

Occupation in Iraq since 2003 and the powers of the UN Security Council

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Abstract

This article provides a summary analysis of the topical question of how far the Security Council may derogate from occupation law. The answer is that the Council may not derogate from those provisions of IHL that are of a specifically humanitarian nature (humanitarian ordre public), that derogations from international law or IHL are in any case not to be presumed and that the Council has not derogated in any way from occupation law in the case of the occupation of Iraq since 2003.

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The occupation of Iraq has focused attention on a problem that has been latent since the occupation of Germany and Japan after the Second World War. The law of occupation is generally based on conservation of the status quo in an occupied territory until the return of legitimate sovereignty. This normative option is designed to protect the self-determination of the territory's indigenous population.¹ The question now arises whether and to what extent this body of the law of armed conflict can be remodelled or derogated from in order to allow reconstruction of the occupied state (nation-rebuilding) under the umbrella of an international operation to which the United Nations makes some contribution. Can the will and supervision of the international community, expressed through the United Nations, roll back the respect for the status quo that is required by the law of occupation? Is such respect perhaps required in the first place only of an occupying power not covered by the United Nations umbrella? Can the law of occupation be set aside, wholly or partially, where the United Nations authorizes

certain transformative measures? More precisely, can the UN Security Council derogate from occupation law by virtue of its powers under Article 25 and Chapter VII of the UN Charter? In other words, to what extent is occupation law *jus cogens* for the Security Council? This last question in particular will be addressed in the following pages.

The concept of derogation and the extent to which occupation law is *jus cogens*

Derogations from the law of occupation that are allowed and channelled via the UN Security Council may indeed appear helpful and constructive. For example, what sense would it make to require strict respect for local legislation when an international operation that aims to implement structural reforms is in place in an occupied country in order to consolidate peace there in the long run? On the other hand, such ad hoc manipulations by the Security Council carry a number of risks. The most striking is that a political body may arrogate for itself the role of judge of the applicability of humanitarian law by setting up selective legal regimes on a case-by-case basis, according to the political interests of a given superpower among its members at a given moment in history.² In such a scenario, the very idea of objective law to protect the interests of local populations, as is inherent in the legal regulation of occupation law, could be jeopardized by political subjectivism reflecting particular interests, not to mention forms of bargaining as varied as they are unpredictable. The question is thus one of striking some form of balance.

What is *jus cogens*? In brief, it is mainly a legal technique intended to maintain the unity and integrity of a legal regime wherever the public interest so requires. The aim is to prevent the fragmentation of that legal regime into more specialized regimes, the application of which would otherwise take priority by virtue of the *lex specialis* principle. For example, the prohibitions on torture and slavery are considered part of *jus cogens*. Accordingly, the law does not allow states or other subjects to adopt legislation³ that departs from these prohibitions.

1 Article 43 of the 1907 Hague Regulations.

2 Such ad hoc manipulations by the Council have been witnessed recently in the field of international criminal law: in Resolution 1422 (2002), the Council requested the International Criminal Court not to commence or proceed with investigation or prosecution of any case involving current or former officials or personnel from a state not party to the Rome Statute contributing to an international peacekeeping or peace-restoring operation established or authorized by the Security Council. The aim of this resolution was to grant blanket immunity to personnel of the United States participating in such operations as, in the absence of such immunity, the United States was threatening to use its veto against these operations or simply to refuse to take part in them. In many cases this would have caused them to collapse. See Sebastian Heselhaus, “Resolution 1422 (2002) des Sicherheitsrates zur Begrenzung des Internationalen Strafgerichtshofs”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 62 (2002), pp. 907 ff. This derogating regime has since been dropped: see Eric David, “La Cour pénale internationale”, *Recueil des cours. Hague Academy of International law*, Vol. 313 (2005), pp. 353–6.

3 Multilateral, plurilateral, bilateral or unilateral.

Otherwise the parties adopting such legislation would be bound to apply it, and not the general prohibitive rule, because of the priority of a special law over a general law. *Jus cogens* thus constitutes a limitation on *law-making power* to preserve the integrity of normative regimes embodying rules of public policy. The key term in relation to this concept of *jus cogens* is therefore “derogation” or “derogability”, or rather *non-derogation* and *non-derogability*. Derogation, when allowed, is the substitution of a normative regime that is more restricted *ratione personae*, and takes precedence *inter partes* for a normative regime that is more general *ratione personae*. In such cases, the general regime remains applicable among those parties that have not subscribed to the special, derogating regime; the special regime, however, governs the legal relations between those parties that have accepted it. Derogation is to be distinguished from abrogation, which puts an objective end to a legal regime for all its subjects. In that case, the legal regime in question ceases to exist *erga omnes*. *Jus cogens*, then, means non-derogability. The aim of non-derogability is to protect the normative integrity of a general regime that is considered indispensable in view of certain social values or public policy (humanitarian, moral, political, etc.). It forbids adoption by subjects of normative regimes especially applicable among them, as described above. Our enquiry will follow that line of thought in order to establish whether international humanitarian law (IHL) and occupation law can be derogated from, either by states (by mutual consent) or by the UN Security Council (by unilateral resolution).⁴

The question of the legal limitations on the powers of the Security Council to derogate from international law (and occupation law in particular) may be formulated at three levels. First, does the Council have the power to do so under the law of the Charter? Second, is the Council bound by general international law, of which the great majority of the rules of IHL are a part? And third, does IHL itself limit anyone’s ability to derogate from it?⁵ Logically, our enquiry must be split into the following sequence: we must ascertain first of all whether the Council has the relevant powers and, second, whether those powers are limited by a general or particular corpus of law.

The powers of the Security Council

Nowhere does the UN Charter expressly affirm that the Security Council has powers to derogate from IHL norms. This is scarcely surprising, as the Charter cannot list exhaustively, *pro futuro*, all the norms from which the Council could be called upon to derogate. For a clearer answer we must therefore examine implicit powers or subsequent practice. The latter can be discounted immediately. The

4 The Security Council’s act may be unilateral (resolution) but it is nevertheless a normative act that lays down *rules* applicable in a particular situation. It could thus “derogate” from occupation law and may therefore be subjected to an analysis based on the concept of *jus cogens*.

5 This is the *jus cogens* perspective.

Council has consistently reaffirmed the importance of respect for IHL and has even considered on several occasions that a breach of IHL constituted a threat to peace.⁶ It is thus hard to imagine that it could itself derogate from that law en bloc.⁷ At most, it will be necessary to identify derogable and non-derogable norms. As for implicit powers to set aside IHL, a theoretical basis could be found in the idea that the Council must have the legal capacity to take all measures necessary to maintain and restore peace. In view of the pre-eminence of Chapter VII of the Charter, as recognized by the Charter itself (see Articles 25 and 103), it must be considered that wherever a rule of international law external to the Charter is contrary to the achievement of that supreme goal, the rule in question should give way to it. An exception could be made for non-derogable rules which remain to be identified. This reading of the Charter would give the Council increased powers. It is consistent with the line of thought that sees peacekeeping and the powers established under Chapter VII, and by the Charter in general, as a type of supreme constitution of the international community.⁸ This constitution would possess an intrinsic primacy that would prevail over any obstacle. Nothing would withstand it save probably *jus cogens*.⁹

The question can also be approached from the opposite perspective. Would it not be necessary to require some form of express legal basis to allow derogation from a body of law as fundamental as IHL? International humanitarian law is part of the essential rules of civilization. Its rules are “locked” against escape devices by means of special provisions contained in the relevant corpus of law (e.g.

- 6 See Jochen A. Frowein and Nico Kirsch, “Article 41”, in Bruno Simma, *The Charter of the United Nations: A Commentary*, 2nd edn, Oxford and New York, 2002, pp. 724–5, with references. The following cases may be mentioned as examples: Yugoslavia (Resolution 771 (1991)); Resolution 836 (1993); Somalia (Resolution 794 (1992)), Rwanda (Resolution 918 (1994); Resolution 929 (1994)); Haiti (Resolution 940 (1994)); East Timor (Resolution 1264 (1999); Resolution 1272 (1999)); Sierra Leone (Resolution 1306 (2000)). See also Fred Grünfeld, “Human rights violations: A threat to international peace and security”, in Monique Castermans-Holleman et al. (eds.), *The Role of the Nation State in the 21st Century: Essays in Honour of P. Baehr*, The Hague and Boston, Mass., 1998, pp. 427 ff.
- 7 David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter*, The Hague and Boston, Mass., 2001, p. 180: “A rather awkward conclusion would ensue from the assumption that the Council itself can employ measures of which it has indicated that they threaten international peace and security.”
- 8 Concerning this idea of a constitution, which is explored in German legal doctrine in particular, see Christian Walter, “International law in a process of constitutionalization”, in J. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford, 2007, pp.191 ff.; Regis Chemain and Alain Pellet (eds.), *La Charte des Nations Unies, Constitution mondiale?*, Paris, 2006; Pierre-Marie Dupuy, “L’unité de l’ordre juridique international”, *Recueil des cours. Hague Academy of International law*, Vol. 297 (2002), pp. 215 ff.; Bardo Fassbender, *UN Security Council Reform and the Right of Veto*, The Hague and Boston, Mass., 1998, pp. 89 ff.
- 9 In the words of Elihu Lauterpacht in the *Genocide Convention Case*, Provisional Measures, ICJ Reports, 1993, p. 440, §100: “The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.” On the limitations of the Security Council with respect to *ius cogens*, see also Alexander Orakhelashvili, *Peremptory Norms in International Law*, Oxford, 2006, pp. 423 ff.

Articles 7, 8 and 47 of the Fourth Geneva Convention). They are considered fundamental by the Council itself, which demands that they be respected by all international actors and, in many cases, also by infra-state actors. They are value standards towards which all the efforts of the United Nations must be directed in accordance with Articles 1 and 55 of the Charter. According to F. Seyersted,¹⁰ the power to interfere with the “military and humanitarian” rules of war would be of such consequence and such seriousness that, to be exercised, it would probably have to be expressly provided for in the Charter. There is no such authorizing rule. In view of the expected consequences, in Seyersted’s opinion, it is not possible to imply such a power. We find similar opinions in the writings of other authors, sometimes in more circumscribed contexts.¹¹ There is room for doubt that it could ever be necessary to set aside IHL in order to maintain peace, or indeed that such a measure could do anything to promote peace and international security. The impossibility of derogating would therefore culminate in a sort of legal fiction: since the Council may derogate from rules of international law only when necessary in order to maintain or restore the peace, and since it is by definition not conducive to peace to put aside minimum rules of civilization such as those of IHL, the Council could never derogate from them. At most, again, this fiction of non-derogability could be limited to a sub-category of IHL rules, namely those which are specifically humanitarian in nature.

In the light of the two lines of reasoning presented, we may proceed on the following assumptions:

- (i) that the Charter confers on the Security Council the power solely to derogate from specific rules of IHL and the law of occupation, but not from these bodies of law en bloc. Powers so far-reaching and so contrary to the very practice of the Council cannot be implied, nor have they been developed through subsequent practice. On the contrary, subsequent practice tends to argue against any construction to the effect that any such en bloc derogation could be “necessary” to the exercise of its international peacekeeping or peace-restoring roles; and
- (ii) that derogation, if at all admissible, would not be presumed and could operate only with respect to specific rules of IHL that are not of a fundamentally humanitarian nature.

10 See Finn Seyersted, *United Nations Forces in the Law of Peace and War*, Leiden, 1966, pp. 206–7.

11 See, e.g., Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, 1970, pp. 168–9: “Aucune disposition de la Charte ne confère, explicitement ou implicitement, au Conseil de sécurité la compétence de modifier les lois de la guerre en prescrivant ou en autorisant l'application inégale de ces lois vis-à-vis d'un Etat agresseur. ... [U]ne résolution du Conseil qui ordonnerait ou autoriserait, dans l'exécution de cette action armée, la discrimination au regard des règles du jus in bello... serai[t] illégale.”

The applicability of general international law

As a subject of international law, any international organization is bound by the international law in which it moves and on which its constitutive instrument, the source of its very existence and powers, is founded. However, there is a whole series of general norms of international law that apply *intuitu personae* to states alone. The simplest example is the principle of sovereignty or territorial integrity. The Council is not bound by them because the UN lacks the objective triggering basis for the application of these rules: in our example, because it has no territory and no sovereign power. Conversely, by their very nature, the Security Council's powers constitute a major derogation from ordinary rules of general international law. In this perspective, the Council possesses stronger powers than those of a state under the guise of sovereignty. The Council possesses the power to decide on a wide range of measures, including military ones, and on the means for implementing them. It also has the power to give these decisions binding force. Measures taken under Chapter VII suppose in essence a derogation from all the most elementary rules of customary law among states: the principles of non-use of force, non-intervention in internal affairs of a state (recognized by Article 2(7) of the Charter, but which expressly creates an exception for Chapter VII), respect for territorial sovereignty and integrity, and so on.¹² A high degree of derogation from general customary law is therefore already implicit in the Council's "exorbitant" powers. Despite the doubts entertained by certain authors as to whether the Security Council can free itself from customary law on the grounds that Article 103 of the Charter states *expressis verbis* that obligations under the Charter prevail over concurrent treaty obligations only,¹³ and not over concurrent customary obligations,¹⁴ majority doctrine and consistent practice demonstrate that the Council, in the exercise of its Chapter VII roles, is not – and cannot without contradiction be – bound by general international law as a whole.¹⁵ Similarly, a

12 One could also refer by way of example to the maritime blockade decisions which derogate from the principles of flag-state jurisdiction and freedom of the high seas: see Danesh Sarooshi, *The United Nations and the Development of Collective Security*, Oxford, 1999, pp. 194 ff., 263 ff., which refers to Southern Rhodesia (1965/66), Iraq (1990), Haïti (1993) and Yugoslavia (1993) cases.

13 This is because the aim of this article was initially only to neutralize the ordinary rule on clashing treaties (the *lex specialis vel posterior* rule) by stating that the Charter took priority in such cases. As regards customary law, any such indication may have seemed unnecessary, since the Charter law, which is more specialized, prevails in accordance with the ordinary rules (*lex specialis*).

14 See, e.g., Alix Toublanc, "L'article 103 et la valeur juridique de la Charte des Nations Unies", *Revue générale de droit international public*, Vol. 108 (2004), p. 446. The author affirms that Article 103 does not give the Charter priority in relation to these customary obligations, which means that the possibility for the Security Council to depart from them is seriously reduced in legal terms.

15 See Frowein and Kirsch, above note 6, p. 711; Hans Kelsen, *The Law of the United Nations*, London, 1950, p. 730; Terry. D. Gill, "Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter", *Netherlands Yearbook of International Law*, Vol. 26 (1995), pp. 61 ff.; Bernd Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrats*, Berlin, 1996, pp. 219 ff.; Karl Zemanek, "The legal foundations of the international system", *Recueil des cours. Hague Academy of International law*, Vol. 266 (1997), p. 232; Schweigman, above note 7, pp. 195 ff.; Erika De Wet, *The Chapter VII Powers of the United Nations Security Council*, Oxford and Portland, 2004, pp. 182 ff.; etc.

state *uti singulus*¹⁶ is not always bound by general international law; it can set it aside when taking countermeasures, provided that it abides by the secondary general rules established by law in connection with this specific type of action.¹⁷

The foregoing does not mean that the Council is entirely free in relation to customary law. That would be contrary to the legal nature of international organizations and to practicability and reason. There are two principal limitations.

First, the general rule is that the Council must not depart from international law *save where its mission related to the maintenance or restoration of peace absolutely requires it to do so*. In other words, it must do so as little as possible.¹⁸ Presumption is always against the validity of such departure; it must be motivated and could be tested according to the standards of necessity and proportionality. International law is the legal order of the community of states. It is an order forged by the experience of history to meet as nearly as possible the demands of international justice. It constitutes a normative reality essential to the survival of the community of states, unorganized and organized (United Nations). It is the order that surrounds the Council and links it to the world of interstate relations. This order should be disturbed as little as possible. The presumption is therefore always in favour of international law. It is for the Council to establish the imperious necessity of derogating from it. In law, no such necessity will be presumed. Unfortunately, the Council's practice does not sufficiently respect this precept. The leading powers increasingly have an unfortunate tendency to consider themselves above the law. The International Court of Justice (ICJ) has no power of review, except by request of advisory opinions and by incidental control – thus hardly ever.

Second, *the Council cannot be considered free in relation to all rules of customary law*. Some of those rules are also binding upon it, and not only on states. These rules may be considered as being part of a corpus of general international law applicable specifically to the Security Council and binding only on it, in the same way as general customary law is binding on states. Alternatively, we may consider them as part of customary law binding on all international legal persons indifferently. These rules could also form a *jus cogens* that is binding on all states and other subjects of international law, including the Security Council, without distinction.¹⁹ In either case, the Council would not be able to depart from the general law as so posited. It would constitute an “intransgressible”²⁰ and

16 This is not a situation of derogation *by agreement between one or more states*, but one of departure from the general rule by a single subject as permitted by customary law.

17 Zemanek, above note 15, p. 232.

18 This requirement for necessity, including in the context of international humanitarian law, is highlighted by Evelyne Lagrange, “Le Conseil de sécurité peut-il violer le droit international?”, *Revue belge de droit international*, Vol. 37 (2004), p. 590.

19 We shall return to this point. Compare for example Schweigman, above note 7, p. 197; De Wet, above note 15, pp. 187 ff.

20 This term is used in the case *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, p. 257, paragraph 79: “Further, these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.” On this concept see Robert Kolb, “*Jus cogens*, intangibilité, intransgressibilité, dérogation “positive” et “négative””, *Revue générale de droit international public*, Vol. 109 (2005), pp. 305 ff.

“non-derogable” barrier that the Council could not cross. The precise legal construction used to this effect is of little import. Again, the whole question boils down to the crucial point of derogation.

Derogability/*jus cogens*

Does international humanitarian law constitute *jus cogens* in the sphere of general international law? Can the Security Council set aside the law of armed conflicts and, by exercising its powers under the Charter, provide for particular rules that are binding on member states and UN forces under Articles 25 and 103 of the Charter qua binding *lex specialis*? If such powers exist, where should their outer contours be drawn? Up to what point can the public order set up by the law of the Charter prevail over the public order of the law of armed conflicts?²¹

Some authors, for instance L. Condorelli,²² consider that the Council must respect international humanitarian law in its entirety. Condorelli affirms that the treaty²³ and customary rule that IHL must be respected “in all circumstances” applies to all subjects of international law, including the Council, because it has essential implications for minimum guarantees that concern the individual. Also close to this school of thought are those, like E. David,²⁴ who consider that the

21 On the *jus cogens* nature of IHL, see also the doctoral thesis of Catherine Maia, “*Le concept de jus cogens en droit international public*”, Université de Bourgogne, 2006, pp. 611 ff.

22 Luigi Condorelli, “Le statut des Forces des Nations Unies et le droit international humanitaire”, in Claude Emanuelli (ed.), *Les casques bleus: policiers ou combattants?*, Montreal, 1997, pp. 105–6.

23 Article 1 common to the 1949 Geneva Conventions. On this provision, see Luigi Condorelli and Laurence Boisson de Chazournes, “Quelques remarques à propos de l’obligation des Etats “de respecter et faire respecter le droit international humanitaire en toutes circonstances””, *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva and The Hague, 1984, pp. 17 ff.; Nicolas Levrat, “Les conséquences de l’engagement pris par les Hautes Parties contractantes de “faire respecter” les Conventions humanitaires”, in Frits Kalshoven and Yves Sandoz (eds.), *Mise en oeuvre du droit international humanitaire*, Dordrecht, 1989, pp. 263 ff.; Kamen Sachariew, “States’ entitlement to take action to enforce international humanitarian law”, *International Review of the Red Cross*, Vol. 71 (1989), pp. 177 ff.; Paolo Benvenuti, “Ensuring observance of international humanitarian law: Function, extent and limits of the obligations of third states to ensure respect of international humanitarian law”, *Yearbook of the Institute of Humanitarian Law*, San Remo, 1992, pp. 27 ff.; Hans-Peter Gasser, “Ensuring respect for the Geneva Conventions and Protocols: The role of third States and the United Nations”, in Hazel Fox and Michael A. Meyer (eds.), *Armed Conflict and the New Law*, Vol. II, London, 1993, pp. 15ff.; Giovanni Casalta, “L’obligation de respecter et de faire respecter le droit humanitaire lors des opérations militaires menées ou autorisées par l’ONU”, *Droit et défense*, Vol. 97 (3) (1997), pp. 13 ff.; Fateh Azzam, “The duty of third states to implement and enforce international humanitarian law”, *Nordic Journal of International Law*, Vol. 66 (1997), pp. 55 ff.; Frits Kalshoven, “The undertaking to respect and ensure respect in all circumstances: from tiny seed to ripening fruit”, *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 3 ff.; Birgit Kessler, *Die Durchsetzung der Genfer Abkommen von 1949 in nicht internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Artikels 1*, Berlin, 2001; Birgit Kessler, “The duty to “ensure respect” under Common Article 1 of the Geneva Conventions”, *German Yearbook of International Law*, Vol. 44 (2001), pp. 498ff. See also ICRC (ed.), *Commentary on the Additional Protocols*, Geneva, 1987, pp. 34ff.; and the case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports, 2004, paras. 154 ff.

24 Eric David, *Principes de droit des conflits armés*, 2nd edn, Brussels, 1999, p. 85. See also Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria,*

great majority of the rules of the law of armed conflicts are part of *jus cogens* because this body of law is a final bastion against barbarity. Consequently, in their view, its application cannot be subordinated to a contrary agreement of states or to the discretionary will of an international body.

Other authors take the view that the rules of the law of armed conflicts that cannot be altered by the Security Council are restricted to what we may refer to as *ordre public humanitaire*, that is to say a core of rules within the law of armed conflicts deemed essential for, in particular, the protection of the individual. According to D. Schindler,²⁵ the non-derogable law of armed conflicts corresponds to its core (*Kerngehalt*). This core is formed by rules of humanitarian purport, for example pertaining to the means and methods of combat or the protection of victims. The Council could in any case not depart from these rules, the aim of which is to provide the individual with elementary forms of protection.

Some authors, for instance in the United States, show greater deference towards the Council's powers. In their view, the rules of the law of armed conflicts, but also the rules pertaining to IHL *stricto sensu*, could be set aside by the Council in an emergency. They opine that derogations are allowed only if there is a formally correct Council decision taken under Chapter VII and if the derogations are temporary, proportional and strictly limited to the irreducible demands of the situation. The Council could in no case dispense with the fundamental guarantees, in particular those contained in Article 3 common to the four 1949 Geneva Conventions.²⁶

Recently a number of authors,²⁷ put off their stride by developments in practice following the Iraq war (2003), have ceased to focus closely on the degree

Present Status, Helsinki, 1988, p. 622; Stefan Kadelbach, *Zwingendes Völkerrecht*, Berlin, 1991, pp. 70–1; Stefan Kadelbach, “Zwingende Normen des humanitären Völkerrechts”, in *Humanitäres Völkerrecht*, Informationsschrift, Vol. 5 (3) (1992), pp. 118–24.

- 25 See Dietrich Schindler, “Probleme des humanitären Völkerrechts und der Neutralität im Golfkonflikt 1990/91”, *Revue suisse de droit international et européen*, Vol. 1 (1991), p. 12. See also Dietrich Schindler, “Die erga-omnes Wirkung des humanitären Völkerrechts”, in *Recht zwischen Umbruch und Bewahrung*, Berlin, 1995, pp. 199 ff. In the context of occupation law, see e.g. Odile Debbasch, *L'occupation militaire: Pouvoirs reconnus aux forces armées hors de leur territoire national*, LGDJ, Paris, 1962, p. 419; David J. Scheffer, “Beyond occupation law”, *American Journal of International Law*, Vol. 97 (2003), pp. 843, 849; Daniel Thürer and Malcolm McLaren, ““Ius post bellum” in Iraq: A challenge to the applicability and relevance of international humanitarian law?”, in *Festschrift für Jost Delbrück*, Berlin, 2005, p. 763; Marten Zwanenburg, “Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation”, *International Review of the Red Cross*, No. 856 (December 2004), p. 763; Massimo Starita, “L'occupation de l'Iraq: Le Conseil de sécurité, le droit de la guerre et le droit des peuples à disposer d'eux-mêmes”, *Revue générale de droit international public*, Vol. 108 (4) (2004), p. 903.
- 26 See Brian D. Tittmore, “Belligerents in blue helmets: applying international humanitarian law to United Nations peace operations”, *Stanford Journal of International Law*, Vol. 33 (1997), pp. 105–6. It is generally accepted that Article 3 common to the Geneva Conventions constitutes *jus cogens*; see Hans-Peter Gasser, *Le droit international humanitaire*, Geneva and Berne, 1993, p. 74. Swiss practice has affirmed this on several occasions; see *Revue suisse de droit international et européen*, Vol. 9 (1999), p. 711; *Revue suisse de droit international et européen*, Vol. 11 (2001), p. 604.
- 27 See, mostly in the context of occupation law, Marco Sassòli, “Legislation and maintenance of public order and civil life by occupying powers”, *European Journal of International Law*, Vol. 16 (2005), pp. 681, 683–4, 690; Zwanenburg, above note 25, p. 763; Steven R. Ratner, “Foreign occupation and international territorial administration: the challenges of convergence”, *European Journal of International Law*, Vol. 16 (4) (2005), p. 710; Gregory H. Fox, “The occupation of Iraq”, *Georgetown Journal of International Law*, Vol. 36 (Winter 2005), pp. 296–7.

of derogation that is acceptable. They content themselves with supposing, very summarily, that the Council's action under Chapter VII, in combination with Articles 25 and 103 of the Charter, prevails over the law of armed conflicts. Some note this with a degree of satisfaction, others with a tinge of regret. To adopt this position is to presuppose something that needs to be proved.

It would seem helpful to start with the intermediate concept of "humanitarian public order". This concept provides the most balanced basis for harmonizing, first, the Council's prerogatives for action and requirements in terms of flexibility and, second, the humanitarian imperatives from which action by the Council must not depart, not least in its own interests. Such a nuanced construction is helpful mainly as far as the law of occupation is concerned. To sum up, the general idea that subtends our analysis is that the Council can derogate by establishing special rules that will prevail over that part of the law of armed conflicts that is not specifically humanitarian. Rules that do not provide for specific forms of protection for the individual fall into this category, such as the provisions of the 1907 Hague Regulations concerning the administration of occupied territory, for example the usufruct for public property of the occupied state provided for by Article 55 of the Regulations. However, the Council cannot derogate from the norms of international humanitarian law *strictu sensu*, namely the many rules of this type contained in the Fourth Geneva Convention of 1949. These are norms that concern the fundamental protections vouchsafed to the individual in case of armed conflict. The effort of specifying these norms one by one will be made in another study, to which I can only refer the reader at this stage.²⁸

Application to the case of Iraq (2003–...)

The occupation of Iraq following the invasion by the US-led Coalition of like-minded states²⁹ provides some significant indications for clarification of our

28 Robert Kolb and Sylvain Vité, *La protection des populations civiles au pouvoir d'une armée étrangère*, Brussels, forthcoming (2008).

29 On this intervention from the point of view of *jus ad bellum*, see *inter alia* contributions in the AJIL, Vol. 97 (2003), pp. 553 ff., and in Karine Bannelier, Olivier Corten, Théodore Christakis and Pierre Klein (eds.), *L'intervention en Irak et le droit international*, Paris, 2004. See also Michael Bother, "Der Irak-Krieg und das völkerrechtliche Gewaltverbot", *Archiv des Völkerrechts*, Vol. 41 (2003), pp. 255 ff.; Thomas Bruha, "Irak-Krieg und Vereinte Nationen", *Archiv des Völkerrechts*, Vol. 41 (2003), pp. 295 ff.; Christopher Clarke-Posteraro, "Intervention in Iraq: towards a doctrine of anticipatory counter-terrorism, counter-proliferation intervention", *Florida Journal of International Law*, Vol. 15 (2002), pp. 151 ff.; Olivier Corten, "Opération "Iraqi Freedom": peut-on admettre l'argument de l'autorisation implicite du Conseil de sécurité?", *Revue belge de droit international*, Vol. 36 (2003), pp. 205 ff.; Rainer Hofmann, "International law and the use of military force against Iraq", *German Yearbook of International Law*, Vol. 45 (2002), pp. 9 ff.; Patrick McLain, "Settling the score with Saddam: Resolution 1441 and parallel justifications for the use of force against Iraq", *Duke Journal of Comparative and International Law*, Vol. 13 (2003), pp. 233 ff.; Paolo Picone, "La guerra contro l'Iraq e le degenerazioni dell'unilateralismo", *Rivista di diritto internazionale*, Vol. 86 (2003), pp. 329 ff.; W. Michael Reisman, "Assessing claims to revise the laws of war", *American Journal of International Law*, Vol. 97 (2003),

problem. These indications are nevertheless limited, so great are the ambivalence, ambiguity and caution that characterize the relevant Security Council resolutions. Immediate political concerns prevailed over legal considerations of principle. This is scarcely surprising, since the Security Council is a political organ acting in emergencies.

The question we shall address is not whether the occupation forces in Iraq have violated the law of occupation. There is little doubt but that they occasionally have done so; legal writing is practically unanimous in this respect.³⁰ Reference is made, for example, to the absence of adequate preparations for maintaining order in the first days after the invasion,³¹ or to the far-reaching structural reforms of the Iraqi economy.³² One of the most thoroughly discussed measures is the radical reform of foreign investment law. By Order 39 (2003) of the Coalition Provisional Authority, Iraq was completely opened up to foreign investments. Any previous, more restrictive legislation was repealed. The degree of openness seems to go beyond that of any other state in the world. Moreover, foreign investors are no longer subject to the duty to reinvest part of their profits in Iraq. All profits can be exported.³³ Under previous Iraqi law, this privilege was granted only to nationals of Arab states.³⁴ This structural reform, which was not necessary either for the security of the occupying army or for the maintenance of civilian life, is manifestly contrary to Article 43 of the 1907 Hague Regulations, at least unless authorized by

pp. 82 ff.; Christian Schaller, "Massvernichtungswaffen und Präventivkrieg: Möglichkeiten der Rechtfertigung einer militärischen Intervention im Irak aus völkerrechtlicher Sicht", *Zeitschrift für ausländisch öffentliches Recht und Völkerrecht*, Vol. 62 (2002), pp. 641 ff.; Pierre-Marie Dupuy, "Sécurité collective et coopération multilatérale", in *Le droit international à la croisée des chemins*, VIème rencontre internationale de la Faculté des sciences juridiques, politiques et sociales de Tunis, Paris, 2004, pp. 61 ff. and 72 ff. The United States' principal allies in the war in Iraq were the United Kingdom, Australia, Spain, Italy, Japan, Poland and Portugal. Official US government sites indicate a rather generous and indiscriminate figure of 49 states: see <http://www.whitehouse.gov/infocus/iraq/news/20030327-10.html> (last visited 26 November 2007).

- 30 See Sassòli, above note 27, pp. 679, 694; Zwanenburg, above note 25, pp. 757–9; Starita, above note 25, pp. 886 ff.; Kaiyan Homi Kaikobad, "Problem of belligerent occupation: the scope of powers exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004", *International and Comparative Law Quarterly*, Vol. 54 (1) (2005), p. 260 (in relation to the nullity of reforms that are contrary to the law of occupation); Fox, above note 27, pp. 202 ff. 240 f., 295–6; Adam Roberts, "The end of occupation in Iraq (2004)", *International and Comparative Law Quarterly*, Vol. 54 (1) (2005), pp. 36 ff.; Adam Roberts, "Transformative military occupation: Applying the laws of war and human rights", *American Journal of International Law*, Vol. 100 (2006), pp. 614–15.
- 31 See Hans-Peter Gasser, "From military invitation to occupation of territory: New relevance of international law of occupation", in Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg and Christian Raap (eds.), *Crisis Management and Humanitarian Protection: In Honour of Dieter Fleck*, Berlin (2004), p. 154; Scheffer, above note 25, pp. 853 ff.
- 32 Complete liberalization of the economy and trade, opening up the country almost completely to foreign investment, abolition of the duty to reinvest in the country, complete reform of the tax system, etc. See, among others, Orders no. 37, 39 and 64 of the Coalition Provisional Authority concerning taxation, investment law and company law.
- 33 The usefulness of this reform for numerous US investors is apparent.
- 34 See Zwanenburg, above note 25, p. 757. The Provisional Authority has argued that it was authorized to carry out these reforms under Security Council Resolution 1483 (2003). This is not correct: see below.

a Security Council resolution.³⁵ Which brings us to the question we need to focus on more closely here: did the Council derogate from occupation law in the case of Iraq? As we shall see, it did not.

Before we plunge *in medias res*, a few introductory remarks are called for:

- (i) The relevant Security Council resolutions all demand, explicitly or by reference, *respect for IHL and the law of occupation*. In the key Resolution 1483 (2003) that established the regime in Iraq after the end of the hostilities phase (albeit in the teeth of continuing resistance), the Council takes note of the letter from the permanent representatives of the United States and the United Kingdom “recognizing the specific authorities, responsibilities, and obligations applicable under international law of these states as occupying powers under unified command” (paragraph 13 of the preamble). This is a declaratory and not a constitutive statement. The Council recognizes a pre-existing obligation to which the states in question are subjecting themselves; it does not create it. That is one of the reasons why this statement appears in a preambular paragraph. Subsequently, in Resolution 1546 (2004), which sets out to endorse the end of the occupation, we find two paragraphs that are equivocal to say the least. On the one hand, the resolution affirms that the occupation of Iraq will cease as of 30 June 2004 (paragraph 2).³⁶ This was the date scheduled for the handover of power from the Coalition Provisional Authority to the Interim Government of Iraq. And yet in paragraph 17 of the preamble, the Council notes “the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law”. We know that occupation law is part of IHL. There is therefore a degree of ambiguity between the two paragraphs: occupation law seems no longer to be applicable; but through international humanitarian law (of which the Fourth Geneva Convention – which contains occupation law – is a part) it

35 It has already been stated that the Council does not have unlimited freedom. Moreover, as Sassòli points out (above note 27, p. 694), even in the case of transitional international civilian administration (in which the law of occupation possibly does not apply entirely and *de jure*), far-reaching reforms should be left to the administered people in accordance with the principle of self-determination: “[E]ven a UN administration should not introduce such fundamental changes, but at the outmost suggest them to the population of the territory it administers as a solution to their problems”. See also Fox, above note 27, p. 276.

36 This time the statement is to be found in the body of the resolution text, in paragraph 2, but it seems no less declaratory and non-constitutive: the occupation would appear to have ceased on 27 June 2004, as the Authority formally handed over its powers to the Interim Government of Iraq three days early. It would probably be mistaken to suppose that the Council wished to maintain occupation law between 27 and 30 June, despite this handover of powers. If that is the case, the statement is declaratory and non-constitutive. The essential thing, from the Council’s point of view, is to know when the Authority relinquished its powers. However, the question may arise whether this statement is not after all constitutive. Does not the Council link the principle of effectiveness, as enshrined in Article 42 of the Regulations with binding effect for all members of the United Nations, with the handover of powers from the Authority to the Interim Government? If that is so, any effectiveness after that date would no longer relate to an occupation in accordance with the resolution, but could relate to one under Article 42 of the Regulations. On these aspects, see below.

could to some extent maintain its hold by effect of the Security Council's resolution itself. In any case, it is odd to imagine the post-occupation forces (as they would be in accordance with the Council's declarations) not complying with the fundamental humanitarian provisions of the Fourth Geneva Convention, many of which are to be found in Articles 27–33 (general rules) and Articles 47 ff. (occupied territories).

- (ii) No derogation from rules of the law of occupation (where allowed) can be presumed, as it sets aside the international law that is ordinarily applicable. What is more, it would entail shuffling off rules of international law that are of great importance, as highlighted by the Fourth Geneva Convention in its “locking” techniques contained in Articles 7, 8 and 47. Any derogation from such a body of law must at least be clearly established by a provision with binding force. For example, it is not possible to derogate from international law by means of an exhortation, a recommendation or a guideline. Nor can one so derogate by means of an equivocal position that lends itself to uncertain interpretation. Political bargaining cannot be engaged in at the expense of humanitarian law. It follows that only a clear injunctive decision that is binding under Article 25 of the Charter can set aside rules of international law that would otherwise apply. Accordingly, any ambiguity in the Security Council's mandate must be interpreted as contrary to the idea of derogation.

Let us now consider separately the preliminary aspect (applicability of the law of occupation) and the substantive aspect (derogation from the substantive guarantees of occupation law). The aim is to see to what extent the Security Council derogated from applicable rules of IHL in these contexts.

The applicability of occupation law

Regarding the applicability of occupation law, the Council's resolutions present two aspects for critical analysis. First of all, the Council seems to arrogate to itself the power to affirm *who is an occupying power and who is not*. The Council then seems to authorize itself to determine *the moment at which the occupation ends*.

Ratione personae: *who is an occupying power?*

In the preamble to Resolution 1483 (2003) – a founding text comparable to Resolution 1244 (1999) for Kosovo – we may read that the Council notes the letter from the permanent representatives of the United States and the United Kingdom and “recogniz[es] the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the “Authority”)” (paragraph 13 of the preamble). In the next paragraph the Council notes that “other States that are not occupying powers are working now or in the future may work under the Authority” (paragraph 14 of the preamble). Among these states are Spain, Poland and Japan. As many authors

remind us,³⁷ the aim of these none too felicitous provisions of Resolution 1483 was to spare the secondary states present in Iraq from being labelled “occupying powers”. This label, perceived as very negative – almost as an affront to honour – in Europe and the United States after the Second World War, was proving potentially troublesome for these states on the domestic political scene. To have to admit, in Spain or Poland, to being an “occupying” power in Iraq would have stirred historical memories and rendered singularly complicated the policy of governments engaged alongside the United States against the majority will of their populations. Be that as it may, these statements by the Council seem to clash with the principle of effectiveness enshrined in Article 42 of the Hague Regulations. For IHL, actual control on the ground is the sole determining factor for the existence of a belligerent occupation.³⁸ If Poland,³⁹ for example, controlled areas of Iraqi territory, it was an occupying power. Could the Council label the situation differently and release the state in question from its duties under occupation law?

It would not appear that the Council could legitimately derogate, nor does it seem in fact to have done so. First of all, it should be borne in mind that the paragraphs in question are purely declaratory and simply preambular. The Council takes note of a situation in the form in which that situation is communicated to it. It considers that, in view of the facts *such as they were presented to it*, there are occupying states and non-occupying states. No attempt is made to arrive at a legal classification. The Council confines itself to affirming that it “notes” this situation, by way of a preambular introduction, before moving on to the injunctions contained in the body of the resolution. Such statements do not meet the conditions needed for derogation as set out above. Accordingly, occupation law continues to apply. If the “non-occupying states” should turn out to have exercised occupation powers in accordance with the criteria set out in Article 42, they would have to be labelled accordingly. But that is not all. The Security Council itself calls 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” (paragraph 5 of the operative part of the resolution). Article 42 is therefore implicitly reaffirmed. The international law principle of effectiveness in the determination whether an occupation exists is certainly not put aside.

What, then, is the status of non-occupying states according to the Council’s view? There are several possible interpretations. The Council may have considered, for example, that these states would not establish autonomous territorial control and would perform only limited tasks (humanitarian,

37 See, e.g., note 30 above.

38 This was recently recalled by the ICJ in the case *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, ICJ Reports, 2005, p. 59, § 172. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports, 2004, p. 167, §78, and p. 172, §89.

39 More than any other “non-occupying” state, Poland did de facto exercise the duties and functions of occupation. See Liesbeth Lijnzaad, “How not to be an occupying power: some reflections on UN Security Council Resolution 1483 and the contemporary law of occupation”, *Making the Voice of Humanity Heard*, Leiden (etc.), 2004, pp. 302–4.

reconstructive, etc.) under the overall and effective control of the United States and the United Kingdom. On the assumption that they possessed no real autonomy and were subordinate to the two dominant powers, the Council may have considered that their acts were attributable to those two main powers. However, this position does not appear very convincing with regard to Poland, which administered and controlled a small zone in the south of Iraq in a sufficiently autonomous and effective manner to be labelled an occupying power.⁴⁰ Although this may not have been entirely foreseeable to the Council, in the final analysis the effectiveness principle found in Article 42 of the Regulations must nonetheless prevail: Poland was undoubtedly an occupying power within the meaning of the Regulations. Quite logically, the ICRC enjoined Poland, as well as other “non-occupying” states, to comply with the provisions of the law of occupation in its zone. Not one of them demurred.⁴¹

In conclusion, it should be noted that the Council did not intend to derogate from the law of occupation and could not have done so by the means it chose to adopt. The preambular paragraphs contain only a declaratory indication of the way in which the Council sees the *de facto* situation on the ground. This indication is devoid of any binding force.⁴² Accordingly, the Netherlands’ position,⁴³ to the effect that these statements constitute decisions of the Security Council that are binding under Chapter VII, is not legally defensible. They are to be analysed as a political stance reflecting a will to achieve a “Transatlantic détente”.

The end of the occupation

The observations of the Security Council in Resolution 1546 (2004) on the end of the occupation confront us with a situation that is in some respects the reverse. The Council “[w]elcomes that, ... by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty” (operative paragraph 2). However, paragraph 17 of the preamble notes “the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law”. The situation is the opposite of the previous one, inasmuch as the occupation is reaffirmed in the preambular paragraph and “set aside” by the operative paragraph. But is occupation law really “set aside”? The Council’s statement in paragraph 2 seems purely declaratory: the

40 Ibid., pp. 302–4.

41 See Thürer and McLaren, above note 25, p. 761, who stress that the ICRC reminded these other states of the law of occupation and that none of them protested.

42 See principally *ibid.*, pp. 759–61, and, in less clear and often too succinct terms, Lijnzaad, above note 39, pp. 292 ff. See also Zwanenburg, above note 25, pp. 755–6. Many authors have considered that Resolution 1483 is, to say the least, ambiguous: Jorge Cardona Llorens, “Libération ou occupation? Les droits et devoirs de l’État vainqueur”, *L’intervention en Irak et le droit international*, Cahiers internationaux series, No. 19, Pedone, Paris, 2004, pp. 239 ff.; Kaikobad, above note 30, pp. 262–3.

43 See Zwanenburg, above note 25, p. 756.

Council notes that power will be handed over by the Authority of the occupying powers to the Interim Government on 30 June 2004; and it expresses its satisfaction at the implicit affirmation contained in this statement to the effect that the Iraqi government will enjoy *de jure* and *de facto* sovereignty over its territory. This is a statement in keeping with the principle of effectiveness contained in Article 42 of the Hague Regulations: if power has effectively been handed over, and if Iraqi sovereignty has been “recovered”,⁴⁴ the occupation will cease from that moment on. The Council interprets this handover of powers as implying that effective occupation has ceased.

We know that the handover of power took place three days before the date stated in the resolution – that is, on 27 June 2004. If we follow the motivation, object and purpose, rather than the letter, of the resolution, we may conclude that the occupation came to an end on 27 June. The Council’s statement is declaratory, not constitutive: it refers to the actual situation. It is therefore a movable and not a fixed reference. If occupational effectiveness ceased on 27 and not on 30 June, the occupation itself ended on 27 and not on 30 June. However, the statement remains hypothetical, as everything depends on the actual situation, which was not yet known at the time the resolution was adopted.

Is the Council’s statement as to the nature of the situation not constitutive on one point, namely the legal significance of the handover of power by the Authority to the government? Was not the Council determining with binding effect for the member states of the United Nations that this handover, scheduled for 30 June, would be tantamount, *pro veritate*, to loss of effectiveness for the occupying powers as of the date on which it took place? Accordingly, it would no longer have been possible to argue that there could still be effectiveness (and hence occupation) after the handover of power.

The situation on the ground does not militate in favour of the idea that this handover of powers on 27 June created a clear break. The United States, in particular, took care to install in the government individuals who had close links with itself and to exclude those it considered hostile to its interests; it has continued to deploy⁴⁵ the same military contingents as before the handover date; it placed all these forces, used in combat against resistance and terrorism in Iraq, under its exclusive command; and it has retained a strict right of scrutiny over the actions of the government, whose margin for autonomous manoeuvre is limited. Accordingly, it can be said at the very most that the restoration of Iraqi sovereignty is an ongoing process.⁴⁶ The date of 27 June 2004 saw only a limited handover. It

44 Not “transfer” of sovereignty, as US sources indicate; since occupation does not alter sovereignty, which remains vested in the occupied state, there is nothing to transfer. This is an illustration of the extent to which politics muddies the most elementary legal truths. See Rahim Kherad, “La souveraineté de l’Irak à l’épreuve de l’occupation”, in D. Maillard Desgrées du Loû (ed.), *Les évolutions de la souveraineté*, Paris, 2006, p. 152.

45 And there has even been an increase the number of these forces in 2007.

46 Roberts, “The end of occupation”, above note 30, pp. 41–2, 46–7. This author acknowledges that occupation law could therefore apply after the date of 27/30 June 2004, in accordance with the principle of effectiveness. See also Roberts, “Transformative military occupation”, above note 30, pp. 616–18.

may not have been sufficient to produce legal effects of a conclusive nature for the purpose of terminating the state of occupation. Some authors prefer to speak openly of an Iraqi government too dependent to be really autonomous: for them, it is not in a position freely to invite the Coalition forces to remain on its territory and thereby to convert the belligerent occupation into an occupation by invitation outside the scope of IHL. According to these authors, although it may not be a puppet government, it is not far from it.⁴⁷ If this is true, the acts of the new government cannot be perceived as acts of sovereignty. In that case, Article 47 of the Fourth Geneva Convention could be upheld vis-à-vis the occupying power: the formal change of status would not have ended the occupation and with it the grant of various forms of protection from its effects to the Iraqi inhabitants. We consider for our part that the government in Iraq since June 2004 has not yet attained such autonomous effectiveness as to authorize the conclusion that occupation law no longer applies.

Whatever interpretation is brought to bear, it must certainly be acknowledged that Resolution 1546 does not trigger the operation of a clear derogation either from Article 42 of the Hague Regulations or from customary law, both of which are based on the criterion of effectiveness.⁴⁸ Paragraph 2 of the resolution seems to be declaratory. It certainly does not expressly exclude the concurrent criterion of effectiveness. On the contrary, it seems to presuppose it by giving expression to it. Preambular paragraph 17 notes that the powers in question have committed themselves to acting in accordance with IHL. This paragraph is also declaratory. It notes that the relevant states have assured compliance with what are in any case their legal obligations. Consequently, the paragraph refers to a “hard” legal obligation to be found in IHL, of which occupation law is a part. How, then, could it be imagined that this binding acknowledgement of the applicability of IHL (and hence also of occupation law with its principle of effectiveness) could be set aside by paragraph 2, which simply notes that Iraq will recover its full sovereignty on 30 June in such a way that the occupation comes to

47 Thürer and McLaren, above note 25, pp. 769 ff. According to these authors, as effective sovereignty was not returned to the Iraqi government, the occupation continues in accordance with the principle of effectiveness. Such is the yardstick of legal correctness; Andrea Carcano, “End of the occupation in 2004? The status of the Multinational Force in Iraq after the transfer of sovereignty to the Interim Iraqi Government”, *Journal of Conflict & Security Law*, Vol. 11 (2006), p. 58. See also Kherad, above note 44, pp. 153–4, who considers that the Interim Government was neither legal nor legitimate, as it was appointed by and subordinate to the authorities of the occupying powers; it was not therefore in a position to formulate an invitation to foreign military forces to remain on its territory and so transform a belligerent occupation into a peaceful occupation to which the IV Hague Convention and the Fourth Geneva Convention are supposedly not applicable. Luigi Condorelli, “Le Conseil de sécurité entre autorisation de la légitime défense et substitution de la sécurité collective: remarques au sujet de la Résolution 1546 (2004)”, in SFDI (ed.), *Les métamorphoses de la sécurité collective, Droit pratique et enjeux stratégiques*, Paris, 2005, p. 237, considers that the sovereignty and independence of the new Interim Government, proclaimed by Resolution 1546, “relèvent du monde des fables et ne ressemblent en rien à la réalité” (belong to the realm of fable and bear no resemblance to reality).

48 There is therefore no basis for thinking that Resolution 1546 (2004) prevails over occupation law because it derogates from it, as affirmed by Sassòli, who begs the question (above note 27), pp. 683–4. Sassòli does, however, correctly acknowledge that the effectiveness of the occupation continues if we take account simply of the facts on the ground.

an end? This statement is a mere anticipation of a future event. If that anticipation should be proved wrong by the facts – by the very operation of effectiveness – IHL and occupation law would continue to apply inasmuch as the ordinary conditions for their applicability are met.

Let us add that operative paragraph 1 reinforces this reading. It imposes on the Interim Government the obligation to refrain “from taking any actions affecting Iraq’s destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office”. This is tantamount to saying that the spirit of the principle codified in Article 43 of the 1907 Regulations operates to limit the margin of action of the Iraqi government in place after 27 June 2004. The Council manifestly considers it as an organ not in possession of full and complete sovereignty.⁴⁹ In the scenario anticipated by the Council, there is therefore no longer an occupation *strictu sensu*, but neither is there an Iraqi government in possession of real and full independence. We are therefore in an intermediate, ambiguous, *sui generis* situation. It is certainly not of such a nature that the rules of occupation law do not apply to it. As long as the sovereignty of the Iraqi people has not been fully recovered, the law of occupation must provide adequate minimum guarantees.

In conclusion, it may be underlined that Article 42 of the Hague Regulations does not brook derogation by the Security Council.⁵⁰ It forms part of the humanitarian *ordre public* or *jus cogens*. Why must this provision be peremptory? If the principal condition for the applicability of the substantive protections vouchsafed by the law of occupation were not peremptory, that would mean that an occupying power or the Security Council would be allowed to set aside *de plano* all these substantive protections, including those of a humanitarian nature. By affirming that this law is not applicable, or by restricting the conditions for its application, it would be possible to avoid fundamental guarantees. Consequently, any effort to “lock in” the humanitarian protections or to declare them imperative would be a vain enterprise; manipulations in the scope of application would allow the entire occupation regime to be swept aside from the outset by a stroke of the pen. The substantive guarantees would then be robbed of any *effet utile* in a way that is contrary to the most intimate spirit of modern occupation law (Articles 7, 8 and 47 of the Fourth Geneva Convention). The reverse conclusion is therefore inescapable: if a single provision of substantive law has peremptory status, the norm that defines the scope of application of that

49 Roberts, “Transformative military occupation”, above note 30, pp. 617–18.

50 This is a sort of a second-degree norm of *jus cogens*. Accordingly, the effectiveness criterion applicable to occupation law – which is the essential content of Article 42 – prevails over any contrary determination by the Security Council. However, this is not to say that a contrary determination by the Council is devoid of effect or relevance. It would indeed constitute an indication of the way effectiveness is perceived by a major organ of the United Nations. This determination could be followed by any juridical operator, at least if it is not in clear contradiction with the facts. It is therefore necessary to conclude that the Council has the possibility of trying to influence occupation law by means of subjective determinations of the situation, but that these determinations could not prevail over the criteria set out in Article 42. Nor has the Council received from the Charter the mandate to give a binding interpretation of the conditions for the application of Article 42.

fundamental rule and therefore constitutes the first condition of its application must also have peremptory status. This non-derogability is relevant to the question of who is (or is not) the occupying power and also the question of when the occupation ends. If we follow this construction, the Council would not have the substantive power to derogate from it. In that case, the resolution clauses cited above would necessarily have to be interpreted in a declaratory and not a constitutive sense, if they were not to be considered null and void by virtue of the principle of interpretation *in dubio pro validitate*.

Derogation from the substantive provisions of occupation law

When we turn to the question of derogations by the Council from substantive norms, the legal evidence is more meagre still. In fact, we have been unable to locate a single one in the relevant resolutions. Some authors take the view that on this point as on others these resolutions demonstrate both the virtues and the vices associated with a degree of ambiguity.⁵¹ In reality, ambiguity is limited. All the resolutions in question affirm, either directly or indirectly by reference to Resolution 1483 (2003), that IHL and occupation law are applicable without any exception. In the key Resolution 1483 (2003), paragraph 13 of the preamble states that the Council notes the letters of the representatives of the United States and the United Kingdom in which they recognize “the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command”. In operative paragraph 5, we read that the Council “calls 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”. No derogation, much less a clear derogation, is thereby enacted. The contrary seems true.

Several operative paragraphs then call upon the Authority (the said “occupying powers under unified command”) and member states to take measures aimed at reconstructing Iraq and bringing it to sovereign independence. All these provisions are remarkably generic. None of them allows or obliges any party to act contrary to occupation law. In paragraph 1 we read that UN member states and concerned organizations are invited to “assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and contribute to conditions of stability and security in Iraq *in accordance with this resolution*” (emphasis added); in paragraph 4 we read that the Authority is called upon to “promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of ... conditions in which the Iraqi people can freely determine their own political future”; in paragraph 8(c) we read that the Authority, in co-operation with the

51 A number of authors have noted this. See, e.g., Nehal Bhuta, “The antinomies of transformative occupation”, *European Journal of International Law*, Vol. 16 (2005), p. 735; Zwanenburg, above note 25, pp. 763 ff.

UN Special Representative, is to advance efforts “to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq”; in sub-paragraph (e) of the same paragraph we read that they should promote “economic reconstruction and the conditions for sustainable development”; in sub-paragraph (g) we read that they should promote “the protection of human rights”; and so on.

It is therefore necessary to conclude that preambular paragraph 13 and operative paragraph 5 forbid derogations from applicable occupation law, given that no other paragraph allows them, expressly or by necessary implication.⁵² As has been rightly pointed out, no provision of the Security Council resolutions calls for action going beyond or departing from occupation law.⁵³ This is clearly different from the situation in Bosnia and Herzegovina or in Kosovo.⁵⁴ At most, we may see in operative paragraph 4 an invitation to somewhat transformative structural reforms.⁵⁵ However, the language remains vague and imprecise. This is too little to constitute a derogation from occupation law, which is recalled in the same resolution as a factor setting limits to action. It is therefore not certain that those authors who affirm summarily that these resolutions extend the powers of the occupying powers beyond occupation law are right.⁵⁶ Admittedly, there are some places where the language goes further. However, it does so more by way of translating the law of The Hague into practical measures than by way of a departure from it. These instances are very limited, for example as regards the treatment of oil.⁵⁷ Are they really in opposition to occupation law or do they develop it in its areas of flexibility? At close scrutiny, they certainly do not seem to come within the realm of derogation.

It may finally be recalled that reforms such as “de-Baathification” – inasmuch as they concern oppressive structures – but also certain human rights reforms such as the ban on child labour are compatible with and even required by occupation law. In principle, these reforms are covered by the “oppressive laws” exception and by the positive obligation to guarantee the rights recognized in the

52 See also Kaikobod, above note 30, pp. 262–3 ; Thürer and McLaren, above note 25, p. 766.

53 Fox, above note 27, pp. 257 ff., 261.

54 Ibid., pp. 261–2.

55 Scheffer, above note 25, pp. 844–5 ; Zwanenburg, above note 25, p. 766.

56 See Starita, above note 25, pp. 893 ff.; Roberts, “Transformative military occupation”, above note 30, p. 613: “Taken as a whole, the purposes of the occupation as outlined in Resolution 1483 went beyond the confines of the Hague Regulations and the Fourth Geneva Convention.”

57 Jorge Cardona Llorens refers to the sale of oil by the Authority as a departure from (or an addition to?) the law of occupation (above note 42, p. 246). But first of all, this oil sale regime followed the “Oil-for-Food” Programme, i.e. an internationalized regime for trading in this commodity that had already begun. Second, it is not certain that occupation law does not allow flexible solutions under the general principle of “usufruct” that we find in Article 55 of the 1907 Regulations. See Langenkamp R. Dobie and Rex J. Zedalis, “What happens to the Iraqi oil? Thoughts on some significant unexamined international legal questions regarding occupation of oil fields”, *European Journal of International Law*, Vol. 14 (3) (2003), pp. 417 ff. It is plain that the establishment of the Special Funds and the detail of the rules go beyond occupation law, but are they contrary to this law?

Fourth Geneva Convention and other human rights sources (for example the 1966 Covenant on Civil and Political Rights).⁵⁸

Conclusion

Our conclusion from the Iraq case study can be summed up in one sentence: the relevant Security Council resolutions contained no express or explicit derogations from the formally applicable law of occupation.

The Council operated more subtly. It adopted texts often characterized by studied ambiguity and implication, while leaving the question of the relationships between occupation law and the (slightly)⁵⁹ transformative mandate granted by it to be more tangibly addressed in practice. On the crest of this inviting and creative wave we should therefore not have been surprised to see the Authority of the occupying powers in Iraq refer to Resolution 1483 (2003) even for its most far-reaching reforms, such as those undertaken in the economic sphere. We find there a reading of occupation law that is to say the least *self-serving*. These fuzzy mandates from the Council constitute a rampant threat for international legality. True, the bastion of international law is formally left intact, as no express derogation from IHL is countenanced. But for how much longer will that remain the case, if there are other precedents like Iraq? Moreover, the substance of IHL that is so fundamental for protecting local populations and ensuring their self-determination is being surreptitiously left to the occupying powers' own interpretation. It is not difficult to guess the direction in which that interpretation will move. A body of law that is apparently malleable to the point of being stifled by many different hands – the historically explicable intrinsic vagueness of the Hague Rules, the flexible and implicit mandates of the Security Council, and the self-serving interpretation of occupying states themselves – is bound to see its credibility suffer. In the worse case, it will end up being perceived as a grimacing mask serving the distinguished but undesirable purpose of concealing reality.

58 Since the end of the Second World War it has been acknowledged that the occupying power must not apply, or leave unchanged, oppressive domestic legislation such as the Nuremberg laws of the National Socialist regime. The aim of the rule that prohibits changes in local legislation is to avoid legislation contrary to the principle of self-determination being imposed from outside. If this rule were to be interpreted as preventing legislative changes to amend oppressive laws, that interpretation would be contrary to its object and purpose. Some have gone so far as to affirm that there is a positive obligation incumbent on the occupying power to repeal, or at least suspend, such legislation. There can be no doubt as to this positive obligation, as otherwise the occupying power would fail in its "humanitarian" duties under the Fourth Geneva Convention, which demands that certain rights be guaranteed in all cases. See Gerhard Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, pp. 95, 107; Morris Greenspan, *The Modern Law of Land Warfare*, University of California, Berkeley (etc.), 1959, p. 245; Allan Gerson, "War, conquered territory, and military occupation in the contemporary international legal system", *Harvard International Law Journal*, Vol. 18 (3) (Summer 1977), p. 531; Sassòli, above note 27, pp. 675–6; Howard S. Levie, *The Code of International Armed Conflict*, Vol. 2, London, Rome and New York, 1986, p. 716. See also Jean Pictet (ed.), *Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1958.

59 Much less than that of the Transitional Civil Administration in Kosovo.

There are arguments in favour of a new codification of the law of occupation to develop and raise it to a level that would meet the demands of the current problems. But this is clearly not the right time to do so. If we embark on that course now, we risk moving backwards rather than forwards. Some states will try to seize the opportunity thus presented to dismember occupation law, rather than to strengthen or at least adapt it.

In the absence of new treaty law, it remains to be hoped that in future the Council will not lightly indulge in explicit or implicit derogations from occupation law, and will not lend its hand to violations of the law by allowing occupying powers excessive latitude in interpreting and applying the (sometimes excessively) generic rules it lays down. It must also refrain from providing a semblance of legitimacy through resolutions that can be used as a source of authority to impress the uninitiated. Moreover, the UN Security Council should not yield to pressing demands to fulfil or give its blessing to particular political wishes by occupying powers in order to re-enter the decision-making process from which those very powers had initially (in the *jus ad bellum* phase) excluded it. There is a world of difference between a civil administration centred on the United Nations from the outset and the remote support provided by the Security Council for occupying powers that have, in that capacity, their own political agenda and particular objectives.

Here the very *rule of law* at international level, weak as it is, is at stake. The relative drubbing that occupation law has received in Iraq is only one of many warning signs that we have seen in recent years. Lest we forget: *caveant consules, ne quid detrimenti res publica (universalis) caperet!*⁶⁰ That is the only point: the enlightened common interest of all.

60 Let the Consuls beware, lest something harmful befall the (world) republic!