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The War in Iraq: A Legal Analysis
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XIII

The Occupation of Iraq: A Reassessment

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I. Introduction

The invasion and subsequent occupation of Iraq in 2003 provided a rare opportunity to examine the viability in the twenty-first century of a legal doctrine rooted in the military and political circumstances of the nineteenth century.[1] The rarity of this opportunity is not a result of paucity of occupations, but of the prevalent disinclination of occupants to recognize their status as such.[2] This article reflects on several key questions concerning the occupation of Iraq, not in an attempt to evaluate the occupants for their compliance with the law, but rather to study contemporary challenges to the law and possibilities for adaptations in the twenty-first century. The article addresses the beginning and end of the occupation in Iraq and potential pre- and post-occupation responsibilities (Part II), and examines the scope of authority of the occupants and of the UN Security Council in Iraq (Part III). Part IV concludes.

II. The Time Frame of the Occupation in Iraq

The Beginning: When Was Iraq Occupied?

Background: When Does Occupation Begin?

This seemingly straightforward question has proven to be quite complex. It has always been complex, but for different reasons. In the nineteenth century, the

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concern was that eager invaders would declare an area occupied prematurely. Because the law of occupation granted occupants control over key strategic resources, such as public property, invaders might be tempted to assert authority without actually controlling the area.[3] But over the years, and most notably since the adoption of Geneva Convention IV, which imposed on occupants extended obligations over civilians in occupied territories, and several human rights conventions that added to those obligations, occupants found little interest in asserting their status as occupants. The derogatory connotation that the term "occupation" has gained, particularly during the second half of the twentieth century, added to this reluctance. Moreover, the asymmetric nature of many of the recent conflicts has provided another incentive for the occupant to act through intermediaries or otherwise minimize its contact with particularly violent indigenous communities. Therefore, while the drafters of the original text on occupation law were concerned about overly assertive occupants, today's interpreters have to deal with occupants who try to evade this designation. With contemporary technology and weaponry that enables certain armies to control an area from a distance, a new challenge to the definition emerges.

Given the occupants' increasing ability and prevailing interest to control an area but not its population, it is important to note that the governing legal definitions seek to preclude this option and insist on the protection of individuals. The Hague Regulations emphasize the territorial test,[4] implying that whoever controls the territory has responsibility over the population, while Geneva Convention IV does not attempt a territorial definition, instead emphasizing the relations between the occupant and the "protected persons" who "find themselves . . . in the hands" of an occupying power[5] as the relevant test.

Some confusion, however, arises from the second sentence of Article 42 of the Hague Regulations, which stipulates that "[t]he occupation extends only to the territory where such authority has been established and can be exercised." This addition can at first sight be interpreted as suggesting that an occupant that manages to control only the land, but does not actually exercise authority over the civilian population, is freed from responsibility toward it. This reading is plainly wrong. It is wrong because the text was intended to exclude premature occupations, rather than to allow occupants to evade their responsibilities.[6] It is wrong also literally, because the reference in "such authority" is to the first sentence of the article, which discusses authority over *territory*, not over *the population* in the territory.[7] Finally, it is wrong because it lets occupants off the hook of responsibility toward the population. The better interpretation of the test for occupation therefore stipulates that occupation begins when the foreign army is in actual control *over enemy territory*, and is *in a position* to establish, if it so wishes, an authority of its own over the population. It is

irrelevant whether or not the army *actually* does so. By assuming control over the land the occupant assumes responsibility over the population situated on that land.[8]

The same confusion is reflected in some States' military manuals. Whereas the German military manual accurately requires merely a *potential* to actually exercise authority,[9] the US military manual insists that the test for occupation is that the "invader has successfully substituted its own authority for that of the legitimate government in the territory invaded."[10] To add confusion, the British manual apparently contains an internal contradiction, as it appears to support both views. On the one hand, it stipulates that "the occupying power [must be] *in a position* to substitute its own authority for that of the former government" (paragraph 13.3), but later it indicates that occupation "depends on whether authority is actually being exercised over the civilian population."[11] In this confusing mist, the International Court of Justice (ICJ) adopted the "actual authority" test in the *Armed Activities* case.[12] Except for one district, where actual authority had been established and hence was regarded by the Court as occupied, the ICJ accepted Uganda's argument that in other areas it controlled only land, not people, and therefore did not "occupy" them.[13] In other words, in the ICJ's view, only direct authority *over a population* amounts to occupation. This is an unfortunate outcome.[14] It is unfortunate from the perspective of the local population, which is left with no accountable government in charge. It is also unfortunate from the perspective of neighboring States that are weary of geographical areas left without responsible State authority. An invader that is unaccountable for what transpires in an area it dominates is likely not to internalize the dangers emanating from the invaded territory, and, as a result, that area may become a source of regional, if not global, instability.

The Occupation of Iraq by the United States and the United Kingdom

It is quite obvious that the initial planning for the invasion of Iraq did not include plans to establish military administration whose authority would derive from the law of occupation. Months before the invasion, which began on March 20, 2003, officials in the US administration had been divided on the applicability of the law of occupation. While some of them believed it was appropriate, others viewed the situation not as occupation, but as mere "liberation."[15] Even after parts of Iraq had already been occupied and Baghdad was falling, President Bush and Prime Minister Blair emphasized this liberating role of their coalition and envisioned "the formation of an Iraqi Interim Authority, a transitional administration, run by Iraqis, until a permanent government is established by the people of Iraq."[16] Military officials still refused to speak of occupation in the legal, rather than colloquial, sense, and maintained that "occupation" in the legal sense required taking over an area "with the intent to run the government in that area,"[17] which, at the time, was

not the case for the coalition forces in Iraq. But British jurists had a different view from the start. In a secret memorandum from late March, the British Attorney General, Lord Goldsmith, wrote that the United States and the United Kingdom would be bound by the law of occupation, unless the Security Council passed a specific resolution.[18]

These differences of opinion were reflected in a gradually changing attitude on the ground. The initial institution entrusted with administering occupied Iraqi territory was the US Office for Reconstruction and Humanitarian Assistance (ORHA), established two months before the ground invasion.[19] During the initial phase of the occupation, despite a late March Security Council resolution that had reminded coalition forces of an occupying power's responsibilities,[20] the coalition forces made efforts to set up an indigenous Iraqi regime. On April 15, Coalition officials held a meeting with Iraqi representatives in Nasiriyah, in which a thirteen-point statement on the political future of Iraq was adopted.[21] Together with a subsequent meeting, which took place on April 28 in Baghdad, these were part of "initial moves towards the establishment of a national conference, which could set up an interim authority and make progress towards constitutional change and the election of a new government."[22] But on April 16, only one day after the Nasiriyah meeting, without an explanation or a formal document setting it up,[23] the head of the ORHA announced the establishment of the Coalition Provisional Authority (CPA). Another three weeks passed until on May 8 the UK and US representatives to the UN sent a letter recognizing their obligations under the Hague Regulations and Geneva Convention IV.[24] L. Paul Bremer was appointed the US presidential envoy to Iraq on May 6 and the CPA Administrator on May 13.

The legal situation crystallized during the month of May as the occupying powers began seeking to establish their own government instead of setting up an interim Iraqi government. To do so they had to rely on authority under international law. While they did not explicitly acknowledge their status as occupants, they impliedly acknowledged the applicability of the Hague Regulations and Geneva Convention IV to their actions in Iraq. Explicit recognition of occupation law came later, when the British Foreign and Commonwealth Office relied on it expressly,[25] as did American legal advisors stationed in Iraq.[26]

Security Council Resolution 1483, of May 23, 2003, clarified the legal status of Iraq at the time. The Resolution "noted" the May 8 letter of the UK and US representatives, but continued to "recogniz[e] the specific authorities, responsibilities, and obligations under applicable international law of these States as *occupying powers* under unified command" (emphasis added).[27] The Resolution further "[*c*]*all*[*ed*] *upon* all concerned to comply fully with their obligations under

international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[28]

But this was not meant to be a casebook example of occupation, because the occupants sought a broad Security Council mandate that went beyond the scope of authority recognized by international law.[29] The UN's role was meant to widen the authority of the CPA, while being instrumental—but without formal authority—in offering humanitarian relief and assistance to the CPA in the reconstruction of Iraq and the establishment of institutions for representative governance.[30]

Pre-occupation Responsibilities?

The traditional reading of the laws of armed conflict distinguishes between the hostilities and the post-hostilities phases. This distinction is also reflected in the different sections of the Hague Regulations. However, such a neat distinction can be questioned. As Dinstein notes, "[i]t is impossible to pinpoint an instant marking transition from an extended foray to a fledgling belligerent occupation."[31] Instead, it is possible to recognize the simultaneous applicability of both *in bello* and *post bellum* norms with respect to the obligations an enemy army has toward the local population.[32] Although it is beyond the scope of this article to explore this question in depth,[33] it can be noted that the obligations toward the population in enemy territory arise even before the establishment of firm control over territory and population. Given contemporary technology and weaponry, on the one hand, and the proliferation of weak or failing indigenous regimes, on the other, the neat allocation of responsibilities between occupant and occupied based on physical control of territory ("boots on the ground") does not serve humanitarian and global interests. It is necessary to impose legal restraints on any foreign power that effectively controls activity in a foreign area, even without having actual presence in the territory in the ancient form of full-fledged military administration. There is thus a need to redefine the rules of allocating responsibilities. The most sensible one would seem to be a rule that interprets authority as "power" (rather than "control" or "jurisdiction"), to be determined based on the consequences of the actual exercise of power in a given territory. A State that exercises its power in a foreign ungoverned or partly governed land will thus be regarded as bearing at least the basic obligations borne by an occupant.

This implies that pre-occupation obligations toward the local population need to be recognized, and they can derive, *inter alia*, from the obligations under Geneva Convention IV toward people who "find themselves . . . in the hands" of the invading army.[34] It would be ridiculous to suggest, for example, that Article 49 of that Convention, which proscribes deportations of enemy civilians, would be inapplicable unless the area has been occupied.[35] Similarly senseless would be the

interpretation that only armies that actually substitute for the ousted government in a foreign territory are required to provide food and shelter to persons protected by Geneva Convention IV.

In the context of Iraq such questions were pertinent also to the failure to protect against looting. As in previous situations of invasions (e.g., Panama in 1989),[36] widespread looting followed the invasion and occupation of Iraq. On April 10, 2003, only one day after the fall of Baghdad to coalition forces, looting was already in progress.[37] But in Iraq the looting affected also art treasures and important archeological artifacts. The National Museum in Baghdad, for instance, lost around 15,000 artifacts.[38] Note that the Hague Convention on Cultural Property (1954)[39] obliges State parties[40] "to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties."[41] The Convention formally amplifies these duties during occupation, but they arguably apply also before the occupation stage.[42]

The End of Occupation

When Does Occupation Cease?

The occupation ends whenever the conditions of Article 42 of the Hague Regulations are no longer fulfilled.[43] Under the test of actual control, an occupation ends when the occupant no longer exercises its authority in the occupied territory. Under the test of potential control, the occupation ends when the occupant is no longer capable of exercising its authority. It is generally accepted that occupation continues as long as the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied area.

In other words, an occupation ends as a result of the armed return of the ousted government, an indigenous uprising or a unilateral occupant withdrawal or as part of a peace agreement. The "legal oddity"[44] that is Article 6(3) of Geneva Convention IV does not affect the end of occupation. Although it stipulates that "the application of the present Convention shall cease one year after the general close of military operations," it does not regard the area as no longer occupied, and considers the occupant as bound by significant portions of the Convention,[45] as well as the Hague Regulations.[46]

A rather problematic question arises when the occupant transfers authority to an indigenous government that has no link to the ousted government. The law looks at such transfers with suspicion, because the concern is that the indigenous government might not be representative of the indigenous population and might be nothing but a puppet regime of the occupant. It is also worried about the commitment of the indigenous regime to respect the rights of the occupied

population.[47] This is the challenge of what Roberts calls "transformative occupations," namely "occupations [that] aim at establishing a political order based on the principle of self-government."[48] In such occupations,

> determining at what point one can say that the transformation has been achieved, and the government of the occupied territory is in a position to exercise the powers of sovereignty, is genuinely difficult. . . . Where what is involved is a gradual transfer of powers to the indigenous authorities as their capacity to govern is built up, there is bound to be an arbitrary element in fixing on a single date as the symbolic ending of the occupation.[49]

Based on policy reasons and State practice, it can be said that "[t]he ultimate test for the legality of a regime installed by an occupant, is its approval in internationally monitored general elections, carried out without undue delay."[50]

The End of Occupation in Iraq

Although occupation is a matter of fact, its legal status can be subject to the determination of the Security Council acting under Chapter VII of the Charter as the ultimate arbiter of the law. Therefore, since Security Council Resolution 1546 stipulated 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,"[51] in the eyes of the law the occupation formally came to a close by June 30 despite the fact that the coalition forces were still exercising administrative authority in certain areas of Iraq.[52]

The discrepancy between the UN declaration on the reassertion of full Iraqi sovereignty and the actual state of affairs derives from the fact that at that point in time the fledgling Iraqi government was the construct of the occupation authority and was yet to be endorsed by a valid act of self-determination. Such an endorsement, which ended the occupation not only from the formal perspective, occurred only after the interim government of Iraq assumed full authority.[53]

Post-occupation Responsibilities?

If occupants may have pre-occupation responsibilities, they may be equally subject to post-occupation responsibilities to the extent that they continue to exert authority in the foreign territory. The previous occupant could also be responsible for ameliorating conditions it created in the previously occupied territory.[54]

Traditionally, in post-occupation situations, when former occupants were requested by the newly installed governments to maintain some authority, such authority was deemed to derive from the sovereigns' authorization, and hence was beyond the scope of the law of occupation. But this traditional view could be

revisited. There may be sufficient ground to argue that even while exercising authority on the behest of an indigenous government, the entity that acts must comply with the international obligations to which it is bound. This is likely to be the case under international human rights law when the actor exercises authority over individuals who are under its control. This is also the case under international humanitarian law that stipulates minimal standards of treatment[55] under the national law of several countries.[56]

Such a view seems to find support in two recent judgments, related to the British occupation and post-occupation practices in Iraq. In the *Al-Jedda* case, the House of Lords ruled that even if the United Kingdom had been operating in Iraq on the UN's behalf (i.e., not as an occupant), it was still subject to its human rights obligations to the extent possible. As Lord Bingham noted, the United Kingdom could detain persons as authorized by the Security Council, "but must ensure that the detainee's rights . . . are not infringed to any greater extent than is inherent in such detention."[57] The same logic could apply to the post-occupation forces present in Iraq. More recently, the United Kingdom maintained that after the end of formal occupation, the British Army was merely an "executor" of decisions of Iraqi courts. Since prisoners were detained and transferred by the United Kingdom at the request of the Iraqi courts, the United Kingdom argued it did not exercise "any recognised extra-territorial authority."[58] The European Court of Human Rights (ECtHR), however, refused to regard that relationship between the British and the Iraqi government as one that excludes the applicability of the European Convention on Human Rights (ECHR) and the Court's jurisdiction. The gist of the idea is simple and convincing: acting under instructions of others cannot and does not relieve one of one's international obligations.

III. The Authority of the Occupants in Iraq

The Transformative Nature of the Occupation

Aiming to create a market-based democratic Iraq, the occupying powers introduced major administrative and legislative changes. These changes related not only to public order and security, to the "de-Ba'athification of Iraqi society," the overhauling of Iraqi criminal law and the judicial system, but also to areas often untouched during occupation, such as trade law,[59] company law,[60] securities law,[61] bankruptcy law,[62] and even intellectual property[63] and copyright laws.[64] The reasons usually given for these reforms were the need to promote human rights, efficiency, modernization and compliance with international standards. Because these reasons sometimes deviate from the traditional law of occupation, scholars referred to the occupation as "transformative."[65] This section reviews some of the

more controversial changes introduced by the CPA. The subsequent section evaluates their compatibility with international law.

Among the many reforms taken by the occupants, it was the economic legislation that attracted the most criticism. Was it lawful, appropriate and needed to replace "all existing foreign investment law,"[66] to rewrite securities law almost completely,[67] to suspend all customs duties and tariffs,[68] and to profoundly change corporation law in a way that allows foreign citizens to acquire membership in companies?[69] The CPA sought to explain the motivation of these and other sweeping economic reforms by emphasizing indigenous endorsement. A key player in this indigenous participation was the Iraqi Governing Council, a "principal bod[y] of the Iraqi interim administration" established by the CPA on July 13, 2003.[70] The CPA emphasized that it "worked closely with the Governing Council to ensure that economic change occurs in a manner acceptable to the people of Iraq,"[71] and reiterated that the change was made "[i]n close consultation with and acting in coordination with the Governing Council."[72] In fact, the CPA attributed the foreign investment initiative to "the Governing Council's desire to bring about significant change to the Iraqi economic system."[73]

The CPA also relied on the UN authorization as an independent source of authority. Practically all orders issued by the CPA contained a preambular paragraph stressing their consistency with the laws and usages of war, as well as with the relevant Security Council resolutions. The CPA additionally relied on the report of the Secretary-General, which concerned "the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth,"[74] and often emphasized that it had "coordinated with the international financial institutions, as referenced in . . . U.N. Security Council Resolution 1483."[75]

Moreover, great efforts were made to show how the reforms would benefit Iraqi society. For example, the goal of foreign investment reforms was to "improve the conditions of life, technical skills, and opportunities for all Iraqis and to fight unemployment with its associated deleterious effect on public security."[76] The CPA saw itself obligated to "ensure the well being of the Iraqi people and to enable the social functions and normal transactions of every day [*sic*] life."[77]

The CPA didn't stop there. Economic modernity, fairness, efficiency, transparency, predictability and independence were invoked as justifications for several reforms.[78] Long-term policies were also mentioned: at one point, the CPA noted "the demonstrated interest of the Iraqi Governing Council for Iraq to become a full member in the international trading system, known as the World Trade Organization."[79]

The Lawfulness of the CPA Measures under International Law

The transformation of Iraq from a centralized dictatorship into a market-based democracy raised questions about the scope of authority of the CPA under international law. Some in the CPA really thought that the law of occupation allowed such wide-ranging reforms.[80] But British officials differed.[81] More generally, the British government distinguished "between *direct positive acts of government* and . . . the *facilitation of plans and efforts* of the nationals of the occupied territory for the development of governmental institutions,"[82] with only the latter being deemed permissible under occupation law.[83] To make reforms that go beyond the law of occupation, they maintained, "further authority in the form of a Security Council resolution would be required."[84] According to this view, with Security Council Resolution 1483 as the additional basis for the reforms, "the question of the UK's responsibilities in respect of political reform is no longer governed solely by the law of occupation."[85] Later the British discovered that they were expected to comply also with their international and European human rights obligations. As a consequence, in the occupation of Iraq there were three bodies of law—occupation law, human rights law and UN law—at play. This section analyzes the outcome.

Authority under the Law of Occupation

We begin with a succinct analysis of the scope of authority under the law of occupation. The request for authorization from the Security Council implies an acknowledgment of the limited authority granted to occupants under traditional occupation law. A textual reading of Article 43 of the Hague Regulations easily supports the conclusion that the occupant is bound by what Gregory Fox named "the conservationist principle."[86] The call for conservation of the *status quo ante bellum* is reflected in the admonition that the occupant has but de facto authority (whereas the ousted government is still the "legitimate power") in the restricted scope of authority "to restore, and ensure" public order and civil life, and in the obligation to respect the laws in force in the country "unless absolutely prevented."[87]

The term "unless absolutely prevented" was inserted during the First Peace Conference in 1899 to replace the term "unless necessary" at the insistence of the potentially occupied States to emphasize the occupant's obligation to also preserve the status quo in the legal sphere.[88] Whether this insertion was prudent is a different question. The restraint on the occupant's authority necessarily creates a tension with its authority and obligation to ensure public order and civil life. This restraint was significantly diluted by Article 64 of Geneva Convention IV, which replaced the negative test of "unless absolutely prevented" with a positive authorization for the occupant, which "may subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its

obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power." The duties of the occupant under Geneva Convention IV are far more numerous than those stipulated in the Hague text. The Geneva text envisions the occupant no longer as the disinterested watch guard, but instead as a very involved regulator and provider.[89] Scholars in the post–World War II period readily conceded legitimate subjects for the occupant's lawmaking other than military necessity. The welfare of the population was deemed a worthy goal for the occupant to pursue.[90] Such an expansive view seems to be consonant with the prevalent view that the occupant is bound also by human rights obligations, and that in general it must "take measures to ensure respect for human rights and international humanitarian law in the occupied territories."[91]

The parallel applicability of international and, for the British troops, European human rights law raises additional questions regarding the authority of the occupants and the adequacy of the conservationist principle. It is beyond the scope of this article to explore the questions concerning the applicability of international and European human rights law to occupied territories, and the relationships between occupation law and human rights law. Still, international treaty bodies and tribunals,[92] as well as the majority of scholars,[93] are of the opinion that human rights law applies to occupied territories. The consequences of this parallel application would seem to support a modification of the conservationist principle when changes are necessary to ensure the enjoyment of human rights by the occupied population.[94]

Reflecting on the occupation of Iraq as a "transformative occupation," Adam Roberts noted that "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."[95] More generally, Roberts believes human rights conventions "can play an important role" in occupations, as they "may impose formal obligations on parties; be instrumental in political debate, as a basis for assessing the actions of external powers and local actors; provide legal procedures for taking action; or serve as one basis for pursuing transformative goals."[96] Other scholars accept this view with some insignificant nuances.

A particularly strong case can be made for extensive authorization to introduce significant changes in an occupied territory that had been governed by an unrepresentative regime that enjoyed little or no domestic support after being ousted by the occupant. The underlying premise of the law of occupation is, as was seen, that the legitimate power in the country retains the right to revert to its *ante bellum* position, unless it agrees to territorial changes. But when this power has already taken its last breath, or when its source of authority is contested by the indigenous population exercising its right to self-determination, the only legitimate power

that seems relevant is the people itself and not the ousted regime. This is a situation where the "reversioner" is the people, and the occupant must take its interests and wishes, rather than those of the ousted regime, into account.[97] Such an argument can support the dismantling of the Ba'athist regime, which is evident in the CPA's first-ever legislative act, aptly titled "De-Ba'athification of Iraqi Society."[98] But it is important to keep in mind that even in such instances, reforms introduced by the occupant—as beneficial to the local population as they may be—are subject to the principle of self-determination. This principle may be "meaningful for the post-occupation society" only by refraining from making "overbroad systemic changes."[99] There is, therefore, ground to argue that the law of occupation, whether alone or together with the law on self-determination and human rights law, gave the occupants in Iraq a wide margin of discretion.[100]

It is noteworthy that the two occupants of Iraq did not wish to found their transformative occupation on their human rights obligations. In fact, they both rejected the applicability of human rights law in Iraq.[101] The US government has claimed that the International Covenant on Civil and Political Rights[102] does not apply outside its territory or during an international armed conflict.[103] In the midst of the Iraq conflict, the United States expressed its "firm belief" that humanitarian law is a "well-developed area of law conceptually distinct from international human rights law," and that the two cannot apply simultaneously.[104] The United Kingdom, as a party to the ECHR, had to face numerous petitions in relation to the ECHR's applicability in Iraq, and offered several reasons why it was not bound by that treaty[105]—reasons that did not impress the British courts[106] or the ECtHR.[107]

Authority under Security Council Resolution 1483

Security Council Resolution 1483 provided the framework for the coalition's actions in Iraq. On the one hand, it endorsed its authority over Iraq and the Iraqi people, and, on the other hand, it delineated the legal constraints and guidelines that this authority was bound by, namely "the Charter of the United Nations and other relevant international law,"[108] and other "obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[109] The President of the Security Council emphasized that the powers delegated by the Resolution "are not open-ended or unqualified," and should be exercised "in conformity with the Geneva Conventions and the Hague Regulations."[110] Concurrently, however, the Resolution clearly endorsed the transformative course of action that the CPA embarked upon immediately. The occupants, referred to as the "Authority" in the Resolution, are

> [*c*]*all*[*ed*] *upon* . . . consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future . . . .[111]

Furthermore, Resolution 1483 created a new position, the "Special Representative for Iraq," which would be independent of the occupying power and whose tasks would include assisting the people of Iraq, coordinating the activities of the United Nations in post-conflict processes in Iraq and with international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and promoting the protection of human rights.[112]

How should one read this Resolution? Does it endorse an expansive view of the law of occupation, or does it form an independent source of authority on the strength of Chapter VII law? Indeed, there are three possible interpretations of Resolution 1483. According to the first reading, the Resolution endorses an expansive reading, influenced by human rights law, of the occupant's authority under the law of occupation. A slightly different interpretation of the Resolution would suggest that the expansive reading of the occupant's powers applies only to the unique circumstances of Iraq as opposed to all other occupations. The third possible interpretation of the Resolution would be that the Resolution gave the occupants additional authority to transform Iraq that they would not have had otherwise. As mentioned above, at least British officials relied on the latter interpretation, having concluded that the law of occupation as such stopped short of granting them extensive authority.

In these authors' view, Resolution 1483 relates, of course, only to the specific situation in Iraq, but at the same time it signals an endorsement of a *general* view that regards modern occupants as subject to enhanced duties toward the occupied population and therefore also having the authority to fulfill such duties. "The call to administer the occupied area 'effectively' acknowledges the several duties that the occupants must perform to protect the occupied population. It precludes the occupant from hiding behind the limits imposed on its powers as a pretext for inaction."[113] Indeed, an evolutionary reading of the law of occupation in an era heavily informed by human rights concerns cannot reach a different conclusion.[114]

This interpretation is based not only on the Resolution or the evolutionary interpretation of the law of occupation. It is also based on the authority of the Security Council when acting under Chapter VII of the UN Charter. This authority is not limitless but subject at least to compliance with *jus cogens*.[115] One of the central *jus cogens* norms is the right of peoples to self-determination.[116] The law of

occupation internalizes a delicate balance between conflicting interests of occupant and occupied, and is heavily influenced by the effort not to alienate the indigenous people's right to continue to exercise its right to self-determination.[117] The law of occupation has always been intimately linked to the concept of national sovereignty. "Indeed, the evolution of the concept of occupation can be seen as the mirror-image of the development of the concept of sovereignty."[118] Therefore, authorizing an occupant to derogate from its responsibilities under the law of occupation and thereby limit and shape the political choices of an occupied sovereign people carries the danger of effectively infringing the right to self-determination, which might be beyond the authority of the Council.[119]

Obviously, not every limitation of the right to self-determination is an impermissible infringement of a *jus cogens* right. There may be solid reasons to interfere in the exercise of the right to self-determination to ensure that the process is practical, inclusive and fair. It is also reasonable to argue that the Security Council is more trustworthy than the occupant to be entrusted with such a complex matter, and therefore it may be granted the authority to limit or influence the exercise of the right to self-determination to a greater extent than the occupant would, as is the case in territories directly administered by the UN.[120] The Security Council is clearly less prone to bias than the occupant, if only because of its diverse composition and lack of immediate interest.[121] It therefore makes eminent sense to recognize that the Security Council would have the authority under Chapter VII of the Charter to authorize the transformation of a regime under occupation beyond what the law of occupation would otherwise allow, but this could not be an unfettered discretion delegated to interested parties without monitoring them. If the Security Council wished to extend such an authorization to the occupant, it would have to remain closely involved, through ample supervisory mechanisms, effectively approving and reviewing the actual transformation process. Because such mechanisms were not employed in the case of Iraq, the CPA having acted with limited monitoring by the Council,[122] one could understand its attitude either as carelessness that bordered on infringement of its *jus cogens* obligations or as a reflection of its general attitude toward the occupant's powers under the law of occupation.

IV. Conclusion: The Legacy of the Occupation of Iraq

The occupation of Iraq raises a host of questions beyond the scope of a single article. In addition to questions regarding the timing of the occupation, pre- and post-occupation responsibilities, and the scope of authority of the occupant in transformative occupation, the occupation of Iraq gave rise to queries regarding the

definition of protected persons[123] and the proper interpretation of Article 49 of the Fourth Geneva Convention,[124] in addition to the proper treatment of detainees and the responsibility for their shameful abuse. The management by the occupants of public property, including natural resources such as oil and freshwater, was also subject to legal analyses.[125] Overall it is almost astounding to observe how a nineteenth-century doctrine that during the last half century almost reached the stage of desuetude due to lack of adherence was suddenly revived in unanticipated circumstances. Critics could argue that its invocation was nothing more than an afterthought, a sort of "Plan B" that was put in motion after the effort to install a "genuine" indigenous regime failed. Nevertheless, the doctrine was there ready to be applied, flexible enough to be adapted to twenty-first-century contemporary circumstances and challenges, as well as current legal and political perceptions.

Resolution 1483 marks the first time the Security Council resorted to the concept of occupation to describe, authorize and delimit the authority of foreign troops in control of enemy territory. The recognition of the applicability of the law on occupations refuted the claim that occupation, as such, is illegal, and revived the neutral connotation of the doctrine, at least from a legal perspective. At the same time, the broad mandate recognized by the Security Council as pertaining to the occupants to transform Iraq into a market-based democracy, although commendable and probably lawful under UN Charter law, also tested the limits of the law of occupation and the Security Council's own authority to shape the way the Iraqi people exercised their inalienable right to self-determination.

Notes

1. On the history of the law of occupation, see Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 LAW & HISTORY REVIEW 621 (2008); Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 721 (2005).

2. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 5 (1993).

3. For this reason, "to extend the rights of occupation by mere intention, implication or proclamation, without the military power to enforce occupation, would be establishing a paper occupation infinitely more objectionable in its character and effect than a paper blockade." DORIS APPEL GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914: A HISTORICAL SURVEY 56 (1949).

4. Regulations Respecting the Laws and Customs of War on Land, Annexed to Convention No. IV Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 69, 80 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) ("Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised") [hereinafter Hague Regulations].

5. Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in id.* at 301, 302 [hereinafter Geneva Convention IV].

6. Suggestions in the Hague conference of 1899 to remove the second sentence had been rejected, as it was seen as crucial to the understanding of the first sentence. The Belgian representative insisted that the second sentence's absence might lead to premature proclamations of occupation. *See* GRABER, *supra* note 3, at 60.

7. "Territory is considered occupied when *it* is actually placed under the authority of the hostile army" (authors' emphasis).

8. *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19) (separate opinion of Judge Kooijmans, ¶ 49) ("I am, therefore, of the opinion that it is irrelevant from a legal point of view whether [Uganda] exercised this authority directly or left much of it to local forces or local authorities. As long as it effectively occupied *the locations* which the DRC Government would have needed to re-establish its authority, Uganda had *effective*, and thus factual, authority" (first emphasis added)).

9. Federal Ministry of Defense of the Federal Republic of Germany, ZDv 15/2, Humanitarian Law in Armed Conflicts: Manual ¶ 526 (1992) ("[T]he occupying power must *be able to* actually exercise its *authority*" (first emphasis added)).

10. DEPARTMENT OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 355 (1956).

11. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶¶ 13.3, 13.3.2 (2004) (authors' emphases).

12. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 173 (Dec. 19) ("the Court must examine whether . . . the said authority was in fact established and exercised") [hereinafter Armed Activities case].

13. *Id.*, ¶ 170.

14. See the critical comments of Judge Kooijmans in his separate opinion, *supra* note 8, ¶¶ 40–41.

15. David Scheffer, *The Security Council and International Law on Military Occupations*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, at 597 (Vaughan Lowe et al. eds., 2008); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 580, 608–9 (2006).

16. Joint Statement by President George W. Bush and Prime Minister Tony Blair on Iraq, 1 PUBLIC PAPERS 328 (Apr. 8, 2003), *available at* http://usa.usembassy.de/etexts/docs/bush080403.htm ("The Interim Authority will be broad-based and fully representative, with members from all of Iraq's ethnic groups, regions and diaspora. The Interim Authority will be established first and foremost by the Iraqi people, with the help of the members of the Coalition, and working with the Secretary General of the United Nations").

17. United States Department of Defense News Transcript, Briefing on Geneva Convention, EPW's and War Crimes (Apr. 7, 2003), http://www.au.af.mil/au/awc/awcgate/dod/t04072003_t407genv.html. When asked whether the United States was an occupying power in Iraq, W. Hays Parks, Special Assistant to the Army Judge Advocate General, replied: "Obviously, we occupy a great deal of Iraq at this time. But we are not, in the technical sense of the law of war, a military occupier or occupation force."

18. John Kampfner, *Blair Was Told It Would Be Illegal to Occupy Iraq*, NEW STATESMAN, May 26, 2003, *available at* http://www.newstatesman.com/200305260010.

19. L. Elaine Halchin, Congressional Research Service, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities* 1–2 (Apr. 29, 2004), *available at* http://www.fas.org/man/crs/RL32370.pdf.

20. S.C. Res. 1472, U.N. Doc. S/RES/1472 (Mar. 28, 2003). However, this Resolution was ambiguous and did not expressly say that the occupation had begun.

21. Plan Unveiled for Iraq (Apr. 15, 2003), http://www.abc.net.au/news/stories/2003/04/15/832822.htm. Principle 13 stated: "The Iraqi participation in the Nasiriyah meeting voted that there should be another meeting in 10 days in a location to be determined with additional Iraqi participants and to discuss procedures for developing an Iraqi interim authority."

22. Paul Bowers, Iraq: Law of Occupation, House of Commons Library Research Paper 03/51 (June 2, 2003), *available at* http://www.parliament.uk/commons/lib/research/rp2003/rp03-051.pdf [hereinafter Research Paper 03/51].

23. Roberts, *supra* note 15, at 610 n.12. It is not clear *how* the CPA was legally established. *See* Halchin, *supra* note 19, at 4.

24. Letter Dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003).

25. Committee on Foreign Affairs Written Evidence, Memorandum from the Foreign and Commonwealth Office (May 13, 22, 2003), *available at* http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/405/405we04.htm.

26. NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING 54–56 (2004).

27. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 23, 2003). As a "unified command," the countries operating in Iraq "bear the brunt of joint responsibility for what is happening within the area subject to their combined effective control." YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 48 (2009). This unified command eventually took the form of the Coalition Provisional Authority. For a discussion of the Authority's creation and structure, see Halchin, *supra* note 19. For an explanation of how the CPA fits in the legal framework of the Hague Regulations, see Michael A. Newton, *The Iraqi Special Tribunal: A Human Rights Perspective*, 38 CORNELL INTERNATIONAL LAW JOURNAL 863, 872 (2005).

28. S.C. Res. 1483, *supra* note 27, ¶ 5.

29. *See infra* pp. 274–76. The two States sought to obtain a UN mandate in order to "evade legal difficulties if [they] sought to move beyond the limited rights conferred by the Hague Regulations and Geneva Convention IV to vary existing arrangements." *See* Research Paper 03/51, *supra* note 22, at 16.

30. S.C. Res. 1483, *supra* note 27, pmbl.

31. DINSTEIN, *supra* note 27, at 39.

32. This arguably applies also to questions concerning the rules of engagement, which are beyond the scope of this article.

33. *See* Eyal Benvenisti, *The Law on Asymmetric Warfare*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahnoush Arsanjani, Jacob Cogan, Robert Sloane & Siegfried Wiessner eds. (forthcoming 2010)).

34. Geneva Convention IV, *supra* note 5, art. 4.

35. See the determination of the International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber in Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T, Judgment, ¶ 221 (Mar. 31, 2003) (reasoning that "[o]therwise civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established").

36. For the US military's failure to prevent the looting in Panama, see DONALD P. WRIGHT & TIMOTHY R. REESE, ON POINT II: TRANSITION TO THE NEW CAMPAIGN: THE UNITED STATES ARMY IN OPERATION IRAQI FREEDOM, MAY 2003–JANUARY 2005, at 55 (2008), *available at* http://www.globalsecurity.org/military/library/report/2008/onpoint/chap02-02.htm.

37. Frank Rich, *And Now: 'Operation Iraqi Looting*,' NEW YORK TIMES, Apr. 27, 2003, § 2, at 1, *available at* http://www.nytimes.com/2003/04/27/arts/and-now-operation-iraqi-looting.html.

38. Roger Cohen, *The Ghost in the Baghdad Museum*, NEW YORK TIMES, Apr. 2, 2006, § 2, at 1, *available at* http://www.nytimes.com/2006/04/02/arts/design/02cohe.html.

39. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 373, *available at* http://www.icrc.org/IHL.NSF/FULL/400?OpenDocument [hereinafter Hague Convention on Cultural Property].

40. The Convention is relevant to the Iraq war assuming the Convention, which currently has 123 parties, is customary law. When the war began, the United States and the United Kingdom were merely signatories (US ratification came on March 13, 2009); Iraq was a party.

41. Hague Convention on Cultural Property, *supra* note 39, art. 4(1).

42. The occupant is required to "support the competent national authorities of the occupied country in safeguarding and preserving its cultural property" and "take the most necessary measures of preservation" (*id.*, art. 5). Since lootings often erupt in the post-invasion, pre-occupation phase, it is sensible to give cultural property a higher degree of protection, usually pertinent in occupations, and oblige the invading power to actively secure art, archeology and similarly endangered resources.

43. For these conditions see pp. 263–64 *supra*, as well as the ICTY's determination in Naletilić & Martinović, *supra* note 35, ¶ 215. *See also* Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 338–39 (Feb. 26, 2001).

44. The "one year after" rule probably never reflected customary law but was instead understood as a specific reference to the post-WWII occupations in Germany and Japan. Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 44, 57 (1990) ("In general, the 'one year after' provision of 1949 must be viewed as a legal oddity"). Professor Bothe and his fellow authors say:

> Article 6(3) of the Fourth Convention . . . was a special ad hoc provision for certain actual cases, namely the occupation of Germany and Japan after World War II. There is no reason to continue to keep in force such provisions designed for specific historic cases. In 1972 the majority of government experts expressed a wish to abolish these time limits.

MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 59 (1982). According to Article 3(b) of Additional Protocol I, occupation law ceases to apply "on the termination of the occupation." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 4, at 422. The ICJ referred to Article 6(3) as relevant in the *Wall* advisory opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 185 (July 9) [hereinafter Wall Advisory Opinion]), but it is widely accepted that this reference was seriously flawed. *See* Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 119, 134 (2005); Roberts, *supra* note 15, at 597; Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 102, 105–9 (2005).

45. This is clear from the text of Article 6(3) itself, which reads:

> [*I*]*n the case of occupied territory*, the *application* of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the

following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143 [emphasis added].

In other words, occupation continues, but it is no longer subject to the entirety of the Convention.

46. See Geneva Convention IV, *supra* note 5, art. 154, discussing the relationship between the Geneva and Hague texts.

47. *See, e.g., id.*, art. 47.

48. Roberts, *supra* note 15, at 616.

49. *Id.*

50. BENVENISTI, *supra* note 2, at 173.

51. S.C. Res. 1546, ¶ 2, U.N. Doc. S/RES/1546 (June 8, 2004).

52. DINSTEIN, *supra* note 27, at 273 (the occupation ended "only 'notionally'"). While Sassòli agrees that this was the legal effect of Resolution 1546, he criticizes it and calls it a "dangerous precedent." Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 661, 684 (2005).

53. It is hard to point at a specific time when that happened. The assumption of authority was gradual, just as the occupation did not end overnight. See Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 27, 46 (2005), discussing Iraq's status after June 28, 2003 ("The Interim Government, while exercising a wide range of governmental decision-making powers, is constrained in key respects by its essentially caretaker character, the formal restrictions as regards 'taking any decisions affecting Iraq's destiny', the limitations on its treaty-making powers, and its weaknesses in certain areas when compared to the position of external powers in Iraq").

54. *See* Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation*, *in* A WISER CENTURY? JUDICIAL DISPUTE SETTLEMENT, DISARMAMENT AND THE LAWS OF WAR 100 YEARS AFTER THE SECOND HAGUE PEACE CONFERENCE 371, 379 (Thomas Giegerich ed., 2009).

55. For example, coalition forces must respect Common Article 3 of the Geneva Conventions, as well as Article 75 of Additional Protocol I (both providing fundamental guarantees), as long as they continue to participate in an armed conflict.

56. American and British laws may bind American and British soldiers, respectively, even when the soldiers are stationed abroad. See Justice Barak's reasoning in HCJ 393/82 Jama'it Askan Alma'amun v. Commander of IDF Forces [1983] IsrSC 37(4) 785, 810 ("Every Israeli soldier carries in his backpack the customary rules of public international law relating to the laws of war, as well as the basic rules of Israeli administrative law").

57. R (on the application of Al-Jedda) v. The Secretary of State for Defence [2007] UKHL 58, ¶ 39 [hereinafter Al-Jedda case].

58. Al-Saadoon and Mufdhi v. United Kingdom, App. No. 61498/08 (admissibility decision), ¶ 79, http://www.echr.coe.int/eng ("The applicants were detained and transferred by United Kingdom forces solely on the basis of decisions taken unilaterally by the Iraqi courts") [hereinafter Al-Saadoon case]. The ECtHR had determined that this argument was not "material" to the admissibility decision, and would be discussed in relation to the merits of the case. *See id.*, ¶ 89.

59. CPA Order No. 54, Trade Liberalization Policy 2004 with Annex A (Feb. 24, 2004). All CPA orders, regulations and memoranda are available at http://www.cpa-iraq.org/regulations/ (then hyperlink by name of order, regulation or memorandum).

60. CPA Order No. 64, Amendment to the Company Law No. 21 of 1997 with Annex A (Feb. 29, 2004).

61. CPA Order No. 74, Interim Law on Security Markets (Apr. 18, 2004).

62. CPA Order No. 78, Facilitation of Court-supervised Debt Resolution Procedures (Apr. 19, 2004).

63. CPA Order No. 80, Amendment to the Trademarks and Descriptions Law No. 21 of 1957 (Apr. 26, 2004).

64. CPA Order No. 83, Amendment to the Copyright Law (Apr. 29, 2004).

65. *E.g.*, Roberts, *supra* note 15; Gregory Fox, *The Occupation of Iraq*, 36 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 195 (2005).

66. CPA Order No. 39, Foreign Investment (Sept. 19, 2003).

67. CPA Order No. 74, *supra* note 61.

68. CPA Order No. 56, Central Bank Law with Annex A (Feb. 24, 2004).

69. CPA Order No. 64, *supra* note 60.

70. CPA Regulation No. 6, Governing Council of Iraq (July 13, 2003). *See also* S.C. Res. 1511, ¶ 4, U.N. Doc. S/RES/1511 (Oct. 6, 2003) ("the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority"). The Governing Council was dissolved on June 1, 2004 (CPA Regulation No. 9, Governing Council's Dissolution (June 9, 2004)) and replaced by the interim government of Iraq (CPA Order No. 100, Transition of Laws, Regulations, Orders, and Directives Issued by the CPA (June 28, 2004)).

71. CPA Order No. 39, *supra* note 66, pmbl.

72. *Id.*

73. *Id.*

74. As articulated by CPA Order No. 78, *supra* note 62.

75. CPA Order No. 40, Bank Law with Annex A (Sept. 19, 2003).

76. CPA Order No. 39, *supra* note 66, pmbl.

77. *Id.*

78. See, for instance, CPA Orders No. 64, *supra* note 60; No. 74, *supra* note 61; No. 80, *supra* note 63; No. 83, *supra* note 64.

79. CPA Order No. 80, *supra* note 63.

80. Theodore W. Kassinger & Dylan J. Williams, *Commercial Law Reform Issues in the Reconstruction of Iraq*, 33 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 217, 218–19 (2004).

81. Or as the Attorney General put it in late March 2003, "[T]he imposition of major structural economic reforms would not be authorised by international law." Kampfner, *supra* note 18.

82. Kayian Homi Kaikobad, *Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004*, 54 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 253, 260 (2005) (emphasis in original).

83. Committee on Foreign Affairs Written Evidence, *supra* note 25 ("Whilst the introduction of democratic changes in government can not be imposed by the Occupying Powers, this does not affect the rights of the Iraqi people themselves to develop their own systems of government. It is therefore permissible for the Occupying Powers to play a facilitating role in relation to reforms genuinely undertaken by the people of Iraq themselves").

84. *Id.*

85. *Id.*

86. Fox, *supra* note 65, at 263.

87. Hague Regulations, *supra* note 4, art. 43 ("The authority 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").

88. Benvenisti, *supra* note 1, at 646–47.

89. The occupant is required to ensure the humane treatment of protected persons, without discriminating among them, and to respect, among other things, the protected persons' honor, family rights, religious convictions and practices, and manners and customs. Geneva Convention IV, *supra* note 5, art. 27. Additionally, it is required to facilitate the proper working of all institutions devoted to the care and education of children (*id.*, art. 51), provide specific labor conditions (*id.*, art. 52), ensure food and medical supplies to the population (*id.*, art. 55), maintain medical services (*id.*, art. 56), and agree to relief schemes and to facilitate them by all means at its disposal (*id.*, art. 59).

90. GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 97 (1957); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 224 (1959); MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 767, 770 (1961); ODILE DEBBASCH, *L'OCCUPATION MILITAIRE: POUVOIRS RECONNUS AUX FORCES ARMÉES HORS DE LEUR TERRITOIRE NATIONAL* 172 (1962); LORD MCNAIR & ARNOLD DUNCAN WATTS, LEGAL EFFECTS OF WAR 369 (1966). For a more conservative view, see Michael Bothe, *Belligerent Occupation*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 65 (Rudolf Bernhardt ed., 1982); RÜDIGER WOLFRUM, DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 9 (2005).

91. Armed Activities case, *supra* note 12, ¶ 211.

92. ICJ (Wall Advisory Opinion, *supra* note 44); ECtHR (Loizidou v. Turkey, App. No. 15318/89, 23 Eur. H.R. Rep. 513 (1996) (merits) (the European Convention on Human Rights applies to the part of Cyprus occupied by Turkey)); UN Human Rights Committee (Concluding Observations of the Human Rights Committee: Israel, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998), *available at* http://www1.umn.edu/humanrts/hrcommittee/israel1998.html).

93. *See, e.g.*, Roberts, *supra* note 44, at 70 ("the scope-of-application provisions of human rights accords do not exclude their applicability in principle, even if they do, as noted below, permit certain derogations in time of emergency"); ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967–1982, at 28–29 (1985); BENVENISTI, *supra* note 2, at 187–89. *But see* Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law, in* HUMAN RIGHTS IN INTERNATIONAL LAW 345, 350–52 (Theodor Meron ed., 1985) (stipulating that most human rights exist in peacetime but may disappear completely in wartime; Dinstein later supported the simultaneous applicability of human rights law. *See* DINSTEIN, *supra* note 27, 69–71).

94. DINSTEIN, *supra* note 27, at 113 (an occupant may repeal existing legislation that is inconsistent with binding norms of international law such as Geneva Convention IV), 115 (the occupant may legislate "at the behest" of the local population), 116 (the occupant has a "right to revise and even reform legislation in consonance with new developments"). Sassòli endorses an expansive authority to legislate and he does so with the local population's best interests in mind. Aside from the usual exceptions to the conservationist principle, he supports occupant legislation that is "essential for the implementation of IHL [international humanitarian law]" and that realizes human rights law or maintains civil life (Sassòli, *supra* note 52, at 675–77). In his view,

> [t]he occupying power . . . has an obligation to abolish legislation and institutions which contravene international human rights standards. . . . [I]t may introduce only as many changes as is absolutely necessary under its human rights obligations and must

> stay as close as possible to similar local standards and the local cultural, legal and economic traditions.

Id. at 676–77.

95. Roberts, *supra* note 15, at 620. One such scenario is when "the occupant and/or international bodies properly refer to human rights law as providing a legal basis for changing certain laws of the occupied territory, or even as setting goals for a transformative occupation." *Id.* at 601.

96. *Id.* at 600.

97. Melissa Patterson, Note, *Who's Got the Title? or, The Remnants of Debellatio in Post-Invasion Iraq*, 47 HARVARD INTERNATIONAL LAW JOURNAL 467 (2006).

98. CPA Order No. 1, De-Ba'athification of Iraqi Society (May 16, 2003). *See also* CPA Memorandum No. 1, Implementation of De-Ba'athification Order No. 1 (June 3, 2003).

99. Fox, *supra* note 65, at 277.

100. An alternative basis for the applicability of international human rights treaties in occupied territories would be the law of occupation itself. Article 43 of the Hague Regulations requires the occupant to respect "the laws in force in the country." To the extent that international treaties, including human rights treaties, form part of the local law, the occupant is bound to respect them as well. Hague Regulations, *supra* note 4, art. 43.

101. That did not keep the CPA from taking human rights considerations into account—e.g., CPA Order No. 19, Freedom of Assembly (July 9, 2003) ("*Determined* to remove the unacceptable restrictions on human rights of the former Iraqi Ba`ath Party regime . . .").

102. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *reprinted in* 6 INTERNATIONAL LEGAL MATERIALS 368 (1967).

103. United States Department of Defense, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations 6 (Apr. 4, 2003), *available at* http://www.dod.gov/pubs/foi/detainees/working_grp_report_detainee_interrogations.pdf. *See also* Brief for Appellees at 41–42, Al Odah v. U.S., 321 F.3d 1134 (D.C. Cir. 2003) (No. 02-5251), *available at* http://www.aclu.org/hrc/Post911_AlAdah_v_US.pdf.

104. Press Release, U.S. Mission to the U.N. in Geneva, General Comments of the United States on Basic Principles and Guideline on the Right to a Remedy for Victims of Violations of International Human Rights and Humanitarian Law (Aug. 15, 2003), *cited in* Michael J. Kelly, *Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier*, 29 FORDHAM INTERNATIONAL LAW JOURNAL 181, 205 (2005).

105. The government maintained that the ECHR was "intended to apply in a regional context in the legal space of the Contracting States." Letter from Adam Ingram, MP, UK Armed Forces Minister, to Adam Price, MP (Apr. 7, 2004), *cited in* Ralph Wilde, *The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq*, 11 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 485, 488–89 (2005). On that basis, the United Kingdom argued that, although it was an occupying power in Iraq, it did not possess the needed degree of effective control for the ECHR to apply, and that there was no general doctrine of "personal jurisdiction" in relation to the ECHR. Al-Skeini and others v. Secretary of State for Defence [2004] EWHC 2911, ¶ 287 [hereinafter Al-Skeini [2004]]. Later, the United Kingdom maintained that its actions in Iraq were attributable to the United Nations, thereby absolving it of any responsibility under the ECHR (Al-Jedda case, *supra* note 57, at ¶ 3, ¶ 49).

106. Al-Skeini [2004], *supra* note 105, ¶ 287; Al-Skeini and others v. Secretary of State for Defence [2007] UKHL 26, ¶ 132.

107. Al-Saadoon case, *supra* note 58, ¶ 88.

108. S.C. Res. 1483, *supra* note 27, ¶ 4.

109. *Id.*, ¶ 5.

110. U.N. SCOR, 58th Sess., 4761st mtg. at 11–12, U.N. Doc. S/PV.4761 (May 22, 2003).

111. S.C. Res. 1483, *supra* note 27, ¶ 4.

112. *Id.*, ¶ 8.

113. Eyal Benvenisti, *Water Conflicts during the Occupation of Iraq*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 860, 863 (2004).

114. For the rise of human rights in international law, see THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW (2006). For an evolutionary interpretation of treaties, see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21); World Trade Organization, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ¶¶ 129–30, WT/DS58/AB/R (Oct. 12, 1998); RICHARD GARDINER, TREATY INTERPRETATION 251–56 (2008).

115. For a discussion of derogation from *jus cogens* rights by the Council, see Case T-315/1, Yassin Abdullah Kadi v. Council of European Union and European Commission, [2005] ECR II-3649, ¶ 230; Erika De Wet, *The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View*, *in* REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 7, 22 (Erika De Wet et al. eds., 2003); Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 309, 322 (1997). *See also* Marten Zwanenburg, *Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 745, 760–66 (2004). *But see* GREG FOX, HUMANITARIAN OCCUPATION 211–13 (2008).

116. For the principle of self-determination as an *erga omnes* obligation, see East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 30). For the principle as also a *jus cogens* right, see Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session 113, U.N. GAOR, 56th Sess., Supp. No. 10, at 48, U.N. Doc. A/56/10 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf; ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 320 (1995).

117. BENVENISTI, *supra* note 2, at 213–14.

118. Benvenisti, *supra* note 1, at 623.

119. *See also* Yehuda Z. Blum, *UN Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 830, 833 (1992) ("Yugoslavia has been *suspended* from the General Assembly, pending reconsideration of the matter by the Council . . ., in a manner not foreseen by the Charter . . .").

120. On these, see RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY (2008); CARSTEN STAHN, THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND (2008).

121. While the United States and the United Kingdom were both occupants in Iraq and permanent members of the Council, their interests were balanced by the presence of other permanent members, most notably China and Russia.

122. The occupants were merely "encourage[d]" to "inform the [Security] Council at regular intervals of their efforts . . ." (S.C. Res. 1483, *supra* note 27, ¶ 24). There is no evidence of such regular notifications.

123. Memorandum Opinion from Jack L. Goldsmith III, Assistant Attorney General, to the Counsel to the President, "Protected Person" Status in Occupied Iraq under the Fourth Geneva Convention (Mar. 18, 2004), *available at* http://www.usdoj.gov/olc/2004/gc4mar18.pdf.

124. Memorandum from Jack L. Goldsmith III, Assistant Attorney General, to William H. Taft, General Counsel, Department of State, Re: Draft Opinion Concerning Permissibility of Relocating Certain "Protected Persons" in Occupied Iraq (Mar. 19, 2004), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf; Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 309, 324–38 (2006); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 VIRGINIA JOURNAL OF INTERNATIONAL LAW 295, 320–43 (2007).

125. Michael Ottolenghi, *The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation*, 72 FORDHAM LAW REVIEW 2177, 2205–10 (2004) (discussing the use of Iraqi oil); Frederick Lorenz, *Strategic Water for Iraq: The Need for Planning and Action*, 24 AMERICAN JOURNAL OF INTERNATIONAL LAW 275, 280, 285, 296–98 (2008); Amy Hardberger, *Whose Job Is It Anyway? Governmental Obligations Created by the Human Right to Water*, 41 TEXAS JOURNAL OF INTERNATIONAL LAW JOURNAL 533, 561–63 (2006).