kingdom as a recent case in point.⁷⁸ Yet this brings to the fore a further actor relevant for the present discussion, not hitherto mentioned: the UN Security Council. Drawing on its powers under Chapter VII of the UN Charter, the Security Council sought to create a legal framework for the occupation of Iraq,⁷⁹ calling upon “all concerned to comply fully with their obligations under

⁷⁶ See B. III.

⁷⁷ Roberts, *supra* note 9, 600, states in this regard that “because of the broad subject matter coverage, [human rights instruments] may be cited particularly often in occupation that continue for a long time, even into something approximating peacetime, and that present problems different from those addressed by the laws of war”. See B. III.

⁷⁸ See e.g. D. Thürer & M. MacLaren, “*Ius post bellum*” in Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law?, in K. Dicke et al (eds), *Weltinnenrecht: Liber Amicorum Jost Delbrück* (2005), 753.

⁷⁹ See SC Res. 1483, UN Doc S/RES/1483 (2003), 22 May 2003; SC Res. 1490, UN Doc S/RES/1490 (2003), 3 July 2003; SC Res. 1500, UN Doc S/RES/1500 (2003), 14 August 2003; SC Res. 1511, UN Doc S/RES/1511 (2003), 16 October 2003; SC Res. 1546, UN Doc S/RES/1546 (2004), 8 June 2004.

international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”.⁸⁰

It is remarkable that the Security Council also called for the appointment of a UN Special Representative whose responsibilities would include efforts to restore and establish national and local institutions for representative governance, encouraging international efforts to contribute to basic civilian administration functions, and promoting the protection of human rights, as well as encouraging international efforts to rebuild the capacity of the Iraqi civilian force and to promote legal and judicial reform.⁸¹ In this regard, the Security Council entrusted the Special Representative, in support of, and collaboration with, “the Authority” (i.e. the Coalition Provisional Authority as the occupation government set up by the US and the UK) with a rule of law-promoting mandate.⁸² It has been rightly noted that “the purposes of the occupation as outlined in Resolution 1483 went beyond the confines of the Hague Regulations and the Fourth Geneva Convention. Yet the resolution did not explain the relation between the transformative purposes of this occupation and the more conservative purposes of the existing body of law on occupations.”⁸³

Having in mind that the UN Member States confer on the Security Council, pursuant to Article 24 of the UN Charter, primary responsibility for the maintenance of international peace and security and that the Security Council, in carrying out its duties under this responsibility, acts on their behalf, the risk of bias and one-sidedness referred to before might not exist in regard to

⁸⁰ SC Res. 1483, UN Doc S/RES/1483 (2003), 22 May 2003, para. 5.

⁸¹ See *ibid.*, para. 8, lit. c, f, g, h.

⁸² See also SC Res. 1511, UN Doc S/RES/1511 (2003), 16 October 2003, pream. para. 10 (“[a]ffirming the importance of the rule of law, national reconciliation, respect for human rights including the rights of women, fundamental freedoms, and democracy including free and fair elections”) as well as op. para. 7, lit. b sublit. iii (“promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq”).

⁸³ Roberts, *supra* note 9, 613. See in this regard also Scheffer, *supra* note 45, 845: SC Res. 1483 “rested uncomfortably within occupation law” and the latter “was never designed for such transforming exercises”, *ibid.*, 849. Calling for a restrictive reading G. H. Fox, ‘The Occupation of Iraq’, 36 *Georgetown Journal of International Law* (2005) 2, 195; Sassòli, *supra* note 12, 679-682; as well as Bhuta, *supra* note 11, 735 seeing “persuasive reasons to construe Resolution 1483 and 1500 as not entitling the US and UK to derogate from the preservationist core of occupation law”, but nonetheless conceding that the resolutions “are sufficiently ambiguous to permit a colourable claim of legitimation – if not legalization – of the idea that the occupying power is authorized, in the interests of the population, to exceed its order-preserving functions and embark on a project of state-building”.

the Security Council. After all, it is not dominated by the interests of a single great power, but its decisions reflect a certain consensus at least of its permanent members so that one might expect the Security Council to take decisions reflecting the common interest of the international community.⁸⁴

Whilst this is certainly a controversial assumption, notably in regard to the Iraqi occupation, another question is whether the Security Council can at least be considered a neutral arbitrator of interests when it comes to so-called post-conflict administrations⁸⁵, i.e. UN-run administrations of territories such as in the cases of Cambodia,⁸⁶ Kosovo,⁸⁷ and East Timor.⁸⁸ These cases are of interest in the context of the present discussion, since they all involve quite ambitious rule of law-promoting mandates.⁸⁹

The question is, however, how these instances of territorial administrations by the UN relate to the law of occupation. In this respect, the prevailing opinion appears to be that they do not constitute situations of occupation and do not therefore trigger the applicability of the international law of occupation.⁹⁰ It

⁸⁴ See, however, Sassòli, *supra* note 12, 693, criticizing that the reliance on the Security Council is “not satisfactory from a humanitarian point of view and [...] also raises concerns from the point of view of the rule of international law because of the selective and short-term political approach of the Council”.

⁸⁵ See in this regard, e.g., S. Chesterman, *You, the People: The United Nations, Transitional Administration and State-Building* (2004); R. Wolfrum, ‘International Administration in Post-Conflict Situations by the United Nations and Other International Actors’, in A. von Bogdandy & R. Wolfrum (eds), 9 *Max Planck Yearbook of United Nations Law* (2005), 649; R. Wilde, *International Territorial Administration* (2008).

⁸⁶ See SC Res. 745, UN Doc S/RES/745 (1992), 28 February 1992, para. 2, establishing the UN Transitional Administration in Cambodia – UNTAC.

⁸⁷ SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999, para. 10, establishing the UN Interim Administration Mission in Kosovo – UNMIK.

⁸⁸ SC Res. 1272, UN Doc S/RES/1272 (1999), 25 October 1999, para. 1, establishing the UN Transitional Administration in East Timor – UNTAET.

⁸⁹ See SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999, para. 11, lit. b, c, d and in particular lit. i (“maintaining civil law and order”) and j (“protecting and promoting human rights”); Special Representative of the Secretary-General, Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, UNMIK/REG/1999/1, 25 July 1999, Sect. 1(1); SC Res. 1272, UN Doc S/RES/1272 (1999), 25 October 1999, para. 2, lit. b, e; Special Representative of the Secretary-General, Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor, UNTAET/REG/1999/1, 27 November 1999, Sect. 1(1).

⁹⁰ See E. de Wet, ‘The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law’, 8 *Max Planck Yearbook of United Nations Law* (2004), 291, 292; Roberts, *supra* note 9, 612. See, however, G. T. Harris, ‘The Era of Multilateral Occupation’, 24 *Berkeley*

has certainly been correctly observed that, as opposed to Security Council Resolution 1483,⁹¹ the pertinent resolutions and regulations do not contain any reference to obligations under international humanitarian law in general or the law of occupation in particular; at the same time, they place emphasis on human rights law.⁹² Furthermore, the United Nations Organization, which is as such not a Party to the *Geneva Conventions*, has never accepted that it is formally bound by the obligations arising from these Conventions. It has rather committed itself to respect the fundamental principles and rules of international human rights and humanitarian law,⁹³ without, however, expressly endorsing one single rule of the international law of occupation.⁹⁴ In addition, there is an ongoing debate as to whether, and to what extent, UN action (be it in the context of territorial administrations or peace-keeping/-making operations) is subject to obligations arising from customary law inasmuch as it also binds

Journal of International Law (2006) 1, 1; Roberts, *supra* note 37, 289; S. R. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', 16 *European Journal of International Law* (2005) 4, 695, 696: "Over the last decade, a new set of occupiers has increasingly administered territory – international organizations." See also Sassòli, *supra* note 12, 688, fn. 157, at least when the UN (or, for that matter, a regional organization) enjoys effective control over a territory without the volition of the sovereign of that territory. Hence, in Sassòli's view *ibid.*, 689 the law of occupation is not applicable to the international administrations in Kosovo and East Timor since the States concerned consented to the presence of foreign troops and administrators.

⁹¹ See *supra* note 80.

⁹² See SC Res. 1244, UN Doc S/RES/1244 (1999), 10 June 1999, para. 11, lit. j; Special Representative of the Secretary-General, Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, UNMIK/REG/1999/1, 25 July 1999, Sect. 2; Special Representative of the Secretary-General, Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor, UNTAET/REG/1999/1, 27 November 1999, Sect. 2; see also Roberts, *supra* note 9, 595.

⁹³ Secretary General's Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13, 6 August 1999.

⁹⁴ See Sassòli, *supra* note 12, 687.

international organizations.⁹⁵ This would then also include the core guarantees under the *Hague Regulations* and the *Fourth Geneva Convention*.⁹⁶

The legal discourse is, moreover, enriched by Article 103 UN Charter, according to which the Charter prevails in the event of a conflict between obligations arising under itself and obligations arising under any other international agreement. Insofar as Security Council resolutions – at least those adopted under Chapter VII that give rise to legal obligations, taking into account that the Member States agree, pursuant to Article 25 UN Charter, to accept and carry out such resolutions – also profit from the primacy privilege enshrined in Article 103 UN Charter,⁹⁷ it can be argued that the Security Council even has the authority to modify, amend, or suspend the rules of the international law of occupation.⁹⁸ Accordingly, it is a plausible contention that the involvement of the UN Security Council “can assist in setting or legitimizing certain transformative policies during an occupation”,⁹⁹ notably when it comes to rule of law-transfers by occupying and quasi-occupying powers. As has been aptly stated,

⁹⁵ See *Interpretation of the Agreement of 25 March 1991 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73, para 37: “International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law [...]”, i.e. customary international law and general principles of law; see M. Nowak & K. Januszewski, ‘Non-State Actors and Human Rights’, in M. Noortmann, A. Reinisch & C. Ryngaert (eds), *Non-State Actors in International Law* (2015), 113, 157. See also the discussion in G. Verdirame, *The UN and Human Rights. Who Guards the Guardians?* (2011), 55-89, concluding that “much – probably most – human rights law binds the UN and other international organisations already through custom”, *ibid.*, 89.

⁹⁶ As regards the customary character of Article 43 HR see International Military Tribunal in Nuremberg, *Trial of the Major War Criminals*, 41 *American Journal of International Law* (1947) 1, 172, 248-249; ICJ, *Wall Opinion*, *supra* note 51, 172, paras. 89, 124.

⁹⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)*, Order of 14 April 1992, ICJ Reports 1992, 3, 15, para. 39.

⁹⁸ See, e.g., Fox, *supra* note 83, 296: such a mandate “would have superseded the conservationist principle by invoking a superior international obligation and could have provided an opportunity to make clear that a consensus within the United Nations supported reform in Iraq”; see also Roberts, *supra* note 9, 622: “[i]n the light of the powers vested in the Council, its capacity [to vary the application of even quite fundamental rules of international law] is hard to deny – especially in a case where what is at issue is reconciling divergent principles of international law on a specific and limited matter relating to the maintenance of peace and security”. See in a similar vein Arai-Takahashi, *supra* note 12, 1427.

⁹⁹ Roberts, *supra* note 9, 580.

“[...] the UN Security Council may mandate conditions in which the population of the occupied territory can freely determine its future life under the rule of law and enjoy the respect of human rights. It may consider that this necessitates the establishment of new local and national institutions and legal, judicial and economic reform. According to the principles of the rule of law – which are essential to any peace-building effort – all this implies the need to adopt legislation which may go further than what can be justified under the exceptions to the principle of Article 43 [...].”¹⁰⁰

This position is particularly convincing in the case of post-conflict UN territorial administrations, not only because the UN can claim the role of a neutral administrator rather than an occupying State,¹⁰¹ but also because the hitherto existing experience of such administrations nourishes the hope that they remain temporally limited and actually contribute toward preparing the independence and self-government of the people under international administration.

One should be more careful, however, when it comes to instances of traditional occupation, i.e. with State involvement. This already becomes manifest in the aforementioned case of the occupation of Iraq. It applies with even more force to the Turkish occupation of Northern Cyprus, the Moroccan occupation of Western Sahara, the Russian occupation of Crimea, or the Israeli occupation of the OPT, to only name some major cases of contemporary occupation. Particularly in the latter case, the heavy involvement of the Security Council¹⁰² had the function of affirming the full applicability of the international law of occupation rather than modifying it.

Hence, in the event of Security Council action allegedly entailing a modification of the international law of occupation, interpretative restraint is required. In the light of the peculiarities of the interpretation of Security Council resolutions,¹⁰³ their legal effects must be established on a case-by-case

¹⁰⁰ Sassòli, *supra* note 12, 680.

¹⁰¹ See Ratner, *supra* note 90, 702, referring to “distinctive paradigms of governance” and opposing the *status quo* approach of the law of occupation to the transformative approach of international territorial administration; see also Scheffer, *supra* note 45, 859; Fox, *supra* note 83, 262-269.

¹⁰² See only SC Res. 242, UN Doc S/RES/242 (1967), 22 November 1967; SC Res. 476, UN Doc S/RES/476 (1980), 30 June 1980; SC Res. 478, UN Doc S/RES/478 (1980), 20 August 1980; SC Res. 2334, UN Doc S/RES/2334 (2016), 23 December 2016.

¹⁰³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403, paras. 94, 117.

basis, considering all relevant circumstances. For lack of any express or otherwise sufficiently clear indication to the contrary, there cannot be any presumption that the Security Council, in discharging its peace-maintaining and peace-restoring duties under Chapter VII, seeks to amend the existing international law of occupation. Put differently, such resolutions should as far as possible be construed in harmony with the law of occupation.¹⁰⁴ In particular, “[a] simple encouragement of international efforts to promote legal and judicial reform by an occupying power is certainly too vague to justify an occupying power to legislate beyond what [international humanitarian law] permits.”¹⁰⁵

E. Concluding Remarks

While in 1944, when Fraenkel’s book was published, understandable concern existed that the rule of law “which is basic in American political philosophy [but] alien to German ideals and traditions”¹⁰⁶ might constitute a bad legal transplant, today the references to the concept of the rule of law in the international legal order abound. From the preamble of the 1948 *Universal Declaration of Human Rights* and the 1970 *Friendly Relations Declaration*, which referred to “the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations”,¹⁰⁷ to the 1993 *Vienna Declaration and Programme of Action*¹⁰⁸ and the Outcome Document of the 2005 World Summit,¹⁰⁹ the UN has time and again, and with increasing intensity and visibility, drawn upon the rule of law as a paramount principle of the international community.

Against this background, it should not come as a surprise that the rule of law has also found, and consolidated, its place in the international law governing situations of occupation. As has been shown in a diachronic perspective, the law of occupation in the strict sense, which already comprises certain rule of law elements, has been widened and enriched by the impact of international

¹⁰⁴ See Sassòli, *supra* note 12, 690.

¹⁰⁵ *Ibid.*, 681.

¹⁰⁶ F. G. Munson, ‘Review of Ernest Fraenkel: Military Occupation and the Rule of Law’, 239 *Annals of the American Academy of Political and Social Science* (1945) 1, 192, 193; see in a similar vein R. S. T. Chorley, ‘Review of Ernst Fraenkel: Military Occupation and the Rule of Law’, 8 *Modern Law Review* (1945) 3, 119, 121.

¹⁰⁷ GA Res. 2625 (XXV), UN Doc A/RES/2625, 24 October 1970, pream. para. 4 and also Fraenkel, *supra* note 1, 225-226.

¹⁰⁸ *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23, 25 June 1993.

¹⁰⁹ GA Res. 60/1, UN Doc A/RES/60/1, 24 October 2005.

human rights law and the actions of the Security Council in situations of occupation, thus substantially increasing the rule of law-promoting potential of the law of occupation in the wider sense. From a synchronic perspective, this signifies that all these elements have to be applied together as forming part of the contemporary *corpus* of the international law governing situations of occupation.

Hence, it can be rightly said that “[h]uman rights and the rule of law (indispensable elements in any peace-building effort) demand that the maintenance of public order be based on law”.¹¹⁰ Whereas such a statement may be primarily aimed at the structure and performance of the administration set up by the occupying power, we have seen that the law of occupation can also function as a driving force concerning rule of law-transfers vis-à-vis the local administration.

At the same time, and to deliberately end on a cautious note, it is crucial to resist the temptation to concede, in the name of promoting the rule of law, too much legislative leeway to the occupying power. Treating “the occupant as the bringer of progress [...] can lead to a dangerous mix of crusading, self-righteousness, and self-delusion”.¹¹¹ Indeed, “experience suggests that even overtly transformative occupants would be wise to recognize the strength and continuing validity of the law on occupation in general, and the conservationist principle in particular”.¹¹²

Restraint is therefore advised when assessing the good measure of prerogatives of the occupying power. In spite of seductive promises of “transformative” and “humanitarian” occupation or the like, also the rule of law is not the panacea allowing us to conceive of a “modern” occupation law that would strip off the risks inherent to a political and military power governing a foreign population. These risks do not necessarily diminish over time, but the appetite of a power in control of another territory and population can also well grow. This *caveat* should remain on the international lawyer’s mind notably when dealing with long-standing occupations and the dangers regarding not only formal, but also *de facto* and creeping annexation.¹¹³

In that sense, the rule of law eventually remains a means to temper the perils involved in the existence of situations of occupation, knowing that it may all too easily be employed for purposes alien to the noble aspirations underlying

¹¹⁰ Sassòli, *supra* note 12, 663.

¹¹¹ Roberts, *supra* note 9, 601.

¹¹² *Ibid.*, 620.

¹¹³ See notably ICJ, *Wall Opinion*, *supra* note 51, 184, para. 121 in this regard.

the idea of the rule of law. As Fraenkel both soberly and wisely concluded his study:

“The rule of law in a democratic state is based on the consent of the citizens. In an occupied territory, public power is enforced upon the residents regardless of their inner feelings. Therefore the concept of ‘rule of law’ has different meanings in a government based on democratic consent and a government based on military force. It was the failure to recognize this fundamental fact that constituted the greatest weakness of the Rhineland Agreement.”¹¹⁴

¹¹⁴ Fraenkel, *supra* note 1, 227.