Chapter 2  International Law and Transformative Occupation: Contemporary Challenges

Their application [of human rights norms], by no means free of difficulty, offers some important opportunities ... occupying powers can justify certain transformative policies on the basis that these are the best way to meet certain goals and principles enshrined in international human rights law, including the right of self-determination.

—Adam Roberts, AJIL, 2006

The previous chapter has, *inter alia*, highlighted the emergence of the phenomenon of transformative occupation as well as its diffusion in the practice of states in the nineteenth century and has sought to articulate a rationale as to why this model of occupation is at odds with that codified in the law of occupation and, consequently, prohibited. Additionally, it has argued that in some exceptional instances, that prohibition could be derogated, or, at least, bypassed, by virtue of the application of an even more specific normative framework than that of the law of occupation, fitting the unique historical context in which a given occupation may unfold.

This chapter concerns the recent history of the international law applicable to an occupation, as opposed to the ‘ancient history’ which has been discussed thus far. On the basis of an analysis of the relevant developments within the system of international law, it inquires whether this evolution has in some way affected the traditional tenets of the law of occupation in favour of transformative policies directed to advancing human rights and democracy and/or enabling the (internal) self-determination of a people under occupation.

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1. The development of the international law applicable to an occupation

In the second half of the twentieth century, under the influence of the UN Charter’s quest to solve international disputes peacefully, and the development of human rights law, international law expanded considerably in terms of both the areas covered and the functions performed. A number of international actors, including judicial and quasi-judicial institutions played a key role in this journey. Acting as the guardians of a system of international relations based ideally on preserving peace and protecting human rights, the practice of such bodies has contributed to making certain international law rules and principles, designed for and within the ‘law of peace’, applicable to situations which were traditionally under the exclusive purview of the ‘laws of war’. This development is not altogether surprising, considering that contemporary international law is indeed the product of a multi-faceted polycentric normative system, but, nevertheless, calls for appropriate reflection, systematisation, and coordination.

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5 As aptly stated by Malcolm Shaw in International Law (6th edn, CUP 2008) 70:

There is no single body able to create laws internationally binding upon everyone, nor a proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the law. One is