A. INTRODUCTION

The U.S.-led military occupation of Iraq\(^1\) between May 1, 2003, and June 28, 2004,\(^2\) has attracted renewed attention to the law of occupation. First of all,
the adoption of Resolution 1483\(^3\) by the Security Council has raised questions as to the precise relationship between resolutions of the Security Council acting under Chapter VII of the UN Charter and the law of occupation, a branch of international humanitarian law (IHL). Thereby the core of the controversy turned on the issue of whether the Security Council may “carve out” parts of the classic law of occupation, especially the prohibition on the occupying power to establish new local and national institutions and to institute legal, judicial and economic reform.

As this question may be of interest for almost all peace support operations (PSOs) run by international organizations, which typically include some kind of transformation of institutions and legal system of the occupied territory, the present contribution thus intends to analyze the topic in a more general approach.

B. THE LAW OF OCCUPATION—
SCOPE OF APPLICATION AND CONTENTS

The law of occupation is part of IHL. Its main sources are the Hague Regulations concerning the Laws and Customs of War on Land, attached to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land (hereinafter Hague Regulations),\(^4\) the 1949 Geneva Conventions I–IV (by virtue of their common Article 2), especially the Fourth Geneva Convention\(^5\) and its Section III on occupied territories, and Additional Protocols (AP) I and II to the 1949 Geneva Conventions.

Article 42 of the Hague Regulations considers a territory occupied “when it is actually placed under the authority of the hostile army.” Article 43 of the Hague Regulations continues with “the authority of the legitimate power having in fact passed into the hands of an occupant.”\(^6\) Therefore, occupation is a matter of fact, not a matter of law: once a situation exists that factually amounts to occupation, the law of occupation applies.\(^7\) For these reasons any formal legal distinction between “occupying powers” and “non-occupying

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\(^3\) SC Res. 1483 (May 22, 2003).

\(^4\) Available at 2 AM. J. INT’L L. SUPP. 90 (1908).

\(^5\) Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287.

\(^6\) Moreover, common Article 2 of the 1949 Geneva Conventions suggests a wide notion of the term “occupation” and requires neither actual resistance against the occupying power nor a complete occupation of the territory concerned.

\(^7\) See Joshua L. Dorosin, Remarks, in ASIL PROCEEDINGS 117, 118 (2004); Jean-Philippe Lavoyer, Remarks, in ASIL PROCEEDINGS 121, 121 (2004); Zwanenburg, supra note 1, at 748.