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The Occupation of Iraq

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THE OCCUPATION OF IRAQ

GREGORY H. FOX*

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I. INTRODUCTION

One of the central justifications for the 2003 war in Iraq was the need for regime change.¹ The United States claimed that an Iraq freed of Ba'ath Party rule, and following democratic and free market principles, would reap benefits for its people, the region, and the rest of the world.² Almost immediately after major hostilities ended, U.S. civil administrators began to implement this vision. A vast program of reform was undertaken. Iraqi political, legal, economic, and regulatory institutions were remade to accord with models generally found in Western, developed states. Inconsistent Iraqi law was repealed. Virtually all components of a political system dominated by one-party rule and an economy characterized by central planning and ownership were swept aside.³ As the U.S.-led occupation authority declared in a mid-term review, "[t]he ultimate goal for Iraq is a durable peace for a unified and stable, democratic Iraq that is underpinned by new and protected freedoms and a growing market economy."⁴

Given the centrality of these reforms to U.S. war aims, the legal issue they raise assumed a critical importance: can a foreign power in custody of a defeated state effectively remake its laws and public

1. See, e.g., President's Address Before a Joint Session of the Congress on the State of the Union, 40 WEEKLY COMP. PRES. DOC. 94 (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

2. *Threats and Responses; In the President's Words: 'Free People Will Keep the Peace of the World'*, N.Y. TIMES, Feb. 27, 2003, at A10.

3. See discussion of the reform initiatives *infra* Part II.B.

4. Coalition Provisional Authority, *An Historic Review of CPA Accomplishments* 4, available at <http://www.cpa-iraq.org> (last visited Jan. 19, 2005). This website is no longer being updated and will be available only until June 30, 2005.

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institutions? Is occupation an opportunity for social engineering during which legislative prerogatives are temporarily transferred to the occupier? Or does international law reserve fundamental decisions about legal and economic policy to a post-occupation, indigenous government? Public discussion of this question was minimal, if not non-existent. At first blush this seems surprising: virtually all of the important political controversies emerging from the war turned largely on points of law, and discussion in the media often focused on the international legal questions.⁵ Several factors may explain the lack of public attention to legal aspects of the occupation reforms. First, few were inclined to question efforts at improving human rights and economic conditions in a country whose recent history had witnessed profound suffering. Second, U.S. authorities deliberately sought to reframe the issue, seeking to avoid the negative implications that seemed to follow from the term “occupying power.” Shortly after U.S. military forces entered Baghdad on April 9, 2003, General Tommy Franks, commander of the coalition forces, announced that the Americans had “come as liberators, not occupiers.”⁶ Other U.S. officials

5. These included the proper role of the United Nations Security Council in authorizing the war, prosecution of deposed Ba’ath Party leaders, alleged torture of Iraqi detainees, misconduct by private contractors, the status of United States and other foreign forces after the return of an Iraqi government, the awarding of reconstruction contracts, and the protection (or lack thereof) of Iraqi cultural heritage. See John F. Burns, Thom Shanker & Steven R. Weisman, *U.S. Officials Fashion Legal Basis to Keep Force in Iraq*, N.Y. TIMES, Mar. 26, 2004, at A10 (discussing the status of post-occupation forces); Severin Carrell & Robert Verkaik, *War on Iraq Was Illegal, Say Top Lawyers*, INDEP., May 25, 2003, at 6 (discussing war’s legality); Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1 (discussing the role of contractors); Christopher Greenwood, *Trying Saddam*, THE GUARDIAN (U.K.), Dec. 17, 2003, Guardian Leader Pages at 21 (trial of Ba’athist leaders); Guy Gugliotta, *Pentagon Was Told of Risk to Museums; U.S. Urged to Save Iraq’s Historic Artifacts*, WASH. POST, Apr. 14, 2003, at A19 (discussing protection of cultural heritage); Luke Harding, *Torture Commonplace, Say Inmates’ Families*, THE GUARDIAN (U.K.), May 3, 2004, Guardian Home Pages at 5; Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42 (discussing detainee torture); Ignacio Ramonet, *Lawless War*, LE MONDE DIPLOMATIQUE, Apr. 2003, available at <http://mondediplo.com/2003/04/01lawlesswar> (discussing war’s legality); Jackie Spinner, *Only Allies to Help with Rebuilding; U.S. to Deny Contracts to Firms from Nonsupporting Nations*, WASH. POST, Dec. 10, 2003, at A1 (discussing preference in reconstruction contracts); Raymond Whitaker & Robert Verkaik, *Revealed: Attorney General Changed His Advice on Legality of Iraq War*, INDEP., Feb. 29, 2004, at 1 (discussing war’s legality). Concise discussions of these and other legal questions raised by the Iraqi war and occupation can be found in the *Insight* publications of the American Society of International Law. See <http://www.asil.org/insights.htm>.

6. See Nir Rosen, *When a Liberator Is an Occupier*, ASIA TIMES, Dec. 4, 2003 (quoting General Tommy Franks), at http://www.atimes.com/atimes/Middle_East/EL04Ak04.html.

repeated this statement.⁷ The distinction seemed to fit well with the U.S. promise to bring democracy and human rights to Iraq. But what were the U.S. forces in law if not occupiers? As a U.S. officer later admitted to a reporter, “[t]here is no liberation law, only occupation law.”⁸ A report of the U.S. Third Mechanized Infantry went further: “For political reasons, leaders declared that U.S. forces were ‘liberating forces’ rather than occupying forces. . . . As a matter of law and fact, the United States is an occupying power in Iraq, even if we characterize ourselves as liberators.”⁹

Finally, the reform program in Iraq appeared to resemble the many nation-building operations undertaken by the United Nations in the 1990s. After Cambodia, Liberia, Bosnia, Kosovo, East Timor, and others, it was no longer politically remarkable for the international community to assist (or even direct) the rebuilding of governing institutions in post-conflict states. And so it was a reasonable assumption that the legal basis for these reformist missions was also uncontroversial. Why should Iraq be any different?

But profound legal questions do exist about the Iraqi reforms. These arise out of the international law of occupation, which is codified in two treaties—the 1907 Hague Regulations Respecting the Laws and Cus-

7. For example, on April 25, 2003, Under-Secretary of State for Political Affairs Marc Grossman told an interviewer, “Obviously we consider ourselves to be liberators of Iraq, not the occupiers of Iraq” U.S. Dep’t of State, International Information Programs, *Grossman Says U.S. Liberator, Not Occupier of Iraq* (Apr. 30, 2003), at <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=April&x=20030430151708tiwomods0.3930475&t=xarchives/xarchitem.html>. Assistant Secretary of Defense for International Security Affairs Peter W. Rodman told a House Committee on March 3, 2004, “[W]e have kept our promise—that we were there [in Afghanistan and Iraq] as liberators, not occupiers.” *U.S. Central Command Fiscal Year 2005 Posture Hearing Before the House Comm. on Armed Services*, 108th Cong. (Mar. 3, 2003) (statement by Peter W. Rodman, U.S. Assistant Sec’y of Defense for Int’l Security Affairs), at <http://www.house.gov/hasc/openingstatementsandpressreleases/108thcongress/04-03-03rodman.html>. Secretary Powell took a more nuanced approach: “We are not occupiers We have come under a legal term having to do with occupation under international law, but we came as liberators.” CNN.com, *Powell: ‘We Are Not Occupiers’ in Iraq* (Sept. 14, 2003), at <http://www.cnn.com/2003/WORLD/meast/09/14/sprj.irq.main/>. See also Editorial, *The U.N.’s Better Idea on Iraq*, N.Y. TIMES, Oct. 10, 2003, at A30 (“President Bush has repeatedly said that American forces came to Iraq as liberators, not occupiers.”).

8. Rosen, *supra* note 6 (internal quotations omitted).

9. THIRD INFANTRY DIVISION (MECHANIZED) AFTER ACTION REPORT: OPERATION IRAQI FREEDOM 289 (2003), available at <http://www.globalsecurity.org/military/library/report/2003/3id-aar-jul03.pdf>.

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toms of War on Land (Hague Regulations)¹⁰ and the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention or GC IV).¹¹ In the traditional understanding, an occupying power is a temporary custodian of the status quo in the territory it controls.¹² Occupiers are assumed to remain only for the limited period between the cessation of hostilities and the conclusion of a final peace treaty. That treaty determines the fate of the occupied territory, most likely returning it to the ousted de jure sovereign. Thus, an occupier exercises mere de facto power. For that reason it enjoys no general legislative authority to make permanent changes to legal and political structures in the territory. These are instead choices reserved to an indigenous government upon its return to power at the end of the occupation.¹³ This limitation on the law-making capacity of the occupier may be referred to as the "conservationist principle."

The principle has obvious and troubling implications for the sweeping reform agenda pursued in Iraq. But adopting this legal paradigm presents an immediate problem, one that suggests the U.S. distinction between "liberator" and "occupier" may not have been so fanciful after all. If occupation law cast the United States as a custodian of Iraq, was it to be a mere disinterested observer of pre-existing conditions in the country? Did the conservationist principle truly require it to respect the laws and political institutions of the Iraqi Ba'ath Party, widely condemned for horrific human rights abuses? Surely, as the only functional authority in Iraq, the American administrators were obligated to oversee the welfare of individual Iraqis. And surely this would entail altering, reinterpreting, or even discarding some Iraqi laws. If this is true, does the Iraq war make the case that the international law of occupation (or at least this part of it) should be treated as an anachronism?

Much of the discussion that follows will explore the legal interplay between these contending imperatives of conservation and reform as they played out in Iraq. The two sides in this debate break down largely between an emphasis on the importance of substantive goals sought by

10. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *Regulations Respecting the Laws and Customs of War on Land*, Annex, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

11. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

12. GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 27-37 (1957).

13. See *infra* Part III.C.

the occupation on the one hand and a proper allocation of decision-making competence on the other. Support for the reforms is based on their consistency with international legal standards such as those set out in human rights treaties, as well as prevailing "best practices" followed by the most highly developed Western democracies. Iraq, it is argued, lagged far behind these high standards and could not successfully emerge from years of repressive, centralized rule without adopting the modes of governing Western democracies embody. Opposition to the reforms' legitimacy is based not on a wholesale rejection of reform, though many may question, for example, the virtual elimination of any barriers to foreign investment in a country scarcely able to compete in a globalized marketplace for goods and services. The critique, in other words, does not involve a debate as to whether the reforms were good or bad for Iraq. Rather, it rests on the view that an occupier acquires only limited rights in the territory it has secured by military force. To permit an occupier all of the prerogatives of the ousted *de jure* sovereign would effectively collapse the distinction between occupation and annexation. The conservationist principle, on this view, is a norm primarily concerned with process that cabins the legislative discretion of an occupier regardless of the substantive merits of the reforms it is prepared to enact.

As this Article will make clear, however, the two sides' seemingly clear distinction between substance and process is not always easy to maintain. There are arguments in support of the reforms that rely on the occupier in fact acquiring valid legislative authority, most importantly through actions of the United Nations Security Council. And some arguments against the occupiers' actions challenge the substantive *bona fides* of certain reforms under international law, most notably in the economic sphere. Finally, there is the question of the lingering effect of the United States' failure to secure Security Council backing for the war itself. Did the Council's reluctance to approve a use of force designed to remove Iraq's Ba'athist leaders have implications for post-war reforms also designed to implement that goal? As will be seen, the answer operates on the level of both doctrine and politics. The former concerns the relation between occupation law, which addresses conduct in warfare, and law regulating the resort to force in the first place. The latter concerns the Council's willingness to grant the occupiers a clear reformist mandate knowing that doing so would in some sense be seen as validating a war that many members opposed from the outset and continued to oppose during the occupation. In short, criticism of the reforms does not automatically reflect a callous disregard for efforts to improve life in Iraq. And support for them does

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not necessarily give a blank check to any and all occupiers to govern as if they were the legitimate sovereign.

The discussion will proceed as follows. Part II describes the nature of the occupation regime established by the United States. The Coalition Provisional Authority (CPA) undertook reforms in six major areas and significantly altered pre-existing Iraqi law and governing institutions. Part III explores the nature and scope of the conservationist principle, the primary legal impediment to a reformist occupation. Part IV evaluates how the U.S. reforms fare under that principle. Because a literal reading of the conservationist principle would find many of the reforms unacceptably over-broad, Part V considers five separate theories that might justify the U.S. actions. These are consent by Iraqi authorities, legislative action by the Security Council, desuetude of the conservationist principle, a reformist reading of occupation law and recourse to the Allied occupation of Germany after World War II as legal precedent. Part VI offers some tentative conclusions.

II. THE NATURE OF THE OCCUPATION

The occupation of Iraq followed a long political confrontation and a short war. At the end of the first Gulf War in April 1991, the U.N. Security Council imposed a laundry list of obligations on Iraq in Resolution 687.¹⁴ Many have analogized this resolution to a peace treaty, designed to eliminate a defeated nation's capacity to wage war on its neighbors.¹⁵ Its most far-reaching provisions obligated Iraq to permit intrusive inspections by international personnel who would verify the destruction of its chemical, biological, and nuclear weapons capabilities.¹⁶ The remainder of the 1990s witnessed a series of confrontations between Iraq and the inspectors over these disarmament obligations.¹⁷ In 2002, after a four-year absence, the inspectors returned to Iraq following the Security Council's decision in Resolution 1441 that it was in "material breach" of its obligations under Resolution 687 and subsequent resolutions and that it had "a final opportunity" to make full disclosure of its weapons stockpiles and capabilities.¹⁸

Consensus at the United Nations then collapsed. The United States

14. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

15. See Bardo Fassbender, *Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council After a Decade of Measures Against Iraq*, 13 EUR. J. INT'L L. 273, 279 (2002).

16. S.C. Res. 687, *supra* note 14, ¶¶ 7-14.

17. See generally Fassbender, *supra* note 15.

18. S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).

claimed that Iraq had failed to meet the demands of Resolution 1441 and sought the Council's authorization to initiate armed intervention.¹⁹ When the necessary votes failed to materialize, the United States and Britain, undeterred, commenced hostilities on March 20, 2003.²⁰ Iraqi resistance proved minimal. U.S. forces entered Baghdad on April 9, and the Pentagon declared an end to major hostilities on April 14.²¹ Most leaders of the Iraqi Government were either dead or captured or had gone into hiding, bringing the regime's control over the country to an abrupt end.²²

A. *The Structure of the Occupying Authority*

The ensuing occupation lasted just over fourteen months, ending on June 28, 2004. The institutions of occupied rule took shape in the month immediately following the end of hostilities. Two actors were primarily responsible: the U.N. Security Council, where broad questions of the occupiers' authority were addressed in a series of resolutions, and the American-led CPA, the body that exercised day-to-day governing power.

The United States and the United Kingdom announced the creation of the CPA in a letter to the Security Council on May 8, 2003.²³ The new authority would "exercise powers of government temporarily" in Iraq.²⁴ Two weeks later the Security Council passed Resolution 1483, its first to address issues of governance under occupation. The Council acknowledged the U.S./U.K. letter and described the two states as "occupying powers under unified command."²⁵ It referred to this command as "the Authority," but said little about the specific powers assumed by the CPA other than to refer several times to the importance of international occupation law and the responsibilities it created for the two states.²⁶

19. See *Contemporary Practice of the United States Relating to International Law: Use of Military Force to Disarm Iraq*, 97 AM. J. INT'L L. 419, 421-25 (Sean D. Murphy ed., 2003).

20. *Id.* at 425.

21. *Id.* at 426-27.

22. *Id.* at 430-31.

23. *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 (2003).

24. *Id.*

25. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).

26. See *id.* pmbl. (noting U.S./U.K. letter and "recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command"); *id.* ¶ 5 (calling on "all concerned to comply fully with their obligations

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While the precise origins of the CPA remain unclear—it was not created by any specific act of U.S. or U.K. law, and a thorough study of its creation concluded that “[d]etailed information that explicitly and clearly identifies how the authority was established, and by whom, is not readily available”²⁷—the Security Council never questioned the CPA’s leading role in making policy for occupied Iraq.

Shortly thereafter, the CPA issued its first decree, Regulation No. 1, which defined the scope of its powers:

The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.²⁸

In order to exercise these “powers of government,” the CPA was to be “vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war.”²⁹ The CPA would exercise these powers by issuing Regulations, Orders, and interpretive Memoranda.³⁰ Regulations and Orders would “take precedence over all other laws and publications to the extent such other laws and publications are inconsistent.”³¹ Existing Iraqi law that did not impede CPA objectives, however, would

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

27. L. ELAINE HALCHIN, CONG. RESEARCH SERV., THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES 4 (Apr. 29, 2004), *available at* <http://fpc.state.gov/documents/organization/32338.pdf>.

28. Coalition Provisional Authority Regulation No. 1, CPA/REG/16 May 2003/01 (May 16, 2003), *available at* www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf. The chronology at this point is rather unclear. CPA Regulation No. 1 bears a date of May 16, 2003, but it makes reference to Security Council Resolution 1483, which was passed almost one week later on May 22, 2003. I will assume that Regulation No. 1 was back-dated for reasons not explained in official CPA documents.

29. *Id.* § 1(2).

30. *Id.* §§ 3(1), 4(1).

31. *Id.* § 3(1).

remain in force:

Unless suspended or replaced by the CPA or suspended by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.³²

The CPA thus asserted a plenary authority to govern Iraq. The Security Council, however, called for an indigenous Iraqi body to play a role in the occupation administration. Resolution 1483 supported “the formation, by the people of Iraq . . . of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.”³³ On July 13, the CPA announced the formation of the Governing Council of Iraq, acknowledging its origins in Resolution 1483.³⁴ The CPA also selected the twenty-five members of the Governing Council.³⁵ The CPA described the Governing Council as “the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq.”³⁶ It seemed to grant the Governing Council something of a partnership in governing Iraq: “the Governing Council and the CPA shall consult and coordinate on all matters involving the temporary governance of Iraq, including the authorities of the Governing Council.”³⁷

Two months later, the Security Council welcomed the creation of the Governing Council, which it described as “an important step towards the formation by the people of Iraq of an internationally recognized,

32. *Id.* § 2.

33. S.C. Res. 1483, *supra* note 25, ¶ 9.

34. *Governing Council of Iraq*, Coalition Provisional Authority Regulation No. 6, CPA/REG/13 July 2003/06 (July 13, 2003), available at www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf. The second preambular paragraph “[r]ecogniz[ed] that, as stated in paragraph 9 of Resolution 1483, the Security Council supports the formation of an Iraqi interim administration as a transitional administration run by Iraqis, until the people of Iraq establish an internationally recognized, representative government that assumes the responsibilities of the CPA.” *Id.* pmbl. (italicization omitted).

35. *Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483*, U.N. Doc. S/2003/715, ¶ 24 (2003) [hereinafter SG July Report].

36. Coalition Provisional Authority Regulation No. 6, *supra* note 34, § 1.

37. *Id.* § 2(1).

representative government that will exercise the sovereignty of Iraq.”³⁸ In October, the Security Council went further and described the Governing Council and its ministers as “the principal bodies of the Iraqi interim administration, which . . . embodies the sovereignty of the State of Iraq during the transitional period.”³⁹

Neither the CPA nor the Security Council described with any precision how the Governing Council would fit into the governing structure of the occupation. No public document states whether the CPA or the Governing Council (or both) would initiate changes in Iraqi law, whether the approval of both bodies was necessary, or how conflicts between the two bodies would be resolved.⁴⁰ The CPA did delegate a variety of tasks to the Governing Council and the Iraqi-run ministries.⁴¹ In addition, Resolution 1483 required that the disbursement of funds by the new Development Fund for Iraq, as well as the review of contracts under the U.N. “Oil-for-Food” program, be made in “coordination” or “consultation” with the Governing Council.⁴² But no general autonomy in decision-making emerged from these discrete cessions of authority.

Indeed, the contrary seems to have been the case. CPA Regulation No. 6, creating the Council, did not alter the CPA’s earlier description of itself as vested with all executive, legislative and judicial authority necessary to achieve its objectives.⁴³ Such authority necessarily included the ability to ignore Governing Council objections to its decisions or to bypass consultation in the first place. Regulation No. 6 did provide that the CPA would “consult and coordinate” with the Govern-

38. S.C. Res. 1500, U.N. SCOR, 58th Sess., 4808th mtg., U.N. Doc. S/RES/1500 (2003) (describing Governing Council as “broadly representative”).

39. S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003).

40. The President of the Governing Council himself admitted to the Security Council that Resolution 1483 “did not set out in a clear and precise manner the functions of the interim administration.” U.N. SCOR, 58th Sess., 4791st mtg. at 9, U.N. Doc. S/PV.4791 (2003).

41. See, e.g., *International Donor Assistance*, Coalition Provisional Authority Regulation No. 7, CPA/REG/5 Dec. 2003/07, § 6 (Dec. 5, 2003) (CPA delegates to Governing Council all its authority to deal with international reconstruction assistance to Iraq.), available at http://www.iraqcoalition.org/regulations/20031205_CPAREG_7_International_Donor_Assistance.pdf; *Licensing Telecommunications Services and Equipment*, Coalition Provisional Authority Order No. 11, CPA/ORD/8 June 2003/11, § 2(1) (June 8, 2003) (Iraqi Ministry of Transportation and Communications “shall assume responsibility for licensing all commercial telecommunications services in Iraq.”), available at http://www.iraqcoalition.org/regulations/20030609_CPAORD_11_Licensing_Telecommunications_Svc_and_Equipment.pdf.

42. S.C. Res. 1483, *supra* note 25, ¶¶ 13, 16.

43. Compare Coalition Provisional Authority Regulation No. 1, *supra* note 28, with Coalition Provisional Authority Regulation No. 6, *supra* note 34.

ing Council “[i]n accordance with Resolution 1483.”⁴⁴ In Resolution 1483, as noted, the Security Council placed responsibility for governing Iraq with the occupying powers.⁴⁵ While the Council did call for the creation of “an Iraqi interim administration” in Resolution 1483, not only did it fail to specify the duties of such a body but, in context, this call seems directed to a *future* period between the time the occupying powers relinquished authority and when a permanent, elected Iraqi government took office. The reference to Resolution 1483 in Regulation No. 6, therefore, did not appear to enhance the Governing Council’s powers.

Unofficial sources confirm the Council’s subordinate role, with many describing a CPA “veto” power over all Governing Council actions.⁴⁶ In several cases, the CPA Administrator threatened to withhold his approval of the Council’s decisions, a threat reported as fatal to the proposed initiatives.⁴⁷ In sum, the Governing Council appears to have played a purely advisory role.

44. See Coalition Provisional Authority Regulation No. 6, *supra* note 34, § 2(1).

45. The resolution

4. *Calls upon* the Authority, 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; 5. *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.

S.C. Res. 1483, *supra* note 25, ¶¶ 4-5.

46. See Council on Foreign Relations, *Iraq’s Governing Council* (Council “can appoint interim diplomats and ministers, approve budgets, and propose policies, but the coalition authorities can veto any of its decisions”), at http://www.cfr.org/background_iraq_council.php (May 17, 2004); Christian Ule, Coudert Bros. LLP, *Legal Framework for Foreign Investment in Iraq* (“[T]he CPA has reserved itself a veto-right and, thus, may abrogate the Governing Council’s resolutions.”), at http://www.coudert.com.au/publications/articles/031015_70iraqInvest_cb.pdf (Oct. 15, 2003).

47. See, e.g., Rajiv Chandrasekaran, *Iraq Occupation Faces New Challenge; Shiite Demand to Elect Constitution’s Drafters Could Delay Transfer of Power*, WASH. POST, Oct. 21, 2003, at A20 (In crafting a process to draft new Iraqi constitution, “[t]he occupation authority is allowing the Governing Council to choose how the drafters will be selected, but Bremer reserves the right to veto the decision.”); Richard A. Oppel, Jr. & Robert F. Worth, *After the War: Politics*, N.Y. TIMES, July 19, 2003, at A7; Vivienne Walt, *Iraq Schools Trying to Close Book on Ba’athist Regime*, BOSTON GLOBE, Oct. 1, 2003, at A15 (“The US administrator in Iraq, L. Paul Bremer III, who has veto power over the Governing Council, has not approved the council’s decision” to fire teachers who were Ba’ath Party members.); Edward Wong, *The Struggle for Iraq: The Government*, N.Y. TIMES, Feb. 22, 2004, at A11.

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Finally, two United Nations actors created by the Security Council were active in the occupation. Neither, however, asserted an independent check on the CPA's supreme governing powers. The first was the Special Representative of the Secretary-General (SRSG). In Resolution 1483 the Council asked the Secretary-General to appoint an SRSG so that he could address a wide range of substantive tasks "in coordination with the Authority."⁴⁸ None involved an actual role in governing.⁴⁹ Further, in executing his mandate the SRSG "made clear the independence of his role and that the Coalition Provisional Authority, not the United Nations, was responsible for administering Iraq, for providing for the welfare of the people, and for restoring conditions of security and stability."⁵⁰ In mid-August 2003, the Security Council established the United Nations Assistance Mission for Iraq (UNAMI), headed by the SRSG.⁵¹ But UNAMI's tasks were similarly of the planning, coordination, exhortation, and information-seeking variety.⁵² The role of the United Nations, in sum, was that of a facilitator, not a ruler: "to assist the Iraqi people in achieving their goals[,] . . . to help them participate in, and take ownership of, the definition of the policies and priorities that will shape the future of their country."⁵³

The second entity was a "multinational force under unified command," which the Security Council authorized in Resolution 1511 to "take all necessary measures to contribute to the maintenance of security and stability in Iraq."⁵⁴ The United States and Great Britain often referred to this force as "the coalition," noting that forty-eight states had either sent troops or made other contributions.⁵⁵ Descriptively, this claim was largely rhetorical, as the United States and Britain

48. S.C. Res. 1483, *supra* note 25, ¶ 8. The United Nations referred to the CPA as "the Authority."

49. Many of the tasks involved issues of governance, such as "efforts to restore and establish national and local institutions for representative governance," "facilitating the reconstruction of key infrastructure," "economic reconstruction and the conditions for sustainable development," and protecting human rights and judicial reform. But they were all to be done "in coordination" with the CPA or other actors, or the SRSG was to "encourage" or "promote" the goals. He was not asked to assume exclusive control over any task. *Id.*

50. SG July Report, *supra* note 35, at 22.

51. S.C. Res. 1500, *supra* note 38.

52. SG July Report, *supra* note 35, at 19-20 (describing UNAMI's mandate, later approved by Security Council in Resolution 1500).

53. *Id.* at 19.

54. S.C. Res. 1511, *supra* note 39, ¶ 13.

55. The White House, *Coalition Members* (Mar. 27, 2003), at <http://www.whitehouse.gov/news/releases/2003/03/20030327-10.html>.

supplied over 90% of the foreign forces in Iraq.⁵⁶ Legally, the multinational force had no mandate to assert U.N. control over governance or security matters. The Security Council did not create any form of operational control over the force. U.S. military commanders (like the CPA Administrator) reported directly to the U.S. Secretary of Defense and through him to the President of the United States.⁵⁷ There seems little basis, therefore, to regard the multinational force as a separate legal actor for purposes of assessing compliance with the law of occupation.

B. *Legal and Institutional Reforms*

In Regulation No. 1, the CPA granted itself authority to supersede any law in force in Iraq. It used this legislative authority to enact a set of reforms so broad that it is no exaggeration to describe the CPA as having engaged in a social engineering project in Iraq. The following sections describe the CPA's reform efforts in several key sectors.

1. De-Ba'athification

On the same date it announced its own creation, the CPA issued Order No. 1 on the "De-Ba'athification of Iraqi Society."⁵⁸ "By this means," the CPA stated, the occupiers would "ensure that representative government in Iraq is not threatened by Ba'athist elements returning to power and that those in positions of authority in the future are acceptable to the people of Iraq."⁵⁹ The Ba'ath Party was formally "disestablished" by "eliminating the Party's structures and removing its leadership from positions of authority and responsibility in Iraqi society."⁶⁰ Both junior and senior members of the Party were removed from governmental positions and barred from future employment in the public sector.⁶¹ All senior Party members and junior members

56. In July 2004, 133,000 foreign soldiers were stationed in Iraq. U.S. and U.K. troops constituted most of these, with 112,000 being American. BBC News, *Coalition Troops in Iraq* (July 20, 2004), at http://news.bbc.co.uk/2/hi/middle_east/3873359.stm.

57. HALCHIN, *supra* note 27, at 11.

58. *De-Ba'athification of Iraqi Society*, Coalition Provisional Authority Order No. 1, CPA/ORD/16 May 2003/01 (May 16, 2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf.

59. *Id.* § 1(1).

60. *Id.* The Party's removal from public life was total. All images of Saddam Hussein and other "readily identifiable" members of the Ba'ath Party, as well as symbols of the Party itself, were banned from display in government buildings or public spaces. *Id.* § 1(4).

61. *Id.* § 1(1)-(3).

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holding positions in the upper tiers of government ministries were to be evaluated for criminal conduct and detained if deemed a security risk or a risk of flight.⁶² In November 2003, the CPA delegated authority to conduct de-Ba'athification to the Governing Council.⁶³

Several days later, the CPA extended the scope of these purges by ordering the dissolution of governmental entities used "to oppress the Iraqi people and as institutions of torture, repression and corruption."⁶⁴ The dissolved entities comprised seven ministries or governmental divisions, two cadres of Saddam Hussein's bodyguards, eight military organizations, four paramilitaries, and seven other organizations.⁶⁵ All assets of these entities were to be turned over to the CPA, all their financial obligations suspended, all their personnel dismissed, and all titles or ranks conferred by the entities cancelled.⁶⁶

Many observers criticized the de-Ba'athification program as depriving the Iraqi government and military of needed expertise and claimed that it unfairly excluded those who had joined the Ba'ath Party due to necessity rather than for ideological reasons.⁶⁷ The CPA appeared to respond to this criticism. On June 28, the last day of its existence, the CPA rescinded the Governing Council's authority to conduct de-Ba'athification.⁶⁸

62. *Id.*

63. *Delegation of Authority Under De-Ba'athification Order No. 1*, Coalition Provisional Authority Memorandum No. 7, CPA/MEM/4 November 2003/7 (Nov. 4, 2003), available at http://www.iraqcoalition.org/regulations/20031104_CPAMEM07_Delegation_of_Authority.pdf. The CPA had initially created an Iraqi De-Ba'athification Council to operate under the authority of the Administrator. *Establishment of the Iraqi De-Ba'athification Council*, Coalition Provisional Authority Order No. 5, CPA/ORD/25 May 2003/05 (May 25, 2003), available at <http://www.iraqcoalition.org/regulations/CPAORD5.pdf>. Memorandum No. 7, issued six months later, rescinded this order and delegated its tasks to the Governing Council. Coalition Provisional Authority Memorandum No. 7, *supra*, § 3.

64. *Dissolution of Entities*, Coalition Provisional Authority Order No. 2, CPA/ORD/23 May 2003/02 (May 23, 2002), available at http://www.iraqcoalition.org/regulations/20030823_CPAORD2_Dissolution_of_Entities_with_Annex_A.pdf.

65. *Id.* annex. The ministries were those of Defense, of Information, and of State for Military Affairs. The military organizations were the Iraqi Army, Air Force, Navy and Air Defense Force, the Republican Guard, and the Special Republican Guard. Other organizations included the Presidential Secretariat, the Revolutionary Command Council, the National Assembly, and the Revolutionary, Special, and National Security Courts. *Id.*

66. *Id.* §§ 2, 3.

67. See FALEH A. JABAR, U.S. INST. FOR PEACE, POSTCONFLICT IRAQ: A RACE FOR STABILITY, RECONSTRUCTION, AND LEGITIMACY (May 2004), available at <http://www.usip.org/pubs/special-reports/sr120.html#top>.

68. *Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority*, Coalition Provisional Authority Order No. 100, CPA/ORD/28 June 2004/100, § 6(7)

2. Reform of Security and Military Institutions

Three months after disbanding virtually the entire Iraqi military establishment, the CPA announced the creation of a "New Iraqi Army."⁶⁹ While the CPA acknowledged that the new force might be altered or disbanded by a successor Iraqi government, it nonetheless promulgated a detailed order setting out new ranks, command structure, and relations to civilian authorities.⁷⁰ A new Code of Military Discipline was promulgated,⁷¹ and five existing military codes and laws were abolished, three of which pre-dated the Ba'ath Party's assumption of power in Iraq in 1968.⁷² An agency was created to provide support services for the new force in the areas of finance, personnel, recruitment, and procurement.⁷³ Two additional services, the Facilities Protection Service and the Civil Defense Corps, were also created to perform security duties not permitted the new Army, which the CPA banned from domestic law enforcement.⁷⁴ Command of the New Army and the Civil Defense Corps resided with the CPA Administrator for the duration of the occupation.⁷⁵

(June 28, 2004), available at http://www.iraqcoalition.org/regulations/20040628_CPAORD_100_Transition_of_Laws_Regulations_Orders_and_Directives.pdf.

69. *Creation of a New Iraqi Army*, Coalition Provisional Authority Order No. 22, CPA/ORD/7 August 2003/22 (Aug. 7, 2003), available at http://www.iraqcoalition.org/regulations/20030818_CPAORD_22_Creation_of_a_New_Iraqi_Army.pdf.

70. *Id.*

71. *Creation of a Code of Military Discipline for the New Iraqi Army*, Coalition Provisional Authority Order No. 23, CPA/ORD/7 August 2003/23 (Aug. 7, 2003), available at http://www.iraqcoalition.org/regulations/20030820_CPAORD_23_Creation_of_a_Code_with_Annex.pdf.

72. Order No. 22 abolished the Iraqi Military Law Code Number 13 of 1940, the Iraqi Military Procedures Code Number 44 of 1941, the Code of Legal Notification of Military Personnel Number 106 of 1960, the Punishment of Military Deserters Law Number 28 of 1972, and the Penal Code of the Popular Army Number 32 of 1984. Coalition Provisional Authority Order No. 22, *supra* note 69, § 2.

73. *Creation of the Defense Support Agency*, Coalition Provisional Authority Order No. 42, CPA/ORD/19 September 2003/42 (Sept. 19, 2003), available at http://www.iraqcoalition.org/regulations/20030923_CPAORD42.pdf.

74. *See Establishment of the Facilities Protection Service*, Coalition Provisional Authority Order No. 27, CPA/ORD/4 September 2003/27 (Sept. 4, 2003), available at <http://www.iraqcoalition.org/regulations/index.html#Regulations>; *Establishment of the Iraqi Civil Defense Corps*, Coalition Provisional Authority Order No. 28, CPA/ORD/3 September 2003/28 (Sept. 3, 2003) [hereinafter *Civil Defense Order*], available at http://www.iraqcoalition.org/regulations/20030903_CPAORD_28_Est_of_the_Iraqi_Civil_Defense_Corps.pdf; Coalition Provisional Authority Order No. 22, *supra* note 69, § 3(2) (mission of the New Army).

75. *See* Coalition Provisional Authority Order No. 22, *supra* note 69, § 3(3) (command of Army); *Civil Defense Order*, *supra* note 74, § 4(1) (Civil Defense Corps subject to CPA command, which may be delegated to commander of coalition forces in Iraq).

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In order to centralize administration of these new entities, the CPA created a new Ministry of Defense on March 21, 2004.⁷⁶ A long list of “key principles” guiding the new Ministry sought to create as stark a contrast as possible to the highly politicized role of the military in the Ba’athist era.⁷⁷

Other security-related reforms went beyond the uniformed military. The CPA created a new Iraqi National Intelligence Service, replacing the old, dissolved service.⁷⁸ An Iraqi Radioactive Source Regulatory Agency regulated the use and disposal of radioactive materials in the country.⁷⁹ A Non-Proliferation Programs Foundation would seek to find “peaceful civilian” employment for scientists and others formerly working in weapons of mass destruction programs.⁸⁰

As the occupation drew to a close, the security situation in Iraq deteriorated. A series of confrontations between U.S. troops and local militias produced heavy casualties.⁸¹ The militias also threatened to undermine the authority of the transitional Iraqi government—created by a constitution-like Transitional Administrative Law (TAL) promulgated by the Governing Council on March 8, 2004⁸²—almost before it had taken office. The TAL therefore prohibited any “armed forces and militias not under the command structure of the Iraqi Transitional Government . . . except as provided by federal law.”⁸³

76. *Ministry of Defence*, Coalition Provisional Authority Order No. 67, CPA/ORD/21 March 2004/67 (Mar. 21, 2004), available at http://www.iraqcoalition.org/regulations/20040321_CPAORD67_Ministry_of_Defence.pdf.

77. The principles were service, loyalty, civilian control, professionalism, unity, representativeness, integrity, stewardship, transparency, security, and affordability. *Id.* § 5.

78. *Delegation of Authority to Establish the Iraqi National Intelligence Service*, Coalition Provisional Authority Order No. 69, CPA/ORD/1 April 2004/69 (Apr. 1, 2004), available at http://www.iraqcoalition.org/regulations/20040401_CPAORD69_Delegation_of_Authority_to_Establish_the_Iraqi_National_Intelligence_Service_with_Annex.pdf.

79. *Iraqi Radioactive Source Regulatory Authority*, Coalition Provisional Authority Order No. 72, CPA/ORD/10 June 2004/72 (June 10, 2004), available at http://www.cpa-iraq.org/regulations/20040615_CPAORD_72_Iraqi_Radioactive_Source_Regulatory_Authority.pdf.

80. *The Iraqi Nonproliferation Programs Foundation*, Coalition Provisional Authority Order No. 79, CPA/ORD/19 June 2004/79 (June 19, 2004), available at http://www.iraqcoalition.org/regulations/20040619_CPAORD_79_Iraqi_NonProliferation_Programs_Foundation_with_Annex.pdf.

81. See Anthony H. Cordesman, Center for Strategic and Int’l Studies, *Fallujah, Sadr, and the Eroding US Position in Iraq 2* (Apr. 30, 2004), available at http://www.csis.org/features/iraq_fallujah.pdf.

82. Coalition Provisional Authority, *Law of Administration for the State of Iraq for the Transitional Period* (Mar. 8, 2004) [hereinafter TAL], available at <http://www.iraqcoalition.org/government/TAL.html>; see discussion *infra* Part II.C.

83. TAL, *supra* note 82, art. 27(B).

Shortly before the CPA disbanded, it issued an order providing for such exceptions, allowing militias that met the criteria of registration, transparency, non-aggression, and non-criminality, among others, to disband slowly through a plan that provided a variety of social service and benefit incentives to their members.⁸⁴ Militias not meeting these criteria were to be treated as criminal.⁸⁵ Further, members of illegal militias could not hold political office, and any political party “associated” with an illegal militia would be penalized.⁸⁶ Because this order implemented a provision of the TAL, it was obviously intended to regulate conduct after the close of the occupation.

3. Human Rights Reforms

Many of the CPA’s reforms in criminal procedure and other areas can be seen as implementing internationally recognized standards of human rights. But the CPA also sought to consolidate oversight of human rights matters in Iraq. To this end, it established a Ministry of Human Rights.⁸⁷ The Ministry was to engage in a variety of tasks—generating proposals for the creation of new institutions or reform of existing ones, public education, assisting victims, and functioning as the national liaison with international human rights bodies.⁸⁸ The Ministry was intended both to address the consequences of human rights abuses under the prior regime and to ensure that post-Ba’athist Iraq adhered to its obligations under human rights treaties to which it is party.⁸⁹ The Minister of Human Rights would also coordinate with other Iraqi ministries “to ensure that new legislation is adopted taking into account” human rights treaty obligations.⁹⁰

A law addressing the problem of child labor straddled human rights and economic-oriented reforms.⁹¹ In addition, the CPA stated that its

84. *Regulation of Armed Forces and Militias Within Iraq*, Coalition Provisional Authority Order No. 91, CPA/ORD/02 June 2004/91, § 4 (June 19, 2004), available at http://www.iraqcoalition.org/regulations/20040607_CPAORD91_Regulation_of_Armed_Forces_and_Militias_within_Iraq.pdf.

85. *Id.* § 6.

86. *Id.* §§ 6(4), (6).

87. *Ministry of Human Rights*, Coalition Provisional Authority Order No. 60, CPA/ORD/19 February 2004/60 (Feb. 19, 2004), available at http://www.iraqcoalition.org/regulations/20040220_CPAORD60.pdf CPA/ORD/19 Feb. 2004/60.

88. *Id.* § 2.

89. *Id.* pmbl.

90. *Id.* § 3.

91. See generally *Amendments to the Labor Code—Law No. 71 of 1987*, Coalition Provisional Authority Order No. 89, CPA/ORD/05 May 2004/89 (May 5, 2004), available at http://www.iraqcoalition.org/regulations/20040505_CPAORD89_Law_No_71_of_1987.pdf.

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substantial amendments to the Iraqi Labor Code related to children were partly intended to implement Iraq's obligations under two International Labor Organization conventions.⁹² The amendments established a minimum age of fifteen for employment and sought to prohibit the "worst forms of child labor," such as slavery and prostitution.⁹³

4. Criminal Law and Law Enforcement Reforms

Iraqi criminal law and procedure were the subject of extensive reforms. The CPA observed that "the former regime used certain provisions of the penal code as a tool of repression in violation of internationally recognized human rights standards."⁹⁴ Early in the occupation it prohibited torture, suspended the imposition of capital punishment, and prohibited discrimination on a wide variety of grounds by all persons holding public office.⁹⁵ Several provisions of the 1969 Iraqi Penal Code were suspended. Other sections, such as those dealing with kidnapping, rape and damage to public utilities, were modified.⁹⁶ Procedurally, a host of changes were made to the 1971 Iraqi Law on Criminal Proceedings, which the CPA regarded as deficient "with regard to fundamental standards of human rights."⁹⁷ For example, all Iraqi law enforcement officers were required to give Miranda-like warnings when making an arrest.⁹⁸

While the structure of the Iraqi judiciary remained largely intact, a new Central Criminal Court was created both to serve as a model for

www.iraqcoalition.org/regulations/20040530_CPAORD89_Amendments_to_the_Labor_Code-Law_No.pdf.

92. *Id.* pmb1. The two are the *Convention Concerning Minimum Age for Admission to Employment* (No. 138) (June 26, 1973) and the *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (No. 182) (June 17, 1999).

93. *Amendments to the Labor Code—Law No. 71 of 1987*, *supra* note 91, arts. 90-91.

94. *Penal Code*, Coalition Provisional Authority Order No. 7, CPA/ORD/9 June 2003/07 (June 10, 2003), *available at* http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf.

95. *Id.*

96. *Modifications of Penal Code and Criminal Proceedings Law*, Coalition Provisional Authority Order No. 31, CPA/ORD/10 September 2003/31, §§ 2-3 (June 10, 2003), *available at* http://www.iraqcoalition.org/regulations/20030921_CPAORD31.pdf.

97. *Criminal Procedures*, Coalition Provisional Authority Memorandum No. 3 (Revised), CPA/MEM/27 June 2004/03 (Dec. 31, 2003), *available at* http://www.iraqcoalition.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf.

98. *Id.* § 4. ("At the time an Iraqi law enforcement officer arrests any person, the officer shall inform that person of his or her right to remain silent and to consult an attorney.")

further judicial reform and to try “those serious crimes that most directly threaten public order and safety.”⁹⁹ Cases heard by the Central Court were to be chosen by the CPA Administrator, who also appointed the judges.¹⁰⁰ Other Iraqi courts were required to cooperate with the Central Court on a variety of procedural matters.¹⁰¹

Because the CPA viewed the Iraqi judiciary as having been widely politicized and corrupted under the Ba’athist regime, new supervisory structures were created.¹⁰² In June 2003 the CPA created a Judicial Review Committee charged with determining the suitability of current judges and prosecutors for office and removing them if they were found unsuitable.¹⁰³ In September it reconstituted the Council of Judges, which had been abolished by the prior regime, to serve as a permanent supervisory and disciplinary body. The Council was to operate independently of the Justice Ministry.¹⁰⁴

In Resolution 1483, the Security Council spoke of the need for “accountability for the crimes and atrocities committed by the previous Iraqi regime.”¹⁰⁵ Invoking this provision, the CPA authorized the Governing Council to establish an Iraqi Special Tribunal “to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws.”¹⁰⁶ While the

99. *The Central Criminal Court of Iraq*, Coalition Provisional Authority Order No. 13, CPA/ORD/X 2004/13, §18 (Apr. 22, 2004), available at http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf; Memorandum from Judge Donald F. Campbell, CPA Senior Advisor to the Ministry of Justice, to All Coalition Provisional Authority Officials with Responsibility for Matters Relating to the Ministry of Justice 5 (June 26, 2003) (new Central Criminal Court “is being established as a model of procedural fairness and judicial integrity and to hear especially serious cases”), available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/2ed78f171710693885256d5e004c0159/Body/M2/Ministry%20of%20Justice%20National%20Policy%20Guidance.doc?OpenElement>.

100. Coalition Provisional Authority Order No. 13, *supra* note 99.

101. *Id.* § 9.

102. *Establishment of the Judicial Review Committee*, Coalition Provisional Authority Order No. 15, CPA/ORD/—June 2003/—(June 23, 2003) (“[T]he Iraqi justice system has been subjected to political interference and corruption over the years of Iraqi Ba’ath Party rule.”), available at http://www.iraqcoalition.org/regulations/20030623_CPAORD_15_Establishment_of_the_Judicial_Review_Committee.pdf.

103. *Id.* § 4.

104. *Re-Establishment of the Council of Judges*, Coalition Provisional Authority Order No. 35, CPA/ORD/13 Sep 2003/35 §6 (Sept. 13, 2003), available at http://www.cpa-iraq.org/regulations/20030921_CPAORD35.pdf.

105. S.C. Res. 1483, *supra* note 25, pmbl.

106. *See Delegation of Authority Regarding an Iraqi Special Tribunal*, Coalition Provisional Authority Order No. 48, CPA/ORD/3June2003/48, § 1(1) (June 23, 2003), available at http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf.

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CPA and the Governing Council collaborated on drafting the Tribunal's statute and the elements of crimes to be prosecuted, the Administrator retained "the authority to alter the statute . . . or any elements of crimes or rules of procedure developed for the Tribunal, if required in the interests of security."¹⁰⁷ The CPA's preeminence was to continue even after the Tribunal began functioning; in the event of a conflict "between any promulgation by the Governing Council or any ruling or judgment by the Tribunal and any promulgation of the CPA, the promulgation of the CPA shall prevail."¹⁰⁸ No cases were initiated, however, before the end of the occupation.

The final change in law enforcement concerned the Iraqi prison system. The CPA consolidated authority over all detention facilities in the Ministry of Justice.¹⁰⁹ More significantly, in light of the Ba'athist regime's history of human rights abuses, the CPA issued a minutely detailed set of standards for the management of detention and prison facilities.¹¹⁰ Standards roughly congruent with those in international human rights instruments addressed the segregation of juvenile and adult prisoners; conditions of accommodation; standards of personal hygiene, food, medical services, discipline, and punishment; and prisoners' right of complaint, among others. All existing Iraqi prison regulations were suspended.¹¹¹

5. Economic Reforms

The most far-reaching reforms were economic. Shortly after the CPA began operation, Administrator Paul Bremer announced that economic reform was the coalition's "most immediate priority."¹¹² He described the Ba'athist-era economy as a "closed, dead-end system."¹¹³ The CPA would work to foster a "transition from a state-dominated to a

107. *Id.* § 1(6).

108. *Id.* § 2(3).

109. See *Management of Detention and Prison Facilities*, Coalition Provisional Authority Order No. 10, CPA/ORD/8 June 2003/10 (June 5, 2003), available at http://www.iraqcoalition.org/regulations/20030605_CPAORD10_Management_of_Detention_and_Prison_Facilities.pdf.

110. See *Management of Detention and Prison Facilities*, Coalition Provisional Authority Memorandum No. 2, CPA/MEM/8 June 2003/02 (June 8, 2003), available at http://www.iraqcoalition.org/regulations/20030608_CPAMEMO_2_Management_of_Detention_and_Prison_Facilities.pdf.

111. *Id.* § 1(2).

112. Ambassador L. Paul Bremer III, Chief Administrator in Iraq, Address at the World Economic Forum (June 23, 2003) [hereinafter Bremer Address], available at <http://www.weforum.org/site/homepublic.nsf/Content/Address+by+Ambassador+L.+Paul+Bremer+III,+Chief+Administrator+in+Iraq#top>.

113. *Id.*

private sector economy” by enacting reforms that would bring about a “demanding, but exciting economic transformation” in the country.¹¹⁴ The CPA spoke of the need for a “transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector,” as well as “the need to enact institutional and legal reforms to give it effect.”¹¹⁵

The economic reforms covered seven broad areas: banking, taxation, foreign trade and investment, private economic transactions, securities regulation, regulatory reforms, and state-owned enterprises.

a. *Banking*

Iraqi commercial banking was wholly transformed by a new Bank Law.¹¹⁶ A comprehensive system of regulations prescribed standards in areas such as capitalization, lending limits, on-site examination of banks and their affiliates, mechanisms for conservatorship, receivership, and liquidation of banks and receipt of deposits.¹¹⁷ As in the

114. *Id.* Bremer summarized the CPA’s economic goals as follows:

- start a thoroughgoing reform of Iraq’s financial sector in order to provide liquidity and credit for the Iraqi economy;
- simplify the regulatory regime so as to lower barriers to entry for new firms, domestic and foreign;
- review Iraq’s body of commercial law to determine which changes are needed to encourage private investment;
- lift unreasonable restrictions on property rights;
- develop anti-trust and competition laws;
- develop an open market trade policy providing for a level playing field with regional trade partners;
- encourage the adoption of laws and regulations to assure that Iraq has high standards of corporate governance;
- develop accelerated training programs for business managers in best practices and business ethics.

Id.

115. *Foreign Investment*, Coalition Provisional Authority Order No. 39, CPA/ORD/19 September 2003/39 (Sept. 19, 2003), available at http://www.iraqcoalition.org/regulations/20031220_CPAORD_39_Foreign_Investment_.pdf.

116. An initial law, issued in September 2003, was later revised in June 2004. See *Bank Law*, Coalition Provisional Authority Order No. 40, CPA/ORD/19 September 2003/40 (Sept. 19, 2003), available at http://www.iraqcoalition.org/regulations/20030919_CPAORD40_Bank_Law_with_Annex.pdf; *Banking Law of 2004*, Coalition Provisional Authority Order No. 94, CPA/ORD/6 June 2004/94 (June 7, 2004), available at http://www.iraqcoalition.org/regulations/20040607_CPAORD94_Banking_Law_of_2004_with_Annex_A.pdf.

117. See generally Coalition Provisional Authority Order No. 94, *supra* note 116.

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United States, Iraqi banks were prohibited from engaging in activities such as retail trade or insurance underwriting.¹¹⁸ All banks were to be licensed by the Central Bank of Iraq (CBI), which would also engage in ongoing regulatory oversight.¹¹⁹ All existing laws inconsistent with the Bank Law were suspended.¹²⁰

The law also opened the Iraqi banking sector to foreign ownership. Previously, only Arab banks were permitted to operate in Iraq.¹²¹ Under the CPA law, any foreign bank may apply to the CBI for a permit to establish a branch in Iraq (provided it is adequately regulated at home) or a license to establish a new Iraqi subsidiary bank.¹²² The CPA initially limited the number of wholly foreign-owned banks to six until 2008, but the limitation was dropped in a revised Banking Law issued on the eve of the CPA's dissolution.¹²³ Once a foreign-owned bank is properly established, it is treated no differently than an Iraqi bank.¹²⁴

The Iraqi Central Bank was also wholly transformed.¹²⁵ Detailed requirements for management, foreign reserves, monetary functions, regulation of currency, and criminal offenses related to legal tender were issued. Disputes were to be heard by a Financial Services Tribunal.¹²⁶

b. *Taxation*

A second set of changes occurred in tax law. A tax holiday was declared on virtually all levies from the inception of the occupation through the end of 2003.¹²⁷ This was later extended for certain

118. *Id.* art. 28.

119. *Id.* art. 4(1).

120. *Id.* art. 107(2).

121. *Financial Reconstruction in Iraq: Hearing Before the Senate Subcomm. on Int'l Trade and Fin.*, 108th Cong. (2004) (statement of John B. Taylor, U.S. Under Sec'y of the Treasury for Int'l Affairs), available at http://banking.senate.gov/_files/ACF68.pdf.

122. See Coalition Provisional Authority Order No. 94, *supra* note 116, arts. 4(1), 6(1).

123. Compare Coalition Provisional Authority Order No. 40, *supra* note 116, art. 4(6) (limitation), with Coalition Provisional Authority Order No. 94, *supra* note 116, art. 6 (no limitation).

124. Coalition Provisional Authority Order No. 94, *supra* note 116, art. 4(5).

125. See *Central Bank Law*, Coalition Provisional Authority Order No. 56, CPA/ORD/1 March 2004/56 (Mar. 6, 2004), available at http://www.iraqcoalition.org/regulations/20040306_CPAORD_56_Central_Bank_Law_with_Annex.pdf.

126. *Id.* art. 63.

127. *Tax Strategy for 2003*, Coalition Provisional Authority Order No. 37, CPA/ORD/19 September 2003/37 (Sept. 19, 2003), available at <http://www.iraqcoalition.org/regulations/>

taxes.¹²⁸ At the same time, a 5% “reconstruction levy” was imposed on all goods imported into Iraq, with a variety of humanitarian goods excepted.¹²⁹ Foreign companies operating in Iraq were required to pay a 15% tax on income earned in the country.¹³⁰

c. *Foreign Trade*

A third set of changes was made to foreign trade and investment laws. All tariffs, custom duties, import taxes, and licensing fees for goods entering or leaving Iraq were suspended until the end of the occupation.¹³¹ A Trade Bank of Iraq was created to facilitate imports and exports with an initial capitalization of \$100,000,000.¹³² In February 2004, Iraq gained observer status at the World Trade Organization, which was described as a prelude to full membership.¹³³ Perhaps most importantly, the CPA promulgated a foreign investment law for Iraq “that would make the country one of the most open in the world.”¹³⁴ Foreigners could own up to 100% of any Iraqi enterprise except “natural resources . . . involving primary extraction and initial process-

20040306_CPAORD_56_Central_Bank_Law_with_Annex.pdf. The exceptions were for taxes on certain hotels and restaurants, real property transfers, car sales, and petrol sales. *Id.* § 3.

128. *Amendments to Coalition Provisional Authority Order No. 37 and Coalition Provisional Authority Order No. 49*, Coalition Provisional Authority Order No. 84, CPA/ORD/30 April 2004/84 (Apr. 30, 2004), *available at* http://www.iraqcoalition.org/regulations/20040430_CPAORD_84_Amendments_of_CPA_Order_37_and_49.pdf.

129. *Reconstruction Levy*, Coalition Provisional Authority Order No. 38, CPA/ORD/19 September 2003/38 (Sept. 19, 2003), *available at* http://www.iraqcoalition.org/regulations/20040404_CPAORD_38_Reconstruction_Levy.pdf.

130. *Tax Strategy of 2004*, Coalition Provisional Authority Order No. 49, CPA/ORD/19 February 2004/49, § 3(3) (Feb. 19, 2004), *available at* http://www.iraqcoalition.org/regulations/20040220_CPAORD_49_Tax_Strategy_of_2004_with_Annex_and_Ex_Note.pdf.

131. The initial suspension lasted until the end of 2003. *Trade Liberalization Policy*, Coalition Provisional Authority Order No. 12, CPA/ORD/7 June 2003/12 (June 7, 2003), *available at* <http://www.iraqcoalition.org/regulations/CPAORD12.pdf>. It was then extended until the transition to Iraqi rule. *Trade Liberalization Policy 2004*, Coalition Provisional Authority Order No. 54, CPA/ORD/24 February 2004/54, § 1 (Feb. 24, 2004), *available at* http://www.iraqcoalition.org/regulations/20040404_CPAORD54_Trade_Liberlization_Policy_2004_with_Annex_A.pdf.

132. *Trade Bank of Iraq*, Coalition Provisional Authority Order No. 20, CPA/ORD/14 July 2003/20 (July 14, 2003), *available at* http://www.iraqcoalition.org/regulations/20030717_CPAORD_20_Trade_Bank_of_Iraq.pdf.

133. Press Release, Coalition Provisional Authority, Iraq Achieves Observer Status at the WTO (Feb. 12, 2004), *available at* http://www.iraqcoalition.org/pressreleases/20040212_WTO.html.

134. UNITED NATIONS/WORLD BANK JOINT IRAQ NEEDS ASSESSMENT 11 (Oct. 2003), *available at* [http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Iraq+Joint+Needs+Assessment/\\$File/Joint+Needs+Assessment.pdf](http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Iraq+Joint+Needs+Assessment/$File/Joint+Needs+Assessment.pdf).

ing” (meaning oil), banking (addressed separately), and insurance.¹³⁵ There was no requirement of partnership or joint venturing with Iraqi investors, though such arrangements were permitted: a foreign investor could create an independent business in Iraq or establish a subsidiary of its own enterprise.¹³⁶ Additionally, foreign investors were made subject to “national treatment,” meaning that they must be allowed to conduct business on terms no less favorable than those permitted Iraqi-owned enterprises.¹³⁷ All funds associated with a foreign-owned business could be transferred abroad without restriction.¹³⁸ The law included no requirement that a foreign investor use local products or services. Prior Iraqi law had prohibited foreigners from owning real property.¹³⁹ While this formal prohibition continues, the new foreign investment law largely undermined its effect by permitting foreigners to obtain licenses to use property for up to forty years, which “may be renewed for further such periods.”¹⁴⁰

d. *Private Economic Transactions*

A fourth area of reform involved changes to laws affecting private economic transactions. Iraqi corporate law was extensively reformed, with many provisions suspended and others added.¹⁴¹ Notably, foreign persons and corporations became eligible to serve as Iraqi corporate founders, shareholders, and partners.¹⁴² The CPA explained that “some of the rules concerning company formation and investment under the prior regime no longer serve a relevant social or economic purpose, and . . . such rules hinder economic growth.”¹⁴³

Substantial changes were made to Iraqi bankruptcy law.¹⁴⁴ The CPA observed that while economic actors “require a fair, efficient, and

135. Coalition Provisional Authority Order No. 39, *supra* note 115, §§ 4(2), 6(1).

136. *Id.* § 7.

137. *Id.* § 4(1).

138. *Id.* § 7(2)(d).

139. See Iraqi Interim Constitution of 1990, art. 16 (giving every *Iraqi* citizen the right to own property), available at http://www.oefre.unibe.ch/law/icl/iz00000_.html.

140. Coalition Provisional Authority Order No. 39, *supra* note 115, § 8.

141. *Amendment to the Company Law No. 21 of 1997*, Coalition Provisional Authority Order No. 64, CPA/ORD/29 February 2004/64 (Feb. 29, 2004), available at http://www.iraqcoalition.org/regulations/20040305_CPAORD64_Amendment_to_the_Company_Law_No._21_of_1997_with_Annex_A.pdf.

142. *Id.* § 1(14).

143. *Id.* pmbl.

144. *Facilitation of Court-Supervised Debt Resolution Procedures*, Coalition Provisional Authority Order No. 78, CPA/ORD/19 April 2004/78 (Apr. 19, 2004), available at <http://www.iraqcoalition.org>.

predictable mechanism for resolving burdensome indebtedness when incurred by businesses, . . . several provisions within Iraqi legislation call for unduly harsh punishments for financially distressed entrepreneurs.”¹⁴⁵ It therefore promulgated eighteen pages of amendments to four different Iraqi codes designed to ensure that “a trader and his creditors may resolve the trader’s indebtedness in a collective, transparent, and realistic manner.”¹⁴⁶

Intellectual property laws were also overhauled. The Iraqi Trademarks and Descriptions Law of 1957 was amended in part to facilitate Iraqi entry into the World Trade Organization.¹⁴⁷ The scope of the existing Patent and Industrial Design Law and Regulations was expanded and renamed the Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law.¹⁴⁸ The Copyright Law of 1971 was amended “to ensure that Iraqi copyright law meets current internationally-recognized standards of protection, and to incorporate the modern standards of the World Trade Organization into Iraqi law.”¹⁴⁹

e. *Securities Regulation and Trading*

Fifth, declaring that “Iraqi entrepreneurs and businesses will benefit from the revival of Iraq’s capital markets,” the CPA promulgated an

org/regulations/20040420_CPAORD_78_Facilitation_of_Court-Supervised_Debt_Resolutio_.pdf.

145. *Id.* pmb1.

146. *Id.* § 4(2) (amending the Code of Commerce, the Penal Code, the Enforcement Law, and the Civil Code).

147. *Amendment to the Trademarks and Descriptions Law No. 21 of 1957*, Coalition Provisional Authority Order No. 80, CPA/ORD/26 April 2004/80 (Apr. 26, 2004) (“[r]ecognizing 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, and the desirability of adopting modern intellectual property standards”), available at http://www.iraqcoalition.org/regulations/20040426_CPAORD_80_Amendment_to_the_Trademarks_and_Descriptions_Law_No._21_of_1957.pdf. This goal, phrased in verbatim language, is repeated in the preambles to the patent and copyright reform orders cited *infra*.

148. *Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law*, Coalition Provisional Authority Order No. 81, CPA/ORD/26 April 2004/81 (Apr. 26, 2004), available at http://www.iraqcoalition.org/regulations/20040426_CPAORD_81_Patents_Law.pdf.

149. *Amendment to the Copyright Law*, Coalition Provisional Authority Order No. 83, CPA/ORD/29 April 2004/83, § 1 (Apr. 29, 2004), available at http://www.iraqcoalition.org/regulations/20040501_CPAORD_83_Amendment_to_the_Copyright_Law.pdf.

Interim Law on Securities Markets.¹⁵⁰ As in other areas, the CPA sought to update existing law to reflect best international practices, observing that “some of the regulations concerning securities markets under the prior regime are not well-suited to a modern, efficient, transparent and independently regulated securities market.”¹⁵¹

The securities law did away with the existing Baghdad Stock Exchange and created a new Iraqi Stock Exchange.¹⁵² All government oversight was removed, as the Exchange was to be a “not-for-profit, member-owned and self-regulatory organization.”¹⁵³ Detailed standards were promulgated for listing traded companies, regulating trading, ensuring full disclosure of information about listed companies, regulating brokers, and other areas. To supervise the Exchange, an Interim Iraq Securities Commission was created.¹⁵⁴ The law made several references to an expected Permanent Securities Law but did not discuss its substance.

f. *Regulatory Reforms*

Sixth, CPA initiatives addressed a variety of social regulatory issues. One concerned the media. An Iraqi Communications and Media Commission was created to license and regulate all forms of media, including print, radio, and telecommunications.¹⁵⁵ The CPA declared a “modern and efficient” telecommunications system essential, among other things, to economic prosperity and in particular to attracting private investment in media.¹⁵⁶ It also sought to “encourage pluralism and diverse political debate” and to protect freedom of expression as defined by international standards.¹⁵⁷ The Commission was given wide regulatory authority, including the granting of broadcast licenses and “creating effective and mandatory Codes of Practice” for broadcast-

150. *Interim Law on Securities Markets*, Coalition Provisional Authority Order No. 18, CPA/ORD/18 April 2004/74, pmbl. (Apr. 18, 2004), available at http://www.iraqcoalition.org/regulations/20040419_CPAORD_74_Interim_Law_on_Securities_Markets_.pdf.

151. *Id.*

152. *Id.* § 2(1).

153. *Id.* § 2(3).

154. *Id.* § 12.

155. *Iraqi Communications and Media Commission*, Coalition Provisional Authority Order No. 65, CPA/ORD/20 March 2004/65 (Mar. 20, 2004), available at http://www.iraqcoalition.org/regulations/20040320_CPAORD65.pdf.

156. *Id.* pmbl.

157. *Id.*

ers.¹⁵⁸ A new Iraqi Media Network was to serve as the public service broadcaster for the nation.¹⁵⁹

In a wholly different sphere, the CPA promulgated a comprehensive traffic code. Previous Iraqi traffic laws were revoked. The new code included driving regulations, standards for licensing, and rules for pedestrian traffic.¹⁶⁰

g. *State-Owned Enterprises*

Early in the occupation, the CPA announced plans to begin privatizing Iraqi state-owned enterprises (SOEs).¹⁶¹ But a variety of circumstances—the difficulty of the task, the limited time available before the CPA ceased operations, opposition by Iraqi officials (including members of the Governing Council), and a fear of violence—led the CPA to abandon these efforts toward the end of 2003.¹⁶²

Instead, control over certain SOEs was transferred to Iraqi ministries, which, the CPA believed, would exercise more efficient control.¹⁶³ Once the transfer occurs, an SOE “shall no longer have a separate legal identity and shall cease to exist.”¹⁶⁴

158. *Id.* § 5(2).

159. *Iraqi Public Service Broadcasting*, Coalition Provisional Authority Order No. 66, CPA/ORD/20 March 2004/66, § 3 (Mar. 20, 2004), available at http://www.iraqcoalition.org/regulations/20040320_CPAORD66.pdf.

160. *Traffic Code*, Coalition Provisional Authority Order No. 86, CPA/ORD/19 May 2004/86 (May 19, 2004), available at http://www.iraqcoalition.org/regulations/20040520_CPAORD86_Traffic_Code_with_Annex_A.pdf.

161. Bremer Address, *supra* note 112; see also Charles Clover & Bob Sherwood, *Early Push for Sell-Off of Iraqi Companies*, FIN. TIMES, June 9, 2003, at 8.

162. See Bruce Stanley, *U.S. in No Rush to Privatize Iraq Oil*, THE STATE (Jan. 28, 2004), available at <http://www.thestate.com/mld/thestate/news/7813540.htm>; Rajiv Chandrasekaran, *Attacks Force Retreat from Wide-Ranging Plans for Iraq*, WASH. POST, Dec. 28, 2003, at A1.

163. *Consolidations of State-Owned Enterprises*, Coalition Provisional Authority Order No. 76, CPA/ORD/20 May 2004/76 (May 28, 2004), available at http://www.iraqcoalition.org/regulations/20040528_CPAORD_76_Consolidations_of_State-Owned_Enterprises_with_Annex_A.pdf. Some confusion exists here. Order No. 76 provided for the consolidation into various government ministries of SOEs listed on Annex A to the Order. But the Annex does not list the responsible ministries. *Id.* Annex A. A separate Order discusses the consolidation of SOEs engaged in military industrial production, but oddly does not explicitly order their transfer to ministerial oversight. *Realignment of Military Industrial Companies*, Coalition Provisional Authority Order No. 75, CPA/ORD/15 April 2004/75 (Apr. 20, 2004), available at http://www.iraqcoalition.org/regulations/20040420_CPAORD_75_Realignment_of_Military_Industrial_Companies_with_Annex_A.pdf. Its Annex A lists thirty-three military industrial enterprises to be consolidated into three different ministries. *Id.* Annex A.

164. Coalition Provisional Authority Order No. 76, *supra* note 163, § 4(1).

6. Good Government Reforms

In a final area of reform, the CPA sought to promote openness, honesty, and trust in government. In January 2004, it authorized the Governing Council to create the Iraqi Commission on Public Integrity, which was to issue and enforce a wide variety of anti-corruption and accountability measures.¹⁶⁵ The Commission was empowered to look into cases of official corruption dating back to July 17, 1968, and to present these to an investigative judge.¹⁶⁶ The Commission was also to promulgate revisions to the existing code of conduct for government employees and propose additional anti-corruption legislation.¹⁶⁷

The Commission was only one part of a new anti-corruption infrastructure. An April 2004 order wholly remade the existing Supreme Board of Audit as “a separate and independent government institution . . . empowered to enhance the economy, efficiency, effectiveness, and credibility of the Iraqi government.”¹⁶⁸ The CPA also created an Office of Inspector General within each Iraqi ministry.¹⁶⁹ The Inspectors were given broad auditing, investigatory, and reporting powers.¹⁷⁰ Another order granted protection to whistleblowers employed by the government or government contractors.¹⁷¹ Government contracts were to be awarded only after a “full, fair and open competitive public bidding process,” with standard provisions modeled on “accepted international standards and best practices.”¹⁷² Government ministers were prohibited from having financial interests in the outcome of government

165. *Delegation of Authority Regarding the Iraq Commission on Public Integrity*, Coalition Provisional Authority Order No. 55, CPA/ORD/27 January 2004/55, § 1 (Jan. 27, 2004), available at http://www.iraqcoalition.org/regulations/20040204_CPAORD55.pdf.

166. *Id.* annex, § 4(1).

167. *Id.* annex, § 4(7).

168. *Board of Supreme Audit*, Coalition Provisional Authority Order No. 77, CPA/ORD/18 April 2004/77, § 2(2) (Apr. 18, 2004), available at http://www.iraqcoalition.org/regulations/20040425_CPAORD_77_Board_of_Supreme_Audit.pdf.

169. *Iraqi Inspectors General*, Coalition Provisional Authority Order No. 57, CPA/ORD/5 February 2004/57, § 2(1) (Feb. 5, 2004), available at http://www.iraqcoalition.org/regulations/20040212_CPAORD57.pdf.

170. *Id.* §§ 5-6.

171. *See Protection and Fair Incentives for Government Whistleblowers*, Coalition Provisional Authority Order No. 59, CPA/ORD/1 June 2004/59 (June 1, 2004), available at http://www.iraqcoalition.org/regulations/20040601_CPAORD59_Protection_and_Fair_Incentives_for_Government_Whistleblowers.pdf.

172. *Public Contracts*, Coalition Provisional Authority Order No. 87, CPA/ORD/14 May 2004/87, §§ 1(1)(a), 6(2) (May 14, 2004), available at http://www.iraqcoalition.org/regulations/20040516_CPAORD_87_Public_Contracts.pdf.

tenders.¹⁷³ And a Financial Management and Public Debt Law sought to standardize the design of federal budgets, increase transparency in the budgeting process, and adopt a “fiscal and budgetary policy in line with international best practices.”¹⁷⁴

Reaching beyond official misconduct, the CPA issued an Anti-Money Laundering Act.¹⁷⁵ It targeted funds involved in unlawful activity generally and terrorist financing in particular.¹⁷⁶ The Iraqi Central Bank was to supervise compliance with the Act.¹⁷⁷

CPA officials often described the virtues of governmental decentralization in Iraq. The autonomy granted to Kurdish regions in the Transitional Administrative Law is the most prominent example of this policy.¹⁷⁸ During the occupation, the CPA also worked to diffuse power downward in the rest of the country. It described its work in Baghdad as “illustrative”:

In each of Baghdad’s 88 neighborhoods, citizens have freely selected representatives for local governing councils. They, in turn, choose members of 9 District Councils and a 37-member City Council. All told, over 800 democratically selected Council Members are now hard at work serving their fellow citizens. They include Sunnis, Shias, and Christians, Arabs and Kurds—and more than 75 women.¹⁷⁹

The TAL also affirmed that during the transition period (and likely beyond) Iraq would function as a federal state.¹⁸⁰ In order to give

173. See *id.* § 8(2).

174. *Financial Management Law and Public Debt Law*, Coalition Provisional Authority Order No. 95, CPA/ORD/2 June 2004/95, § 1(1) (June 2, 2004), available at http://www.iraqcoalition.org/regulations/20040604_CPAORD_95_Financial_Management_Law_and_Public_Debt_Law_with_Annex_A_and_B.pdf.

175. *Anti-Money Laundering Act of 2004*, Coalition Provisional Authority Order No. 93, CPA/ORD/2 June 2004/93 (June 3, 2004), available at http://www.iraqcoalition.org/regulations/20040603_CPAORD_93_Anti-Money_Laundering_Act_of_2004_with_Annex.pdf.

176. See *id.* Annex A, art. 4.

177. See *id.* Annex A, art. 7.

178. TAL, *supra* note 82, arts. 53-54.

179. Coalition Provisional Authority, *Representative Government at the Local Level*, at http://iraqcoalition.org/government/local_level.html (last visited Jan. 19, 2005).

180. Article 4 of the TAL provided:

The system of government in Iraq shall be republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations. The

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substance to the federal structures, the CPA issued an order on Local Governmental Powers,¹⁸¹ which delineated the structure of local entities and their relations to each other. All inconsistent Iraqi law was suspended.¹⁸² However, the order did not describe the extent to which the new structures reform existing local entities or create wholly new ones.

C. *The Transition to Iraqi Rule*

With many (if not most) Security Council members opposed to the Iraq intervention from the start, the Council began calling for a swift hand-over of authority to an Iraqi government almost immediately after the occupation began.¹⁸³ In July 2003, the SRSG reported an “overwhelming demand” by Iraqis for “the early restoration of sovereignty.”¹⁸⁴ Accordingly, on October 16, 2003, the Security Council requested the Governing Council and the occupying powers to provide a timetable for drafting a new constitution and holding democratic elections no later than December 15, 2003.¹⁸⁵

On November 15, 2003, the CPA and the Governing Council announced agreement on a transitional process.¹⁸⁶ It called for a Transitional National Assembly to be selected by local caucuses by May 31, 2004, and for the Assembly to assume full sovereign power in Iraq by June 30. At that point both the Governing Council and the CPA would be dissolved. The Assembly would govern pursuant to a Transitional Administrative Law to be drafted by the Governing Council by the end of February 2004. A permanent constitution would be written by a

federal system shall be based upon geographic and historical realities and the separation of powers, and not upon origin, race, ethnicity, nationality, or confession.

TAL, *supra* note 82, art. 4.

181. *Local Government Powers*, Coalition Provisional Authority Order No. 71, CPA/ORD/6 April 2004/71 (Apr. 6, 2004), available at http://www.iraqcoalition.org/regulations/20040406_CPAORD_71_Local_Governmental_Powers_.pdf.

182. *See id.* § 8(1).

183. *See, e.g.*, S.C. Res. 1483, *supra* note 25, pmbl. (“expressing resolve that the day when Iraqis govern themselves must come quickly”); *id.* ¶ 8(c) (Secretary-General requested to assist Iraqi people in “working together to facilitate a process leading to an internationally recognized, representative government of Iraq”).

184. SG July Report, *supra* note 35, ¶ 11.

185. S.C. Res. 1511, *supra* note 39, ¶ 7.

186. Coalition Provisional Authority & Iraqi Governing Council, *The November 15 Agreement: Timeline to a Sovereign, Democratic and Secure Iraq* [hereinafter *November 15 Agreement*], at <http://www.iraqcoalition.org/government/AgreementNov15.pdf> (last visited Jan. 19, 2005).

constitutional convention to be elected by March 15, 2005, and subsequently put to a popular referendum. Elections under the new constitution would be held by December 31, 2005. The Transitional Administrative Law would then expire.¹⁸⁷

The caucus plan for selecting the Transitional Assembly proved unpopular with certain powerful Iraqis.¹⁸⁸ A proposed alternative was direct elections for the Assembly. In late February 2004, however, a U.N. fact-finding team reported that elections before June 30 were not feasible and that an alternative method of transferring control to Iraqis by June 30 needed to be found.¹⁸⁹ The Secretary-General dispatched Lakhdar Brahimi as his special envoy to consult with Iraqi leaders and explore the alternatives.¹⁹⁰ At the same time, preparations for the June 30 hand-over continued. On March 8, the Governing Council approved the TAL, which reaffirmed the hand-over date.¹⁹¹ The TAL provided that it would remain in force until a permanent constitution was approved, which was to coincide with the holding of nation-wide elections no later than January 31, 2005.¹⁹²

Brahimi ultimately proposed that elections for the Transitional Assembly be postponed until the end of 2004.¹⁹³ Meanwhile, an interim provisional government would be selected to run the country until those elections.¹⁹⁴ Events on the ground proceeded along these lines, with an Iraqi Interim Government being named on June 1, 2004.¹⁹⁵ On June 7, in Resolution 1546, the Security Council endorsed both this government and Brahimi's timetable for going forward, adding that the Transitional Assembly would be responsible for draft-

187. *Id.*

188. See Larry Diamond, *What Went Wrong in Iraq*, FOREIGN AFF., Sept./Oct. 2004, at 34, 48, available at <http://www.foreignaffairs.org/20040901faessay83505/larry-diamond/what-went-wrong-in-iraq.html>; International Crisis Group Middle East Report No. 27, *Iraq's Transition: On a Knife Edge* 3 (Apr. 27, 2004), available at http://www.icg.org/library/documents/middle_east_north_africa/iraq_iran_gulf/27_iraq_transition_on_a_knife_edge.pdf.

189. *The Political Transition in Iraq: Report of the Fact-Finding Mission*, U.N. SCOR, 59th Sess., Annex, at 12, U.N. Doc. S/2004/140 (2004).

190. *Id.* at 1.

191. *Letter Dated 17 March 2004 from the Interim President of the Iraqi Governing Council Addressed to the Secretary-General*, U.N. SCOR, 59th Sess., Annex II, at 3, U.N. Doc. S/2004/225 (2004) (noting TAL approval).

192. TAL, *supra* note 82, art. 2.

193. *The Political Transition in Iraq*, *supra* note 189, at 12.

194. *Id.* at 13.

195. ADAM ROBERTS, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, *THE END OF OCCUPATION IN IRAQ* 10 (2004), available at <http://www.ihlresearch.org/iraq/feature.php?a=51>.

ing a permanent constitution and that elections for a constitutionally elected government would take place by December 31, 2005.¹⁹⁶ Although Resolution 1546 endorsed the process by which the Interim Government was created, it failed to mention (and thus specifically endorse) the TAL, an integral component of that process.¹⁹⁷ The Council declared 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.”¹⁹⁸ On June 28, two days earlier than planned, CPA Administrator Bremer formally transferred political authority to the Interim Government and left the country.¹⁹⁹

However, the CPA did not intend that its dissolution would also cause its many legislative actions to lapse. To the contrary, just before its demise it took two steps to ensure that those enactments would remain valid after the occupation had ended.²⁰⁰ First, the TAL provided that all the laws enacted by the CPA would “remain in force until rescinded or amended by legislation duly enacted and having the force of law.”²⁰¹ CPA legislation would thus continue in force unless the new government chose to opt out.

Second, in the run-up to the June 28 hand-over, the CPA issued a number of orders specifically addressed to the post-occupation period. Many concerned the transitional political process, including an electoral law, a political parties law, an order disqualifying certain persons from running for or holding public office, and an order creating an independent electoral commission.²⁰² A CPA regulation also desig-

196. S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg. at 3, U.N. Doc. S/RES/1546 (2004).

197. Some claim that the lack of a Council endorsement meant the TAL never entered into force. See Peter W. Galbraith, *Iraq: The Bungled Transition*, N.Y. REV. BOOKS, Sept. 23, 2004, at 70, 71.

198. S.C. Res. 1546, *supra* note 196, at 2.

199. See Rajiv Chandrasekaran, *U.S. Hands Authority to Iraq Two Days Early*, WASH. POST, June 29, 2004, at A1.

200. For a general discussion of the end of the occupation, see ROBERTS, *supra* note 195.

201. TAL, *supra* note 82, art. 26(C).

202. See *Disqualification from Public Office*, Coalition Provisional Authority Order No. 62, CPA/ORD 26 February 2004/62 (Feb. 26, 2004), available at http://www.iraqcoalition.org/regulations/20040301_CPAORD62.pdf; *The Independent Electoral Commission of Iraq*, Coalition Provisional Authority Order No. 92, CPA/ORD/31 May 2004/92 (May 31, 2004), available at http://www.iraqcoalition.org/regulations/20040531_CPAORD_92_Independent_Electoral_commission_of_Iraq.pdf;

Political Parties and Entities Law, Coalition Provisional Authority Order No. 97, CPA/ORD/7 June 2004/97 (June 7, 2004), available at http://www.iraqcoalition.org/regulations/20040615_CPAORD_97_Political_Parties_and_Entities_Law.pdf; *The Electoral Law*, Coalition Provisional Authority Order No. 96, CPA/ORD/7 June 2004/96 (June 7, 2004), available at http://www.iraqcoalition.org/regulations/20040615_CPAORD_96_The_Electoral_Law.pdf.

nated the thirty-six members of the Iraqi Interim Government.²⁰³ Another order created a Joint Detainee Committee to coordinate detention policy between the Interim Government and the U.S.-U.K. multinational force that would remain in Iraq after the occupation.²⁰⁴ And a comprehensive omnibus order amended many of the CPA's legislative instruments to substitute the names of the interim Iraqi authorities for the CPA and occupation officials.²⁰⁵ The CPA described this order as "facilitat[ing] the continuity of Iraqi law,"²⁰⁶ though the order was limited to law *it* had created, amended, and liberally re-shaped during the course of the occupation.

III. LEGAL IMPEDIMENTS TO A REFORMIST OCCUPATION

A. *The Law of Occupation*

The CPA's reforms are to be evaluated by the international law of occupation. Occupation law emerged in the late eighteenth century as a humanizing trend in the law of war, modifying a state's previously unencumbered right to subjugate conquered foreign territories.²⁰⁷ Whereas states had traditionally claimed an almost absolute entitlement to the spoils of conquest, writers such as Vattel began to suggest that because sovereignty over territory acquired in war was not final until the execution of a peace treaty, a conquering power ought not to exercise full dominion until its territorial rights had been formalized.²⁰⁸ Holding full sovereignty in abeyance would withhold the right to subjugate until the occupier had perfected its rights. Early articulations of occupation rules in the nineteenth century gave detail to the

203. See *Members of Designated Iraqi Interim Government*, Coalition Provisional Authority Regulation No. 10, CPA/REG/9 June 2004/10, Annex A (June 9, 2004), available at http://www.iraqcoalition.org/regulations/20040609_CPAREG_10_Members_of_Designated_Iraqi_Interim_Government_with_Annex_A.pdf.

204. See *Joint Detainee Committee*, Coalition Provisional Authority Order No. 99, CPA/ORD/27 June 2004/99 (June 27, 2004), available at http://www.iraqcoalition.org/regulations/20040627_CPAORD_99_Joint_Detainee_Committee.pdf.

205. See *Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority*, Coalition Provisional Authority Order No. 100, CPA/ORD/28 June 2004/100, § 1 (June 28, 2004), available at http://www.iraqcoalition.org/regulations/20040628_CPAORD_100_Transition_of_Laws_Regulations_Orders_and_Directives.pdf.

206. *Id.* pmbl.

207. See generally OPPENHEIM'S INTERNATIONAL LAW 432-33 (H. Lauterpacht ed., 7th ed. 1952).

208. E. DE VATTEL, 3 THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 386, §§ 197-198 (Joseph Chitty ed., T. & J.W. Johnson 1852) (1758).

principle that “belligerent occupation is in essence a temporary condition in which the powers of the belligerent occupant are not without limit.”²⁰⁹ As John Marshall wrote in 1828, “the usage of the world is, if a nation be not entirely subdued to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace.”²¹⁰ In the early codifications, occupiers were thus prohibited from engaging in certain government activities deemed the legitimate prerogatives of the then-still *de jure* sovereign regime.²¹¹

There was a peculiar quality to these early norms. Because international law of the time did not prohibit conquest itself—the use of force being understood as a legitimate tool of statecraft²¹²—one would assume an occupying power could step automatically into the shoes of the ousted regime and act as if the conquered territory was its own. One reason why limits nevertheless appeared in all the early codifications was that the assumption of rights over conquered territory was often brutal and punitive—“rape and pillage” being the harsh but common consequence of foreign control over territory.²¹³ With the rise of standing armies and more standardized codes of conduct in the nineteenth century, efforts were made to restrain these excesses of conquest. Rigid notions of a sovereign’s prerogatives ruled out the more obvious ways of restraining brutal occupations—endowing the inhabitants of an occupied territory with human rights against the occupier or limiting states’ ability to go to war (and thereafter occupy)

209. Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT’L L.J. 65, 87 (2003); see also SHARON KORMAN, *THE RIGHT OF CONQUEST* 109-11 (1996).

210. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828).

211. See *The Lieber Code: Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War*, arts. 31-47 (1863), reprinted in 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 158, 164-67 (Leon Friedman ed., 1972); *Declaration of Brussels*, arts. 1-8 (1874), reprinted in *THE LAW OF WAR*, *supra*, at 194-96.

212. See generally KORMAN, *supra* note 209, at 94-131.

213. See THE RIGHT HON. EARL OF BIRKENHEAD, *INTERNATIONAL LAW* 253 (Ron W. Moelyn-Hughes ed., 6th ed. 1927). As Oppenheim recounts,

[i]n former times, enemy territory occupied by a belligerent was in every point considered his State property, so that he could do what he liked with it and its inhabitants. He could devastate the country with fire and sword, appropriate all public and private property therein, and kill the inhabitants, or take them away into captivity, or make them take an oath of allegiance. He could, even before the war was decided, and his occupation was definitive, dispose of the territory by ceding it to a third State.

L. OPPENHEIM, 2 *INTERNATIONAL LAW* 294 (Arnold D. McNair ed., 4th ed. 1926).

in the first place. The former was unthinkable in an era in which only states enjoyed international personality. And the latter would not enter international law until after the First World War.

Occupation law thus represented a more limited and indirect way of preserving the *status quo ante bellum* in the territory. Despite their limited reach, restraints on an occupier's powers did involve international law stepping in to fill a vacuum of responsibility; the ousted sovereign had no ability to protect the local population and the occupier, if it did not intend to remain in the territory, had no interest in doing so. The maturing international legal system of the nineteenth century could slowly begin to require formal indicia of authority before the full rights of sovereignty would vest in an occupier.²¹⁴

The international law of occupation evolved throughout the nineteenth century and, after several early efforts, became codified in the 1907 Hague Regulations on Land Warfare.²¹⁵ In the aftermath of World War II and the brutal Nazi and Japanese occupations, "Hague law" was substantially expanded upon in "Geneva law"—the Fourth Geneva Convention of 1949.²¹⁶ Today, Hague and Geneva law are widely recognized as norms of international custom, binding even on states not parties to the treaties.²¹⁷

Yet despite occupation law's long pedigree and extensive delineation in two widely subscribed treaties, Iraq is one of the few cases of the post-WWII era in which a state has acknowledged its status as an "occupying power."²¹⁸ Many states during this period, of course, have exercised effective control over foreign territories,²¹⁹ thus bringing

214. KORMAN, *supra* note 209, at 110-11.

215. Hague Regulations, *supra* note 10.

216. Fourth Geneva Convention, *supra* note 11.

217. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 257, ¶ 79 (July 8) [hereinafter *Nuclear Weapons Advisory Opinion*] ("[T]hese fundamental rules [of Hague and Geneva law] 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."); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ¶ 89 (July 9, 2004) [hereinafter *Legal Consequences of the Construction of a Wall*] (holding Hague law applicable to Israeli conduct in occupied territories even though Israel is not a party to Hague Convention), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

218. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 6 (1993) ("[M]ost contemporary occupants ignored their status and their duties under the law of occupation."); cf. Adam Roberts, *What Is a Military Occupation?*, 1984 BRIT. Y.B. INT'L L. 249, 301 (1984) ("Parties involved—especially those on the side of the intervening forces—are often and understandably reluctant to use the word 'occupation' at all.").

219. Post-WWII examples include Turkey in Cyprus, Morocco in the Western Sahara, Vietnam in Cambodia, South Africa in Namibia, and Iraq in Kuwait.

them within the pragmatic definition of an "occupier" contained in the Hague Regulations: "Territory . . . is considered occupied when it is actually placed under the authority of the hostile army."²²⁰ The Israeli occupation of Palestinian territory is one of the few cases acknowledged by the international community, though not by Israel itself.²²¹ The myriad obligations imposed by occupation law have led states to make a variety of arguments as to why their administrations of foreign territory fall outside the Hague and Geneva regimes.²²² Even the U.N. Security Council has been unwilling to elaborate on the legal obligations of occupying powers, with the exceptions of Israel in the Palestinian territories and the U.S.-led coalition in Iraq.²²³

One consequence of these few acknowledged occupations is a lack of state practice that might give depth and nuance to often spare treaty provisions and assess their relation to cognate bodies of international law. As will be discussed, there seems a natural affinity between occupation law and the contemporary legal regimes of human rights, self-determination, and the use of military force. Yet state practice in which these separate sets of norms might be assessed together is almost wholly absent. Scholarly commentary is also sparse. While there was no shortage of analyses following the two world wars, only one book has comprehensively addressed the state of occupation law in the last thirty-five years.²²⁴ Since the other areas of international law relevant to an occupier's duties have changed dramatically during this period, older accounts are of limited utility on some questions.

There is another source of law, however, usefully combining the active element of practice with the reflective detachment of legal commentary, that has been notably missing from most considerations of occupation law. This is the national military manual, issued by states

220. Hague Regulations, *supra* note 10, art. 42; *see generally* JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 695-97 (1954).

221. *See infra* text accompanying notes 260-64 (discussing Israeli occupation).

222. *See* Roberts, *supra* note 218, at 301.

223. *See infra* note 264 (discussing resolutions on Israel). In two resolutions, the Council demanded that Iraq comply with the Fourth Geneva Convention in its occupation of Kuwait, though because Iraq had declared the country annexed the main focus of the Council's concern was on its removal. *See* S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/RES/674 (1990); S.C. Res. 666, U.N. SCOR, 45th Sess., 2939th mtg., U.N. Doc. S/RES/666 (1990). The Council passed a number of resolutions on other aspects of the Moroccan occupation of the Western Sahara and the Indonesian occupation of East Timor but made no references to duties under occupation law. *Cf.* BENVENISTI, *supra* note 218, at 151-54.

224. The book is Benvenisti's, *supra* note 218. Others have addressed specific occupations or a narrow subset of occupation law.

to guide their own armed forces' conduct. Military manuals, often drafted with the assistance of prominent scholars, have played an important role in diffusing and explicating international humanitarian law.²²⁵ They have also served as direct *sources* of law.²²⁶ A number of manuals build directly on Hague and Geneva norms in describing the proper conduct of occupiers. In the analysis that follows, these national understandings of international obligations will become central to understanding the law applicable to CPA reforms.

B. *The United States and the United Kingdom as Occupying Powers*

There is little question that the United States and United Kingdom qualified as "occupying powers" in Iraq. Their instrument of authority, the CPA, described itself as exercising the "powers of government" in the country.²²⁷ As we have seen, it used these powers energetically. While pockets of resistance remained throughout the CPA's tenure, no serious competitors existed to its overall exercise of authority.²²⁸ As a result, the effective control test for the existence of an occupation was met—a test that turns not on legal formalities (such as declarations of occupation or their recognition by third states), but on pragmatic indicia of actual control.²²⁹ In political settings the United States strove mightily to describe itself as a "liberator" rather than an occupier.²³⁰ But the following survey of formal statements by all relevant actors makes clear that this distinction carried little weight as a legal claim.

225. See, e.g., Colloquium, *National Implementation of International Humanitarian Law: Proceedings of an International Colloquium at Bad Homburg, June 17-19, 1998*, at 215 (Michael Bothe ed., 1990); W. Michael Reisman & William K. Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, in 64 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 1, 4-7 (Horace B. Robertson, Jr. ed., 1991) (describing the role of manuals in the transmission of law).

226. The Yugoslav Tribunal has regularly cited national military manuals as evidence of customary international law. See *Prosecutor v. Galić*, Case No. IT-98-29, ¶ 31 n.50 (2003), available at <http://www.un.org/icty/galic/trialc/judgement/gal-tj031205e.pdf>.

227. See Coalition Provisional Authority Regulation No. 1, *supra* note 28.

228. Cf. BRITISH COMMAND OF THE ARMY COUNCIL, *MANUAL OF MILITARY LAW, THE LAW OF WAR ON LAND* 142, ¶ 509 (1958) [hereinafter *THE LAW OF WAR ON LAND*] ("Occupation does not become invalid because some of the inhabitants are in a state of rebellion, or through occasional successes of guerilla bands or 'resistance' fighters."); L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 248 (1993) ("[T]he presence of isolated areas in which that authority [of the ousted regime] is still functioning does not affect the reality of the occupation if those areas are effectively cut off from the rest of the occupied territory.").

229. See *Hague Regulations*, *supra* note 10, art. 42 ("Territory is considered occupied when it is actually placed under the authority of the hostile army.").

230. See sources cited *supra* note 7.

In the period surrounding the onset of war in March 2003, many states made clear in Security Council debates that they expected the United States and the United Kingdom to abide by Geneva law.²³¹ Even the Secretary-General supported this view.²³² Accordingly, on March 28, in the midst of the war, the Security Council, acting under Chapter VII of the Charter, passed Resolution 1472, in which it “requested[ed] all parties concerned to strictly abide by their obligations under international law, in particular the Geneva Conventions and the Hague Regulations.”²³³ On May 8, less than one month after the end of hostilities, the United States and the United Kingdom informed the Security Council of their intention to “strictly abide by their obligations under international law.”²³⁴ On May 22, the Council set out the terms of Iraq’s post-war administration in Resolution 1483, in which it “[called] 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.”²³⁵ On May 19, 2004, the United States acknowledged to the Security Council that “United States forces in Iraq are required to operate in accordance with the Geneva Conventions, and this is an obligation we take very seriously.”²³⁶

While none of these statements explicitly acknowledged the existence of an occupation—again, surely the result of political considerations—the references to applicable humanitarian law could mean little else. Clarity finally emerged at the end of CPA rule. On June 8, 2004, the Council declared that the formation of an interim Iraqi Government meant “the occupation will end.”²³⁷ The United States

231. See U.N. SCOR, 58th Sess., 4726th mtg., U.N. Doc. S/PV.4726 (2003); U.N. SCOR, 58th Sess., 4726th mtg., Resumption 1, U.N. Doc. S/PV.4726 (2003); U.N. SCOR, 58th Sess., 4732d mtg., U.N. Doc. S/PV.4732 (2003).

232. U.N. Doc. S/PV.4726, *supra* note 231, at 3:

I would recall in particular the provisions of the Fourth Geneva Convention, under which those in effective control of any territory are responsible for meeting the humanitarian needs of its population and are required to maintain dialogue and cooperation with international organizations engaged in humanitarian relief. No one, on either side, must obstruct that relief.

233. S.C. Res. 1472, U.N. SCOR, 58th Sess., 4732d mtg. ¶ 1, U.N. Doc. S/RES/1472 (2003).

234. *Letter from the United Kingdom and the United States to the Security Council*, *supra* note 23.

235. S.C. Res. 1483, *supra* note 25, ¶ 5.

236. U.N. SCOR, 59th Sess., 4971st mtg. at 2, U.N. Doc. S/PV.4971 (2004) (statement of U.S. Ambassador Cunningham).

237. S.C. Res. 1546, *supra* note 196, ¶ 2.

acceded to this view.²³⁸ In sum, there was no evident disagreement with the legal conclusion that for the fourteen months during which the United States and the United Kingdom were the only effective political and military authorities in Iraq, they were occupying powers subject to the requirements of Hague and Geneva Law.

C. *The Prohibition Against Altering Legal and Political Institutions in the Occupied Territory: The Conservationist Principle*

Occupation law posed a direct challenge to the CPA's reformist agenda in Iraq. Occupiers, as temporary de facto powers, are prohibited from making wholesale changes to the legal and political institutions of the occupied state. Yet one of the oft-stated purposes of the Iraqi occupation was to remake those institutions according to liberal, democratic, and free market principles. Traditional law views occupiers as trustees, preserving the *status quo ante bellum*. The Iraqi occupiers, by contrast, were agents of political and social change. Can the two co-exist?

When the law of war coalesced in the nineteenth century, there were few reasons why a temporary occupying power would seek to intervene in daily life in the territory, apart from reasons of security. Warfare was mostly a matter for professional armies, and the European monarchical states of the time played only a minimal role in the economic lives of their own citizens.²³⁹ This essential commonality of interests among the dominant states provided few incentives to treat occupation as an opportunity for social engineering.²⁴⁰ Eyal Benvenisti aptly describes the consequences of this separation of the public sphere of war from the private sphere of everyday life under occupation:

The separation of interests provided room for a simple balancing principle of disengagement: the occupant had no interest in the laws of the area under its control except for the security of its troops and the maintenance of order; the ousted sovereign was ready to concede this much in order to ensure maintenance of its bases of power in the territory against

238. U.N. Doc. S/PV.4971, *supra* note 236, at 2 (U.S. Ambassador Cunningham states, "On 30 June, the Coalition Provisional Authority and the framework of occupation recognized and established under Resolution 1483 (2003) will come to an end.").

239. BENVENISTI, *supra* note 218, at 26-27; Davis P. Goodman, Note, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1591 (1985).

240. See KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 123-24 (1968).

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competing internal forces and in order to guarantee the humane treatment of its citizens. This solution was not only well founded in theory; it was supported by the practice of the nineteenth-century occupations. These occupations were of relatively short duration, during which occupants, by and large, retained existing legislation as much as possible.²⁴¹

The final codifications of occupation law adhered to this minimalist conception of the occupier's role. The 1907 Hague Regulations provide in article 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 [civil life], while respecting, *unless absolutely prevented*, the laws in force in the country.²⁴²

The Fourth Geneva Convention of 1949 built upon article 43 in its article 64:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or adminis-

241. BENVENISTI, *supra* note 218, at 28.

242. Hague Regulations, *supra* note 10, art. 43 (emphasis added). The original French text called for the protection of "*l'ordre et la vie publique*." For reasons that are unclear, the English translation still in use today reads "*vie publique*" as "public safety." This is simply incorrect. See Edmund H. Schwenk, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 YALE L.J. 393 n.1 (1945).

tration, and likewise of the establishments and lines of communication used by them.²⁴³

These central treaty pillars of occupation law impose two primary obligations on occupying powers. The first is that they not acquire (or attempt to acquire) sovereignty over the territory. An assertion of *de jure* authority through annexation is fundamentally at odds with the temporary nature of occupation.²⁴⁴ There has been no challenge to this principle in Iraq, as the Security Council consistently reaffirmed the “sovereignty and territorial integrity of Iraq”²⁴⁵ and, in the November 15 Agreement, the CPA negotiated a timetable for its own dissolution.²⁴⁶

The second obligation is to leave the legal and political structures of the occupied territory intact. Article 43 of the Hague Regulations requires occupiers to respect laws in force “unless absolutely prevented” from doing so.²⁴⁷ The Fourth Geneva Convention focuses specifically on the continuity of penal laws.²⁴⁸ This is the conservationist principle. The principle flows naturally from the prohibition on annexation, as “[t]he powers of occupation authorities are limited precisely by the presumed temporary nature of the occupation regime and in particular by the need to avert creeping annexation through the

243. Fourth Geneva Convention, *supra* note 11, art. 64. According to authoritative commentary by the International Committee of the Red Cross, article 64 merely sets out, “in a more precise and detailed form, the terms of Article 43 of the Hague Regulations, which lays down that the Occupying Power is to respect the laws in force in the country ‘unless absolutely prevented’.” INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 335 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) [hereinafter PICTET].

244. PICTET, *supra* note 243, at 275 (“[T]he occupation of territory in wartime is essentially a temporary, *de facto* situation, which deprives the occupied Power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights.”). One might argue that even in 1949, when the Fourth Geneva Convention was drafted, this requirement was redundant in light of the U.N. Charter’s general prohibition on the annexation of another state’s territory. U.N. CHARTER art. 2, para. 4. The prohibition retains utility, however, since annexations may not be sudden and forceful but rather may be accomplished through a slow accretion of regulatory control over life in a territory. The Fourth Geneva Convention makes clear that legislative activity of this kind also cannot create title to occupied territory. *See generally* Fourth Geneva Convention, *supra* note 11.

245. *See* S.C. Res. 1511, *supra* note 39, ¶ 1; S.C. Res. 1500, *supra* note 38, pmbl; S.C. Res. 1483, *supra* note 25, pmbl.

246. *See November 15 Agreement*, *supra* note 186.

247. Hague Regulations, *supra* note 10, art. 43.

248. Fourth Geneva Convention, *supra* note 11, art. 64.

imposition of the legal regime and administrative structure of the enemy power.”²⁴⁹ The occupier thus assumes only as much of the displaced sovereign’s authority as is necessary to administer the territory, but no more.²⁵⁰ General legislative competence remains with the displaced regime as the continuing *de jure* authority over the territory.²⁵¹ Thus, “[g]enerally speaking, the occupant is not entitled to alter the existing form of government, to upset the constitution and domestic laws of the occupied territory, or to set aside the rights of the inhabitants.”²⁵² The legitimate sphere of an occupier’s concern, in other words, is limited to pragmatic tasks of orderly administration.²⁵³

Both Geneva Convention article 64 and Hague Regulations article 43 provide limited exceptions to the conservationist principle when required by military necessity.²⁵⁴ These generally arise from security concerns and involve the preservation of public order and implementation of other obligations under the Convention. Although such mea-

249. HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 283 (1992).

250. In the words of the U.S. Army Field Manual:

Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order.

U.S. ARMY FIELD MANUAL NO. 27-10, *THE LAW OF LAND WARFARE* ¶ 358 (1956) [hereinafter *THE LAW OF LAND WARFARE*].

251. See NEW ZEALAND DEFENCE FORCE, *INTERIM LAW OF ARMED CONFLICT MANUAL* 13-7, ¶ 1304(1) (1992) (“The authority of the Occupying Power is of a provisional nature and it should only take measures which are necessary for the purposes of the war, the maintenance of order and safety, and the proper administration of the occupied territory.”).

252. CANADIAN OFFICE OF THE JUDGE ADVOCATE GENERAL, *LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS* 12-2, ¶ 1205 (2001) [hereinafter *LAW OF ARMED CONFLICT*]; see also *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 254 (Dieter Fleck ed., 1995) (Commentary on regulations for German armed forces, developed through collaboration between scholars and German Government, provides, “The authority to pass laws is unquestionably an attribute of sovereignty. Thus the lawful authorities alone—even if absent from the country and in exile—can make laws for the occupied territory.”).

253. THE JUDGE ADVOCATE GENERAL’S SCHOOL, *LAW OF BELLIGERENT OCCUPATION* 37 (1944) (“The supreme authority of the occupant is not sovereignty and, therefore, he has no right to make changes in institutions, laws, or administration other than those which are demanded by military necessity or public order and safety.”).

254. See, e.g., VON GLAHN, *supra* note 12, at 139-41 (discussing censorship, control of public meetings, travel restrictions, limits on private ownership of munitions, and other actions as justified by needs of orderly administration).

asures may substantially alter daily life in the occupied territory—for example, by suspending civil liberties such as freedom of speech and assembly, or prohibiting the carrying of firearms—these can only be justified by the limited objectives of military necessity.²⁵⁵ Others may arise from the simple fact that an occupier cannot centrally administer the many facets of a complex modern society without asserting some form of centralized control.

Such legitimate objectives do not encompass subjective views on the part of the occupier that politics in the territory ought to be different. The preeminent goal of traditional occupation law is not justice but peace: “[t]he law of belligerent occupation is an attempt to substitute for chaos some kind of order, however harsh it may be.”²⁵⁶ It is true that the Fourth Geneva Convention affords many rights to inhabitants of occupied territories and that these may not be transgressed by an occupant in the name of imposing order.²⁵⁷ Indeed, if an occupier complies fully with all the rights-protective provisions of Geneva law, the newly established order may result in human rights conditions that substantially improve on those existing under the ousted *de jure* regime.²⁵⁸ But order is to be achieved for its own sake, not for the purpose of introducing new political institutions.²⁵⁹

The one case where international actors have consistently reviewed legislative changes by an occupying power is the Israeli occupation of Palestinian territories.²⁶⁰ One might argue that certain early administra-

255. Cf. MCCOUBREY & WHITE, *supra* note 249, at 342-43.

256. LORD MCNAIR & A.D. WATTS, *THE LEGAL EFFECTS OF WAR* 371 (1966).

257. Under the Fourth Geneva Convention, the rights include protections from discrimination (art. 27), impositions on honor and dignity (art. 27), physical or moral coercion (art. 31), physical suffering (art. 32), collective punishments (art. 33), intimidation, retribution, the taking of hostages or pillage (arts. 33-34), mass or individual forced transfers (art. 49), compulsion to serve in the occupant's armed forces (art. 51), destruction of personal property (art. 53), altering the status of judges or other public officials (art. 54), infringements on the free exercise of religion (art. 58), executing those under eighteen years old (art. 68), *ex post facto* prosecutions (art. 70), infringements on due process protections in criminal proceedings (art. 71), and inhumane conditions for detainees (art. 76). Fourth Geneva Convention, *supra* note 11, arts. 27, 31-34, 49, 51, 53, 54, 58, 68, 70, 71, 76.

258. PICTET, *supra* note 243, at 274.

259. MCCOUBREY & WHITE, *supra* note 249, at 283 (“It was certainly the intention of those who framed the Hague Convention that the occupier's law-making powers could be exercised only where it was a matter of military necessity that they should and not merely where the occupier considered it expedient to do so.”) (quoting P. ROWE, *DEFENCE: THE LEGAL IMPLICATIONS* 184 (1987)).

260. Israeli violations of occupation law were largely the focus of the ICJ's security wall advisory opinion. *See* *Legal Consequences of the Construction of a Wall*, *supra* note 217; *see also*

tive changes in the territories were similar to many of the CPA reforms in that they were made in the best interests of the local population; they included the alteration of taxation methods, abolition of the death penalty, and changes in labor laws.²⁶¹ The Israeli Supreme Court has upheld many such acts, in one case interpreting article 43 of the Hague Regulations to impose only a "duty to act as a proper government that looks after the local population in all fields of life."²⁶² One author has described this as the "benevolent occupation" approach.²⁶³ Nonetheless, the Security Council has unequivocally condemned Israel's introduction of its own laws into the territories and affirmed the application of the Fourth Geneva Convention to its actions.²⁶⁴

On this view of Hague and Geneva law, the conservationist principle

Richard A. Falk & Burns H. Weston, Debate, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129 (1991); Ayelet Levy, *Israel Rejects Its Own Offspring: The International Criminal Court*, 22 LOY. L.A. INT'L & COMP. L. REV. 207, 223-32 (1999); Uri Shoham, Note, *The Principle of Legality and the Israeli Military Government in the Territories*, 153 MIL. L. REV. 245 (1996).

261. See Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 86 (1990) (Since 1967 "extensive economic changes have been brought about in such key areas as agriculture, land ownership, use of water resources, the road system, building construction and taxation Not all these changes have been for the worse."); cf. GREEN, *supra* note 228, at 249; Moshe Drori, *The Legal System in Judea and Samaria: A Review of the Previous Decade with a Glance at the Future*, 1978 ISR. Y.B. HUM. RTS. 144, 161-68.

262. Ja'amait Ascan v. IDF Commander in Judea and Samaria, (1982) 37(4) PD 785, 800, quoted in DAVID KRETZMER, *THE OCCUPATION OF JUSTICE* 68 (2002).

263. KRETZMER, *supra* note 262, at 69.

264. See S.C. Res. 904, U.N. SCOR, 49th Sess., 3351st mtg., U.N. Doc. S/RES/904 (1994); S.C. Res. 607, U.N. SCOR, 43rd Sess., 2780th mtg., U.N. Doc S/RES/607 (1988); S.C. Res. 497, U.N. SCOR, 36th Sess., 2319th mtg., U.N. Doc S/RES/497 (1981) ("[T]he Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect."); S.C. Res. 465, U.N. SCOR, 35th Sess., 2203rd mtg., U.N. Doc S/RES/465 (1980) (condemning as a "flagrant violation of the Geneva Convention . . . all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967"). Israel has taken the position that the Fourth Geneva Convention does not apply to its occupation because the Convention applies only to the "territory of a high contracting party," which the lands occupied after 1967, in its view, are not. See, e.g., Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968). This claim is based on a selective reading of the Convention, however: while the second paragraph of article 2 does apply its provisions to "territory of a High Contracting Party," the first paragraph applies the Convention to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." See Roberts, *supra* note 261, at 62-66. Even the United States acknowledges that "[t]he international community considers Israel's authority in the occupied territories to be subject to the Hague Regulations of 1907 and the 1949 Geneva Convention relating to the Protection of Civilians in Time of War." UNITED STATES DEP'T OF STATE, COUNTRY REPORTS ON

may be seen as an allocation of decision-making competence between the occupier and the ousted sovereign. The allocation rests on “the contrast between the fullness and permanence of sovereign power and the temporary and precarious position of the Occupant.”²⁶⁵ The occupying power is competent to legislate both to maintain security while it exercises governing authority and to fulfill the obligations under occupation law that secure basic rights for the local population. But because the occupier possesses no local legitimacy or necessary stake in the welfare of the territory after it departs, it is not competent to enact reforms that fundamentally alter governing structures in the territory and create long-term consequences for the local population.

IV. CPA REFORMS AND THE CONSERVATIONIST PRINCIPLE

Such is the traditional understanding of the conservationist principle. Several arguments can be made challenging this strict understanding. Before addressing these, however, we must first ask how the CPA reforms fare under the traditional view. In all six substantive areas of reform—de-Ba’athification, security and military institutions, human rights, criminal law and law enforcement, the economy, and good governance—significant changes were made to institutions, laws, regulations, and personnel. Some entities, such as the Iraqi military, were abolished altogether. Other areas, such as foreign investment, banking, and securities regulation, were reformed in ways that radically altered the guiding ethos of pre-existing law. Still others, such as the judicial system and the penal laws, were modified in ways claimed to ameliorate violations of international legal principles.

A literal interpretation of article 43 of the Hague Regulations, prohibiting change to the laws in force “unless absolutely prevented” from doing so, would likely find most of the CPA’s reforms invalid. Apart from the changes in security and law enforcement, which directly affected the CPA’s ability to keep civil order and dealt with the ongoing insurgency challenging its authority, a literal view would hold that the CPA appropriated legislative authority unrelated to the orderly administration of the territory. While scholars have employed a remarkable range of linguistic constructions to shed light on when an occupier is “absolutely prevented” from respecting the laws in force, few propose

HUMAN RIGHTS PRACTICES FOR 2001, at 2102 (2002). The claim was also rejected by the ICJ. *See* Legal Consequences of the Construction of a Wall, *supra* note 217, ¶¶ 93-101.

265. STONE, *supra* note 220, at 694.

justifications wholly divorced from military necessity.²⁶⁶ This appeared to be the reasoning of the British Attorney General, who issued a cautionary opinion just prior to the onset of the Iraqi occupation:

- (a) Article 43 of the Hague Regulations imposes an obligation to respect the laws in force in the occupied territory 'unless absolutely prevented.' Thus, while some changes to the legislative and administrative structures of Iraq may be permissible if they are necessary for security or public order reasons, or in order to further humanitarian objectives, more wide-ranging reforms of governmental and administrative structures would not be lawful.
- (b) Geneva Convention IV prohibits, subject to certain limited exceptions, any alteration in the status of public officials or judges (although officials may be removed from post in certain circumstances).
- (c) Geneva Convention IV also requires that the penal laws of the occupied territory must remain in force except where they constitute a threat to security or an obstacle to application of the Convention. In addition, the courts of the occupied territory must be allowed to continue to function. There are limited exceptions allowing the Occupying Power to promulgate its own laws in order to fulfill its obligations under the Convention and to maintain security and public order, but in

266. As Schwenk recounts:

Hyde states that the occupant is absolutely prevented from respecting the laws of the occupied country if they conflict 'with the security of his army or its support, efficacy, and success.' Garner suggests that military security or interests is a test for permissible change of the laws. Wilson considers the occupant entitled to abrogate the existing laws of the occupied country if they are 'detrimental to the occupant.' Oppenheim submits that a change of the laws of the occupant is permissible if 'necessitated by [the occupant's] interest,' or 'by military necessity.' Feilchenfeld believes that the laws may be changed if the change is 'sufficiently justified.' Fenwick thinks that the occupant need not respect the laws of the occupied country if they are not 'compatible with the existence of a state of war and the safety of the army of occupation.' Stauffenberg regards a change of the laws of the occupied country permissible if it is justified by 'necessity of the war, public safety, and welfare of the population.' Meurer takes the position that the existing laws in the occupied country may be changed in so far as 'unsurpassable military obstacles exist.' He believes, however, that such 'unsurpassable obstacles' will soon turn out to be in existence.

Schwenk, *supra* note 242, at 400 (citations omitted) (quotes and alterations in original).

principle, the existing structures for the administration of justice must remain in place.

- (d) Apart from rules on the collection of taxes (which must as far as possible be in accordance with existing local law), there are no specific provisions in Geneva Convention IV or the Hague Regulations dealing with the economy of the occupied territory. However, the general principle outlined in (a) above applies equally to economic reform, so that the imposition of major structural economic reforms would not be authorised by international law.²⁶⁷

One could argue that the CPA's more ambitious reforms were in fact required by military necessity and orderly administration of the territory.²⁶⁸ It could be claimed that because the Ba'athist regime functioned, at least in later years, as a virtual cult of personality surrounding Saddam Hussein, the CPA was "absolutely prevented" from working through Ba'athist administrative structures and personnel once Saddam and his close associates were driven from power. But at best this would be an argument for removing Ba'athist Party loyalists from positions of authority—as was done—and replacing them with a merit-based civil service.²⁶⁹ Moreover, this claim fails to provide a necessity justification for reforms based on disapproval of particular political or economic models, rather than an inability to work through Ba'athist officials. Many CPA reforms fell into the former category, including abolition of military laws that pre-dated the Ba'ath Party's assumption of power in 1968, creation of the Central Criminal Court, anti-corruption laws, and the wide range of economic reforms.

Alternatively, one could argue that because the Fourth Geneva Convention imposes an array of affirmative obligations on occupying powers—going well beyond the spare language of Hague article 43—local laws that impede the occupier from fulfilling those obligations must be reformed. Many of these obligations require respect for

267. Memorandum from the Right Hon. Lord Goldsmith, QC to the Prime Minister (Mar. 26, 2003), *reprinted in* John Kampfner, *Blair Told It Would Be Illegal to Occupy Iraq*, NEW STATESMAN, May 26, 2003, at 16-17.

268. See HOWARD S. LEVIE, 2 THE CODE OF INTERNATIONAL ARMED CONFLICT 715 (1986) (justifying WWII Allies' rescission of laws supporting Italian Fascist and German Nazi organizations on grounds of military necessity).

269. Although article 54 of the Fourth Geneva Convention allows the occupier to remove public officials from their posts, one widely cited commentary limits this right to situations where "a public official refuses to fulfil his or her tasks under the occupying authorities." HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 252, at 258.

human rights.²⁷⁰ Others require provision of basic necessities of life to the population.²⁷¹ Working within statutory and administrative structures that failed to guarantee these basic rights and necessities would "absolutely prevent" the occupier from fulfilling its Convention obligations. On this view, the rights-based clauses of the Fourth Geneva Convention establish minimum standards of occupation governance. An occupier who *preserves* existing laws that deny rights to the population would presumably violate the Convention, notwithstanding a claim that the laws presented no obstacle to maintaining order or pursuing military objectives. Further, because the Convention's protections focus on the *condition* of a territory's inhabitants, such an occupier could not rest on the claim that it had not itself enacted the offending laws.²⁷² The Convention would instead impose an affirmative duty to substitute new laws that ensure actual respect for rights. This view finds support in the proviso of article 64 of the Convention that an occupier may "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention."²⁷³ This passage, according to the International Committee of the Red Cross (ICRC), "means that when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail."²⁷⁴

Many of the CPA's actions did expand the quantity and quality of rights guaranteed to Iraqis. But a claim that article 64 and the associated rights provisions of the Convention provided a blank check for the CPA to enact any reforms it believed to be in the best interests of the Iraqi population goes too far. First, the rights guaranteed in the Fourth Geneva Convention are generally limited to instances of egregious misconduct: discrimination (art. 27), impositions on honor and dignity (art. 27), physical or moral coercion (art. 31), physical suffering (art. 32), collective punishments (art. 33), intimidation, retribution, the

270. See list of rights, *supra* note 257.

271. "[T]he Occupying Power has the duty of ensuring the food and medical supplies of the population," Fourth Geneva Convention, *supra* note 11, art. 55, as well as "the duty of ensuring and maintaining . . . the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics." *Id.* art. 56.

272. In typical phraseology, article 27 of the Fourth Geneva Convention provides that protected persons "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." *Id.* art. 27.

273. *Id.* art. 64.

274. PICTET, *supra* note 243, at 336.

taking of hostages or pillage (arts. 33-34), limitations on internment (art. 42), mass or individual forced transfers (art. 49), compulsion to serve in the occupant's armed forces (art. 51), destruction of personal property (art. 53), infringements on the free exercise of religion (art. 58), non-retroactivity of laws (arts. 67 & 70), executing those under eighteen years old (art. 68), due process rights in criminal proceedings (arts. 71-75), and inhumane conditions in detention (art. 76). Even the CPA's human rights-oriented reforms go well beyond this list. Most of the others address different subjects altogether. At most, some of the criminal procedure and prison reforms might be covered by this theory.

Second, the CPA made no showing that pre-existing Iraqi *law* permitted forms of abuse prohibited by the Convention. If, instead, some of the enumerated rights were violated through informal practices or the predilections of particularly brutal officials, sweeping law reform would not be a necessary response. Given that occupation law creates a presumption of normative continuity, changes in existing law cannot be the path of first resort. Yet in order to remain consistent with a literalist interpretation of article 43, one would need to make the dubious claim that the CPA was *unable* to refrain from violating each right protected by the Convention without broad legal and institutional reform.

The claim is even more unsustainable when applied to economic reforms. The CPA obviously believed that Iraqi prosperity required abandoning the old central planning model in favor of liberal market policies. But this economic paradigm shift was not so essential to providing basic means of subsistence to Iraqis that the CPA would have been unable to do so had the old economic structures remained in place. A number of non-governmental organizations made assessments of basic services needed in post-war Iraq. While all found conditions dire and much of the population in need of immediate assistance, none recommended market reforms as an immediate (or even long-term) remedy.²⁷⁵ Certainly there is nothing in either the Hague Regulations or Fourth Geneva Convention that suggests a preference

275. See John Hamre et al., Ctr. for Strategic and Int'l Studies, *Iraq's Post-Conflict Reconstruction* (July 17, 2003), available at <http://www.csis.org/features/IraqTrip.pdf>; International Crisis Group, *Baghdad: A Race Against the Clock* (June 11, 2003), available at http://www.icg.org/library/documents/report_archive/A401000_11062003.pdf; Open Soc'y Inst. & United Nations Found., *Reconstructing Iraq: A Guide to the Issues* (May 30, 2003), available at http://www.soros.org/initiatives/washington/articles_publications/publications/reconstructingiraq_20030530/reconstructing_iraq.pdf; United States Inst. of Peace, *Establishing the Rule of Law in Iraq* (Apr. 2003), available at <http://www.usip.org/pubs/specialreports/sr104.pdf>.

for one economic model over another.²⁷⁶

Perhaps more importantly, the economic reforms were not intended solely (or even primarily) to prevent the CPA from transgressing rights of economic subsistence. They were instead long-term and forward looking, intended primarily to reap positive benefits after the occupation had ended.²⁷⁷ Indeed, given the radical behavioral changes they required of Iraqi officials and citizens, one might well say they were *incapable* of reaping their intended benefits without a long period of acclimation. The reforms' future orientation was made clear in the structure of the transition to Iraqi rule. Virtually none of the CPA legislation was rescinded and the TAL created an opt-out system, ensuring that CPA laws would continue in force unless affirmatively repealed. And the omnibus order issued on the very last day of occupation—substituting the names of new Iraqi institutions and officials for those of the CPA—had no other purpose than to project the reforms into the future. To the extent the CPA's economic reforms protected individual rights, they were therefore rights held against a post-occupation *Iraqi* government. But a claim of necessity in these circumstances—arguing that failure to enact economic reforms would result in mass privation, thereby placing the occupying powers in violation of their treaty obligations—can only address conditions that existed during the occupation.²⁷⁸

276. See STONE, *supra* note 220, at 729 (Hague Regulations “provide only the vaguest inferential guidance on the now basic State functions of currency, banking, debt, exchange, and import and export control.”).

277. This future orientation was evident in U.S. officials' own description of the reforms:

U.S. assistance is predicated on and directed toward reforming Iraq's society and economy. A new, prosperous, peaceful Iraq must be a democratic, free enterprise Iraq, fully integrated into the community of nations. The Governing Council and the CPA are working to establish a solid foundation on which future Iraqi governments can build. To establish a prosperous, dynamic, and competitive Iraqi economy, Iraqi and CPA officials are hard at work putting into place modern regimes for trade, investment, banking, tax, and corporate law.

Economic and Financial Reconstruction in Iraq: Hearing Before the Senate Banking Subcomm. on Int'l Trade and Finance, 108th Cong. (Feb. 11, 2004) (statement of E. Anthony Wayne, U.S. Assistant Sec'y for Econ. and Bus. Affairs), available at http://banking.senate.gov/_files/ACF84.pdf.

278. See MYRES S. McDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR* 753-54 (1994) (“Authority to bind the indefinite future bears no necessary relation to the securing of the purposes of the law of belligerent occupation.”).

V. ALTERNATIVE SOURCES OF LEGITIMACY FOR CPA REFORMS

If a literal interpretation of the conservationist principle would arguably invalidate many of the CPA's reforms, do alternative sources of legitimacy exist? Several such claims can be made.

Two are straightforward and do not require any change in the literalist view. First, Iraqi authorities arguably consented to the CPA's reforms. Second, it may be claimed that the Security Council ratified the reforms by effectively legislating a set of goals for the occupation that superseded the limitations of Hague and Geneva law.

Three others are more ambitious. The first argues there is little sense in preserving the prerogatives of an ousted regime in a war whose entire purpose was to bring about regime change. Hague and Geneva law, on this view, embody an anachronistic conception of occupying powers as having little interest in the governments or laws of states they defeat in war. Since this assumption is less true for contemporary wars generally and not at all true for the Iraq war, this claim directly challenges the ongoing relevance of the conservationist principle.

The second claim looks to developments in international law that parallel CPA reforms. If states are legally constrained to apply certain norms to their own citizens, this claim asserts, international law could not very well sanction a different model when those states become legally responsible for the welfare of citizens in an occupied territory. Further, because the Fourth Geneva Convention supplemented the Hague Regulations by adding an extensive catalogue of protections for the occupied populations, our understanding of those protections ought to evolve with more general understandings of similar international legal entitlements. Otherwise, a population deprived of its *de jure* government by the actions of a foreign occupier could become, through no fault of its own, subject to a lesser set of protections than existed before the occupation.²⁷⁹

This claim draws strength from the effective ossification of occupation law since the Hague and Geneva treaties were drafted. As noted, there is virtually no state practice of acknowledged occupations to shape a contemporary understanding of the conservationist principle. By contrast, international law has developed an increasingly marked concern with matters previously considered the exclusive prerogative of national governments. The protection of human rights is primary

279. Obviously this was not the case for human rights in Iraq, where it would be difficult to violate human rights more thoroughly than occurred throughout the history of the Ba'athist regime. See MIDDLE EAST WATCH, HUMAN RIGHTS IN IRAQ 128 (1990) ("Iraq is a well-organized police state and its government is one of the most brutal and repressive regimes in power today.").

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among these but other areas of governance are also the subject of international legal regimes.²⁸⁰ In short, occupation law has remained static while other areas of international law have developed a rich, value-laden jurisprudence. The vacuum of direct legal authority leaves room for these cognate developments to shape the contemporary understanding of an occupier's rights and obligations.

The third ambitious claim looks to the specific case of post-WWII Germany as precedent for actions in Iraq. The Allies stripped the German state of its Nazi infrastructure in much the same way that the CPA removed all traces of the Ba'athist legacy. Unless one is prepared to hold de-Nazification and its correlate reforms as violating Hague law, this claim contends, they provide direct support for the Iraqi reforms.

A. *Consent of Iraqi Authorities*

The first argument rests on the consent of Iraqi authorities. That consent, it may be asserted, operates to waive any claims of infringement on the rights of the post-occupation *de jure* regime, whose interests the CPA, as *de facto* temporary authority, was bound to protect. Even if the CPA exceeded its authority under occupation law, in other words, the right-holder potentially injured by such acts renounced any claim of injury or illegality.

The only entity capable of giving such consent during the occupation was the Iraqi Governing Council. The Ba'athist regime had been disbanded and its leaders taken into custody.²⁸¹ While governments of occupied territories have often gone into exile and continued to issue legal proclamations from abroad—requiring courts and scholars to assess their legal effect in the territory—that did not occur here.²⁸² The Governing Council was created specifically to introduce an Iraqi voice into policy-making during the occupation.²⁸³ Although the CPA did not seek the Governing Council's formal approval for each of its reforms, Council members made public statements generally support-

280. See generally *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* (Gregory H. Fox & Brad R. Roth eds., 2000).

281. According to the U.S. Central Command, forty-five Iraqi leaders on a "most wanted list" of fifty-five had been captured or killed. U.S. CENT. COMMAND, *IRAQI 55 MOST WANTED LIST*, at http://www.centcom.mil/Operations/Iraqi_Freedom/55mostwanted.htm. (last visited Jan. 19, 2005).

282. See BENVENISTI, *supra* note 218, at 21-27 (discussing governments in exile); Eric Stein, *Application of the Law of the Absent Sovereign in Territory Under Belligerent Occupation: The Schio Massacre*, 46 MICH. L. REV. 341 (1948).

283. See Coalition Provisional Authority Regulation No. 6, *supra* note 34.

ing CPA initiatives designed to enhance human rights and liberalize the Iraqi economy.²⁸⁴ CPA directives occasionally noted their origins in consultations with the Governing Council.²⁸⁵ And Iraqi ministries, operating under the Governing Council, were actively involved in implementing many of the reforms.

A critical question is whether the Governing Council possessed the authority to speak for post-occupation “Iraq” and give valid consent on its behalf. Occupation law contains no criteria by which to judge whether a local entity adequately represents the occupied state. This is not surprising: because authority to legislate for the territory is reserved to the *de jure* sovereign, the conservationist principle can be understood as simply deferring all questions of how the *de jure* sovereign is chosen or constituted until after the occupation is over. At that point, selection of a new government becomes not a matter of international occupation law but a matter of the national constitutional law of the post-occupation state.

One might conclude, therefore, that such legitimizing criteria are absent from the Hague and Geneva instruments because they simply do not recognize consent by a local body as relieving an occupying power of conservationist obligations. An innovation of the Fourth Geneva Convention strongly supports this view. The Convention’s

284. On July 22, 2003, Adnan Pachachi, speaking as the head of a delegation from the Governing Council, described for the Security Council a list of “pressing issues to be addressed by the interim Governing Council.” U.N. Doc. S/PV.4791, *supra* note 40, at 10. These included “a re-examination of the legislation enacted by the previous regime—legislation that enabled it to tighten its control over the country,” as well as efforts “to rebuild its economy, modernize its industrial sector, reform its educational system, improve its sanitation services and provide basic necessities to all its citizens.” *Id.*

285. Acknowledgment of consultations was mostly limited to the economic reforms and usually consisted of the same general boilerplate rather than specific delineations of a legislative path for a given reform. *See, e.g.*, Coalition Provisional Authority Order No. 39, *supra* note 115, pmbl. (order promulgated “[i]n close consultation with and acting in coordination with the Governing Council”); Coalition Provisional Authority Order No. 40, *supra* note 116, pmbl. (noting that the CPA had “worked closely with the Governing Council to ensure that economic change occurs in a manner acceptable to the people of Iraq”); *see also* Coalition Provisional Authority Order No. 56, *supra* note 125, pmbl.; Coalition Provisional Authority Order No. 64, *supra* note 141, (same language in preamble to amendments to Company Law); Coalition Provisional Authority Order No. 18, *supra* note 150 (same language in preamble to Interim Law on Securities Market); Coalition Provisional Authority Order No. 75, *supra* note 163 (same language in preamble to Realignment of Military Industrial Companies); Coalition Provisional Authority Order No. 76, *supra* note 163 (same language in preamble to Consolidations of State-Owned Enterprises); Coalition Provisional Authority Order No. 78, *supra* note 144 (virtually same language in preamble to reform of bankruptcy procedures); Coalition Provisional Authority Order No. 80, *supra* note 147 (same language in preamble to amendments to Trademarks and Descriptions Law).

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drafters were aware that past occupiers had effectively manufactured local consent for their actions. "The experiences of both world wars clearly indicated the need of circumventing a variety of ingenious devices by which occupants avoided the observance of the rules of international law."²⁸⁶ In its commentary, the ICRC criticized World War II occupying powers for creating pliant local governments to help implement their political agendas:²⁸⁷

Of course the Occupying Power usually tried to give some colour of legality and independence to the new organizations, which were formed in the majority of cases with the co-operation of certain elements among the population of the occupied country, but it was obvious that they were in fact always subservient to the will of the Occupying Power.²⁸⁸

Agreements with local authorities, whether new or pre-existing, "represent a more subtle means by which the Occupying Power may try to free itself from the obligations incumbent on it under occupation law."²⁸⁹ There is, warned the ICRC, "a particularly great danger of the Occupying Power forcing the Power whose territory is occupied to conclude agreements prejudicial to protected persons."²⁹⁰

As a result, article 7 of the Fourth Geneva Convention provides that protected persons, who include those in occupied territories, "may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention."²⁹¹ Article 47 reiterates and expands upon this injunction:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, *nor by any agreement concluded between the authorities of the occupied territories and the*

286. VON GLAHN, *supra* note 12, at 74.

287. See PICTET, *supra* note 243, at 69.

288. *Id.* at 273.

289. *Id.* at 274.

290. *Id.* at 274-75.

291. Fourth Geneva Convention, *supra* note 11, art. 7.

Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.²⁹²

Occupying powers, therefore, cannot accomplish indirectly through agreements or pliant local administrators what they are prohibited from accomplishing directly: changing existing laws or institutions so as to diminish the rights of protected persons. "In other words, no more Quislings, Lavals or others of their ilk!"²⁹³ Whether this was the case for the CPA's actions in Iraq will be considered below. Here, the point is only that such changes, if prejudicial, cannot be sanitized by the "consent" of the Governing Council.

But CPA proponents might well respond that the Governing Council was in no way comparable to the Nazi and Japanese puppet regimes that gave rise to these provisions. The puppets were integral parts of plans to brutalize the occupied territories. The Council, by contrast, facilitated a program of reform and progress. Where local consent does not result in obvious violations of Geneva rights provisions, on this view, a local entity's "representativeness" must be evaluated on its own merits.

This policy argument appears weak in light of the treaty provisions' plain language. But let us assume here that local consent could rescue *rights-enhancing* reforms from the conservationist principle. The question would remain of how to evaluate the Governing Council's capacity to consent.²⁹⁴ A requirement that it be democratically elected is unacceptably ahistorical, since notions of democratic governance were wholly absent from international law when the Hague and Geneva rules were drafted.²⁹⁵ What of the Council's specific powers? The primary factor weighing against its "representativeness" was its subordination to

292. Fourth Geneva Convention, *supra* note 11, art. 47 (emphasis added).

293. LEVIE, *supra* note 268, at 716-17.

294. An alternate conclusion would be that local bodies like the Governing Council are simply irrelevant. If an occupier's legislative changes diminish protected rights, then no degree of local consent, however genuine, will cure a violation of Geneva law. If the changes do not violate protected rights, there is no need to resort to local consent in order to secure their legitimacy.

295. Writing just prior to the 1907 Hague Regulations, Lasa Oppenheim stated in the first edition of his influential treatise, "The Law of Nations prescribes no rules as regards the kind of head a State may have. Every State is, naturally, independent regarding this point, possessing the faculty of adopting any Constitution . . . according to its discretion." L. OPPENHEIM, *INTERNATIONAL LAW* 403 (1st ed. 1905). Even in 1949, when the Fourth Geneva Convention was drafted, global human rights treaties guaranteeing a right to political participation were more than a decade away. See generally Gregory H. Fox, *The Right to Political Participation in International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 280, at 48, 50-53.

the CPA. All Council members were chosen by the CPA, Iraqi ministries were compelled to carry out CPA directives, no formal mechanism existed for the Council to vet proposed CPA legislation, and, even when vetting occurred, Council decisions were subject to the Administrator's veto.²⁹⁶ The CPA even revamped the salaries and terms of employment of civil servants working in Iraqi ministries supposedly operating under the Governing Council's authority.²⁹⁷ In the words of a constitutional advisor to the CPA, "[t]he Governing Council governed no one. Its 'decisions' were more in the nature of recommendations. While it named technocrat transitional ministers to run Iraq's various ministries, the Governing Council had little or no say in the ministries' day-to-day operations."²⁹⁸

In its favor, the Council was intended to be representative of the various ethnic and religious groups in Iraq, though its membership was somewhat skewed by a large presence of Iraqi exiles.²⁹⁹ In addition, Council members were seated as representatives of the Iraqi state at meetings of the Arab League, the Organization of the Islamic Conference, and the World Trade Organization.³⁰⁰

The most significant factor weighing in the Governing Council's favor was its recognition by the Security Council. In May 2003 the Security Council declared in Resolution 1483 that it supported

296. See *supra* text accompanying notes 38-47.

297. See *Reform of Salaries and Employment Conditions of State Employees*, Coalition Provisional Authority Order No. 30, CPA/ORD/8 September 2003/30 (Sept. 8, 2003), available at http://www.iraqcoalition.org/regulations/20030908_CPAORD_30_Reform_of_Salaries_and_Employment_Conditions_of_State_Employees_with_Annex_A.pdf

298. NOAH FELDMAN, *WHAT WE OWE IRAQ* 110 (2004). Another CPA advisor writes similarly,

The IGC was neither fish nor fowl: It was not really a 'governing' council, as Bremer made it clear that he would continue to exercise supreme power, including the power to veto any IGC decisions. But it was given some ability to advise the American viceroy and to nominate Iraqi ministers (who would themselves have limited power), as well as to propose a timetable and formula for drafting and ratifying the new constitution and then conducting elections for a new government.

Larry Diamond, *Lessons from Iraq*, 16 J. DEMOC. 9, 10-11 (2005).

299. See Int'l Crisis Group, *Governing Iraq* 10-12 (Aug. 25, 2003), available at http://www.icg.org/library/documents/report_archive/A401098_25082003.pdf.

300. *Report of the Secretary-General Pursuant to Paragraph 24 of Resolution 1483 (2003) and Paragraph 12 of Resolution 1511 (2003)*, U.N. SCOR, 58th Sess. ¶ 57, U.N. Doc. S/2003/1149 (Dec. 5, 2003); Press Release, Iraq Achieves Observer Status at the WTO, *supra* note 133.

the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.³⁰¹

In July the Security Council welcomed the creation of the Governing Council one month earlier.³⁰² Two months later, in Resolution 1511, the Council declared that the Governing Council satisfied its call in Resolution 1483 for “an Iraqi interim administration as a transitional administration run by Iraqis.” The Council continued:

[T]he 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.³⁰³

Almost by definition, an entity said to “embody the sovereignty” of Iraq would appear to represent the state. And because it emanates from the Security Council’s powers under Chapter VII of the Charter, that declaration is authoritative. But the Council’s statement begs the question of “sovereign” for what purpose? Not to govern Iraq on an equal footing with the CPA, because other Council resolutions had affirmed the CPA’s primary governing role.³⁰⁴ Not to run the Iraqi ministries, which were all but controlled by CPA “advisors” during the occupation.³⁰⁵ Not to restrain the scope of CPA lawmaking, since the

301. S.C. Res. 1483, *supra* note 25, ¶ 9.

302. S.C. Res. 1500, *supra* note 38, ¶ 1 (Council “[w]elcomes the establishment of the broadly representative Governing Council of Iraq on 13 July 2003, as an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq.”).

303. S.C. Res. 1511, *supra* note 39, ¶ 4 (emphasis added).

304. S.C. Res. 1483, *supra* note 25, ¶ 4. In debate over Resolution 1500, which welcomed the creation of the Governing Council, the Mexican ambassador explained, “That welcome does not constitute legal recognition. Nor should it be interpreted as endorsement. It is not, because the Governing Council is still under the authority of the occupying Powers.” U.N. SCOR, 58th Sess., 4808th mtg. at 5, U.N. Doc. S/PV.4808 (2003) (statement of Mexican Ambassador Zinser).

305. According to the General Accounting Office,

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CPA exercised a de facto veto over Council actions.³⁰⁶ And not to prevent CPA reforms from carrying over, as they did, into the post-occupation period. It is true that Resolution 1511 did not explicitly disclaim the Governing Council's capacity to consent, most likely because, as many delegations noted in Security Council debate, the resolution was a compromise document.³⁰⁷ But when in previous resolutions the Security Council declared that ad hoc bodies in post-conflict states "embody" the sovereignty of the state, those resolutions also made clear the relationship between the local bodies and the international actors.³⁰⁸ Here the Council provided no such clarifica-

[the] CPA assigned U.S. advisors from various agencies, including the Department of State and the Department of Defense, to work directly with the Iraqi interim minister appointed by the Governing Council. According to a former senior advisor, the advisors had broad managerial authority, including the authority to hire and fire ministry employees, determine ministry budgets, change ministry structures and functions, and make major policy decisions.

U.S. GENERAL ACCOUNTING OFFICE, REBUILDING IRAQ: RESOURCE, SECURITY, GOVERNANCE, ESSENTIAL SERVICES, AND OVERSIGHT ISSUES, GAO-04-902R, at 75 (June 2004), *available at* <http://www.gao.gov/new.items/d04902r.pdf>.

306. See sources cited *supra* note 47.

307. See U.N. SCOR, 58th Sess., 4844th mtg. at 4, U.N. Doc. S/PV.4844 (2003) (statement of German Ambassador Pleuger); *id.* (statement of French Ambassador De La Sablière); *id.* at 6 (statement of Chinese Ambassador Guangya); *id.* (statement of Pakistani Ambassador Akram); *id.* at 8 (statement of Syrian Ambassador Mekdad).

308. In Cambodia, the Paris Accords created a Supreme National Council—a coalition group headed by Prince Sihanouk—that was said to be "the unique legitimate body and source of authority in which, throughout the transition period, the sovereignty, independence and unity of Cambodia are enshrined." Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991, 1663 U.N.T.S. 28, 59, [hereinafter Paris Accords], *reprinted in Letter Dated 30 October 1991 from the Permanent Representatives of France and Indonesia to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 46th Sess., Agenda Item 24, at 8, U.N. Doc. A/46/608 (1991); see also S.C. Res. 668, U.N. SCOR, 45th Sess., 2941st mtg., U.N. Doc. S/RES/668 (1990) (endorsing the framework for a comprehensive political settlement of the Cambodia conflict). A Special Representative of the Secretary-General had the authority to override decisions of the Supreme National Council if they were inconsistent with the Paris Accords. See Paris Accords, *supra*, Annex 1, art. 2(b) (stating that the Special Representative would follow the National Council's advice "provided that it is consistent with the objectives of the present Agreement"); see also Steven Ratner, *The Cambodia Settlement Accords*, 87 AM. J. INT'L L. 1, 12 (1993). Likewise in Somalia, the United Nations instigated the creation of a Transitional National Council that would serve as "the repository of Somali sovereignty" during a transitional period. Addis Ababa Agreement Concluded at the First Session of the Conference on National Reconciliation in Somalia, Mar. 27, 1993, in *THE UNITED NATIONS AND SOMALIA, 1992-1996*, at 264-65 (1996). The Addis Ababa Agreement creating the Council provided that it would "be the prime political authority having

tion. Indeed, its very use of the term “sovereignty”—a highly contested concept that many consider to be devoid of any clear substantive content—only muddled the waters further.³⁰⁹

The most pragmatic reading of these passages suggests that the Security Council did not intend to alter the authority exercised by the Governing Council under CPA regulations. From the beginning of the occupation the Security Council was notably passive in addressing CPA reforms. It reminded the occupying powers of their humanitarian law obligations and defined broad goals for UNAMI and the SGRG, but it stopped short of creating a binding mandate for the occupation. The Governing Council was the “representative” body created by the occupiers and presented as a *fait accompli* to the Council, which appeared loathe to alter its role or functions.

In the end, the Geneva Convention’s strong disposition against rights-negating agreements with local bodies, combined with the Governing Council’s inability to exercise any independent judgment, suggests that it should not be seen as legitimizing CPA legislation through consent. If nothing else, the Governing Council cannot be said to have consented to the CPA’s reform agenda when it lacked any meaningful power to withhold that consent. The Security Council’s endorsement in no way altered this subordinate role.

B. Security Council Preemption

The second potential source of legitimacy for CPA actions is the Security Council. Under Chapter VII of the U.N. Charter, the Council possesses virtually unlimited authority to respond to “threats to the peace.”³¹⁰ The Council has frequently invoked this power to compel action it deems essential to restoring international peace and security,

legislative functions” during the transition period. *Id.* at 265. The United Nations was asked only to provide implementation assistance. *Id.* at 266. The Security Council expressed support for the Addis Ababa Agreement in September 1993. See S.C. Res. 865, U.N. SCOR, 48th Sess., 3280th mtg., U.N. Doc. S/RES/865 (1993).

309. For a thoughtful discussion of how the Council used this term in Resolutions 1483, 1500 and 1511, see Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT’L L. 823 (2003).

310. A finding of a “threat to the peace” is one of the triggers for Chapter VII authority found in article 39 of the Charter. U.N. CHARTER art. 39. Once such a finding is made, the Council has an escalating series of measures at its disposal. Article 41 allows it to use “measures not involving the use of armed force” including “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” *Id.* art. 41. If these have proven or appear to be inadequate, article 42 allows the Council to “take such action by air, sea, or land forces as may be necessary to maintain or

including authorizing the use of force when states (and sub-state actors) refuse to heed its demands.³¹¹ This claim views Council ratification of the CPA's reform agenda as an exercise of its plenary power.³¹² It asserts that even if Hague and Geneva law proscribed the United States and other coalition partners—as individual states—from significantly altering Iraqi law, that limitation could not trump Council-sanctioned reforms. The Security Council, on this view, invokes a superior law when it acts under Chapter VII. Its dictates prevail even against conflicting treaty norms.³¹³

One can find many broadly worded pronouncements that the Security Council lacks the legislative authority to alter pre-existing international legal obligations.³¹⁴ Recent U.S. efforts to secure a resolution exempting its citizens from the jurisdiction of the International Criminal Court (ICC), for example, led many states to argue that the Council could not modify rights and obligations under the pre-existing ICC statute.³¹⁵ Despite these objections, the resolution eventually passed.

restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." *Id.* art. 42.

311. For a discussion of the exceptionally broad range of punitive actions taken under Chapter VII, see *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 605 (Bruno Simma ed., 2d ed. 2002).

312. This was apparently the position of the U.S. Department of State. See Joshua L. Dorosin, *Jus in Bello: Occupation Law and the War in Iraq*, Remarks at the American Society of International Law 98th Annual Meeting (Mar. 31-Apr. 3, 2004), in 98 AM. SOC. INT'L L. PROC. 117, 119-20 (2004) (with standard caveat of remarks in a personal capacity).

313. Article 103 of the Charter provides, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.

314. See, e.g., Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 4, 138 (June 21) (separate opinion of Judge Dillard) (while Court relies on Charter articles 24 and 25 to support binding character of Council resolutions "it does not purport to carry the implication that, in its view, the United Nations is endowed with broad powers of a legislative or quasi-legislative character"). Ironically, given its anti-ICC initiative, discussed below in the text, the United States took this position in regard to the 1960 Treaty of Guarantee for Cyprus. See U.N. SCOR, 19th Sess., 1096th mtg. at 36, U.N. Doc. S/PV.1096 (1964) ("This Treaty or any international treaty cannot be abrogated, cannot be nullified, cannot be modified either in fact or in effect by the Security Council of the United Nations.").

315. In July 2002, the United States proposed a resolution, ultimately adopted as S.C. Res. 1422 (July 12, 2002), by which the Security Council would request the ICC not to initiate prosecutions against individual U.N. peacekeepers whose states had not ratified the treaty establishing the Court. The resolution stated that the request was being made pursuant to article 16 of the ICC statute (a treaty), which allows the Security Council to defer prosecutions for twelve

More generally, since the end of the Cold War the Council has acted to supersede or in other ways alter a variety of pre-existing treaty norms.³¹⁶ Responding to the events of September 11, 2001, for example, the Council required "all States" to end financing for terrorist groups, an obligation contained in a multilateral treaty which at that point had been ratified by only four states.³¹⁷ The resolution ending the 1991 Gulf War contained a host of new obligations for Iraq, compelling it to accept a border it had previously rejected, adhere to treaties it had not ratified, and submit to inspection regimes substantially more intrusive than those contained in treaties it had ratified.³¹⁸ In 1992, the Council ordered Libya to extradite two terrorist suspects even though Libya was party to a multilateral convention that provided the option of national prosecution, which Libya had offered to undertake.³¹⁹ And in creating a war crimes tribunal for Rwanda, the Council authorized the prosecution of a host of Geneva Convention violations that, under the Conven-

months. S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572d mtg., U.N. Doc S/RES/1422 (2002). Many state parties to the ICC argued that article 16 was not intended to function as a permanent exemption for any class of defendants and that the resolution would effectively rewrite the ICC statute. *See* Press Release, United Nations, Preparatory Commission for International Criminal Court 'Deeply Concerned' at Security Council Developments Regarding Court and Peacekeeping, U.N. Press Release L/3008, at 2-3 (July 3, 2002), *available at* <http://www.un.org/News/Press/docs/2002/13008.doc.htm> (Switzerland: "[I]t was alarming to see the Council attempting to legislate in contravention of an existing valid treaty The Security Council did not have competence to adopt rules of law which ran counter to a treaty when that treaty was in compliance with the United Nations Charter.") (New Zealand: "The Council had no right to highjack article 16 of the Rome Statute. Under treaty law, the meaning of that article was determined by States parties at the time the Statute was drawn up.") (Mexico: "The Security Council did not have the power to amend treaties.") ("Venezuela: "If such a decision [the proposed U.S. resolution] were adopted, the Security Council would be exceeding the competence granted to it, which was limited to the maintenance of international peace and security.") (Côte d'Ivoire: "The Vienna Convention on the Law of Treaties stipulated that treaties could be changed using procedures they themselves elaborated Therefore, the Statute [of the ICC] could only be amended in the way it had decided, with the full agreement of States parties.") (Democratic Republic of Congo: "A United Nations body could not give itself the right to change the Statute.").

316. *See generally* Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002).

317. S.C. Res. 1373, U.N. SCOR, 57th Sess., 4385th mtg. ¶ 1, U.N. Doc. S/RES/1373 (2001). The treaty was the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229; *see* G.A. Res. 54/109 (Annex), U.N. GAOR, 54th Sess., 76th mtg., U.N. Doc. A/RES/54/109 (2000); Szasz, *supra* note 316, at 903.

318. *See* Lawrence D. Roberts, *United Nations Security Council Resolution 687 and Its Aftermath: The Implications for Domestic Authority and the Need for Legitimacy*, 25 N.Y.U. J. INT'L L. & POL. 593 (1993).

319. S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., U.N. Doc. S/RES/1422 (1992).

tions themselves, do not give rise to individual culpability during civil wars such as Rwanda's.³²⁰

The critical question, therefore, is whether the Security Council exercised its legislative authority to ratify the CPA reforms. The Council's repeated insistence that the occupying powers adhere to the requirements of occupation law suggests that it did not.³²¹ In Resolution 1483 the Council bluntly referred to "the specific authorities, responsibilities, and obligations under applicable international law of these states [the United States and the United Kingdom] as occupying powers under unified command."³²² Limiting discretion of the American-led CPA was particularly important to Security Council members who had opposed the war in the first place and who, in its aftermath, consistently sought a primary role for the United Nations in Iraqi reconstruction.³²³ These members were also eager for the CPA to relinquish power to an elected Iraqi Government at the earliest opportunity.³²⁴ Their views prevailed early on; beginning with Resolution 1483, the Council began to call for a swift end to the occupation.³²⁵ One reason articulated by several member states was to ensure that Iraqis and not outsiders set the course of reform for a post-Ba'athist

320. See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., U.N. Doc. S/RES/955 (1994) (creating Rwanda tribunal).

321. See S.C. Res. 1511, *supra* note 39, ¶ 1 (affirming CPA's "specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483"); S.C. Res. 1483, *supra* note 25, ¶ 5 (calling on "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"); see also S.C. Res. 1472, *supra* note 233, ¶ 1. An alternative understanding of these demands is that they addressed only the CPA's obligation to maintain civil order in Iraq, a basic obligation under Hague and Geneva law. Especially after the disastrous bombing of U.N. headquarters in Baghdad in August 2003, security was very much on the mind of Security Council members. None of the three resolutions explicitly limited application of occupation law in this manner.

322. S.C. Res. 1483, *supra* note 25, pmbl. The importance of the United States and the United Kingdom adhering to occupation law is underlined in the next preambular paragraph, in which the Council notes that "other States that are not occupying powers are working now or in the future may work under the Authority." *Id.* "The two occupying powers were thus designated to shoulder primary responsibility." Eyal Benvenisti, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 844 (2003).

323. See, e.g., U.N. SCOR, 58th Sess., 4761st mtg. at 3-6, U.N. Doc. S/PV.4761 (2003) (statements of the French, German, and Mexican ambassadors).

324. See *id.*

325. S.C. Res. 1483, *supra* note 25, pmbl. ("expressing resolve that the day when Iraqis govern themselves must come quickly"); S.C. Res. 1511, *supra* note 39, ¶ 6 (calling upon the CPA "to return governing responsibilities and authorities to the people of Iraq as soon as practicable").

era.³²⁶ This evident desire for the CPA to make an early exit and leave a light footprint seems incompatible with the Council simultaneously granting a mandate for unlimited CPA legislative authority.

On the other hand, Resolution 1483 appealed to member states “to assist the people of Iraq in their efforts to reform their institutions and rebuild their country.”³²⁷ Paragraph 4 elaborated, calling upon the CPA,

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.³²⁸

Paragraph 8 of the resolution called for the appointment of a Special Representative of the Secretary-General, whose responsibilities included coordinating among U.N. and other international agencies “engaged in humanitarian assistance and reconstruction activities in Iraq.”³²⁹ The SRSG was also to coordinate with “the Authority” (the CPA) in “assisting the people of Iraq.”³³⁰ The list of tasks to which that assistance was directed was extensive:

- (a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;
- (b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;
- (c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to

326. See, e.g., U.N. Doc. S/PV.4761, *supra* note 323, at 6 (statement of Spanish Ambassador) (describing the “fundamental principle” that “the Iraqis alone are the owners of their political future and their economic resources”); U.N. Doc. S/PV.4844, *supra* note 307, at 3 (statement of Russian Ambassador Lavrov) (Resolution 1511 “unambiguously stresses the Iraqi people’s right to determine its own political future and to manage its own natural resources.”).

327. S.C. Res. 1483, *supra* note 25, ¶ 1.

328. *Id.* ¶ 4.

329. *Id.* ¶ 8

330. *Id.*

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an internationally recognized, representative government of Iraq;

- (d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;
- (e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;
- (f) encouraging international efforts to contribute to basic civilian administration functions;
- (g) promoting the protection of human rights;
- (h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and
- (i) encouraging international efforts to promote legal and judicial reform.³³¹

A number of these goals arguably support CPA reforms: (1) restoring and establishing national and local institutions for representative governance; (2) promoting economic reconstruction and the conditions for sustainable development; (3) promoting the protection of human rights; and (4) encouraging international efforts to promote legal and judicial reform. And the goals of promoting “the welfare of the Iraqi people” and assisting in efforts to “reform their institutions and rebuild their country” might be read as a kind of prospective blank check by which the Council authorized any reforms the CPA believed would advance these broad objectives.

Despite this superficial congruence, Resolution 1483 should not be read as a clear endorsement of CPA-led reforms. First, Resolution 1483 was a compromise document that accommodated conflicting views among Council members about whether the United States or the United Nations should lead in post-war Iraq, not to mention sharp conflicts about the legality of the war itself.³³² Seeking a clear CPA mandate from such an ambiguous document may be a fool’s errand—reading deeper meaning into phrases that carry none. While one may find implicit support for reconstruction in Council debate, no member state clearly described the resolution as providing the CPA with a legal

331. *Id.*

332. See U.N. Doc. S/PV.4761, *supra* note 323, at 3 (France: “The resolution we have just adopted is not perfect.”); *id.* at 5 (Germany: “This resolution is a compromise reached after intensive and sometimes difficult negotiations.”); *id.* at 6 (Mexico: “The text of this resolution is undoubtedly a compromise text.”); *id.* at 7 (Russia: “Definitely—and many colleagues stressed this point—there was compromise.”).

basis to act beyond the parameters of occupation law.³³³ Indeed, many members coupled their references to CPA authority with exhortations that it strictly comply with humanitarian law obligations.³³⁴ The resolution itself echoes this schizophrenia, espousing both a commitment to reform *and* fidelity to international law within a single paragraph.³³⁵ The Secretary-General did express support for market-oriented economic reforms in his report on implementation of Resolution 1483.³³⁶ But he also urged the CPA “to ensure Iraqi ownership of the political process and the tangible delegation of executive authority and real power to Iraqi representatives in terms of policy-making, including the allocation and administration of budgetary resources.”³³⁷ Even if the Secretary-General understood Resolution 1483 to authorize economic reconstruction, therefore, it was not to occur under the CPA’s plenary control. And when discussing political and legal reforms, the Secretary-

333. At most, members made vague allusions to a reconstruction mandate. *See id.* at 3 (United States: “[T]he Security Council has provided a flexible framework . . . for the coalition provisional Authority [and others] . . . to participate in the administration and reconstruction of Iraq and to assist the Iraqi people in determining their political future, establishing new institutions and restoring economic prosperity to the country.”); *id.* at 4 (France: “[T]he resolution . . . attributes to the occupying Powers broad authorities in the area of international humanitarian law and the necessary means to exercise those authorities.”); *id.* at 5 (Germany: “A process of political and economic reconstruction will be started.”); *id.* at 7 (Spain: discussing “the process of Iraq’s reconstruction, which starts with this resolution”); *id.* at 11 (Pakistan: “[Pakistan] has agreed, due to the exigencies of the circumstances, to the delegation of certain powers by the Security Council to the occupying Powers, represented by the Authority.”).

334. *Id.* at 5 (United Kingdom: “[Resolution 1483] gives a sound basis for the international community to come together, in the interests of the Iraqi people, consistent with international law.”); *id.* at 7 (Russia: noting that one basis for Iraq settlement in resolution is “the observance by the occupying Powers of international humanitarian law”); *id.* at 11-12 (Pakistan: “[T]he powers delegated by the Security Council under this resolution are not open-ended or unqualified. They should be exercised in ways that conform . . . especially . . . with the Geneva Conventions and the Hague Regulations.”).

335. Resolution 1483, *supra* note 25, ¶ 4 (calling upon “the Authority, 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”) The next paragraph 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.” *Id.* ¶ 5.

336. SG July Report, *supra* note 35, ¶ 84 (reviewing Iraq’s dire economic circumstances and recommending that “the development of Iraq and the transition from a centrally planned economy to a market economy needs to be undertaken”); *id.* ¶ 88 (declaring that U.N. expertise “will prove particularly valuable in laying the foundations for economic recovery and the comprehensive reforms associated with the transition to a market economy”); *id.* ¶ 90 (noting the need for “institutional and legal reforms” to “establish a market-oriented environment”).

337. *Id.* ¶ 21.

General was quite explicit in emphasizing the need for Iraqi control.³³⁸ None of the circumstances surrounding Resolution 1483, in other words, suggests a clear reform mandate for the CPA.

Second, and more specifically, the resolution's list of reformist tasks was directed not to the CPA but to the Special Representative of the Secretary-General. The distinction is not merely semantic. Many Council members opposed to the war were prepared to authorize the United Nations to perform tasks they would not explicitly delegate to the CPA.³³⁹ In his first comprehensive report on progress in implementing Resolution 1483, the Secretary-General made no mention of a Council mandate for the CPA, but instead described a largely identical set of tasks as "the focus of *United Nations action* in Iraq."³⁴⁰

Third, the studied ambiguity of Resolution 1483 stands in stark contrast to language in resolutions in which the Security Council has directly authorized international actors to undertake wide-ranging reforms in post-conflict states. Those resolutions were clear and detailed in setting out reformist mandates. In Bosnia, for example, the Council welcomed the Dayton Agreement and its creation of an international High Representative, who would oversee implementation of an entirely new constitutional structure for the country.³⁴¹ The Council declared that "the High Representative is the final authority in theatre regarding interpretation of Annex 10 on the civilian implementation of the Peace Agreement."³⁴² That Annex covered such reforms as "rehabilitation of infrastructure and economic reconstruction; the establishment of political and constitutional institutions in Bosnia and Herzegovina; promotion of respect for human rights and the return of

338. *Id.* ¶ 23 (In discussing constitutional process, the SRSG "has strongly advocated that the Authority devolve real executive authority to a broadly representative and self-selecting Iraqi leadership, including in policy- and decision-making."); *id.* ¶ 44 ("[O]nly an elected Iraqi government should decide" how to address accountability for past crimes.); *id.* ¶ 53 ("Before encouraging efforts to promote legal and judicial reform, there is a pressing need for the justice system in Iraq to resume functioning within the framework of the provisions of the Geneva Conventions.").

339. Even the U.S. representative did not describe the CPA as alone setting a reform agenda, but instead told the Council that it had "provided a flexible framework under Chapter VII for the coalition provisional Authority, Member States, the United Nations and others in the international community to participate in the administration and reconstruction of Iraq." U.N. Doc. S/PV.4761, *supra* note 323, at 3.

340. SG July Report, *supra* note 35, ¶ 98 (emphasis added). The Secretary-General added several items to the list in Resolution 1483.

341. S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995).

342. *Id.* ¶ 27.

displaced persons and refugees; and the holding of free and fair elections.”³⁴³ In Kosovo, the Council created a civil administration for the territory that would be responsible for “[o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections.”³⁴⁴ And in East Timor, the mission was endowed with “all legislative and executive authority” in the territory and was empowered to “establish an effective administration,” “assist in the development of civil and social services,” “support capacity-building for self-government,” and perform other tasks.³⁴⁵

While equivalent language for Iraq would have authorized reforms undertaken by an occupier rather than a U.N.-created mission, that is not a significant difference. Each is an external actor confronting domestic laws and institutions in need of change. In either instance, when the Council seeks to remake national politics along liberal democratic lines it has a decade’s worth of precedent from which to draw. None of that experience seems to have informed the wording of the three major Iraqi resolutions, all of which lack the clarity and forthrightness of the prior documents. Given the Council’s simultaneous insistence on fidelity to Hague and Geneva law, a much clearer mandate, directed explicitly to the CPA, would have been required. A legislative override of occupation law cannot be read into the Council’s tepid language.

C. *The Conservationist Principle: An Anachronism?*

The third source of legitimacy for CPA reforms, unlike the first two, does not seek to render the conservationist principle inapplicable to the Iraqi occupation. It is instead a direct challenge to the principle itself. When occupation law was first codified in the nineteenth and early twentieth centuries, wars among the major Western states were primarily undertaken for geopolitical advantage, not to affect the quality of governance in other states. “Misrule” by a defeated regime was only rarely of concern to a victorious occupying power.³⁴⁶ Misrule by occupiers, on the other hand, occurred with regularity. Thus, while

343. *General Framework Agreement for Peace in Bosnia and Herzegovina*, Dec. 14, 1995, Annex 10, art. 1 (Agreement on Civilian Implementation), 35 I.L.M. 75, 147 (1996).

344. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg. ¶ 11(c), U.N. Doc. S/RES/1244 (1999).

345. S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg. ¶ 2, U.N. Doc. S/RES/1272 (1999).

346. See SIMON CHESTERMAN, *JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 42-43 (2001).

the conservationist principle prevents an occupier from violating rights of the local population through punitive or discriminatory laws, neither Hague nor Geneva law directly addresses an occupier who seeks to *enhance* their rights through *protective* legislation.³⁴⁷

In the U.N. era, by contrast, and particularly since the end of the Cold War, military interveners have increasingly proclaimed changes in domestic governance as a central war aim. Humanitarian intervention, both unilateral and as authorized by the Security Council, has gained a significant currency, though a unilateral right is still highly controversial among both states and scholars. But virtually all the post-1945 cases usually cited in support of a right of unilateral humanitarian intervention resulted in regime change.³⁴⁸ The Council-authorized actions embody the ultimate expression of collective concern with the quality of national governance. The Security Council has twice approved the use of armed force to oust regimes deemed democratically illegitimate.³⁴⁹ The elimination of regimes viewed by traditional occupation law as legitimate *de jure* governments, in other words, has itself become a war aim, albeit in a limited number of conflicts. Of course this is not an entirely new phenomenon, as some justified German de-Nazification on the grounds that "removal of the law associated with that régime had been proclaimed to be one of the major purposes of the war waged by the allies."³⁵⁰

347. As Kalshoven and Zegveld note, by the time the Geneva instruments were drafted, "the degree to which state organs influence, and even participate directly in, economic and social affairs [was] immeasurably greater than in the days the Regulations were written." FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR* 65 (2001). But acknowledgement of these trends took the form of enhancing the quality and quantity of rights *against* occupiers.

348. Excluding pre-1945 cases is necessary because only then did the U.N. Charter prohibit most instances of unilateral intervention, creating the legal question of whether an exception exists for humanitarian actions. The oft-cited cases of this period are India's 1971 intervention in East Pakistan, resulting in the new state (and government) of Bangladesh; Vietnam's 1978 Intervention in Cambodia, ousting the Khmer Rouge; Tanzania's 1979 intervention in Uganda, ousting Idi Amin; France's 1979 intervention in the Central African Republic, ousting Jean-Bedel Bokassa; the United States' 1983 intervention in Grenada, ousting leaders of a coup; and the United States' 1989 intervention in Panama, ousting and arresting Manuel Noriega. See THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (SUPP.) 47-77 (2001).

349. S.C. Res. 1162, U.N. SCOR, 53d Sess., 3872d mtg. ¶ 2, U.N. Doc. S/RES/1162 (1998) (commending forceful ouster of the junta in Sierra Leone); S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. ¶ 4, U.N. Doc. S/RES/940 (1994) (authorizing the use of force to restore elected government of Haiti); see BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 366-87, 394-98 (1999).

350. THE LAW OF WAR ON LAND, *supra* note 228, at 143 n.1.

The claim, then, is that maintaining a distinction between the legitimate prerogatives of a *de jure* government and the limited legislative capacities of an occupier makes little sense when a war is undertaken precisely to remake the political and legal institutions of the target state. If the war aim is itself legally sanctioned, then implementing that aim during occupation should logically follow. In these circumstances, where international actors seek to enhance human rights in the territory, the obstructing conservationist principle is simply an anachronism.

While this claim is superficially appealing, the conservationist principle has substantially deeper roots than an appeal to pro-democratic war aims might suggest. The principle is integral to how occupation law is understood by military lawyers in the major powers. While national military manuals allow limited exceptions in the case of laws sanctioning extreme violations of human rights, the principle itself is uniformly reaffirmed.³⁵¹ As noted, the manuals are among the most probative evidence of *opinio juris* on this question.³⁵²

More broadly, abandoning the principle would have profound consequences elsewhere in international law, suggesting a variety of reasons why the claim should be rejected. First, abandoning the conservationist principle under any circumstances would irredeemably blur the line between occupation and annexation. Occupiers enjoy limited legislative authority precisely because they do not assume the sovereign rights

351. THE LAW OF LAND WARFARE, *supra* note 250, ¶ 370 (American manual provides that with limited exceptions for “restoring public order and safety, the occupant will continue in force the ordinary civil and penal (criminal) laws of the occupied territory.”); HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 252, at 254 (German manual notes that while exceptions exist, “[t]he authority to pass laws is unquestionably an attribute of sovereignty The occupying power must administer the occupied territory within the context of its existing legislation.”); INTERIM LAW OF ARMED CONFLICT MANUAL, *supra* note 251, at 13-7, ¶ 1304 (New Zealand manual provides, “Generally speaking, the occupant is not entitled to alter the existing form of government, to upset the constitution and domestic laws of the occupied territory, or to set aside the rights of the inhabitants.”); LAW OF ARMED CONFLICT, *supra* note 252, at 12-2, ¶ 1205 (Canadian manual provides, “Generally speaking, the occupant is not entitled to alter the existing form of government, to upset the constitution and domestic laws of the occupied territory, or to set aside the rights of the inhabitants.”); THE LAW OF WAR ON LAND, *supra* note 228, at 143, ¶ 511 (British manual provides, “The Occupant is not entitled, as a rule, to alter the existing form of government, to upset the constitution and domestic laws of the territory occupied, or to set aside the rights of the inhabitants.”); MINISTÈRE DE LA DÉFENSE, SECRETARIAT GÉNÉRAL POUR L’ADMINISTRATION, MANUEL DE DROIT DES CONFLITS ARMÉS (conduct of French occupying forces controlled by the Fourth Geneva Convention), available at http://www.defense.gouv.fr/portal_repository/752609292_0001/fichier/getData (last visited Feb. 1, 2005).

352. See Colloquium, *supra* note 225; Reisman & Lietzau, *supra* note 225.

of the ousted regime. Restrictions on their governing powers are indicia of their temporary, custodial status. But that status exists only as a legal construct: "an occupier does not acquire the rights of a sovereign in occupied territory, but *only those limited military rights allowed to him under the international law of belligerent occupation . . .*"³⁵³ If the most important legal marker distinguishing de jure from de facto regimes were erased, the status of an occupied state would be irredeemably altered. And if the two were largely indistinguishable, then the act that de facto status was intended to prevent—annexation—would effectively be accomplished. Annexation is, of course, profoundly condemned by contemporary international law.³⁵⁴ What would remain of that prohibition if occupying powers could assume all the legislative authority of a de jure sovereign?³⁵⁵

Second, the humanitarian intervention claim improperly conflates arguments of *jus ad bellum* with those of *jus in bello*. *Jus ad bellum* is law concerning the initiation of armed conflict, asking when a particular use of force is permissible. *Jus in bello* is law addressing conduct in warfare; for example, the immunity of civilians from direct attack or the proper treatment of prisoners.³⁵⁶ A fundamental tenet of *jus in bello* norms is that they apply to any armed conflict regardless of its motivation or objective.³⁵⁷ Article 1 of all four Geneva Conventions provides, "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in *all* circumstances."³⁵⁸ Even a just war, in other words, legally sanctioned by *jus ad bellum*, cannot legiti-

353. U.S. Department of State, *Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez*, Oct. 1, 1976, in 16 I.L.M. 733, 734 (1977) (emphasis added); see also OPPENHEIM, *supra* note 213, at 296 ("International Law not only gives certain rights to an occupant, but also imposes certain duties upon him.").

354. When Iraq purported to annex Kuwait in 1990, the Security Council responded that "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void." It further called "upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation." S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg., U.N. Doc. S/RES/0662 (1990).

355. As von Glahn states, "If not only de facto but also all de jure authority passes into the hands of the occupant, then the territory can no longer be considered as part of the domain of the enemy government but has been annexed to the domain of the occupying power." VON GLAHN, *supra* note 12, at 31.

356. See generally INGRID DETTER, *THE LAW OF WAR* (2d ed. 2000); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (2004).

357. GREEN, *supra* note 228, at 16-17.

358. Fourth Geneva Convention, *supra* note 11, art. 1 (emphasis added).

mize impermissible means of conducting war.³⁵⁹ This is a fundamental principle of humanitarian law.³⁶⁰ It rests on the view that the primary beneficiaries of *jus in bello* norms—civilians and individual combatants—will have had little role in initiating conflict and so should not be penalized for the alleged unlawfulness of their side's cause for war.

Occupation law is a species of *jus in bello*. As a result, claims that the war preceding an occupation was just should play no role in assessing the duties of the occupying power.³⁶¹ Yet the humanitarian intervention claim argues precisely that because an occupation results from a legally sanctioned war to oust a repressive regime, that determination of legality should control the legality of reforms enacted under occupation. The wall of separation between *jus ad bellum* and *jus in bello* renders this claim a non-sequitur.

There is an additional danger here. Even if one could successfully bridge the *jus ad bellum*/*jus in bello* divide in the Iraq case—perhaps by saying that unlike other *jus in bello* rules like targeting civilians, the conservationist principle presents a unique barrier to the realization of valid humanitarian war aims—there is no consensus among states or scholars that a unilateral right of humanitarian intervention exists.³⁶²

359. See GREEN, *supra* note 228, at 18. The ICRC commentary on article 1 of the Fourth Geneva Convention states: "Whether a war is 'just' or 'unjust', whether it is a war of aggression or of resistance to aggression, whether the intention is merely to occupy territory or to annex it, in no way affects the treatment protected persons should receive." PICTET, *supra* note 243, at 16-17.

360. As Dinstein correctly observes, "If every belligerent were given a licence to deny the enemy the benefits of the *jus in bello* on the ground that it is the aggressor State, there is reason for scepticism whether any country would ever pay heed to international humanitarian law." YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 141 (3d ed. 2001).

361. As the Nuremberg Tribunal held in the Hostage case,

international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.

United States v. List et al., 11 N.M.T. 1230, 1247 (1948).

362. See FRANCIS KOFI ABIEW, *THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION* 231-35 (1999) (surveying conflicting scholarly opinion). Notably, even during the Kosovo intervention in 1999—a case sometimes cited as precedent for the Iraq war and an undoubted human rights emergency—most participating NATO governments declined to base their actions on a right of humanitarian intervention without Security Council approval. See Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN

There is even less support for a right of pro-democratic intervention (the creation of “democratic” institutions being an oft-stated goal of the CPA).³⁶³ Discarding the conservationist principle, therefore, would allow an intervener to validate and realize war aims under occupation law that may well be invalid under law regulating the use of force. If the international community is unable to prevent an intervention from occurring, one of the few points of legal leverage it may retain is to insist that the conservationist principle be respected in a subsequent occupation. Yet this can only occur if the wall between the two bodies of law remains impregnable.

Third, principles of state autonomy that largely entered international law (or were substantially strengthened) after the Geneva Conventions form an independent foundation for restraining an occupier’s legislative authority. The autonomy principles find various doctrinal expressions—state equality, internal self-determination, and non-intervention being the most common.³⁶⁴ All were championed by the newly independent states of the post-colonial era, who insisted on legal recognition of autonomy in national political processes and fundamental decisions of domestic political architecture. To be sure, human rights norms and other standards directed at states’ treatment of their own citizens circumscribe autonomy in policy-making. But these norms limit specific *acts* or *modes* of governance. They do not divest states of all authority to legislate on matters of political and economic infrastructure.

Yet that would be the consequence of abandoning the conservationist principle. The principle that “[e]very State has an inalienable right

INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 232, 235-36 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

363. See Michael Byers & Simon Chesterman, “*You, the People*”: *Pro-Democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 280, at 259. Indeed, continued unilateral interventions to enforce an entitlement to democratic governance could have the effect of undermining the legitimacy of the entitlement itself. As Thomas Franck warned in a prescient 1992 article, democratization norms “will have to be uncoupled, in the clearest fashion, from a long history of unilateral enforcement of a tainted, colonialist ‘civilizing’ mission.” Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 84 (1992).

364. See Ian Brownlie, *The Rights of Peoples in Modern International Law*, in THE RIGHTS OF PEOPLES 1, 5 (James Crawford ed., 1988) (describing the core of the self-determination principle as “the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives”).

to choose its political, economic, social and cultural systems, without interference in any form by another State,” would cease to apply to the occupied state.³⁶⁵ The conservationist principle thus finds new life as a concomitant to the view that no conception of political autonomy is compatible with completely divesting a state of the capacity to make fundamental policy decisions.

Fourth, an occupier unconstrained by the conservationist principle would face no barriers to enacting legislation that could incur the international responsibility of the occupied state. A state incurs “international responsibility” for its wrongful acts when it breaches an international obligation and the breach is attributable to the state.³⁶⁶ Legislation enacted in defiance of the conservationist principle could breach the occupied state’s obligations in any number of ways: it could violate the state’s pre-existing treaty obligations; it could repudiate debts owed by the state; or it could discriminate against aliens in ways that constitute “denials of justice,” thereby creating compensatory rights in the alien’s state of nationality. Attributing an occupying power’s breach to the state is a more complex matter. Because states rather than governments incur international legal obligations, any entity properly acting on behalf of the state may incur its responsibility.³⁶⁷ These agency principles include both actual and apparent authority.³⁶⁸ However, they largely focus on an agency created by national rather than international law.³⁶⁹ Because the legal status of an occupying power is determined by the latter rather than the former, the capacity of an occupier to act on the state’s behalf is not entirely clear.³⁷⁰

365. *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883d mtg., Annex (1970) [hereinafter *Friendly Relations Declaration*].

366. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Report of the International Law Commission on the Work of Its Fifty-Third Session*, art. 2, U.N. GAOR, 56th Sess., Supp. 10, Nov. 2001, at 43, U.N. Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc/>.

367. *Id.* at 59, 80 (2001) (“[T]he general rule is that the only conduct attributable to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.”).

368. *Id.* at 83.

369. *Id.* at 82.

370. The U.S. Department of State argued in 1976 that an occupier could not take the similar action of granting a concession for the exploitation of mineral resources. U.S. Department of State, *supra* note 353, at 746-48. The State Department claimed that a concession would be the type of legislative act prohibited by article 43 of the Hague Regulations. *Id.* at 747.

Given this doctrinal uncertainty, prudence dictates that occupiers should not be given discretion to incur legal obligations for the post-occupation regime. This is not to suggest that occupiers will always act rashly and impose such burdens. But if they did, the injured states could bring claims for compensation against an entirely innocent post-occupation regime. The conservationist principle creates an important barrier to liabilities of this kind.

There are, in addition, more basic doctrinal reasons to preserve the conservationist principle. Primary among them is that it is set out in binding treaties whose force cannot be dissipated by unilateral action.³⁷¹ Moreover, a common danger highlighted by the objections above is that of sanctioning self-help on the part of occupiers. International law generally discourages states from taking unilateral enforcement actions, even in response to violations of fundamental rights.³⁷² It does so by erecting other normative regimes that protect national decision-making against external intervention. Many of these bulwarks of state autonomy and sovereign equality are at work here: the prohibition on annexation, the imposition of *jus in bello* obligations on states fighting just wars, and the limitations of instances in which an occupier may act as an agent for the occupied state. Despite harmony in a variety of substantive areas, international law still vigorously protects states' autonomous capacity to make (even illegal) policy choices without incurring unilateral intervention by self-appointed enforcers.³⁷³

371. While a treaty can lose its normative status by falling into "desuetude" through disuse, the necessary conditions do not exist here. Obsolescence must be manifest in conduct of the parties. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 250-51 (2000); LORD MCNAIR, *THE LAW OF TREATIES* 516 (1961). But the general validity of the Hague and Geneva instruments has been reaffirmed not only in recent judicial decisions but by the Security Council during the Iraqi occupation itself.

372. Certain "counter-measures" are permitted, but their scope is severely limited. Most notably, they cannot involve armed force in violation of the U.N. Charter or contravene human rights. See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 366, art. 50(1)(a), at 57.

373. In the Nicaragua case, the United States argued that the Sandinista regime had refused to fulfill promises made to the Organization of American States to liberalize its governing institutions, including the holding of free and fair elections. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 130-31 (June 27). The Court held that even if this claim were true, it could not justify the use of force by the United States as a measure of unilateral self-help. *Id.* More generally, the court refused to sanction "the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system." *Id.* at 133.

D. *A Reformist Reading of Occupation Law*

1. Looking to International Standards

The fourth argument justifying CPA reforms is similar to the third in that it presents a direct challenge to the conservationist principle. But this claim stops short of rejecting the principle altogether. It seeks only to modify the principle in order to account for recent developments in other areas of international law.

The argument begins with the view that Geneva occupation law “is of an essentially humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such.”³⁷⁴ The specific prohibitions in articles 27-34 and 47-78 of the Fourth Geneva Convention overwhelmingly involve the protection of individual rights. Collectively, these provisions have been described as a “bill of rights for the occupied population.”³⁷⁵ The Geneva drafters, meeting in the shadow of Nazi atrocities in occupied Europe, substantially expanded upon the rights guaranteed in the Hague Regulations.³⁷⁶ Their work also reflected a slow demise of the minimalist nineteenth century European state that intervened little in the lives of its citizens, either to provide social services or to protect individual rights. If most *de jure* regimes of that era were non-interventionist, there was little reason for occupation law to require that a *de facto* regime—presumably an extrapolation of prevailing conceptions of good governance—actively work to better the lives of persons in occupied territories. In the post-WWII era, however, human rights became an increasingly central concern of the Western states that dominated the Geneva drafting process. A number of commentators point out that their views on occupied populations reflected this emerging concern. Accordingly, these writers argue that neither Hague nor Geneva law should protect laws and institutions of an ousted sovereign that fall below minimally acceptable standards of

374. PICTET, *supra* note 243, at 274.

375. BENVENISTI, *supra* note 218, at 105.

376. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 245-47 (2000) (discussing the human rights concerns of the Geneva Convention drafters). Apart from protection of private property, the only provisions of the Hague Regulations similar to contemporary human rights principles appear in article 45 (“It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.”) and article 46 (“Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”). Hague Regulations, *supra* note 10, arts. 45-46.

humanity.³⁷⁷ This is also the view of the U.S. Army.³⁷⁸

Unlike a claim that all liberal/democratic reforms can be reconciled with the treaty's text, this argument relies on external normative sources. It takes the Convention's text as a means of assimilating recent developments in international law that appear to support the CPA's reforms. This resort to external sources is necessary because the rights enumerated in the Convention are basic and do not reflect the full range of protections now contained in human rights treaties. Rights essential to political participation, for example, such as freedoms of speech, press, and conscience, are omitted. The rights of children and ethnic minorities are not explicitly protected. In addition, the Convention does not require an infrastructure of rights protection. There is no obligation to create institutions that monitor rights compliance, investigate allegations of wrongdoing, and prosecute violators. Like most new governmental structures introduced by occupiers, such institutions would likely run afoul of the conservationist principle. All these obligations, however, can be found in contemporary human rights law.

Linking the Fourth Geneva Convention with trends in customary law can be justified on two grounds. First, treaty obligations may be

377. See GREEN, *supra* note 228, at 249 (occupier may "remove from the penal code any punishments that are 'unreasonable, cruel or inhumane' together with any discriminatory racial legislation"); PICTET, *supra* note 243, at 336 (occupier may "abolish courts or tribunals which have been instructed to apply inhumane or discriminatory laws"); GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 195 (1968) (An enemy who has "relapsed into a state of barbarism" may "make unavoidable the exercise of the occupant's legislative powers for the double purpose of destroying the legal foundations of such a barbarous system and restoring a minimum of civilised life in the occupied territory."); VON GLAHN, *supra* note 12, at 115 ("[A]n occupant should be able to set aside the operation of laws opposed to the humanitarian concepts of the convention . . ."); R.Y. Jennings, *Government in Commission*, 1946 BRIT. Y.B. INT'L L. 112, 132 n.1 (1946) (Article 43 of Hague Regulations does not require an occupier "to respect the laws in force in the country to the extent of respecting laws which are contrary to natural justice.").

378. The U.S. Army Field Manual on the Law of Land Warfare, after setting out Hague and Geneva standards on the inviolability of local laws and institutions, nonetheless provides:

The occupant may alter, repeal, or suspend laws of the following types:

- a. Legislation constituting a threat to its security, such as laws relating to recruitment and the bearing of arms.
- b. Legislation dealing with political process, such as laws regarding the rights of suffrage and of assembly.
- c. Legislation the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination.

THE LAW OF LAND WARFARE, *supra* note 250, ¶ 371.

understood in their larger normative context in order to assimilate developments in international law that elucidate and update their meaning.³⁷⁹ Second, the link may rest on an occupier's own human rights treaty obligations. Those obligations are understood as restraining every coercive exercise of a state's power over individuals it governs.³⁸⁰ They attach not only within an occupier's own territory and in regard to its own citizens, but, in the words of the International Covenant on Civil and Political Rights, wherever persons are "subject to their jurisdiction."³⁸¹ That is certainly the case in an occupation.³⁸²

379. Together with context, a treaty may be interpreted by reference to "any relevant rules of international law applicable in the relations between the parties." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(c), S. TREATY DOC. NO. 92-12, 1155 U.N.T.S. 331, 340. The International Court of Justice has said that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31.

380. See Legal Consequences of the Construction of a Wall, *supra* note 217, at ¶¶ 107-111 (holding Israel's obligations under the International Covenant on Civil and Political Rights to apply outside its territory, explaining that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory").

381. Article 2(1) of the Covenant provides in full:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(1), S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171, 173 [hereinafter ICCPR]. See Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995). The Human Rights Committee, established by the Covenant, has interpreted article 2(1) to require a State Party "to respect and ensure the rights laid down in the Covenant to anyone within the power and effective control of that State Party, even if not situated within the territory of the State Party." As an example of state "power and effective control" the Committee cites "forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." Office of the U.N. High Commissioner for Human Rights, *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/74/CRP.4/Rev. 6, ¶ 10 (2004).

382. The European Convention on Human Rights has been applied on a number of occasions to the Turkish occupation of northern Cyprus. See Loukis G. Loucaides, *The Protection of the Right to Property in Occupied Territories*, 53 INT'L & COMP. L.Q. 677, 683-85 (2004). In the *Loizidou* case for example, the European Court of Human Rights held:

[T]he responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out

Triggering human rights obligations in this manner is consistent with applying occupation law whenever a belligerent power exercises “effective control”: both tests turn not on the formal question of whether a state has acquired *de jure* authority over a territory but on the factual question of whether it exercises powers of government on the ground. If it does, minimum protective standards for the affected population apply. And if both bodies of law are triggered by the same factual circumstances, it makes little sense to interpret the scope of occupation law obligations without taking into account an occupier’s human rights obligations as well.

The CPA itself made frequent reference to international law as a basis for its reforms.³⁸³ Security Council resolutions were mentioned in virtually every piece of legislation.³⁸⁴ The CPA also made frequent reference to substantive international standards, suggesting that a range of norms beyond the goals articulated by the Security Council had influenced the content of its law-making.³⁸⁵

in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 24 (1995) (Preliminary Objections).

383. None of the CPA’s orders, regulations, or memoranda made any mention of Iraqi constitutional law. While the 1970 Iraqi Provisional Constitution—the last of Iraq’s six constitutions in force since its independence from the Ottoman Empire in 1920—was not formally suspended, it was effectively ignored in CPA decrees. See UNITED NATIONS/WORLD BANK JOINT IRAQ NEEDS ASSESSMENT: GOVERNMENT INSTITUTIONS, CIVIL SOCIETY, THE RULE OF LAW AND MEDIA 42 (Oct. 2003) (“The Iraqi Provisional Constitution of 1970, while not repealed or suspended, has been essentially in abeyance since the beginning of the occupation.”), available at [http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/IQ-GOVERNANCE/\\$File/GOVERNANCE+final+sector+report+16+October.pdf](http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/IQ-GOVERNANCE/$File/GOVERNANCE+final+sector+report+16+October.pdf); see also Int’l Crisis Group Middle East Rep. No. 27, *Iraq’s Constitutional Challenge* 1-5 (Nov. 13, 2003) (discussing Iraq’s previous constitutions, noting that all constitutions since the monarchy was overthrown in 1958 have been denominated “provisional”), available at http://www.icg.org/library/documents/middle_east___north_africa/19_iraq_s_constitutional_challenge.pdf.

384. The Administrator began every CPA regulation, order, and memorandum by declaring that he was acting pursuant to “relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war.” See, e.g., Coalition Provisional Authority Regulation No. 1, *supra* note 28.

385. See, e.g., Coalition Provisional Authority Order No. 89, *supra* note 91 (standards on child labor needed in light of Iraqi obligations under two ILO conventions); Coalition Provisional Authority Order No. 87, *supra* note 172 (order on public procurement needed because “public contract laws should conform to international standards”); Coalition Provisional Authority Order No. 80, *supra* note 147 (amendments to Iraqi Trademarks and Descriptions Law needed because “several provisions of the current Iraqi trademark legislation do not meet current internationally-recognized standards of protection”); Coalition Provisional Authority Order No. 79, *supra* note 80

Must occupying powers, then, apply the full range of their human rights obligations to territories they administer? Are any shortcomings in the minimum set of rights contained in the Fourth Geneva Convention to be filled by (i) an interpretive expansion of Geneva law obligations and/or (ii) an extra-territorial application of the occupier's own human rights treaty obligations? If this were the case, the conservationist principle would cease to apply to human rights reforms. Human rights and humanitarian law obligations would effectively become fused: with the exception of actual combat and other exigent circumstances of warfare, which may justify the suspension of certain guarantees,³⁸⁶ governments would be held to one set of human rights obligations whether they were at war or peace and whether or not the individual right-holders were their own citizens or aliens over whom they exercise temporary jurisdiction.

This goes well beyond how national militaries have interpreted Hague and Geneva law for their own forces' conduct. The U.S. military manual allows for the repeal of laws "the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination."³⁸⁷ The New Zealand manual is identical.³⁸⁸ The German manual gives only the examples of racially discriminatory laws and those violating *jus cogens* norms.³⁸⁹ The British manual refers

(creation of Iraqi Nonproliferation Programs Foundation based in part on TAL provision "calling on the government to respect and implement Iraq's international obligations regarding" nonproliferation); Coalition Provisional Authority Order No. 60, *supra* note 87 (creation of Ministry of Human Rights based in part on "the obligations assumed by Iraq under international human rights treaties to which it is party"); Coalition Provisional Authority Order No. 7, *supra* note 94 (noting that "the former regime used certain provisions of the penal code as a tool of repression in violation of internationally recognized human rights"); *Freedom of Assembly*, Coalition Provisional Authority Order No. 19, CPA/ORD/9 July 2003/19 (July 9, 2003), available at http://www.iraqcoalition.org/regulations/20030710_CPAORD_19_Freedom_of_Assembly_.pdf (repealing restrictions on freedom of assembly, which were "inconsistent with Iraq's human rights obligations").

386. Most human rights treaties allow "derogation" from specified rights in extreme circumstances. The International Covenant on Civil and Political Rights, for example, permits derogation from some (but not all) protected rights in a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." ICCPR, *supra* note 381, art. 4(1).

387. THE LAW OF LAND WARFARE, *supra* note 250, ¶ 371.

388. INTERIM LAW OF ARMED CONFLICT MANUAL, *supra* note 251, at 13-7, ¶ 2(c).

389. HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 252, at 255. *Jus cogens* rules are "of a superior status and cannot be affected by treaty." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 331 cmt. e (1987).

to laws that “shock elementary conceptions of justice and of the rule of law.”³⁹⁰ Nazi-era laws are the only example given. The Canadian manual refers to repealing laws if “the welfare of the population” so requires.³⁹¹ The French and Argentine manuals are silent on any exceptions to the conservationist principle.

Abandoning the constraints of the conservationist principle in this fashion also goes further than scholars who seek to “humanize” the role of an occupier administering a formerly totalitarian state. Their descriptions of the repealable laws seem to emerge directly from the Nazi experience and are phrased in extreme terms. The authors speak of a nation having “relapsed into a state of barbarism,” “inhumane or discriminatory laws,” and laws “which are contrary to natural justice.”³⁹² This is a high threshold and does not include every right arguably protected by human rights instruments.

Three additional factors counsel a restrained application of human rights obligations to occupiers. First, a reform agenda legitimized solely on the grounds that it accords with human rights norms would radically skew the delicate balance of conflicting policies inherent in reconciling human rights imperatives with the conservationist principle. The CPA could have gone much further than it did, for example by imposing a new constitution on Iraq, wholly rewriting its civil and criminal laws, restructuring the judicial system or imposing a new federalist structure. All these actions could be justified by contemporary human rights standards. But legitimacy based on that outcome would cease to be an accommodation between humanitarian law and human rights and become, instead, a full substitution of the latter for the former. This may well be a result the Security Council accepts after collective deliberation and exercise of its legislative capacity. But for a single occupier, it is simply cherry-picking between equally binding treaty obligations. It is not even clear this result would obtain, as the International Court of Justice has suggested that in the event of a conflict between certain humanitarian and human rights law, the former ought to govern as the *lex specialis*.³⁹³

390. THE LAW OF WAR ON LAND, *supra* note 228, at 143 n.1.

391. LAW OF ARMED CONFLICT, *supra* note 252, at 12-3, ¶ 1209(2).

392. See sources cited *supra* note 377.

393. In the *Nuclear Weapons* case, the Court was faced with the claim that the “right to life” protected by human rights instruments ought to restrain the use of nuclear weapons, regardless of how humanitarian law viewed the question. The Court observed:

Second, there is affirmative value in some domestic norms and institutions emerging from the politics of a post-occupation society. While democratic political theory now largely excludes the view that political majorities may legitimately choose to subordinate “the right” to collective notions of “the good,” this view does not require bypassing majoritarian politics on all issues arguably affecting human rights. Some questions of political architecture, legal policy, and social ordering are legitimately open to debate and collective national decision-making. Utilitarian conceptions of democracy in fact regard deliberative politics as essential to the long-term viability of liberal institutions.³⁹⁴ This *societal* autonomy principle underlies the still-vital doctrine in international law of internal self-determination, noted above. This is the view that “[e]ach State has the right freely to choose and develop its political, social, economic and cultural systems.”³⁹⁵ At its core, the conservationist principle seeks to preserve this decision-making capacity by preventing, as McDougal and Feliciano put it, “the active transformation and remodeling of the power and other value processes of the occupied country.”³⁹⁶ This is not to support the continuation of laws that clearly violate core human rights. But at a certain point, an occupier’s reforms may become so sweeping and far-reaching that inhabitants lose the opportunity to make important choices about the nature of their own society.³⁹⁷ Deferring sweeping reforms until the

[T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

Nuclear Weapons Advisory Opinion, *supra* note 217, ¶ 25.

394. This is Mill’s argument, for example. See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 48-74 (1861) (Gateway ed. 1962).

395. *Friendly Relations Declaration*, *supra* note 365.

396. MCDUGAL & FELICIANO, *supra* note 278, at 768.

397. Thus, Christopher Greenwood concludes:

return of an indigenous government allows both objectives to be served: core human rights obligations would be respected through narrowly tailored reforms enacted during occupation, while self-determination would remain meaningful for the post-occupation society by prohibiting overbroad systemic changes.

Third, the commentators who argue for a human rights exception to the conservationist principle do so in order to allow for the *repeal* of offensive laws. None speak of replacement legislation. And none speak of creating entire bodies of rules or new governmental entities in areas where none existed before. Finally, none speak of monitoring or enforcement mechanisms. An unadulterated application of human rights law might well require all of these affirmative steps. But in occupation law, they must be balanced against the presumption against institutional change. Allowing the repeal of clearly offending laws but not permitting the enactment of new ones, except when necessary to avoid incoherence or confusion, seems an appropriate accommodation.³⁹⁸

If, for these reasons, occupiers should be held to a more limited set of human rights obligations, what are their particulars? The preceding discussion suggests a series of guideposts. First, by definition, the rights in question must unquestionably be protected by international law. Second, any pre-existing laws that *require* occupiers to violate well-established human rights may (and probably must) be repealed. This follows from the widespread reaction against the discriminatory laws of Nazi Germany, as well as from the affirmative obligations of the Fourth

Existing administrative and legislative structures and the political process may be suspended for the duration of the occupation but an occupant will exceed its powers if it attempts, for example, to create a new State, to change a monarchy into a republic or a federal into a unitary government. An occupant may, therefore, suspend or bypass the existing administrative structure where there is a legitimate necessity of the kind discussed . . . but any attempt at effecting permanent reform or change in that structure will be unlawful.

Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION* 241, 247 (Emma Playfair ed., 1988).

398. An area not covered by this resolution would be the violation of rights in the private sphere. If the existing law did not speak to issues such as family violence, a non-repeal rule would do nothing to address the problem. *See generally* ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1993).

Geneva Convention. If, on the other hand, the laws in force cannot plausibly be identified as a cause of human rights violations, then repeal would not be justified.³⁹⁹ Third, in the absence of repealable laws violating human rights, if the very lack of legal protection itself appears to contribute to rights being denied in practice, an occupier may enact new laws tailored to the particular violations. This follows both from the Convention's focus on the *condition* of rights in the territory and from a restrained understanding of human rights treaty obligations. Fourth, if rights violations appear to result from a lack of supervisory institutions or review mechanisms, those may be created as well. The degree of permissible legal reform is thus linked to the actual experience of citizens in the territory. Reforms based on mere efficiency considerations or projections of potential future violations in the post-occupation era would remain subject to the conservationist principle.

2. Consistency with International Human Rights Norms

How do the CPA's human rights reforms fare under these guidelines? Many appear consistent with human rights now deeply entrenched in international law. The following chart shows the major human rights reforms and the corresponding protected rights in the International Covenant on Civil and Political Rights (ICCPR), the most widely ratified general human rights treaty⁴⁰⁰:

399. Most human rights treaties require state parties both to refrain from violations and to enshrine rights protection in law. The standard set out in the text would only require the latter if necessary to ensure the former. The distinction between these two obligations is well-captured by the two sub-parts of article 2 of the Covenant on Civil and Political Rights:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

ICCPR, *supra* note 381, art 2(1-2).

400. The Covenant had 149 state parties as of June 9, 2004. See Office of the U.N. High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (2004), at <http://www.unhcr.ch/pdf/report.pdf>. The CPA's prohibition of child labor by Order No.

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<u>CPA Action</u>	<u>ICCPR Right Protected</u>
• Torture prohibited ⁴⁰¹	Right against torture (art. 7)
• Capital punishment suspended ⁴⁰²	Heightened procedural protections in capital cases (art. 6(2))
• Discrimination by public officials prohibited ⁴⁰³	Discrimination prohibited (art. 2)
• Central Criminal Court created ⁴⁰⁴	Right to fair judicial hearing (art. 14)
• Due process in criminal proceedings enhanced ⁴⁰⁵	Due process guarantees (art. 9)
• Supervision of judiciary enhanced ⁴⁰⁶	Right to fair judicial hearing (art. 14)
• Tribunal to punish former regime members ⁴⁰⁷	Victims have right to a remedy (art. 3)
• Prison conditions improved ⁴⁰⁸	Humane treatment in detention (art. 10)
• Human Rights Ministry created ⁴⁰⁹	Measures necessary to ensure recognition of rights (art. 2)

The only exception to this consonance with international standards is de Ba'athification. Not only is the wholesale purge of former regime members not required by human rights law, but some argue it is

89, while not addressed by the Political Covenant, is supported by two widely ratified conventions of the International Labor Organization. Coalition Provisional Authority Order No. 89, *supra* note 91; *see* Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297 (ratified by 135 states); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, S. TREATY DOC. NO. 106-5, 2133 U.N.T.S. 163 (ratified by 150 states). For ratification information, see the International Labour Organization's Database of International Labour Standards at <http://www.ilo.org/ilolex/english/convdisp1.htm>. It is also supported, though in less categorical terms, by the Rights of the Child Convention. *See* United Nations Convention on the Rights of the Child, Nov. 20, 1989, art. 32, 1577 U.N.T.S. 3, 54-55. The Rights of the Child Convention had 192 States Parties as of November 14, 2003. *See* Office of the U.N. High Commissioner for Human Rights, *Status of Ratification of the Convention on the Rights of the Child* (2003), at <http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm>.

401. Coalition Provisional Authority Order No. 7, *supra* note 94.

402. *Id.*

403. *Id.*

404. Coalition Provisional Authority Order No. 13, *supra* note 99.

405. *See* Coalition Provisional Authority Memorandum No. 3, *supra* note 97; Coalition Provisional Authority Order No. 13, *supra* note 99; Coalition Provisional Authority Order No. 15, *supra* note 102.

affirmatively prohibited, or at least radically circumscribed.⁴¹⁰ However, the CPA largely abandoned its de-Ba'athification initiatives toward the end of the occupation.⁴¹¹

The second and third guidelines ask whether pre-existing Iraqi law required the occupiers to violate human rights or whether the mere absence of protections contributed to rights violations. Any definitive answers to these questions would require almost impossibly precise estimations of causation. Iraq's constitution of 1970 contained a set of fundamental rights and duties that, while short on detail, was not unacceptable by international standards.⁴¹² But layered on top of permanent legal structures were a series of ad hoc mechanisms of arbitrary authority and repression.⁴¹³ Since 1991 the Iraqi Revolutionary Command Council, headed by Saddam Hussein, had "issued some 1,500 resolutions annually, ranging from amendments to the constitution and security decrees to changes in laws concerning trade and taxes."⁴¹⁴ The Ba'ath Party had also largely marginalized the judiciary as a check on state power.⁴¹⁵ One report has described the result as "a legal jumble."⁴¹⁶ Existing Iraqi law clearly facilitated the Ba'athist regime's violations of human rights, but whether legal reform was necessary to abate violations or whether removal of the Ba'athist leaders would have been sufficient is an unanswerable counter-factual. Given the intertwining of the two, law reform should not be rejected as clearly unnecessary to protecting human rights.

Finally, did human rights violations result from a lack of supervisory mechanisms? This question also calls for disentangling the thicket of inadequate norms, informal control mechanisms and behavioral patterns in a repressive political culture. Human rights law generally

406. See Coalition Provisional Authority Order No. 15, *supra* note 102.

407. See Coalition Provisional Authority Order No. 48, *supra* note 106.

408. See Coalition Provisional Authority Order No. 31, *supra* note 96; Coalition Provisional Authority Memorandum No. 2, *supra* note 110.

409. Coalition Provisional Authority Order No. 60, *supra* note 87.

410. See Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357 (1999).

411. See Coalition Provisional Authority Order No. 100, *supra* note 68, § 3.

412. See *Iraqi Interim Constitution*, ch. III (July 16, 1970) in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: IRAQ 21, 25-28 (Fouad Famy Shafik trans., Albert P. Blaustein & Gisbert H. Flantz eds., 1990).

413. See MIDDLE EAST WATCH, *supra* note 279.

414. United States Inst. of Peace, *supra* note 275, at 7.

415. *Id.* at 5.

416. *Id.* at 7.

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regards implementing institutions as essential to effective rights guarantees, but specificity of particular methods is lacking.⁴¹⁷ Creating impediments to the effective realization of protected rights, however, is itself a treaty violation. Two examples are broad amnesties for violators and sham investigations into known cases of abuse.⁴¹⁸ In a state like Iraq, where the effective guarantee of human rights is largely a new task for the government, deference to the CPA's judgment that a Human Rights Ministry and other changes in infrastructure were necessary seems appropriate.

All reforms save de-Ba'athification, therefore, appear necessary to ensure that Iraqis actually enjoy internationally sanctioned human rights in practice.⁴¹⁹

3. Military and Security Reforms

Human rights was only one category of CPA reforms. Another was change in Iraq's military and security infrastructure: the old Iraqi army was disbanded, a new one was created along with a supporting bureaucracy, military laws and codes were abolished, and a new Ministry of

417. This hands-off approach is evident in the Human Rights Committee's General Comment on article 2 of the ICCPR, which requires state parties to take effective steps to guarantee protected rights:

[A]rticle 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article. It recognizes, in particular, that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.

Office of the U.N. High Commissioner for Human Rights, *General Comment No.03: Implementation at the National Level* (Art. 2) CCPR General Comment No. 3., 13th Sess., ¶ 1 (1981). This deference to national methods of implementation is often referred to as the "margin of appreciation." See generally YUTAKA ARAI-TAKAHASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* (2002).

418. See, e.g., *Barrios Altos Case*, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 45-49 (2001) (Inter-American Court of Human Rights finds Peruvian amnesty laws to violate provisions of American Convention on Human Rights); *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 180-186 (1988) (Honduran government has an affirmative obligation to investigate case of disappearance in good faith).

419. That is, all the reforms described *supra* Parts II.B.3-4.

Defense was established. Reforms were made to the national intelligence service, and two agencies related to non-proliferation were created.⁴²⁰

These reforms fail the first prong of the test for a reformist reading of occupation law—consistency with well-established international norms. Simply put, there is no international law on the subject. There are no multilateral treaties setting standards for national militaries, either in their internal governance or in their relation to other branches of government. One might argue that an effective transition to democracy requires civilian control of the military. Or one could make the specific claim that the Ba’athist-era military had become an instrument of repression. But both these arguments are overbroad, potentially justifying any reforms, no matter how sweeping, that result in improvements in human rights protection. Maintaining at least some respect for the conservationist principle requires that a “least drastic means” test be applied to reforms that appear to go beyond changes strictly necessary to give effect to the norm in question. Here, concern for the military’s arbitrary exercises of power could have been addressed directly by either limiting the military’s involvement in civilian affairs or ensuring that individual rights are protected against infringement by civilian and military personnel alike. Or one could take the quite reasonable view that no military reforms were needed to protect human rights during the occupation, since no indigenous Iraqi institutions, political or military, exercised independent authority during the CPA’s tenure. Either argument demonstrates the overbreadth of the CPA’s approach.

4. Economic Reforms

a. *International Legal Context*

The CPA remade virtually every aspect of Iraqi economic life. The laws of banking, taxation, trade, foreign investment, corporations, bankruptcy, intellectual property, securities regulation, the media, state-owned enterprises, and even road traffic were extensively overhauled. All were intended to transform Iraq’s economy from a centrally planned to a free market model.⁴²¹

The two routes by which human rights law may be assimilated into the obligations of occupying powers are not available for these changes in economic policy. Multilateral treaties exist in only a few of the areas

420. See *supra* Part II.B.2.

421. See *supra* Part II.B.5.

of economic regulation, principally intellectual property and foreign investment and trade. But even these do not impose the extra-territorial obligations contained in human rights instruments.⁴²² No multilateral instruments that impose regulatory standards exist for banking, taxation, corporate law, bankruptcy law, securities regulation, media regulation, traffic control, and state-owned enterprises.⁴²³ Nor does Hague or Geneva law contain a list of economic infrastructure

422. In the area of intellectual property, the United States is party to the Berne Convention for the Protection of Literary and Artistic Works. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 (1986) (originally signed at Berne Sept. 9, 1886) [hereinafter Berne Convention]. The treaty's protections apply in all countries that are parties. *Id.* art. 1. Iraq, however, is not a party to the Berne Convention. See Status on Dec. 2, 2004, at <http://www.wipo.int/treaties/en/documents/word/e-berne.doc>. Article 31 allows a State Party to declare at any time that the Convention "shall be applicable to all or part of those territories, designated in the declaration or notification, for the external relations of which it is responsible." Berne Convention, *supra*, art. 31. The United States has made no such declaration regarding Iraq. See World Intellectual Property Organization, WIPO Treaties Database, Notifications, Berne Convention, at http://www.wipo.int/treaties/en/ShowResults.jsp?search_what=N&treaty_id=15. The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights simply incorporates the requirements of other intellectual property treaties, such as the Berne Convention, by reference. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994). In the area of trade, Article 26(5)(a) of the original GATT agreement states, "Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility." General Agreement on Tariffs and Trade, Oct. 30, 1947, art. 26(5)(a), 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194. The United States did not notify the GATT Secretariat of its intention to apply the treaty outside its metropolitan territory, which it had an opportunity to do. See WORLD TRADE ORGANIZATION, 2 GUIDE TO GATT LAW & PRACTICE 917 n.39 (1995). The 1994 Agreement establishing the World Trade Organization provides that members of the original GATT who accept the substantive agreements also negotiated in 1994 "become original members of the WTO." WTO Agreement, *supra*, art. XI(1). Presumably the territorial scope of the GATT obligations carries forward for each such original member.

423. Standards do exist in some of these areas, but they are generally advisory and do not rise to the level of international legal obligations. An example is banking regulation. The most widely followed standards are those produced by the Basel Committee on Banking Supervision, which is organized under the aegis of the Bank for International Settlements. The Basel Committee itself notes that it "does not possess any formal supranational supervisory authority, and its conclusions do not, and were never intended to, have legal force." Bank for International Settlements, Basel Committee on Banking Supervision, *About the Basel Committee on Banking Supervision*, at <http://www.bis.org/bcb/aboutbcb.htm>. And whatever effects the Committee's recommendations may have had in other regions, they have not been widely followed in the Arab world. Several central elements of the CPA's banking law—diversity of ownership and openness to foreign investment—are generally absent in banking practices in the Middle East. As the International Monetary Fund notes of the region:

obligations that might be deepened or broadened when informed by the details of cognate legal regimes. Apart from general obligations to provide for the welfare of inhabitants, as well as provisions concerning an occupier's use of public and private property, matters of economic regulation are almost wholly absent from the treaties.⁴²⁴

In fact, a reference to international legal "context" here would tend to restrict, not enhance, an occupier's legislative competence in economic affairs. Emerging from colonialism, newly developing countries reacted against Western economic power by introducing a robust notion of economic sovereignty into international law.⁴²⁵ On this view, economic policy is a matter of legitimate diversity among states.⁴²⁶ This *preservation* of domestic competences stands in contrast to the now-dominant assumption that human rights deviating from global norms are *not* proper exercises of sovereign discretion, even for states not parties to the major treaties. Much of the developing world's "new international economic order" did not survive the turbulent era of its

[T]he banking sector is dominated by public sector banks, which are characterized by government intervention in credit allocation, losses and liquidity problems, and wide interest rate spreads (or spreads in rates of returns). In more than half the countries, the banking sector is highly concentrated, with assets of the three largest banks accounting for over 65 percent of total commercial bank assets, and the entry of new banks is difficult. And in many parts of the region, there is an urgent need for developing modern banking and financial skills.

Susan Creane et al., International Monetary Fund, *Financial Development in the Middle East and North Africa* (2003), at <http://www.imf.org/external/pubs/ft/med/2003/eng/creane/>.

424. Articles 46-53 of the Hague Regulations, *supra* note 10, address public and private property, requisitions, pillage, and other matters such as levies to support the occupation. Article 53 of the Fourth Geneva Convention, *supra* note 11, deals with destruction of personal property. But "[t]he general rule requiring respect for fundamental institutions would seem to have important economic and financial implications. It would seem that an occupant has no right to transform a liberal into a communistic or fascistic economy, except so far as military or public-order needs should require individual changes." ERNST H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 90 (1942).

425. See generally JERZY MAKARCZYK, *PRINCIPLES OF A NEW INTERNATIONAL ECONOMIC ORDER* (1988).

426. The General Assembly's *Friendly Relations Declaration*, frequently cited by the International Court of Justice as evidence of customary law, provides that "[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature." *Friendly Relations Declaration*, *supra* note 365. The ICJ has cited the *Friendly Relations Declaration* as authoritative. See, e.g., *Legal Consequences of the Construction of a Wall*, *supra* note 217, ¶¶ 87-88, 156.

birth. And to be sure, when developing states join trade organizations such as the WTO or accept assistance from international financial institutions, their range of economic policy choices shrinks dramatically.⁴²⁷ But states *choose* to operate under these constraints. This is the essential point for occupation law. The economic sovereignty movement did not prescribe a particular economic model, though many proponents rejected market mechanisms. Instead, it sought to protect opportunities for legitimate choice, unconstrained by such burdens as concession contracts entered into by former colonial powers, to pick a common example from the 1960s. The principle of autonomy in choosing economic models has remained integral to international law.⁴²⁸ It is legitimate, for example, for a state to decide that utilities, media outlets, natural resource extraction, and other strategically important industries should be government-owned or off-limits to foreign ownership. In short, there is no normative obligation for a post-occupation government to choose a market economy (or any component thereof) over a command and control system. *A fortiori*, that choice cannot be made in its stead by an occupying power.

Nonetheless, a clear trend exists in the world away from centrally planned economies and toward free markets. International organizations such as the World Bank and the International Monetary Fund are entirely devoted to implementing market-based reforms in developing countries. And foreign direct investment grew steadily across the globe in the 1990s, though it has dipped in recent years.⁴²⁹ Thus, the CPA might have argued that even if conventional sources of law did not

427. See Dermot McCann, *Small States in Globalizing Markets: The End of National Economic Sovereignty?*, 34 N.Y.U. J. INT'L L. & POL. 281 (2001).

428. This autonomy principle has been described as

one that takes seriously the self-determination of peoples as extending to fundamental choices of political, economic, social, and cultural systems (as provided for in numerous authoritative international instruments), notwithstanding the ontological primacy of the individual and the universality of certain basic principles of human equality. This standard allows that the collective capacity to make fundamental decisions, and to have outside actors acknowledge their status as governing law, has a moral value independent of the justice or injustice of the decisions themselves (albeit a moral value that may be trumped where that capacity is egregiously abused).

Brad R. Roth, *Anti-Sovereignism, Liberal Messianism, and Excesses in the Drive Against Impunity*, 2001 FINNISH Y.B. INT'L L. 17, 26-27 (2001) (footnote omitted).

429. U.N. CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT, 2002, U.N. Sales No. E.02.II.D.4 (2002). It is noteworthy that this report does not even cover foreign direct investment in the Middle East, though all other regions of the developing world are discussed.

support liberalizing the Iraqi economy, there is a sufficient consensus in the world to find little objectionable in the CPA's actions. Have not recent trends, it might have said, at least put to rest the claim that Iraqis would be worse off under a liberalized economy?

The trouble with this superficially attractive claim is that it seeks to elide the distinction between state practice giving rise to legal obligations and state practice simply expressing policy preferences. The former arises according to the requirements of customary international law, which act as an essential filtering mechanism: only practice understood by the states themselves as reflecting legal obligations can be counted.⁴³⁰ To interpret the Hague Regulations according to mere policy preferences, however strongly felt at the moment, risks consigning the Fourth Geneva Convention to an ebb and flow of meaning according to trends in sub-normative international opinion.

The varying interpretations given the economic clauses in the Hague Regulations well illustrate this danger. As noted, when the Regulations were drafted in 1907 there were few centrally planned economies. Strict protection was therefore afforded to private property, and an occupier's assumption of economic functions previously in the hands of private industry was assumed to be prohibited.⁴³¹ But by the mid-twentieth century, state socialism had emerged as a competing economic model. This led several commentators to question whether the Regulations might be ignored by states that had come to have far less regard for the sanctity of private property than the drafters.⁴³² Today, of course, the pendulum has swung back, and the Hague Regulations may be criticized for impeding the *undoing* of state-owned and regu-

430. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 8-9 (6th ed. 2003).

431. Hague Regulations, *supra* note 10, art. 46 ("Family honors and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.").

432. See FEILCHENFELD, *supra* note 424, at 24-25. Stone, for example, criticized the Hague Regulations at length for their antiquated assumptions of laissez-faire economics. Writing in 1954, he observed:

Even in capitalist economies there has been a sweeping assertion of State power over economic ownership and control. This shows itself in the movement from the *laissez faire* of the liberal State, to the setting of collectivist goals. New objectives are matched by new techniques and practices of governmental intervention and manipulation. The field of private property has been steadily eroded, and even the residual field subjected to political control.

STONE, *supra* note 220, at 728.

lated economic structures. In a future perhaps characterized by the hyper-mobility of capital, disease pandemics, and environmental crises, central economic planning may yet make a come-back. But a treaty's meaning should not shift regularly depending on prevailing policy preferences. Only when states choose to codify a particular economic model in law should an argument be made for its recognition by occupation law.

b. *Foreign Investment*

A separate comment on the foreign investment reforms is needed, since they are potentially the most far-reaching enacted by the CPA. The new Iraqi foreign investment law opened virtually all sectors of the Iraqi economy to foreign ownership. All utilities (electrical supply, telephone service, retail gasoline sales, home heating oil, and internet service) may be owned by non-Iraqis. The same is true for transportation, media of all kinds, banks, and the entire manufacturing sector. In competition between foreign and domestic providers, no preference is given to Iraqi businesses, as all foreign investors are subject to national treatment. Moreover, all restrictions on the repatriation of profits are eliminated.

No general multilateral treaty on foreign investment exists, though many states have entered into webs of bilateral investment treaties.⁴³³ While some Arab states have begun reforming their foreign investment regimes, many retain the restrictions on foreign investment swept away by CPA Order No. 39.⁴³⁴ These include restrictions on foreign ownership in certain sectors, local content requirements, requirements for

433. The World Trade Organization does not yet address barriers to foreign investment of the kind dismantled by the CPA. See SHERIF H. SEID, *GLOBAL REGULATION OF FOREIGN DIRECT INVESTMENT* 58 (2002). The WTO's Agreement on Trade-Related Investment Measures (TRIMS) is narrowly tailored to address investment barriers related to the free flow of goods, such as domestic content requirements or restrictions on exports by foreign investors. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), available at http://www.wto.org/English/docs_e/legal_e/18-trims.pdf. An attempt by the Organisation for Economic Co-operation and Development to negotiate a Multilateral Agreement on Investment foundered in 1998. SEID, *supra*, at 88-94.

434. See Joseph Ghougassian, *Iraq*, 38 INT'L LAW. 712, 713 (2004) (Order 39 "is the most liberal law in the Arab world, and the most transparent and most attractive directive to foreign investment in the Middle East.").

hiring domestic labor, and capital repatriation limits.⁴³⁵ The nature and degree of the restrictions vary greatly, but no Arab state has taken the CPA's approach of eliminating virtually all restrictions on foreign direct investment. The Arab world as a whole received less than 1% of the total global flow of foreign direct investment from 1975 to 1998.⁴³⁶ Moreover, the little foreign investment by global multinationals was generally limited to secondary economic activities and did not establish bases for industrial production designed to export to world markets.⁴³⁷ As the United Nations Development Program concluded in 2002, "[t]he Arab world remains comparatively cut off from financial globalization."⁴³⁸ Neither global nor regional norms, in short, support the CPA's extreme version of free trade.

5. Good Government Reforms

The CPA's anti-corruption initiatives, including creation of an Iraqi Commission on Public Integrity, reformation of the Supreme Board of Audit, and placement of an Auditor General in each government ministry, follow an increasing global focus on the costs of official corruption.⁴³⁹ Because the CPA supervised all the Iraqi ministries and their staff during the occupation, these reforms were quite clearly intended primarily for the post-occupation period. This creates a presumption against their compatibility with occupation law. But problems also exist under the theory that global anti-corruption norms may be incorporated into an occupier's legal obligations. Occupation law contains no prohibitions or even general guidelines on corruption that might serve as an entry point for incorporating international norms. A U.N. treaty on corruption exists, but only five parties have ratified it and it was not yet in force during the occupation.⁴⁴⁰ Regional treaties

435. Florence Eid & Fiona Paua, *Foreign Direct Investment in the Arab World: The Changing Investment Landscape*, in THE ARAB WORLD COMPETITIVENESS REPORT 2002-2003, at 108, 113-16 (Peter K. Cornelius & Klaus Schwab eds., World Econ. Forum 2003).

436. UNITED NATIONS DEVELOPMENT PROGRAM, ARAB HUMAN DEVELOPMENT REPORT 2002, at 87 (2002) [hereinafter AHDR 2002].

437. UNITED NATIONS DEVELOPMENT PROGRAM, ARAB HUMAN DEVELOPMENT REPORT 2003, at 136-37 (2003).

438. AHDR 2002, *supra* note 436, at 87.

439. See generally Symposium, *On Combating the Culture of Corruption*, 10 SW. J. L. & TRADE AM. 243 (2004) (containing several articles addressing corruption in Latin America).

440. See United Nations Convention Against Corruption, U.N. GAOR, 58th Sess., Annex, U.N. Doc. A/RES/58/4 (2003). The Convention will come into force when thirty states have ratified. *Id.* art. 68(1). Information on States Parties is available at http://www.unodc.org/unodc/en/crime_signatures_corruption.html.

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exist, but only the Organisation for Economic Co-operation and Development (OECD) and Latin American conventions are in force.⁴⁴¹ Moreover, each takes a different approach to combating corruption, with the OECD treaty addressing the “supply” side and the Inter-American treaty addressing both the “supply” and “demand” sides.⁴⁴² As for the “portable obligations” theory, none of the anti-corruption treaties explicitly creates extra-territorial obligations that require States Parties to address corrupt acts by non-citizens occurring in foreign territory.

E. *The Precedent of Occupied Germany*

The final argument justifying CPA actions seeks a precedent in the Allied occupation of post-World War II Germany. Superficially, the German and Iraqi cases appear quite similar. In both, the victorious powers concluded that the ideology and leading members of the former regime posed irredeemable threats to peace and future stability. Accordingly, party structures were abolished and party members purged from leadership positions. A zero-tolerance policy for the ideas and symbols of the former regime was instituted.

The details of the German occupation are essential to understanding the validity of this comparison. On May 9, 1945, the post-Hitler German Government, led by Admiral Dönitz, signed a Final Act of Unconditional Surrender.⁴⁴³ This was followed on June 5 by the Berlin Declaration, in which the Allies set out principles to govern their control over Germany. The Berlin Declaration stated that there was “no central Government or authority in Germany capable of accepting responsibil-

441. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1 (1998), available at [http://www.oilis.oecd.org/olis/1997doc.nsf/LinkTo/daffe-ime-br\(97\)20](http://www.oilis.oecd.org/olis/1997doc.nsf/LinkTo/daffe-ime-br(97)20); Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. NO. 105-39, 35 I.L.M. 727 (1996). The Organization of African Union Convention on Preventing and Combating Corruption has only four parties and is not yet in force. Convention on Preventing and Combating Corruption, July 11, 2003, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf; see also List of Countries Which Have Signed, Ratified/Acceded to the African Convention on Preventing and Combating Corruption as of Aug. 27, 2004, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Convention%20on%20Combating%20Corruption.pdf.

442. See generally Brian C. Harms, Note, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT'L L.J. 159 (2000).

443. *Act of Surrender by Germany, Signed at Berlin, May 8, 1945*, reprinted in DOCUMENTS ON GERMANY, 1944-1985, at 14 (U.S. Dep't of State ed., 1985).

ity for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.”⁴⁴⁴ It therefore announced:

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany.⁴⁴⁵

Authority was to be exercised by the Allied Control Council, which would coordinate the actions of individual national authorities in four separate zones of occupation. The Council’s first proclamation, on August 30, 1945, declared that “supreme authority in matters affecting Germany as a whole has been conferred upon” it.⁴⁴⁶ The four-power organs operated fitfully until 1948 when, after France blocked the creation of central German administrative departments and the Soviet Union left the Council altogether, authority devolved to the individual zonal authorities.⁴⁴⁷ Cold War tensions soon dictated the course of events: the three western zones merged in 1949, and when the occupations finally terminated in 1955 the occupation lines had hardened into the state borders of East and West Germany.⁴⁴⁸

A wide-ranging program of “de-Nazification” was an early and central aim of the occupation.⁴⁴⁹ At Yalta, the Allies had agreed to “destroy German militarism and Nazism” and to “wipe out the Nazi Party, Nazi

444. *Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers, Signed at Berlin, June 5, 1945, reprinted in DOCUMENTS ON GERMANY, supra note 443, at 33.*

445. *Id.*

446. Theodor Schweisfurth, *Germany, Occupation After World War II*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 582, 584 (1995).

447. *Id.* at 584-85.

448. *Id.* at 586-87.

449. Elmer Plischke, *Denazification Law and Procedure*, 41 *AM. J. INT’L L.* 807 (1947). At the Potsdam Conference in August 1945, the Allies declared, “All Nazi laws which provided the basis of the Hitler regime or established discrimination on grounds of race, creed, or political opinion shall be abolished. No such discriminations, whether legal, administrative or otherwise, shall be tolerated.” *Report on the Tripartite Conference of Berlin, reprinted in 2 FOREIGN RELATIONS OF THE UNITED*

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laws, organizations and institutions.”⁴⁵⁰ Accordingly, Control Council Law No.1 repealed a core of Nazi laws and implementing measures and provided that no other discriminatory legislation would be enforced.⁴⁵¹ Other provisions, such as those related to High Treason, were repealed by Control Council Law No. 11.⁴⁵² Control Council Law No. 2 abolished the Nazi Party and affiliated organizations and declared them henceforth illegal.⁴⁵³ A parallel process was undertaken to identify, arrest and ban from public life the individuals most closely associated with Nazi policy and institutions.⁴⁵⁴ As Wolfgang Friedmann observes, the Allies were confronted with “the penetration of Nazism into all parts of German life, public and private.”⁴⁵⁵ The de-Nazification program “was dictated by the desire to reverse the process as far as humanly possible.”⁴⁵⁶

What was the legal basis for the Allied actions? In order to claim the German occupation as precedent for Iraq, one would need to argue that the Allied reforms were somehow permissible under Hague law. Yet to reconcile those extensive reforms with the conservationist ethic of occupation law seems an impossible task. As Friedmann wrote:

[E]ven the most elastic interpretation could not bring the wholesale abolition of laws, the denazification procedure, the arrest of thousands of individuals, the introduction of sweeping social reforms, the expropriation of industries, and above all the sweeping changes in the territorial and constitutional structure of Germany within the rights of belligerent occupation. These are symbols of sovereign government, yet it is of the essence of belligerent occupation that it does not claim such powers.⁴⁵⁷

STATES: THE CONFERENCE OF BERLIN (THE POTSDAM CONFERENCE) 1945, at 1499, 1503 (U.S. Dep’t of State ed., 1960).

450. *Communiqué Issued at the End of the Conference*, reprinted in FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT MALTA AND YALTA 1945, at 968, 970 (U.S. Dep’t of State ed., 1955).

451. Plischke, *supra* note 449, at 810-11.

452. *Id.* at 811.

453. *Id.* at 810.

454. *Id.* at 811.

455. W. FRIEDMANN, THE ALLIED MILITARY GOVERNMENT OF GERMANY 112 (1947).

456. *Id.*

457. *Id.* at 65; *see also* United States v. Tiede, 86 F.R.D. 227, 230 (U.S. Ct. Berlin 1979) (“The Allies’ objectives in occupied Germany went far beyond an ordinary belligerent occupation of enemy territory.”).

Confronted with this legal obstacle to a central post-war objective, Allied international lawyers faced a stark choice: concede that the Allies had violated occupation law, or produce arguments as to why occupation law did not constrain their actions. Unsurprisingly, virtually all chose the latter path.⁴⁵⁸ Some argued that the Allies had effectively conquered Germany, and the old doctrine of *debellatio* allowed the Allies to govern the state.⁴⁵⁹ But not only was this view inconsistent with the contemporaneous prosecution of Nazi leaders at Nuremberg for their annexation of Poland, but the Berlin Declaration itself explicitly denied that an annexation had been effected.⁴⁶⁰ Others asserted that the German state had wholly ceased to exist and that the territory had become *res nullius*, which under traditional international law meant that it was available for acquisition by any power asserting effective control and claiming title.⁴⁶¹ But the formality of surrender and the continued functioning of at least some local governmental units belied this claim, as did the lack of any mention of state dissolution in the Potsdam Agreement setting out the Allies' post-war objectives. Moreover, if the Allies had disclaimed taking steps to annex the German state, they presumably had not taken the much more drastic step of extinguishing it altogether.

By far the most influential theory was that put forth by Robert Jennings.⁴⁶² Jennings recognized that "the whole *raison d'être* of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany, and to attempt to apply it would be a manifest anachronism."⁴⁶³ The anachronism arose because the Allies had neither annexed Germany nor terminated the state of warfare through a peace treaty (which was never in fact concluded).⁴⁶⁴ The assumption that occupation would be a temporary event awaiting one of these two outcomes was therefore absent. But in Jennings' view, the Allies *could*

458. See Schweisfurth, *supra* note 446, at 587-88 (summarizing various legal theories).

459. See Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 520 (1945).

460. See *Declaration Regarding the Defeat of Germany*, *supra* note 444, at 33.

461. See MICHEL VIRALLY, L'ADMINISTRATION INTERNATIONALE DE L'ALLEMAGNE 26 (1948).

462. See Roberts, *supra* note 218, at 269 (describing Jennings' article as "authoritative").

463. Jennings, *supra* note 377, at 136. The British government came to agree with Jennings. The 1958 edition of its military manual, citing Jennings' article, states, "The position in Germany after the unconditional surrender has given rise to much controversy. It was probably not governed by the Hague Rules 42-56." THE LAW OF WAR ON LAND, *supra* note 228, at 140 n.2, ¶ 499.

464. The Berlin Declaration remained in effect until it was terminated in 1990 by the agreement on German reunification. See Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, art. 7, S. TREATY NO. 101-20, 1696 U.N.T.S. 123, 128.

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have subjugated and annexed Germany, thereby acquiring title to the state and, as sovereigns (perhaps in condominium), the right to make whatever changes they desired to national laws and institutions. That they chose not to pursue this course did not mean they could not engage in a lesser form of subjugation, one that would also confer powers of governance:

[I]f as a result of the Allied victory and the German unconditional surrender Germany was so completely at the disposal of the Allies as to justify them in law in annexing the German state, it would seem to follow that they are by the same token entitled to assume the rights of supreme authority unaccompanied by annexation; for the rights assumed by the Allies are coextensive with the rights comprised in annexation, the difference being only in the mode, purpose, and duration of their exercise, the declared purpose of the occupying Powers being to govern the territory not as an integral part of their own territories but in the name of a continuing German state.⁴⁶⁵

In Jennings' view, the Allies had annexed the German Government but not the state, and that annexation was sufficient to avoid their assuming the status of belligerent occupants.

This was clearly an essential conclusion for Allied international lawyers. But if Jennings was correct that the right to subjugate a state *a fortiori* created a right to subjugate its government, then *any* occupation following an unconditional surrender could fall into this "third category" at the discretion of the victors. The victors' actions would thereby fall beyond the reach of the Hague Regulations. Moreover, as Friedmann pointed out, if the Allies had stepped into the shoes of the German Government and, in the absence of a peace treaty, the state of war with Germany continued, the conclusion must be that "the allies are at war with themselves."⁴⁶⁶ This would have required the Control Council, an Allied institution, "to assert rules of warfare on behalf of Germany against the allied governments."⁴⁶⁷

Beyond these incoherencies, two post-war developments have made Jennings' reasoning virtually impossible to replicate for the Iraqi occupation. First, the Fourth Geneva Convention applies occupation

465. Jennings, *supra* note 377, at 137.

466. FRIEDMANN, *supra* note 455, at 66.

467. *Id.*

law to "all cases of partial or total occupation of the territory of a High Contracting Party."⁴⁶⁸ This includes occupations following surrender.⁴⁶⁹ Jennings' "anachronistic" category of territory neither annexed nor subject to a peace treaty simply does not exist under Geneva law. Second, the illegality of state annexation under article 2(4) of the U.N. Charter, even in a war of self-defense, renders Jennings' *a fortiori* argument untenable. The sanctity of existing borders has been one of the cornerstones of post-Cold War international practice. This is no less true for Iraq, since the Security Council consistently reaffirmed the "sovereignty and territorial integrity of Iraq."⁴⁷⁰

A realpolitik conclusion may well be justified that the Allies' actions in Germany constituted breaches of occupation law perpetrated by victors upon the vanquished, but given the nature of the war, one could not imagine them acting otherwise. As a matter of international law, this might lead one to conclude that the Hague regime had been so blatantly ignored as to have suffered irreparable damage. But this view helps little in understanding Iraq. For one thing, the Hague Regulations were emphatically reaffirmed and substantially expanded just a few years later in the Fourth Geneva Convention. And early in the Iraqi occupation, both the United States and the Security Council affirmed that both Hague and Geneva law governed the CPA's actions. Even the occupiers themselves, evidently, were not willing to claim the German experience as precedent for wholly ignoring occupation law, including the conservationist principle.

468. Fourth Geneva Convention, *supra* note 11, art. 2 (emphasis added).

469. The ICRC Commentaries focus on the need to apply occupation law in the absence of a final peace treaty, a circumstance crucial to Jennings' analysis. "An armistice suspends hostilities and a capitulation ends them, but neither ends the state of war, and any occupation carried out in wartime is covered by paragraph 1 [of article 2]. It is, for that matter, when a country is defeated that the need for international protection is most felt." PICTET, *supra* note 243, at 22. The formalities of terminating war also play no role in the U.S. Army's view of when an occupation commences:

Military occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.

THE LAW OF LAND WARFARE, *supra* note 250, ¶ 355.

470. See S.C. Res. 1511, *supra* note 39, ¶ 1; S.C. Res. 1500, *supra* note 38, pmbl.; S.C. Res. 1483, *supra* note 25, pmbl.

VI. CONCLUSIONS

The occupation of Iraq was a remarkable episode in international law. The first occupation acknowledged as such since the Fourth Geneva Convention was drafted, Iraq dramatically challenged the vitality of the conservationist principle, which lies at the doctrinal core of occupation law. It did so by pursuing social reforms far removed from the objectionable Nazi practices that led Geneva drafters to include a catalogue of individual rights in the treaty. Instead, the CPA's reforms resonate with many widely subscribed trends in contemporary international society. At the same time, the CPA's actions came immediately following a conflict deeply unpopular in the Security Council, which had numerous opportunities to pass judgment on CPA actions. The Council's response to the reforms, best described as studiously ambiguous, reflected this ongoing sense of discomfort.

Most of the reforms appear inconsistent with the literal meaning of Hague and Geneva law. A limited exception exists for some of the substantive human rights reforms, which can be reconciled (though uneasily) with many of the affirmative obligations Geneva law imposes on occupiers. Remedial and supervisory human rights reforms are more suspect, as they clearly depart from the substantive prohibitions in the treaty. And virtually none of the de-Ba'athification measures and military, economic, and good government reforms finds support in the treaty texts.

Two theories purporting to justify the reforms by asserting the inapplicability of occupation law—consent by the Iraqi Governing Council and legislative fiat by the Security Council acting under Chapter VII of the U.N. Charter—do not appear convincing. The former is refuted both by the Geneva Convention's strong presumption against sanitizing agreements with pliant local bodies and by the Governing Council's lack of an independent voice in occupation governance. If the Council lacked the authority to disapprove CPA actions, the value of its purported approval of certain reforms is minimal. Legitimization by the Security Council encounters not only the lack of clarity in Council resolutions—they both expressed indirect support for some of the CPA's policy goals and insisted on strict adherence to occupation law—but a stark contrast with the clear language used in past resolutions to authorize post-conflict nation-building missions. Even as the Iraqi occupation was unfolding, Council-authorized missions in Bosnia and Kosovo continued to operate under these reformist mandates.

Three more ambitious justifications directly challenge the conservationist principle, in whole or in part. The first claims that it is an

anachronism, arguing that the now common approach of condemning the practices of non-democratic regimes and, occasionally, intervening to remove them from power, cannot co-exist with a norm that would object to the central goals of such an intervention. But this claim would largely eviscerate the important assumption of non-annexation at the heart of occupation law, as well as impermissibly blend *jus in bello* and *jus ad bellum* principles. The conservationist principle still resonates with values fundamental to contemporary international law.

A more persuasive claim is that the substantive rights and implementation responsibilities in human rights treaty law should inform our understanding of Hague and Geneva law. These external norms may support CPA reforms either as a matter of treaty interpretation or as “portable” legal obligations binding on the United States by virtue of its exercising effective control over Iraqi territory. But as a delicate accommodation between two conflicting normative premises—conservation and reform—an occupier cannot be held to the same human rights obligations as a state acting within its own territory. Otherwise the accommodation would become a preemption. A limited support for the CPA’s human rights initiatives emerges from this approach. But reading occupation law in light of external norms cannot legitimate the other areas of CPA reform. In most of these areas treaty obligations simply do not exist. In others, the obligations are not extra-territorial. And most importantly, the Hague and Geneva treaties contain few if any obligations in these areas that might serve as entry points for external norms. While there may be many good policy arguments for the CPA’s economic, military, and good government reforms, there are few good legal arguments.

A final purported justification based on the Allied occupation of post-war Germany fails because the contemporary arguments for why the Hague rules did not bind the Allies cannot be replicated under current international law.

Resort to all these arguments could have been avoided, of course, had the United States sought an integral role for the United Nations at the outset of the occupation. A Security Council mandate would have superseded the conservationist principle by invoking a superior international obligation and could have provided an opportunity to make clear that a consensus within the United Nations supported reform in Iraq. Since the CPA seems to have taken past Council-sanctioned missions as an inspiration for its actions, a multilateral route may not have changed much of the legislative agenda in Iraq. But it would have avoided the dispiriting spectacle of the United States justifying worthy substantive initiatives on specious procedural grounds. Claims that the

reforms were permitted by occupation law itself at best render a central portion of that law incoherent. And claims that the reforms were authorized by the Security Council threaten to marginalize the Council by reading great depth of meaning into the blandest of its language. The distinction between multilateral and unilateral actions—particularly in the sensitive area of national governance—is hopelessly blurred by such overreaching.

But the distinction is important and needs to remain clear. The lessons of the Iraqi occupation ought to center on this point. In an age of globalization and human rights, it is easy to discount the value of national political processes. It is particularly easy where, as in Iraq, the reasons given for imposing a new politics (and economics) on a state are ones broadly consistent with human rights and other areas of evident international consensus. It is easy, in other words, to treat all opportunities for nation-building alike, whether they are unilateral or multilateral in origin, staffing, and oversight. But as demonstrated by the insurgency that persisted throughout the occupation, laudable substantive goals alone do not legitimize the actions of nation-builders. Legitimacy emerges from right process, a point generally understood in domestic legal systems and, one would have thought, by now also clear for the international legal system.⁴⁷¹ But unless future occupations receive the legitimating force of a collective mandate, the lesson of Iraq should be that the conservationist principle retains its authority.

471. See generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).