The Transformation of Occupied Territory in International Law
Leiden Studies on the Frontiers of International Law

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The Hague)

VOLUME 2

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The Transformation of Occupied Territory in International Law

By

Andrea Carcano
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Editorial Foreword

Andrea Carcano’s work is the second book in our new Leiden Series on the Frontiers of International Law. It is the result of several years of study and scholarship. We are delighted to carry it. Our series intends to attract research that crosses boundaries in international law and maps partly uncharted waters. That is what this study on the ‘Transformation of Occupied Territory’ does.

The issue of transformative occupation has gained new attention with the 2003 Iraq intervention. The Iraq occupation was characterized by a unique legal regime, which combined traces of collective security (e.g., Security Council Resolution 1483) with elements of foreign occupation. This book offers one of the most insightful and complete treatments of legal challenges, practices and criticisms of the international occupation of Iraq. It illustrates how the interplay between United Nations Law, international humanitarian law and human rights shaped practices and policies of the Coalition Provisional Authority, as well as some of its shortcomings. It constitutes one of the most complete accounts of occupation and post-occupation practice. While one may have doubts whether the formula of the Iraq occupation will be replicated in other contexts, many of the critical insights and lessons learned (e.g., experiences relating to vetting, accountability, the role of private contractors, investment, constitution-making, ‘exit strategy’) are of direct relevance for other international engagements with a transformative nature, such as UN rule-of-law reform, peacebuilding or transitional justice. Practices and policies in these areas are in flux since the Brahimi Report (‘Report of the Panel on Peace Operations’), the 2004 Report of the Secretary-General on ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ and the aftermath of the 2005 World Summit. This work highlights a need for further re-thinking.

Part of the merits of this book lies in the fact that it goes far beyond the occupation of Iraq. The book situates contemporary practice in its histori-
cal setting and analyses patterns of continuity and change. It argues that transformative occupation has its origins in the ‘Age of Empire’, and that it did not fully emancipate from this heritage. The study shows fascinating parallels between the occupation of Iraq and the British occupation of Mesopotamia (1914-1919) and the subsequent Mandate over Iraq under the League of Nations (1920-1932) which brought similar challenges to administration under foreign rule. In both instances, external rule was partially driven by economic interest and struggled to gain the ‘hearts and minds’ of the local population despite promises of wealth, societal progress and liberal transformation. Exercises in constitutional reform were visibly influenced by the system of government of the former occupant, i.e., British government in the 20th century, and U.S. constitutionalism in the 21st century. The book further draws comparisons to the occupations of Germany and Japan after 1945. It argues that their success was grounded in the unique historical circumstances which differ considerably from the fragmented societal structure and political reality in Iraq.

Given some of the blatant human rights failures and critiques of the occupation (e.g., Abu Ghraib, the rushed Saddam Hussein Trial), the failure of the constitution to promote integrative and pluralist democratic rule after the end of occupation, and the subsequent descent into chaos with the rise of the ‘Islamic State’ (IS), it is tempting to argue that such projects of reform require an entirely different set of responses, and that transformative occupation should be avoided in transitions from conflict to peace. This work adopts a slightly more optimistic view. It expresses doubts whether it is feasible to steer a process of democratization through occupation rule. But it suggests that there is some merit in involving the Security Council in situations of occupation. It argues that Security Council practice may (i) temper some of the tensions between ‘self-interest’ and fiduciary duties of the occupant, (ii) align occupation more closely with the requirements of the right of self-determination, and (iii) ultimately introduce some form of international accountability to regimes of occupation which is missing in the current legal order. The book also explores the dividing lines and connections between the law of occupation, regimes of international territorial administration and jus post bellum. It is thus, in many ways, an example of shifting boundaries in international law and illustrative of the focus of this series.

We hope that this volume will receive wide readership, and we look forward to further debate on these important themes.

Carsten Stahn
Grotius Centre for International Legal Studies
On behalf of the Editors
The invasion and occupation of Iraq have given rise to much legal controversy; first and foremost on the legality of the use of force outside any possible plea of self-defense and in the absence of an authorization by the Security Council. Equally important was also the controversy over the nature of the ensuing occupation and the right of the occupying powers to effect a radical regime change, as well as over the proper role of the Security Council in that enterprise.

It is in the context of this latter controversy that the neologism “transformative occupation” has been used. And it is to the examination of the legality and practical feasibility of this type of occupation that the present substantial study of Andrea Carcano is devoted, in the light of the Iraqi case.

For the international lawyer, the term “transformative occupation” sounds paradoxical. It flies in the face of the protective and conservative character of the law of belligerent occupation as it has crystallized and was codified in the Hague Regulations of 1897 (revised in 1907). According to that law, belligerent occupation is a transient situation “durante bello” that does not affect the title to sovereignty over the occupied territory nor should it perturb the legal and political structures of its government, except to the extent necessary for the restoration and maintenance of law and order and ensuring the security of the occupying power, which is mandated, in so doing, to respect “unless absolutely prevented, the laws in force in the country” (Hague Regulations, Art. 43).

The assumption underlying this legal regulation is, given the prohibition of conquest in contemporary international law, that the occupied territory will be returned eventually to its rightful sovereign at the end of occupation.

But what happens when the factual premises of this legal regulation do not obtain? when for one reason or another occupation perdures? or when the governmental structures of the original sovereign to whom the exer-
exercise of sovereignty over the occupied territory should revert at the end of occupation totally collapse in the course, or as a result of the armed conflict?

Concerning the first hypothesis, the perduring occupation, Andrea Carcano tells us that a measure of flexibility has been introduced in the legislative freeze mandated by Article 43 of the Hague Regulations, by Article 64 of the Fourth Geneva Convention of 1949 which extends the permissible ambit of the legislative power of the occupant beyond the maintenance of law and order and ensuring its own security, to “provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention”. These consist of a large spectrum of obligations extending and tightening the legal protection of the population (i.e. the civil rights of its members), as well as the obligation of the occupying power to provide for the basic needs and the welfare of this population.

Depending on the state of pre-existing legislation, a wide margin of legislative flexibility and elbow-room may be required to enable the occupying power to fulfill this wide ranging set of obligations.

A caveat has to be entered here, however, derived from the specificity of the pattern of development of International Humanitarian Law, to which I drew attention some thirty years ago. It is the “non rolling back” or “ratchet effect”, i.e. the uni-directional, character of this development, which can only move in the direction of adding to the already existing protection of the potential victims of armed conflicts, i.e. the “acquis”; but cannot backtrack from it or dilute it in the name of flexibility or adaptation to changing conditions.

Andrea Carcano remarks in this respect that the law of occupation has evolved with international law beyond the Hague Rules, and has become “multilayered”. Indeed, a major illustration of this is the relatively recent general recognition - by the ICJ, the International Criminal Tribunals, the UN Human Rights Committee, etc., as well as the quasi unanimity of writers—of the “simultaneous and cumulative application” of International Humanitarian Law and the International Law of Human Rights, including in situations of occupation.

Applying the two UN Human Rights Covenants in an occupied territory, even within the limits imposed by the exigencies of belligerent occupa-
tion, may entail a significant transformation, particularly if the regime of the original sovereign is an oppressive one. It would go a long way in such a case towards the entrenchment of “the rule of law” (“l’état de droit”), which is a fundamental component of democracy that has recently emerged (in the 1990s) as a promotable objective by the UN (viz. Secretary-General Boutros Boutros-Ghali’s “Agenda for Democratization”).

The fact that democracy is an objective promoted by the UN (either in its cooperation programs with member countries or where it exercises directly or oversees the international administration of a territory), does not mean, however, that it should or could be propagated or imposed by force. In other words, the lack of democracy in a country does not legally justify, by itself, the use of force against it, with the purported aim of installing democracy, absent one of the two prescribed exceptions to the prohibition of Article 2/4 of the UN Charter, namely self-defense or an authorization of the Security Council under Chapter VII. Even in this latter case, the Security Council cannot give such an authorization merely on the basis of lack of democracy, if the situation does not constitute one of those provided for in Article 39, i.e. “a threat to the peace, a breach of the peace, or an act of aggression”.

This is, however, precisely the line of argument put forward by those who defended the Coalition’s invasion of Iraq, pleading the legitimacy, if not the legality of the use of force to topple a dictatorial regime that oppresses its own people and poses a permanent threat to its neighbors.

Beyond the question of the legality of the use of force to attain this purported objective, its attainment brought about and vividly illustrated the insuperable problems of the second case or hypothesis in which the factual premises of the law of occupation do not obtain. This is when the governmental structures of the original sovereign to whom the exercise of sovereignty over the occupied territory should revert at the end of occupation, collapse in the course, or as a result of the armed conflict.

In such a case, as debellatio, which is roughly equivalent in effect to conquest, is not permissible under contemporary international law, sovereignty remains in theory with the State whose territory is occupied. But in the absence of the institutional embodiment of this State, that speaks for it (i.e. government), the title to sovereignty remains in the hands of the other basic component of this State (beside its territory), namely its population.

However, given the institutional vacuum, in order for the population to be able to exercise its sovereignty, it has first to reorganize itself (this being in fact the first act of such exercise), by choosing freely its structures of governance and crafting them in accordance with its political, economic
and social needs and options i.e. by exercising the internal face of its right to self-determination.

Such a massive and complex collective choice cannot take place spontaneously, in an unorganized manner. It requires the prior establishment of apposite conditions under which the population can thus start exercising its sovereignty; in other words, a transition period of preparation, guidance and stewardship. Can it be entrusted to the occupant, thus enlarging its role and powers beyond the law of occupation to something that can be called “transformative occupation”, akin to the model of “international administration of territory”? And in the affirmative, how can such a transformation of role and mandate be legally effected?

To start with the second question, the only instance that can give such an exceptional mandate in our present non-centralized system, is the “deus ex machina” of international law, as José Alvarez has called it, the Security Council acting under Chapter VII of the Charter. But should it do it? Which brings us back to the first question.

Andrea Carcano avoids giving a clear-cut answer when discussing the question in general, preferring to speak of a case-by-case solution. But his thorough study of the Iraqi case inexorably leads to a negative answer. It clearly shows the failings of both the occupying powers and the Security Council, which probably could not be avoided given the contradictory demands of such situations.

Thus, as the author shows, the Security Council declared the end of occupation at a certain date, well before the objective conditions making up the legal status of occupation disappear. By the same token, it transformed over night, by fiat, the occupying forces into an international force with an international mandate akin to that of international administration of territory, but without exercising any effective control over their implementation of that mandate. The Security Council thus conferred on them a semblance of legality beyond the status of occupying forces, which was interpreted by some as a retroactive legitimization of the invasion and occupation. Moreover, by not exercising effective control over their activities, it allowed the occupying powers to continue to direct the structural transformation of the country according to their views and interests particularly in the political and economic fields; and to push a constitution which, while having democratic trappings, did not reflect an indigenous response to the needs of the country and the situation in which it was found.

In sum, according to the author, the Iraqi case illustrates and warns against all that should not be done. And I would add that it also illustrates
the well-nigh impossibility of success of the “transformative occupation” enterprise.

One does not have to share all the author’s analyses to accept his eminently sensible conclusions and lessons drawn from the Iraqi precedent. These are mainly (as I understood them):

1. The necessity and continuous relevance of the foundational rules of the law of occupation, though they may prove insufficient in cases where their factual premises do not obtain.

2. In such cases, the Security Council can intervene to widen the powers of administration in order to permit the adoption of measures necessary for the desired transformations. But as I see it, this means a change of mandate and regime from belligerent occupation to one akin to that of the international administration of territories.

3. If this happens, then the mandate, in the words of the author, “may be better carried out (if by anybody) by entities that are less divisive, less prone to bias, more inclined to comply with international standards, and more experienced than the occupation administration would normally be” (p. 457). In other words, the occupying power is most ill-suited to carry out such mandate given the inevitable conflict of interests in such situations.

4. Again, if out of necessity, for example, owing to the lack of alternatives, the Security Council is led, again in the words of the author “to entrust so much [i.e. the larger mandate] to an entity that is as apparently unfit to protect an occupied people’s right to self-determination may in general be, it should exercise an extraordinary level of supervision” (p. 457).

5. Finally, the powers of the Security Council in this regard are not unlimited. They are bound by the jus cogens rules of international law and more particularly in this respect by its duty to guarantee the free exercise by the population of the occupied territory or country of its right to self-determination.

With this thorough and thought provoking study, Andrea Carcano has put us all in his debt.

Georges Abi-Saab
Preface

This book discusses the concept and practice of ‘transformative’ military occupation from the perspective of public international law through the prism of the occupation of Iraq. Grounded in a broad historical perspective, this volume seeks to assess how international law should respond to measures undertaken in the pursuit of a given transformative project, whether or not supported by the Security Council. It also attempts to respond to claims that pursuing the democratisation of a country is a legitimate (international) objective, notwithstanding that such a transformation is undertaken through the means of belligerent occupation.

The preparation of this book has been inspired, in particular, by two insights and a sense of dismay at the tragic news emanating from Iraq. Since the US-led invasion of Iraq, more than 100,000 Iraqi civilians have died of unnatural causes. And several years after the overthrowing of Saddam Hussein, Iraq remains a deeply troubled country in which a human being can be killed in a heartbeat. All this drove me to intensify my efforts to offer a contribution—one among several—to an understanding of why things had developed in the way that they did, what role international law played therein, and what role it should play in comparable situations to prevent the recurrence of such events.

The first observation is that the transformation of the political and economic system of an occupied territory is neither a novel event in history nor one unregulated by international law. Therefore, to understand the phenomenon and devise constructive responses, it is essential to reflect on what history, duly interpreted, can teach, and to chart the development of applicable international law to gauge whether it serves a useful purpose from a contemporary perspective. The second observation is that, unlike the use of force that led to the occupation of Iraq, both international law and the Security Council played a significant part in the occupation itself and in its aftermath, acting as limiting and enabling agents. There-
fore, to discuss what international law should learn from the occupation of Iraq and what adjustments would allow it to successfully govern future instances of transformative occupation, the analysis must not be limited to the question of an occupying power's compliance with international law. It must include a critical review of the practice of the Security Council and an evaluation of the adequacy of the applicable norms and principles of international law.

In handing over this book to the publisher, I can only express the hope that I have provided the reader with a serious platform from which to think and reflect, not only on the dramatic events that unfolded in Iraq—the repetition of which the international community must strive to prevent—but also on the way international law should develop in response to pro-democratic transformative occupations. To respond adequately to such challenges and to serve the needs of a pluralistic international community, international law must adjust and evolve while still remaining true to the aspirations and principles that have informed its growth and consolidation within the international community over the centuries. It is to the pursuit of this objective that this book hopes to contribute.

Writing a book is certainly a solitary enterprise, so I would like to acknowledge those who, in one capacity or another, have helped to render the journey less arduous. I have learned much over the years from enlightening and frank conversations with Judge Fausto Pocar—the supervisor of my doctoral dissertation at Università ‘Statale’ of Milan, which dealt with the topic of belligerent occupation. Professor Georges Abi-Saab, whose classes at the Graduate Institute of International Studies and Development in Geneva I was fortunate to attend, graced me with his time, and critical analysis of my thinking and writing. I feel privileged to have had the chance to discuss sections of this book with the late Professor Thomas Franck and to receive feedback on some of the issues discussed in Chapter 1 from Professor Martti Koskenniemi. I also wish to thank warmly Rita Hauser, whose generous support enabled me to spend an enriching year of study and research at New York University School of Law. In a number of stimulating conversations, Ambassador Hamid Al-Bayati helped me to better understand the events that unfolded in Iraq before and after March 2003. I would also like to thank the anonymous reviewers of my book proposal and sample chapters for their insightful criticism and constructive comments. Several scholars and friends kindly read the manuscript in whole or in part, making helpful remarks: Guido Acquaviva, John Ceroni, the late Joakim Dungell, Charles Garraway, Agnès Hurwitz, Christine Keller, Cóman Kenny, Yvonne McDermott, Marco Pedrazzi, and Gabriele
Porretto. Last, but not least, I am grateful to Maureen MacGlashan for so skilfully preparing the index and to Matteo Bianchi of Giuffrè Editore for authorising me to use material from a monograph I wrote in Italian in 2009 (‘L’occupazione dell’Iraq nel diritto internazionale’), on which this book builds.

In conclusion, I wish to state that I could have not completed this book without the love of Nakako, my wife, and the joyful smiles of my son, Leo, and my daughter, Sofia. It is to them that this book is dedicated.

Andrea Carcano
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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AD</td>
<td>Annual Digest of Public International Law Cases</td>
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<td>AFDI</td>
<td>Annuaire français de droit international</td>
</tr>
<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>ASIL Proc</td>
<td>Proceedings of the American Society of International Law</td>
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<td>AV</td>
<td>Archiv des Völkerrechts</td>
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<tr>
<td>BJIL</td>
<td>Berkeley Journal of International Law</td>
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<td>BYIL</td>
<td>British Yearbook of International Law</td>
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<td>Case W. Res. J. Int'l L.</td>
<td>Case Western Reserve Journal of International Law</td>
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<tr>
<td>CESC</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<td>CJIL</td>
<td>Cornell International Law Journal</td>
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<td>CJTL</td>
<td>Columbia Journal of Transnational Law</td>
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<td>CPA</td>
<td>Coalition Provisional Authority</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>EpIL</td>
<td>Encyclopaedia of Public International Law</td>
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<td>FA</td>
<td>Foreign Affairs</td>
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<td>GJIL</td>
<td>Georgetown Journal of International Law</td>
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<td>GYIL</td>
<td>German Yearbook of International Law</td>
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<td>HJIL</td>
<td>Harvard Journal of International Law</td>
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<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
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<td>IACCommHR</td>
<td>Inter-American Commission on Human Rights</td>
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<td>IAMB</td>
<td>International Advisory and Monitoring Board for Iraq</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICJ Rep</td>
<td>Reports of Judgments, Advisory Opinions, and Orders of the International Court of Justice</td>
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<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>IGC</td>
<td>Iraqi Governing Council</td>
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<td>IHL</td>
<td>International humanitarian law</td>
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<td>ILR</td>
<td>International Law Reports</td>
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<td>IMT</td>
<td>Nuremberg International Military Tribunal</td>
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Given Saddam Hussein’s history of aggression, given what we know of his grandiose plans, given what we know of his terrorist associations and given his determination to exact revenge on those who oppose him, should we take the risk that he will not some day use these weapons ... at a time when the world is in a much weaker position to respond?

—Colin Powell, New York, 2003

Is it a matter of regime change in Baghdad? No one underestimates the cruelty of this dictatorship and the need to do everything possible to promote human rights. But that is not the objective of UNSCR 1441. And force is certainly not the best way to bring about democracy. It would encourage dangerous instability, there and elsewhere.

—Dominique de Villepin, New York, 2003

Following several dramatic sessions of the United Nations Security Council, the efforts of the United Kingdom, the United States, and Spain to obtain a resolution authorising the use of force against Iraq, based on the (erroneous) belief that it possessed weapons of mass destruction, failed.

1 UN Doc S/PV.4701, 5 February 2003, 17.
2 UN Doc S/PV.4714, 7 March 2003, 20.
Nevertheless, on 20 March 2003, a US-led coalition of states (Coalition Forces) invaded Iraq. After successfully ousting Saddam Hussein’s regime, the Coalition Forces rapidly gained control over the whole of Iraq. On 16 April 2003, the commander of the Coalition Forces, General Franks, established the Coalition Provisional Authority (CPA) to temporarily administer the country. Barely a month later, on 22 May 2003, the Security Council recognised the US and the UK as ‘occupying powers’. The CPA’s administration, whose goal was to create a market-based, democratic Iraq, lasted until 28 June 2004, when it was replaced by an interim Iraqi government that it had helped to form. In accordance with a project initiated and executed by the CPA, with the support of an Iraqi body (the Iraqi Governing Council), on 30 January 2005 the Iraqi people voted for a Transitional National Assembly. This Assembly drafted a new, permanent Iraqi Constitution, which embraced democracy and federalism. Pursuant to this new constitution, which was approved by the Iraqi Parliament in 2005, Iraqi parliamentary elections were held in December 2005, followed by further parliamentary elections in March 2010. The last US troops, which had comprised a major part of the Coalition Forces, withdrew from Iraqi territory at the end of 2011.

The result of these events, of which this summary is only a snapshot, was that, in the space of a few years, Iraq had shifted from being a despotic regime to a formally democratic state grounded on a new constitution.

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4 A more detailed analysis of the events summarised here is undertaken in Chapter 3.
5 UNSC Res 1483 (22 May 2003).
9 As detailed in Chapter 5, the Iraqi Constitution contains provisions establishing democracy as the new form of government of Iraq. At time of writing, however, it may be an overstatement to consider that Iraq is a substantially democratic state. See in this regard the detailed study of Toby Dodge, *Iraq from War to a New Authoritarianism* (International Institute of Strategic Studies 2012), especially 147–209, and Ned Parker, ‘The Iraq We
However, this profound transformation of Iraq’s political system did not come without a cost, accompanied as it was by a wave of violence, including an insurgency against the Coalition Forces, terrorist attacks, and internecine fights among various Iraqi groups. This violence has plagued the country for years and continues to affect it at the time of writing.

1. Scope of the research

Among the various perspectives from which these events can be viewed, this book focuses on the effort, led by the US and supported by other countries, to introduce a new political and economic order in Iraq founded on a democratic constitution, and discusses it from the perspective of pub-
lic international law. This effort was pursued during, and as a result of, what may be defined as the belligerent occupation (henceforth occupation) of Iraq by the Coalition Forces, as explained in Chapter 3. While there have been other cases of occupation in recent years, the occupation of Iraq stands out because it brought about the re-emergence on the international scene of a model of occupation that, as articulated in the course of this book, can be described as ‘transformative’. Not since the aftermath of World War II and the post-surrender occupations of Germany and Japan had the world witnessed an occupation undertaken to install a new political and economic regime in lieu of an existing one on such a grand scale.

The idea that a foreign actor could be actively involved in a process of democratisation of a country or territory has emerged in the practice of the United Nations (UN). Former UN Secretary-General Boutros Boutros-Ghali advocated that democratisation be achieved through a variety of activities, ranging ‘from support for a culture of democracy to assistance in institution-building for democratization’, and considered such processes to be a ‘key component of peace-building’. In more recent years, the UN has been actively engaged in creating conditions conducive to the emergence of democratic regimes based on a respect for human rights in the territories it has administered. Yet the case of Iraq differs from the practice of the UN in several respects, primarily in that its democratisation was pursued through a belligerent occupation established in the aftermath of a ‘war of choice’. Furthermore, it called for the systematic eradication of


15 Boutros Boutros-Ghali, An Agenda For Democratization (United Nations Department of Public Information 1996) 19.


all the institutions that had governed and supported the State of Iraq for more than 30 years. Moreover, the occupation of Iraq has been coloured by the close involvement of the Security Council, which considered the situation in Iraq to be a threat to international peace and security. Instead of sanctioning the possible illegality of the use of force and the ensuing occupation, neither of which it had authorised, the Security Council passed several resolutions, which, *inter alia*, lent some support to some of the goals of the occupants, including the democratisation of Iraq. If the resolutions of the Security Council indeed came to support, to a greater or lesser extent, the project to transform Iraq into a democratic state, and if these resolutions complied with international law, this could establish a legally valid precedent that could be invoked to support future democratisation processes carried out by the Security Council.

Based on a broad historical perspective and a review of the applicable international law, this book seeks to understand what international law has to learn from the transformative occupation of Iraq and how it should respond to the challenges that this particular form of occupation poses to its development. To this end, it discusses whether and under what circumstances measures taken by occupants in pursuit of a transformative occupation are lawful under contemporary international law. It investigates whether international law, in its various guises, is sufficiently equipped to manage the legal issues that emerge during a transformative occupation. It also examines whether general international law—and, in particular, the practice of the Security Council—should accommodate and validate occupations seeking to achieve ‘internationally desirable objectives’, such as the imposition of democracy.

In the pursuit of these objectives, this book is structured along the following lines. Chapter 1 discusses the content and rationale of the international law applicable to an occupation and, through the analysis of a number of historical case studies, reflects on how international law has traditionally responded to situations involving occupation with a transformative agenda. Chapter 2 considers that, because of recent developments in international law, contemporary occupation is governed not only by the ‘law of occupation’, ¹⁸ but by a plurality of legal regimes belonging

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¹⁸ The term ‘law of occupation’ covers the Hague Regulations, namely Articles 42–58 of Section III of the Fourth Hague Convention of 1907 (Hague Regulations), and the whole of the 1949 Geneva Convention IV Relative to the Protection of Civilians in Time of War (Geneva Convention IV). This body of law is now reflective of customary international humanitarian law. To
to various branches of international law. It seeks to understand how this evolving framework responds to contemporary aspirations to use occupation as a means of improving the lives of people in an occupied territory by introducing pro-human rights reforms and enabling the pursuit of the right to (internal) self-determination.

Beginning with an analysis of whether the Coalition Forces had a duty to stop the widespread looting that unfolded in many Iraqi cities in the immediate aftermath of Operation Iraqi Freedom, Chapter 3 examines the legal nature of the CPA, its purposes, and the legality of its presence in Iraq under international law. The chapter then critically reviews Security Council Resolution No. 1483, analysing the legality of the complex experiment attempted by the Security Council to shape, albeit implicitly, the applicable normative framework and to establish the roles of the main actors operating in Iraq.

Systematising the role of the CPA by drawing an analogy between its functions and those of a government, Chapter 4 seeks to understand whether the abundant normative production of the CPA complied with international law. In the course of this analysis, the interplay between the relevant Security Council resolutions (Nos. 1483, 1500, 1511, and 1546), international humanitarian law, and the right to self-determination, coupled with how these norms impacted on the practice of the CPA, is examined in some detail.

Based on an analysis of the status and practice of the governments that succeeded it, Chapter 5 inquires whether it is possible to say that the occupation of Iraq ended in June 2004 with the demise of the CPA, as claimed in Resolution 1546 and discusses the role played by the Security Council in carrying forward the process of democratisation of Iraq initiated by the CPA. To gauge the impact of decisions made during the occupation, this

these core instruments, some provisions of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 (Additional Protocol I) are to be added, because this instrument supplements Geneva Convention IV, and certain of its provisions specifically concern cases of occupation. Also Article 5 of the 1954 Hague Convention on the Protection of Cultural Property in an Event of Armed Conflict and Article 9 of the 1999 Second Protocol to the said Convention, which concerns specific occupation, should be considered part of the law of occupation. For a broader analysis, see Eyal Benvenisti, The International Law of Occupation (OUP 2012) 1–12. As discussed in Chapter 2, the instruments cited are not the only international law norms applicable to a belligerent occupation.
chapter also reviews the process of adoption and the content of the new democratic constitution approved by the Iraqi parliament in 2005.

Moving from a micro to a macro approach, Chapter 6 contextualises the occupation of Iraq in international practice by comparing it with historical cases of transformative occupation and with the practice of international territorial administration. Reflecting on the proposal espoused by some scholars of the need to introduce a new normative category, \textit{jus post bellum}, as a framework for the transition from war to peace, this chapter seeks to understand whether the international law applicable to an occupation, particularly in the case of a transformative occupation, is sufficiently equipped to provide a viable framework for guiding and constraining the conduct of the actors involved in such situations.

2. Some issues of methodology

When dealing with matters as heavily politicised as the transformation of an occupied territory entrenched in a number of intertwined historical, political, moral, and economic issues, international law may seem to have only a negligible role to play, as more important issues are at stake. The contrary, it is submitted, is actually true. Certainly, international law cannot replace the role of politics and diplomacy in solving international issues, which require mediation and compromise. However, its usefulness should not be disregarded either. One of its functions is to ensure that the rights and legitimate interests of all those operating within that system are taken seriously and that the corresponding duties are complied with. This aspiration, I submit, can be fulfilled only if international law carries the necessary authority to act as a bridge between the various subjects and entities operating within it and to draw them towards compliance. This, in turn, depends on a number of factors, including the quality of the interpretation of its content carried out by its scholars.

As in any legal system, interpretation—that is the process of ascertaining the meaning of a given norm or principle or of the wording contained in a legal document\textsuperscript{19}—is a necessary component of the activity of

a scholar of international law.20 Far from being a mechanical and neutral process, however, the process of interpretation is influenced by the methodology employed, which is, in turn, shaped by a scholar’s own moral and philosophical preferences and his own legal philosophy, which includes his perception of what international law is and should be for.21 That being so, it may be appropriate to make clear to the reader, albeit briefly, some of the methodological premises underpinning the analysis conducted in this book.

A key aspiration is to produce a legal analysis that can be of value to scholars and practitioners by being based on an interpretative process that eschews both formalism, as the practice of law does not consist in the mere application of rules to facts, and politicisation which would transform legal analysis into a servant of the political and moral views of the interpreter.22 Moreover, as, in order to construct viable normative approaches, it is necessary to deconstruct those that are not, the analysis will also include, where necessary, criticism of existing norms and interpretations. As the meaning of a rule or a principle can be more thoroughly ascertained by testing it against the facts to which it applies, due attention will be given to the analysis of the factual context in which that rule or principle is called to operate.

Although a commitment to objectivity is a necessary corollary of any scientific work, the analysis undertaken in this volume will not be informed by the (dogmatic) assumption that the proposed solutions are necessarily


22 On ‘formalism’ see Martin Stone, ‘Formalism’ in Jules Coleman and Scott Shapiro (eds), The Oxford Handbook of Jurisprudence and Philosophy of Law (OUP 2002) 166–72. See also Hart (n 21) 124–36.
true for everybody. They cannot be, as they are unavoidably influenced by one’s subjectivity. This recognition is not, however, nor should it be, a licence for unrestrained subjectivism. The legal scholar is constrained by what I would characterise as his ‘calling’ or, in other words, his professional ethics. This requires the construction of arguments that, on due reflection, are true to the best of one’s assessment, adhering to the canons of the profession as a scientific discipline, and giving due consideration to the raison d’être of the legal system of which he is but an interpreter.

It is with these considerations in mind that in the chapters that follow I shall strive to provide an account of how international law has responded and should respond to projects seeking the transformation of occupied territory.

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24 Abi-Saab (n 23) 30.

Chapter 1

International Law and Transformative Occupation: A Historical Perspective

International law, like any other legal system, is a bridge between the social past and the social future through the social present ... It is the law of a social system which is the product of many pasts, the past of all human societies. It is a universalising of the pre-existing values not merely of one particular society, but of all human societies... It is a product of the past that conditions the future not merely of one particular society, but of all human societies.

—Philip Allot, Cambridge 2002

The tension between the ambition of certain occupying powers to introduce long-term reforms—often of a transformative character—and the law of occupation, which places strict limits on the normative authority of occupying powers and, hence, on the pursuit of transformative projects, has attracted much scholarly debate. In the context of the occupation of

Iraq, where, as discussed in Chapter 3, the occupying powers sought to transform Iraq into a democracy and a market economy, this tension arose in all its complexity. Speaking from the pages of the American Journal of International Law, David Scheffer argued that the situation in Iraq is ‘ill suited for law of occupation’ and that the ‘law of occupation should be returned to the box from which it came’. Scheffer contended that the law of occupation places limitations on the democratic transformation of the occupied territory, and is ineffectual in situations where the ‘whole-sale transformation of the occupied territory is a desirable international objective’. In a similar vein, Melissa Patterson commented that the law of


Ibid, 859.

Ibid.
occupation is ‘poorly tailored to nation building’ and ‘is fundamentally inconsistent with the Coalition’s exercise of power within Iraq’.

Such claims appear excessive in their criticism of the law of occupation. Dismissing an entire body of law refined over centuries, as if the values it seeks to protect have suddenly become obsolete, may be incautious and leave a vacuum not easily filled. That said, however, summarily dismissing them would be equally careless. Such opinions force us to reflect on a number of pertinent questions. What is the function of the law of occupation? How does this function relate to the purposes of an occupying power? Why do we need a law of occupation if it cannot serve an internationally desirable objective? Should the law of occupation be set aside, or interpreted more liberally when the occupying powers pursue democratic goals?

As these questions and the way in which they relate to Iraq are dealt with in subsequent chapters, this chapter focuses on these issues from both an international law and a historical perspective. This involves reconstructing how and why the law of occupation developed in the way it did, and discussing its evolution through historical cases of contemporary relevance. In this context, specific attention is paid to the concept and practice of ‘transformative occupation’, which is the category—for reasons outlined in Chapter 3—that the occupation of Iraq falls under. The central tenet of this chapter is that through the lens of an historical perspective—using both a theoretical and practical approach—it is possible to achieve a deeper understanding of the purposes and rationale underlying the law of occupation, as well as its limits when applied in contexts other than those for which it was conceived. This, in turn, can be instrumental in addressing contemporary challenges about the role and scope of the law of occupation in a non-superficial manner.

The proposed line of inquiry is also appropriate from a methodological point of view. Unlike, arguably, other more recent bodies of law, the law of occupation, having developed over centuries, is closely connected to and shaped by history. It is the result of a process brought about by historical circumstances and the evolution of political, moral, and legal thought.

8 Ibid.
9 For a broader and illuminating discussion of the intersection between law and history, see Adriano Cavanna, Storia del diritto moderno in Europa (Giuffré Editore 2005) vol 2, 1–12.
Because of this historical background, it would be superficial, if not misguided, to interpret and apply the law of occupation as if its rich past had no bearing on the content of its provisions, or to consider that such history would be of no assistance in its contemporary application and interpretation. This is not to say that history can provide definitive answers. Nor can history dictate the solution of contemporary problems as if the present were simply a repetition of the past. Instead, I argue that, in light of its close ties with history, any interpretative claim as to what the role of the law of occupation is, or what its provisions mean, should be informed by what its history, duly interpreted, has to teach us.

1. Occupation as conquest and exploitation

1.1. The Roman law tradition and its influence up to the Modern Age

In Roman law, the word occupation (occupatio) described a mode of acquisition of property over territory. If a given territory was a res nullius (a thing belonging to nobody), such as an uninhabited land, the occupant, through the act of occupying it, acquired ipso facto legal entitlement to it. Belligerent occupation (occupatio bellica) was a species of the genus of occupation. The occupation was bellica, in the sense of being brought about during, or as a result of war. Unlike modern occupations, it was not a temporary situation that provisionally gave control over a territory; it carried the immediate effect of granting the winning party ownership over the territory acquired by force.10

Legally, this outcome could occur if two criteria for the acquisition of property were satisfied. First, the occupant had to have the animus possidendi, defined as the intent to forcibly acquire ownership of a territory and related booty and to hold these for his own benefit against that of the previous owner.11 Second, the territory of the enemy or, res hostium (a thing belonging to the enemy) was assimilated to a res nullius.12 As the enemy was not part of the Roman Empire and was outside the system of laws that bound the empire together (jus gentium), the enemy was considered an

10 Theodor Mommsen, Le droit public romain (E Thorin 1889) 206–7.
11 Ibid.
12 Francesco Capotorti, L’occupazione nel diritto di guerra (Jovane 1949) 15–6. See also Alessandro Corsi, L’occupazione militare in tempo di guerra (G Pellas 1886) 3–4.
outlaw and regarded as not having rights over the inhabited territory. The territory was consequently regarded as a *res nullius* that could, therefore, be freely appropriated through force.

The concept of ‘just war’ in the Middle Ages did not substantially affect the idea that occupation was synonymous with conquest and ownership. Rather, the two concepts coexisted in the sense that war in the Middle Ages could be waged either as an instrument of conquest or to punish the wicked. In both cases, occupation was synonymous with conquest.¹³ For instance, Francisco de Vitoria drew from the works of Roman authors and from Chapter 20 of the Book of Deuteronomy to conclude in favour of the ‘lawfulness of seizing … either a part of an enemy territory or an enemy city’, though ‘within due limits’.¹⁴ He linked the right to occupy (conquer) a territory to the right of a just war to redress a wrong suffered. In the context of discussing the rights of those waging a just war, Vitoria argued that:

> ... a superior Judge has competence to mulct the author of a wrong by taking away from him a city (for instance) or a fortress. Therefore a prince who has suffered wrong can do this too, because by the law of war he is put in the position of a judge. Again, it was in this way and by this title that the Roman Empire grew and developed, *that is, by occupation, in right of war*, of cities and provinces belonging to enemies who had injured them, and yet the Roman Empire is defended as just and lawful by St. Augustine …¹⁵ (emphasis added)

Relying on a passage of the *Institutiones* of Gaius, Hugo Grotius adopted a similar approach when stressing that ‘what is taken from the enemy, by the law of nations becomes at once the property of those who take it’.¹⁶ He wrote:

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¹³ For a succinct but comprehensive and insightful history of belligerent occupation touching several of the issues addressed in this chapter, see Peter Haggenmacher, ‘L’occupation militaire en droit international: genèse et profile d’une institution juridique’ (1994) 79 Relations Internationales 285–301.

¹⁴ Franciscus De Vitoria, *De Indis et de iure belli relectiones* (first published 1557, 7 Classics of International Law, Carnegie Institution of Washington 1917) 185.

¹⁵ Ibid, 186.

By the law of nations nor merely who wages war for a just cause, but in a public war also anyone at all becomes owner, without limit or restriction, of what he has taken from the enemy. That is true in this sense, at any rate, that both the possessor of such booty and those who hold their title from him are to be protected in their possession by all nations: and such a condition one may call ownership so as far as its external affects are concerned.17

Subsequent writers, such as Samuel Pufendorf, followed Grotius’ approach.18 This conception of occupation as synonymous with conquest and exploitation remained well entrenched in the practice of states until the nineteenth century.19 An example of this kind of occupation and what it meant for an occupied territory is provided in the following section.

17 Ibid, 664.
18 Samuel Pufendorf, De iure naturae et gentium libri octo (first published 1672, Classics of International Law, Carnegie Endowment for International Peace 1934) wrote:

[T]he property of enemies in relation to another enemy are made, as it were, void of dominion, not because enemies through war cease to be masters of their own things in their own rights, but because their dominion does not stand in the way of an enemy being able to carry off such things and keep them for himself just as mere seizure is enough to acquire dominion over a thing unoccupied. And yet those who undertake to seize enemy property in war may be and usually are repelled with all alacrity. It should, however, be observed that dominions over things taken in war acquire full validity only when he, from whom they were taken, renounces his claim to them by concluding peace.

For Alberico Gentili, in De iure belli libri tres (first published 1612, Classics of International Law, Carnegie Endowment for International Peace, Clarendon Press 1933) vol II, 381: ‘territories, places, and buildings ... they all remain in the power of the man who holds them at the time when peace is made, unless it has been otherwise provided by a treaty’.

19 When discussing the laws of war in his Summary of the Law of Nations published in 1792, Martens does not mention the word occupation, referring only to conquest, in relation to which he stated, ‘The Conqueror has a right to seize on all the property of the enemy that comes within his power: it matters not whether it be immovable ... or moveable’. See Georg Friedrich von Martens, Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe (William Cobbett tr, Bradford
1.2. **The French occupation of the Rhineland (1794–1801)**

In Article 4 of the ‘Décret concernant le droit de faire la paix et la guerre’, approved on 22 May 1790, the French National Assembly declared that the French nation renounced the undertaking of any war with a view to making conquests, and that it would never use its power against the liberty of any other people. However, on 20 April 1792, the National Assembly declared war against the Holy Roman Emperor Leopold II, and shortly thereafter invaded the left bank of the Rhine. By 1794, an army of 100,000 French soldiers had occupied the Rhineland, with a centralised civil administration set up in the same year, organised by civil commissioners from Paris. The occupation by French troops of the Rhineland, one of the richest regions of Europe, was a way of overcoming France’s disastrous financial situation during the French Revolution. Due to the financial situation and the consequent lack of resources to supply the needs of the French army, the occupation turned into exploitation. In 1794, General Hoche, Commander in Chief of the Army of the Moselle, told his divisional commanders:

> You are in a rich country; that is all you need to be told: requisition, don’t wait for the needs of the poor sans-culotte to show themselves, anticipate them—he will love you for that as a result ... Don’t conceal from yourselves the fact that, if we suffer a reverse, they will take up arms against us. Have as much seized as possible. Begin with food, then cloth, leather and linen. The grain is to be taken to Landau the other to headquarters so that it can be sent on to the interior.

According to the historian Timothy Blanning, the French occupation of the Rhineland can be described as:

> \[\text{1795) 285–9. See also the \textit{Foltina} case, in which the British Court of Admiralty maintained the traditional doctrine of occupation as conquest. The Foltina, 1 Dodson 450, 451 (1814) reprinted in 165 Eng Rep 1374, 1375 (1865) (‘No point is more clearly settled in the Courts of the Common Law than that a conquered territory form immediately part of the King’s dominions’).}\]

\[\text{20 Bulletin annoté des lois et décrets (Société anonyme des publications périodiques de l'imprimerie Paul Dupont, 1835) vol IV, 123.}\]

\[\text{21 Stuart J Woolf, \textit{Napoleon’s Integration of Europe} (Taylor & Francis 1991) 46.}\]

\[\text{22 This declaration is quoted in Timothy CW Blanning, \textit{The French Revolution in Germany} (OUP 1983) 73.}\]
a tragedy, for its history charts the frustration of high ideals by intractable reality. Originally, inspired by liberty, equality, and fraternity what was intended to be a crusade of liberation degenerated into a campaign of exploitation directed to satisfy the growing needs of the French army.\footnote{Ibid, 15.}

For instance, in May 1794, an \textit{agence d'évacuation} was established in the occupied territory to confiscate all books of any value, scientific instruments, and works of art, shipping them back to Paris.\footnote{Ibid, 110.} There was also a \textit{fonctionnaire} known as the \textit{commissaire du gouvernement français, chargé de recueillir les objets d'art et de sciences dans le pays conquis d'Allemagne}. On 4 November 1797, the Directory appointed Budler as a \textit{commissaire} for the occupied regions. His mission was to reorganise the administration on the French model and to divide the occupied territory into four departments. Following the peace signed at Lunéville on 11 February 1801, the Rhineland was ceded to France, and on 30 June 1802, a consular decree was passed, announcing that from 23 September of that year, all French laws would be applicable to the Rhineland.\footnote{Ibid, 81.} This analysis would appear to support Blanning’s theory that the nature of the occupation of the Rhineland was a system of exploitation. Consequently, were it to be assessed in light of the law of occupation that emerged later in the nineteenth century, this kind of occupation would be regarded as illegal.

While it seems unlikely that an occupation of this kind would occur again, it is still possible that contemporary occupations can be instrumental in the exploitation of the resources of a country, particularly its natural resources, for the occupying power’s own profit. In such cases, the role of the law of occupation, together with the applicable principles of international law, is that of protecting the sovereignty of a country and its people by limiting the exploitation of its wealth and resources to what is necessary for the needs of the occupation government and army.

\section*{2. Occupation as control and administration of territory}

In the course of the nineteenth century, the concept of occupation as conquest was gradually abandoned in favour of a model of occupation based on the temporary control and administration of the occupied ter-

\begin{thebibliography}{9}
\bibitem{Ibid} Ibid, 15.
\bibitem{Ibid2} Ibid, 110.
\bibitem{Ibid3} Ibid, 81.
\end{thebibliography}
ritory, the fate of which could be determined only by a peace treaty. This development was also accompanied by a major shift in the relationship between the occupant and the occupied people. The authority of an occupant evolved from a condition of unrestrained power to the emergence of a specific duty to protect and respect the occupied population. These developments are discussed in turn.

### 2.1. Occupation and sovereignty

In his book *Le droit des gens* (1758), speaking of the rights of conquerors, Emmerich de Vattel wrote:

> [R]eal property—lands, towns, provinces—become the property of the enemy who takes possession of them; but it is only by the treaty of peace, or by the entire subjection and extinction of the State to which those towns and provinces belong, that the acquisition is completed and the ownership rendered permanent and absolute. A third party can not, therefore, obtain secure possession of a conquered town or province until the sovereign from whom it has been taken has either renounced it by the treaty of peace or lost his sovereignty over it by final and absolute submission to the conqueror.26 (emphasis added)

From the point of view of the law of occupation, this passage contains two important ideas. First, it distinguishes between temporary possession of enemy territory pending war, and its final and permanent acquisition through a treaty or by the final submission to the conqueror (*debellatio*). This distinction has been heralded as the starting point of the modern law of occupation.27 Second, Vattel’s remarks reveal the emergence of the principle of sovereignty, which is a key factor in the development of the modern concept of occupation.28 The shift to a public law approach, epitomised in expressions such as ‘sovereign’ or ‘sovereignty’, replaced the pri-

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28 On this point see Alessandro Migliazza, *L’occupazione bellica* (Giuffré 1949) 13–17.
vate law approach, typified in the use of terms such as ‘ownership’. This shift eradicated the Roman equation of *res hostium* with *res nullius*. Given that sovereignty operated both in peacetime and wartime, the occupied territory could no longer be labelled as *res nullius*. It belonged to the existing ‘sovereign’ and could be removed from it only through a peace treaty. Sovereignty came to be regarded as a shield against conquest, a far stronger title than military supremacy for determining the fate of an occupied territory. Funck-Brentano and Sorel expressed this clearly in their *Précis du droit des gens*:

Les États qui se font la guerre rompent entre eux les liens formés par le droit des gens en temps de paix ; *mais il ne depend pas d'eux d'anéantir les faits sur lesquels repose ce droit des gens. Ils ne peuvent détruire ni la souveraineté des États, ni leur indépendance, ni la dépendance mutuelle des nations*. Ils ne peuvent détruire non plus toutes les conséquences qui en sont résultées dans les rapports pacifiques des États.²⁹ (emphasis added)

In accordance with and out of respect for the principle of sovereignty, conquest could no longer be the chief purpose of war—at least among the ‘nations civilisées de l’Europe’. War had become ‘the continuation of politics with other means’,³⁰ a mechanism for the settlement of disputes among sovereign states,³¹ or an instrument to redress a wrong suffered. As a result, the equation of *res hostium* to *res nullius*, and the *animus possidendi* which characterised the occupant/conqueror, no longer prevailed.

The affirmation of the principle of sovereignty as the basis of relations between nations in both peacetime and wartime, and the demise of the concept of war as conquest, constituted a cardinal force in the emergence of the modern concept of occupation. In contradistinction to the Napoleonic wars of conquest (and the then truly innovative ideas of the French Revolution concerning the sovereignty of peoples rather than of their rulers), the Congress of Vienna endorsed the principle of legitimacy of the original (indigenous) sovereign over a territory.³² On the basis of this principle, the original sovereigns of most of the nations conquered by Napo-

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³¹ Oppenheim (n 27) 53–5.
Leon were regarded as having retained their sovereignty, despite having been conquered by the Napoleonic armies. In a report to Louis XVIII, King of France, upon his return from the Congress of Vienna, Charles de Talleyrand (1754-1838), the French representative at the Congress, wrote:

Nous établîmes que l’existence de tous les gouvernements était compromise au plus haut degré dans un système qui faisait dépendre leur conservation ou d’une faction, ou du sort de la guerre. Nous fimes voir enfin que c’était surtout pour l’intérêt des peuples qu’il fallait consacrer la légitimité des gouvernements, parce que les gouvernements légitimes peuvent seuls être stables, et que les gouvernements illégitimes, n’ayant d’autre appui que la force, tombent d’eux-mêmes, dès que cet appui vient à manquer, et livrent ainsi les nations à une suite de révolutions dont il est impossible de prévoir le terme. (emphasis added)

As clearly seen in this passage, one of the ideas that emerged during the Congress of Vienna was that the original and existing ruler of a territory/state had, unlike the conqueror, the right to exercise sovereignty over it: sovereignty remained with the original holder of the territory, who was regarded as the ‘legitimate sovereign’. The conqueror of territory (i.e. Napoleon) was illegitimate and therefore could not acquire de jure sovereignty. This development reversed the Roman concept of occupation as conquest, in which the legitimate title-bearer was the conqueror and the illegitimate one was the defeated enemy. It also crystallised a development in the international society—at least among European states—whereby its main subjects had become a number of independent sovereign states that, in order to coexist, had devised a system that protected each other’s sovereignty from imperialistic expansionism. The idea that occupation was no longer synonymous with conquest was gradually consolidated in the writings of scholars, in case law, in the practice of states, and in the process of codification.

August Wilhelm Heffter is credited with being the first international lawyer to note the impact of these new ideas on the doctrine of occupation.

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34 Charles-Maurice de Talleyrand Périgord, Mémoires du prince de Talleyrand, (Calman-Lévy 1891) vol III, 203.
35 Oppenheim (n 27) 168.
tion. Heffter observed that, in the nineteenth century, war was a temporary accident and no longer a permanent state of hostility or ‘hostilité éternelle’. The purpose of war had become the restoration of peace and not the destruction of the enemy; war did not eradicate the established relations among sovereign nations. On this basis, Heffter concluded that conquest of territory only allowed the occupant to sequester power over it, but did not entail the transfer of sovereignty, which could occur only when the enemy was no longer able to resist (debellatio, ultima victoria).

As for case law, it can be recalled that as early as 1818, the French Cour de cassation denied that the simple occupation of a territory was sufficient to grant the occupier’s citizenship to the territory’s inhabitants. In a case concerning the murder of a Catalan by a Frenchman during the French occupation of Catalonia, the Cour de cassation denied jurisdiction over it on the basis that:

the occupation of Catalonia by French troops and its government by French authorities had not communicated to its inhabitants of Catalonia the character of French citizens, nor to their territory the character of French territory, and that such character could only be acquired by a solemn act of incorporation which had not gone through.

(emphasis added)


37 Heffter (ibid) 252.

38 Ibid, 253. Cf Johann Ludwig Klüber, *Droit des gens moderne de l’Europe* (Durand 1861) 328, who wrote:

Selon les principes aujourd’hui suivis en Europe, la seule perte de la possession par le sort des armes ne peut éteindre la propriété. Il s’ensuit que le conquérant, quoique exerçant les droits de souveraineté et jouissant des propriétés de son ennemi, ne peut pas se les approprier, ni en disposer en faveur d’un tiers, à moins qu’un traité de paix ne lui en ait conféré le droit.

39 This decision is quoted in Henry W Halleck, *Elements of International Law and Laws of War* (Philadelphia 1886) 472–3. In a subsequent case (*Magill c Héritiers Monnel-Gonnier*), the French Cour de cassation, ruling on an issue
In a similar development which followed soon after, the US Supreme Court in the *American Insurance* case held that ‘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 determinate in the treaty of peace’.40

With regard to the practice of states, an interesting example of this development is contained in the text of the Treaty of Paris, of 30 May 1856, which ended the Crimean War. From this treaty it is possible to evince the drawing of a distinction between conquest and occupation. Article II of this treaty provides that ‘peace being happily re-established between their said Majesties, the Territories conquered or occupied by their armies during the War shall be reciprocally evacuated’ (emphasis added); and Article IV of the same treaty indicates that the ‘Allied Powers’ were to return to the Russian Emperor all the ‘territories occupied by the Allied Troops’.41

Encapsulated first in the Lieber Code and then in the Brussels Declaration,42 the concept of occupation as mere control of territory was


41 According to the historian Curtiss, during the negotiation of the Treaty of Paris, France and England urged Russia to give the citadel of Kars back to Turkey for the reason that ‘their obligations to the Porte compelled them to support the integrity and inviolability of the Ottoman Empire’. See John Shelton Curtiss, *Russian’s Crimean War* (Duke University Press 1979) 510.

42 The Brussels Declaration was adopted on 27 August 1874 at the end of an international diplomatic conference held in Brussels at the request of Czar Alexander II of Russia in order to examine a draft international agreement concerning the laws and customs of war. The Brussels Declaration was titled ‘Project of an International Declaration Concerning the Laws of War’ (Brussels Declaration). See text in Dietrich Schindler and Jirí Toman (eds),
finally codified in Article 42 of the Hague Regulations. According to this provision, territory is considered occupied ‘when it is actually placed under the authority of the hostile army’ and the occupation ‘extends only to the territory where such authority has been established and can be exercised’.

Article 43 of the Hague Regulations confirmed the provisional nature of the occupant’s control of territory by compelling the occupying powers to respect the ‘laws in force’ in the occupied territory ‘unless absolutely prevented’. This limitation on an occupant’s legislative authority, which, by implication, mandates it to make as few changes as possible to existing laws and institutions, has been defined as the ‘conservationist principle’. The reason for this limitation on the occupying power is that it ‘protects the separate existence of the State, its institutions and its laws’. This provision can be described as a barrier protecting the sovereignty of the occupied country so as to prevent the occupying power from acting as it deems fit in a territory which is not its own. In this sense, it constitutes a ‘critical boundary between occupation and annexation’. Thus, an occupying power that alters the fundamental laws of a country, such as by adopting a new constitution, would be in breach of Article 43. More broadly, it would be in breach of the principle that provides that the occupying power is not the sovereign of the occupied territory.

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Fox, ‘Transformative Occupation and the Unilateralist Impulse’ (n 2) 238.

The US Ninth Court of Appeals spelled out the distinction between sovereignty and occupation clearly in Cobb v United States, United States, Court of Appeals, Ninth Circuit, 11 June 1951, ILR, vol 18, 553, where it observed that the:

United States Military Government now governs, and will continue indefinitely to govern the island of Okinawa, free from interference from other powers. The will of the United States is in fact the ‘supreme will’ on Okinawa. The United States has, therefore acquired, and still retains, what may be termed a ‘de facto sovereignty’. However, the tra-
The explanation and justification for the restrictive approach adopted in Article 43 of the Hague Regulations is the need to protect the sovereignty of the ousted rulers, which, as discussed earlier, constitutes a building block of the modern concept of occupation. Following the Hague Regulations, the principle of occupation as mere control of territory has been reaffirmed (though not necessarily observed) during World War I,\(^47\) and by the Nuremberg International Military Tribunal, which asserted the customary status of the Hague Conventions.\(^48\) More recently, the United

ditional 'de iure sovereignty' has not passed to the United States. The conqueror does not acquire the full rights of sovereignty merely by occupying and governing the conquered territory without a formal act of annexation or at least an expression of intention to retain the conquered territory permanently.

47 In response to the proclamation of Germany and Austria-Hungary on 5 November 1916 that in the areas of Russian Poland occupied by their forces, an autonomous 'Polish state' was created, the Allied Powers issued a declaration on 18 November 1916, reprinted in William W Bishop, *International Law (Cases and Materials)* (1953) 613, stating:

It is a universally admitted principle of the modern right [law] of nations that, by reason of its precarious and *de facto* character of possession, a military occupation resulting from the operations of war may not imply a transfer of sovereignty over the territory occupied and consequently does not involve any right of disposing of this territory to the profit of anyone. In disposing without right of the territory occupied by their troops, the German Emperor, and the Austrian Emperor, King of Hungary, have not only committed an action which is null and void, but have once more shown contempt...

See also *Affaire de la Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie)*, 18 April 1925, 1 RIAA, 529, 555; Rules of Land Warfare of the War Department of the United States, Basic Field Manual (FM 27-10, 1940) 73–4, para 273, providing:

Being an incident of war, military occupation confers upon the invading force the right to exercise control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty.

Nations General Assembly in Resolution 2625 of 24 October 1970 solemnly proclaimed that ‘No territorial acquisition resulting from the threat or use of force shall be recognized as legal’, and Article 4 of Additional Protocol I confirmed this principle by providing that: ‘[n]either the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.’

2.2. *The distinction between belligerent states and private individuals*

Despite the efforts of princes and monarchs to regulate the conduct of their (non-professional) armies through ordinances and instructions, such as the Ordinances of Henry V (1413) or the Military Statute of the Czar, Peter the Great (1716), or through Christian and chivalric ideals, it seems fair to suggest that for several centuries there were few limits to the power that an occupant/conqueror could exercise over an occupied population and its property. The seventh edition of Oppenheim’s treatise on interna-

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50 See Alain Pellet, ‘The Destruction of Troy Will not Take Place’ in Emma Playfair (ed), *International Law and the Administration of Occupied Territories* (Clarendon Press 1992) 171–3. In the Al-Skeini case, the European Court of Human Rights (ECtHR) stated: ‘Occupation does not create any change in the status of the territory (see Article 4 of Additional Protocol I), which can only be effected by a peace treaty or by annexation followed by recognition. The former sovereign remains sovereign and there is no chance in the nationality of the inhabitants.’ See *Al-Skeini and Others v UK*, App no 55721/07 (ECtHR, 7 July 2011) para 89.


52 The seemingly unlimited nature of this power appeared to be legitimate in a ‘just war’ against infidels. In a passage of his report in the Calvin Case, the English jurist Edward Coke (1552–1634) drew a distinction between the power of the victor over the territory of Christians and that of the infidels. In the former case, the new sovereign could ‘at his pleasure alter and change the Lawes of that kingdome, but untill he doth make an alteration of those lawes, the ancient lawes of that kingdome remaine’.
tional law described the occupants’ attitude towards the civilian population before the nineteenth century in this way:

> [e]nemy 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 their 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 an oath of allegiance.53

However, this condition of unrestrained power over occupied populations gradually began to change. The conception of war54 as a struggle between

By contrast, in the case in which a ‘Christian King should conquer a kingdom of an Infidel, and bring them under his subjection, there ipso facto the lawes of the Infidel are abrogated’. See these quotations in Richard Tuck, The Rights of War and Peace (OUP 1999) 122. Ernest Nys (1851–1920) put it thus: ‘au moyen âge la guerre est empreinté d’un caractère d’indicible cruauté; les adversaires se font le plus de mal possible et l’anéantissement complet de l’ennemi est le but final des hostilités’, and remarked that this reality had undergone little change as a result of ideals of chivalry and Christianity. See Ernest Nys, Le droit de la guerre et les précurseurs de Grotius (Bruxelles 1882) 112–3. Samuel Pufendorf in On the Duty of Man and Citizen According to Natural Law (first published 1688, OUP 1927) 171, remarked that:

> The extent of licence in war is such that, however, far one may have gone beyond the bounds of humanity in slaughter or in wasting and plundering property, the opinion of nations does not hold one in infamy nor as deserving of being shunned by honest men. However, the more civilized of the nations condemns certain ways of inflicting harm on enemy: for instance, the use of poison or bribing the citizens or soldiers of other rules to assassinate them.


54 Bluntschli wrote ‘l’admission de ce principe [the new conception of war] a contribué, dans une large mesure, à civiliser la guerre et à assurer les droits des citoyens’. See Bluntschili (n 36) 299. For completeness, it should be noted that that quoted text was not the only—albeit probably the prevailing—doctrine of war circulating in the nineteenth century. See Joseph de Maistre (1753–1821), a French lawyer and philosopher, who celebrated war as divine; Joseph De Maistre, Les soirées de Saint-Pétersbourg, ou entretiens sur le gouvernement temporel de la providence: suivies d’un traité sur les sac-
states rather than individuals, and the principle of humanity were key factors in this regard. The idea of war as an inter-state dispute, rather than a dispute between private individuals, found expression in a famous passage of *Du contrat social* (first published in 1762), in which Jean-Jacques Rousseau concluded that:

> War, then, is not a relation of man to man but a relation of state to state, in which individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers, not as members of the country, but as its defenders. Finally, each state can have for its enemies only other states and not men, seeing that between things of a diverse nature no true relation can be fixed.\(^{56}\)

War had become an issue between the armies of the states fighting each other, which did not involve the civilian population. This distinction offered greater protection to the civilian population because, unless individuals sided with either of the belligerents, they were not supposed to

#### Notes

55 A well-known expression of the principle of humanity is the so-called Martens Clause, which is contained in the Preamble of the Hague Convention IV of 1907:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.


56 Jean Jacques Rousseau, *Du contrat social* (first published 1762, Aubier 1943) Book I, Chapter IV. Some authors dispute that this conception of war was first expressed by Rousseau on the basis that it could already be found in Grotius. See, in this regard, Karma Nabulsi, *Traditions of War* (OUP 1999) 184–5.
be, and in principle could not be, targeted by either warring faction. An application of these ideas can be found in the Lieber Code.\(^57\) Linking the distinction between armies fighting a war, and the civilian population remaining apart from the conflict, with the then popular concept of civilisation, Article 22 of the Lieber Code stated that:

> as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The *principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.*\(^58\) (emphasis added)

Notably, the need to ensure the protection of the ‘unarmed citizen’, emphasised in this provision, was conditioned upon the ‘exigencies of war’, i.e. military necessity.\(^59\) In fact, alongside the developments described in this section, military necessity continued to play a role in defining the au-

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57 The ‘Instructions for the Government of Armies of the United States in the Field’ was prepared by Francis Lieber, professor at then Columbia College in New York, and promulgated on 24 April 1863 as General Order no 100 by Abraham Lincoln (Lieber Code). See text in Schindler, *The Laws of Armed Conflicts* (n 42) 3–23.

58 Lieber Code (ibid) 3. Bluntschili argued that military armies were bound to respect ‘les lois de l’humanité, de la justice et de l’honneur, ainsi que les usages admis en guerre par les nations civilisées’. See Bluntschi (n 36) 307.

59 The Lieber Code forbade the destruction of property, but only if carried out without the order of the commanding officer, and the taking of property from the civilian population, unless it was necessary for the ‘support of the army or of the United States’ (Art 38). With regard to military necessity, Art 14 of the Lieber Code stated:

> Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Article 16 clarifies that military necessity excluded cruelty, the ‘infliction of suffering for the sake of suffering’, ‘torture to extort confession’, ‘the use of poison in any way’, and ‘the wanton devastation of a district’. Lieber Code (n 57).
authority of an occupying power within the law of occupation. This was not as broad as Clausewitz's *Kriegsräison*, whereby the aims of war justified any means considered necessary to achieve them, but neither was it insignificant, as demonstrated by its incorporation within the law of occupation. Military necessity, then, became synonymous with the security of the occupying forces and their installations, as well as the maintenance of resources and procedures necessary for the basic support of the occupation army. For Jean Pictet, the concessions made to the exigencies of military necessity were a realistic requirement to ensure that the norms of the Geneva Conventions would not remain ‘lettre morte’. The next section provides an example of occupation in which the ideas discussed here began to receive recognition.

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According to the view of the high contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

61 Clausewitz wrote that the first objective of war is ‘invasion, that is, the occupation of the enemy’s territory not with a view to keeping it but in order to levy contributions upon it or to devastate it’. See Clausewitz (n 30) 40–1. For further analysis see Michael N. Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’ (2010) 50(4) Virginia Journal of International Law 795, in particular at 796–817.


64 See Jean S Pictet, ‘La Croix-Rouge et les Conventions de Genève’ (1950) 76 RCADI 1. 35.
2.3. **The Prussian occupation of Alsace-Lorraine (August 1870–February 1871)**

By August 1870, as a result of the victories at Wissembourg (4 August), Mars-la-Tour (16 August), and Gravelotte (18 August), the Prussian forces quickly gained control over large portions of the French region of Alsace and Lorraine. On entering France on 11 August 1870, King William of Prussia outlined the general attitude of his troops towards the French population. He made the following proclamation:

I wage war against French soldiers, not against French citizens. These therefore will continue to enjoy security for persons and property as long as they do not, by committing hostile acts against the Germans troops, deprive me of the right of affording them protection.

By two decrees dated 14 and 21 August 1870, the King of Prussia established the general governments of Alsace and Lorraine, respectively. Two additional general governments were subsequently established at Reims on 16 September and at Versailles on 16 December 1870, with a military general in command of each government and below them a civil commissioner. Military prefects were appointed to rule the occupied departments. On 21 August 1870, the King of Prussia issued a document called 'Instructions pour le Gouverneur général des parties occupées du pays ennemi', providing guidance for the administration of the occupied territories. Article 1 of this document, *inter alia*, reads:

Le gouverneur-général d’une partie occupée du pays ennemi exerce l’ensemble du pouvoir administratif et militaire dans ce territoire. À l’application rigoureuse de ses droits, le gouverneur général doit joindre tous les ménagements possibles pour le pays et les habitants.

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68 Gustave Rolin-Jaequemyns, ‘La guerre actuelle dans ses rapports avec le droit international’ (1870) 2 RCIC 53.
69 Bray (n 67) 276.
In line with this proclamation of the King, on 21 August 1870 Otto von Bismarck issued the following declaration on his appointment as governor-general of Alsace:

Habitants de l'Alsace: Les évènements de la guerre ayant amené l'occupation d’une partie du territoire français par les forces des puissances alliées allemandes, ces territoires se trouvent par ce fait même soustraits à la souveraineté impériale [Napoleone III], en lieu et place de laquelle est établie l'autorité des puissances allemandes. C’est en leur nom que je suis appelé a exercer le pouvoir dans les départements ... en qualité de gouverneur-général de l'Alsace. Le maintien des lois existantes, le rétablissement d'un ordre de choses régulier, la remise en activité de toutes les branches de l'administration, voilà où tendront les efforts de mon gouvernement dans la limite des nécessités imposées par les opérations militaires. La religion des habitants, les institutions et les usages du pays, la vie et la propriété des habitants jouiront d'une entière protection, rien enfin ne sera négligé de ce qui pourra contribuer à rendre plus supportables à la population les charges aussi douloureuses ...70 (emphasis added)

The wording employed by Bismarck suggests that the civilian population, namely the inhabitants of the occupied territory, were not perceived as an enemy force but rather as a distinct entity enjoying a position of neutrality. Further, it suggests that while the Prussian occupant replaced the existing sovereign of the territory, it performed the functions of a mere ‘administrator’, albeit a very powerful one. During the occupation of Alsace-Lorraine, the Prussian occupant left French laws in place, and courts and local municipalities could continue their regular activities.71 As collecting taxes directly would have been too difficult, the occupant made use of the local municipalities,72 with low-level civil servants who were not hostile to the occupant keeping their positions in the administrations.73 However, if they violated their word of honour to serve the general-government loy-

71 Rolin-Jaequemyns, ‘La guerre actuelle dans ses rapports avec le droit international’ (n 68) 55.
72 Bray (n 67) 279.
73 Loening (n 70) 639. See also Percy Bordwell, The Law of War Between Belligerents (Callaghan 1908) 98.
ally, they were forcibly conscripted into the Prussian army on the basis of a decree issued by Bismarck. Since employees of the railroad and postal departments refused to serve under the enemy, the administration of these services was conducted directly by the Germans.

A key concern of the occupant in France was to guarantee the security of the army and to satisfy its logistical needs. Various measures were taken to address this concern. A royal decree, dated 15 December 1870, forbade the inhabitants of Alsace and Lorraine from joining the French army, and imposed sanctions, such as the confiscation of goods and ten-year banishments for those who did not respect the decree. Rolin-Jaquémyens believed the occupant had the right to forbid enrolment in the French army because the inhabitants had to remain as neutrals, but he considered the sanction of permanent confiscation of goods ‘odieuse’. Instead, he suggested a more lenient sanction, namely the temporary sequestration of goods. In the middle of August 1870, a proclamation by Bismarck established military jurisdiction in all the occupied territories. The death penalty was to be inflicted on French citizens in all cases in which they compromised the security of German troops by serving the enemy as spies, misleading German troops, killing, wounding, or plundering German soldiers, destroying bridges, or taking up arms against the German troops.

The war and occupation ended quickly. In a treaty signed in Versailles on 26 February 1871, France renounced the territory of Alsace and Lorraine and agreed that some of the German troops would withdraw, but some remained to guarantee the payment of war indemnities by France. On the same day, France (the French Republic) and Germany (the German Empire) signed a convention regulating the occupation of part of Paris. Under Article 3 of this convention, Prussian soldiers were given the opportunity to visit (without weapons and escorted by public officials) the ‘galeries du Louvre et l’hôtel des Invalides’, and were to be lodged in public buildings

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74 Bray (n 67) 298.
75 Bordwell (n 73) 98–9.
76 Loening (n 70) 643.
77 Gustave Rolin-Jaquémyens, ‘Chronique du droit international (Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international)’ (1871) 3 RCIC 318.
78 Bray (n 67) 305.
or in the houses of private citizens. This was also a form of occupation in the sense of being characterised by the forcible control of territory. But as it occurred as a guarantee of a peace treaty, being regulated by the terms of the treaty and subsequent regulations, this occupation is different from the model of belligerent occupation: it is an example of what scholars have called *occupatio pacifica*.

In view of the foregoing analysis, it is submitted that the occupation of Alsace and Lorraine constitutes an example of the emergence of the basic principles underlying the modern law of occupation, as subsequently codified in the Hague Regulations. This can be demonstrated by the application of the principle of distinction, the extent of the powers exercised by the occupant, and the efforts made to minimise the effects of war on the civilian population and to avoid excessive exploitation of its resources. Of course, this does not preclude that Prussian soldiers may have committed crimes, or that the civilian population may have suffered from the occupation. It merely testifies to the gradual affirmation of the model of occupation as the control and administration of territory, which was about to be consolidated through the codification of the law of occupation.

### 2.4. The process of codification

The principal instruments through which states sought to implement and codify the emerging ideas and practice in the realm of occupation are the Lieber Code, the Brussels Declaration, and the Hague Regulations. There are obvious differences between the documents, with the Lieber Code serving as a military manual, the Hague Regulations being part of a binding instrument.

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81 For further analysis, see Charles Calvo, *Le droit international* (Durand et Pedone-Lauriel 1896) 232; Raymond Robin, *Les occupations militaires en dehors des occupations de guerre* (Sirey 1913) 9–15.

82 In addition to these developments brought about by states, an effort to codify emerging norms and principles was made by the *Institut de droit international*. On 9 September 1880, the *Institut de droit international* adopted a manual on the ‘laws of war on land’ that became known as the ‘Oxford Manual’. Article 6 of the Oxford Manual reads: ‘No invaded territory is regarded as conquered until the end of the war: until that time the occupant exercised, in such territory, only a de facto power, essentially provisional in character.’ See text in Schindler, *The Laws of Armed Conflicts* (n 42) 35–47. Commentary to the Geneva Convention IV (n 44) 273.
ing treaty, and the Brussels Declaration having never entered into force, though acting as a ‘template’ for the Hague Regulations. Nonetheless, all of these instruments sought to regulate the conduct of armies and the administration of occupied territories, and to reduce the suffering of the civilian population during an occupation. They purported to serve the ‘progressive needs of civilization’ and to implement the principle of humanity to reduce ‘the evils of war, as far as military requirements permit’.83

To gauge the outcome of this process and the model of occupation codified and framed in the Hague Regulations, which are still, in part, valid today, some key principles and provisions of the Hague Regulations are briefly highlighted here. To begin with, in keeping not only with the conservationist principle, but also with the liberal ideas of the nineteenth century concerning the function of the state, the Hague Regulations envisaged a limited role for the occupying power in the management of the occupied territory.84 The occupying power was considered the ‘administrator’ of the occupied territory, tasked with guaranteeing ‘public order and safety’ and maintaining the situation as it was in a territory without aggravating it. As a mere administrator, it was only the usufructuary of ‘public buildings, real estate, forests, and agricultural estates belonging to the hostile State’ (Art 55). Yet, at the same time, it was empowered with levying taxes (Art 48), collecting contributions under a written order of the commander-in-chief (Art 51), and undertaking requisitions from the civilian population insofar as military necessity required and in proportion with the resources of the country (Art 52).

As concerns the protection of the safety and independence of the civilian population, the Hague Regulations identified a number of prohibitions as having an absolute character, thus operating regardless of military necessity. These include the prohibitions against compelling the population to swear allegiance to the occupant (Art 45), the confiscation of private property (Art 46), pillage (Art 47), reprisals (Art 50), and the ‘seizure of, destruction or wilful damage done to … private property, historic monuments, works of art and science’ (Art 56). The Hague Regulations also imposed on the occupying power a duty to respect ‘family honour and rights,

83 See Article 14 of the Lieber Code in Schindler, The Law of Armed Conflicts (n 42) 6; see the Preamble of the Brussels Declaration in Schindler, The Laws of Armed Conflicts (n 42) 26–7.
lives of persons, and private property as well as religious convictions and practice’ (Art 46).

In light of this brief synopsis, it could be said that the protection afforded to the civilian population under the Hague Regulations is not insignificant, despite the role of military necessity. In line with the conservationist principle, which underlines several provisions of the Hague Regulations, the occupying power is required to essentially refrain from interfering with the life of the civilian population and to disturb it as little as possible. Military necessity, however, is the counterbalance of this principle because it reduces the impact of it. Put simply, the broader the military necessity, the smaller the prospect that the civilian population will be left undisturbed. Although proving largely inadequate during World War I,\(^85\) in part because the occupants and the occupied greatly differed in their interpretation of the provisions,\(^86\) and frequently violated during World War II, the Hague Regulations became a pillar of customary international law applicable to an occupation, and they remain so to this day. The Nuremberg International Military Tribunal contributed to this affirmation by asserting the customary nature of the Hague Conventions.\(^87\)

A second major step in the codification of the law of occupation was the Geneva Convention IV of 1949. This is discussed in section 4 below, having first reflected on a direct challenge to the model of occupation codified in the Hague Regulations: the concept of transformative occupation.

### 3. Occupation as transformation

#### 3.1. The concept and its origin

In codifying the model of occupation as mere control and administration of territory, the Hague Regulations sought to strike a balance between (i) the interests of the occupying powers, which had significant leeway in the administration of territory depending on their military needs; (ii) the interests of the ousted sovereign, whose institutions and laws it protected; and (iii) the rights of the members of the civilian population and its prop-

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85 Roberts and Guelff (n 60) 300.
86 For examples of these disagreements with regard to specific provisions of the Hague Regulations, see James Wilford Garner, *International Law and the World War* (Longmans 1920) 60–1, 136–7, 157, 181–3.
87 See Nuremberg Judgment (n 48) 65. See also Greifelt and Others (n 48) 655.
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tivity. This complex balance is absent in what Adam Roberts aptly calls ‘transformative military occupation’.88

Transformative occupation is a form of occupation which is the antithesis of the model of occupation as administration and control of territory, as codified in the Hague Regulations. Contrary to the provisions of the Hague Regulations, the transformative occupant feels entitled to dramatically alter the normative system in force in a given territory by establishing its own set of laws and institutions, irrespective of the will and interests of the ousted, yet legitimate, sovereign. Although in breach of the Hague Regulations, the practice of transformative occupation nevertheless demands detailed examination. Not only are there historical examples of transformative occupations, which, in the case of the aftermath of World War II, could be regarded as having facilitated the progression of Germany and Japan towards democracy, but it is also the category of occupation that, for the reasons discussed in Chapter 3, can be used to describe the occupation of Iraq.

The distinctive trait of a transformative occupation is neither the conquest of territory, as in the Roman tradition, nor the exploitation of resources—even though annexation and exploitation of territory may be a consequence of it. Nor is it that the transformative occupier becomes involved in the full governance of the occupied territory in addition to its mere administration. Rather, it is the painstaking effort on the part of an occupant—sometimes spanning a considerable number of years—to radically alter the existing political, economic, and, as the case may be, social structure of a territory with seemingly permanent effects, achieved through the introduction of new institutions and laws, some of which may have a constitutional character.89 Furthermore, an occupant may try to

88 Roberts, ‘Transformative Military Occupation’ (n 3) 620.
89 In this regard, the Preamble of the Treaty of Paris of 20 November 1815, the text of which is available at <http://www.napoleon-empire.com/official-texts/treaty-of-paris-1815.php> accessed on 1 April 2013, setting out the peace conditions imposed on France, held that:

The Allied Power having ... preserved France and Europe from the convulsions with which they were menaced by the later enterprise of Napoleon Bonaparte, and by the revolutionary system ... in the desire to consolidate, by maintaining inviolate the Royal authority ... the order of things which had been happily re-established in France ... which the factual effects of the Revolution and the system of Conquest had for so long a time disturbed. (emphasis added)
justify its transformative ambitions as an instrument for the improvement of the life of the occupied people, beginning with their liberation from oppressive rulers and continuing with the adoption of pro-democracy reforms.\(^{90}\) This argument is not baseless: by dislodging from power an existing despotic ruler, a transformative occupation may, in appropriate circumstances, enable the occupied people to take charge of, and determine its future, free from internal oppression. From this viewpoint, it may be argued that certain measures enacted by a transformative occupant could, in certain contexts, be beneficial to an occupied people; but the problem remains of identifying who is entitled to determine what is beneficial for an occupied people. These difficult yet fundamental issues will be discussed further in the context of analysing the occupation of Iraq, in Chapters 3 and 4. At issue in this chapter is the clarification of the concept of transformative occupation.

Although difficult to pinpoint with precision the period in which the concept of transformative occupation emerged in the practice of states, an early and distinct affirmation, if not recognition, that an army could engage in this kind of occupation can be traced back to the French revolution.\(^{91}\) In support of the French army’s impending occupation of various parts of Europe to spread revolutionary ideas, the French National Assembly adopted a decree on 15 December 1792 titled ‘Décret par lequel la France proclame la liberté et la souveraineté de tous le peuples chez lesquels elle a porté et portera ses armes’. Article 1 of this decree reads:

\[
\text{Dans les pays qui sont ou seront occupés par les armées de la république, les généraux proclameront sur-le-champ, au nom de la nation française, la souveraineté du peuple, la suppression de toutes les autorités établies, des impôts ou contributions existants, l’abolition de la dîme, de la féodalité, des droits seigneuriaux, tant féodaux que censuels, fixes ou casuels, des banalités, de la servitude réelle ou personnelle, des privilèges de chasse et de pêche, des corvées, de la noblesse, et généralement de tous les privilèges. (emphasis added)}
\]

Article 2 shows the intention of the French occupants to be liberators:

\[^{90}\text{Fox, ‘Transformative Occupation and the Unilateralist Impulse’ (n 2) 241.}\]
Ils annonceront au peuple qu’ils lui apportent paix, secours, fraternité, liberté et égalité et ils le convoqueront de suite en assemblées primaires ou communales, pour créer et organiser une administration et une justice provisoire, ils veilleront à la sûreté des personnes et des propriétés ...\(^92\)

The significance of this decree is twofold. First, it advanced the innovative idea that occupation could be a way to liberate an oppressed people from what Talleyrand had defined as the ‘legitimate sovereign’. Second, it recognised people as independent and legitimate subjects, having the right to political independence from their rulers, which may, today, be classified as the right to self-determination. Notably, as in the case mentioned earlier of the French occupation of the Rhineland, the subsequent practice of France betrayed these ideals. Nonetheless, the idea of a sovereign people bearing rights was proclaimed and, like many other ideas of the French Revolution, was a signal development hinting at advances yet to come in the following centuries.

Transformative occupation came of age in the second half of the nineteenth century and at the beginning of the twentieth century, in what Eric Hobsbawm has aptly called the ‘Age of Empire’.\(^93\) Contrary to the approach adopted with respect to other European states, when acting outside what was then considered European territory, the norms and principles governing an occupation were almost an afterthought, or rather, as Benvenisti suggested, the ‘colonial powers operating outside Europe maintained the older doctrine of occupation’, enabling ‘the unilateral assumption of sovereignty over lands inhabited by what they deemed to be uncivilized peoples’.\(^94\) Arguably, one reason for this disparity of treatment is that most of the European states were concomitantly sovereign states and global empires.\(^95\)

Relations among the European states were governed by a system of balance of powers, of which the law of occupation, with its protective cloak for existing sovereigns, may be seen as both a product and a component. As empires, European states experienced few, if any, restrictions on their

\(^{92}\) Bulletin annoté des lois et décrets (n 20) 55.
\(^{94}\) Benvenisti (n 2) 22.
\(^{95}\) For further analysis on this point, see Martti Koskenniemi, The Gentle Civi-
expansionistic projects when acting outside Europe, where the logic of empire was justified, *inter alia*, by the belief that the concept of sovereignty did not apply outside the circle of ‘civilised’ nations.\(^{96}\) Hence, it could be argued that a kind of dual legal regime that applied concomitantly, but in different contexts, appears to have emerged in the nineteenth century: one rather strict, which was codified in legal norms that limited the conduct of states in occupied territory so as to guarantee respect for the sovereignty of states and the principle of humanity; the other rather permissive, which was essentially customary in nature and enabled European states to pursue their imperial ambitions freely within agreed spheres of influence. To elaborate upon this latter category, the following sections provide two examples: the Russian Empire occupation of Bulgaria (until then under Ottoman rule); and the British Empire occupation of Mesopotamia.

### 3.2. From ‘liberation’ to political independence

#### 3.2.1. The Russian occupation of Bulgaria (1877–1878)

In April 1876, a Bulgarian nationalist movement composed of intellectuals and clerics revolted against the Ottoman Empire, which had governed the territory of Bulgaria since the end of the fourteenth century.\(^{97}\) The revolt was unsuccessful and was subsequently repressed by the Sultan through the use of mercenaries known as the *Bachibouzouks*, who became notorious for killing thousands of people.\(^{98}\) These events prompted the military intervention of Russia in support of the Bulgarian cause against the Ottoman Empire. Russia declared war against the Ottoman Empire on 24 April 1877, considering its duty to be the protector of the Christian population of Bulgaria from the inhumane treatment to which it was being subjected.\(^{99}\) Russia’s desire to gain access to new territory in the Balkans, to gain control of the straits without crossing the territory of the Ottoman Empire, and the sense of prestige and solidarity it shared with the Slavic populations of the Orthodox faith were additional causes of the conflict.\(^{100}\)

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\(^{96}\) Ibid.


\(^{98}\) Pierre Milza, *Les relations internationales de 1871 à 1914* (Colin 2006) 19–20; Crampton (n 97) 80–1.


\(^{100}\) Ibid, 21. For a detailed analysis, see Barbara Jelavich, *The Ottoman Empire, the Great Powers, and the Straits Question* (Bloomington 1973) 89–96.
In his book *La paix et la guerre*, Fedor de Martens, the well-known Russian scholar and diplomat, provides a detailed analysis of this conflict and the ensuing occupation of most of the Bulgarian territory, as well as a passionate defence of the righteousness of the occupation itself. For Martens, the Russian intervention was a ‘sainte mission’ directed to respond to the cruelties of the Bachibouzouks and to install in Bulgaria ‘... un ordre de choses qui pouvait garantir l’amélioration du sort des populations chrétiennes’. Martens quotes with approval the war proclamation issued by the Czar on 10 June 1877, emphasising that Russia’s mission in Bulgaria was directed at building rather than destroying, and at protecting the Christian population from Ottoman rule. The proclamation reads in part:

Habitants de la Bulgarie! La mission de la Russie est de créer et non détruire. Elle est appelée par la Providence à concilier et à pacifier toutes les nationalités et toutes les confessions dans ces parties de la Bulgarie, où cohabitent des hommes de races différentes et de cultes différents. À l’avenir, les armes russes protégeront chaque chrétien contre toute violence; pas un cheveu ne tombera de sa tête impunément pas une parcelle de ses biens ne lui sera ravie par un musulman ou par un autre, sans rémunération immédiate.

The idea of protecting the Christian minority and the sense of brotherhood among the Slavic people can also be gauged by the instructions to the Russian Army of its commander in chief in April 1877, stating that ‘... Ce n’est pas pour des conquêtes que nous marchons, c’est pour défendre nos frères insultés et opprimés, pour défendre la foi du Christ ...’

On 12 May 1877, the Czar issued an *Oukaze* addressed to the Russian ‘Senate dirigeant’, giving instructions to military and civilian authorities also Rodogno (ibid) 64–5.

102 Ibid, 243.
103 Ibid, 268.
104 Ibid, 251.
105 The importance of the *Oukaze* was such that in its resolution entitled ‘*Application du Droit des Gens à la guerre de 1877 entre la Russie et la Turquie, Observations et vœux*’, adopted at the Zurich Session in 1877, the *Institut de droit international* made specific reference to it. See text in Martens, *La paix et la guerre* (n 101) 547.
106 Martens (ibid) 547.
as to their relationship with the enemy, neutral states, and, more generally, on the conduct of war. These instructions demanded, inter alia, respect for the 1864 Geneva Convention and the 1868 St Petersburg Declaration and for the application of the Brussels Declaration. As regards the Brussels Declaration, the Russian Army was only required to follow its principles generally, as strict adherence would have been unwarranted, given that it had not entered into force and thus did not bind Russia. Yet, according to Martens, the Russian Army had the moral duty to comply with such principles insofar as they were compatible with the purposes of war and in a way that was consistent with its leading role in the Brussels Conference.

The Russian Army quickly penetrated Bulgarian territory and established control over large portions of it. In November 1877, the chief of the Russian Army appointed Prince Tscherkassky as governor of the civil administration of Bulgaria, with the task of building a new civilian administration, including, if necessary, the creation of new districts and administrative councils in every provincial administration to deal with economic matters.

Martens observed that in the new administrations, the appointment of members of the Christian population was ‘highly recommended’ and supported, as by doing so the Russian Army could seek to remedy the injustice of having fewer Christians than Muslims in leadership positions, even though the Christians represented the majority of the population. In November 1877, the Russian army took the town of Kars, and marched through and occupied Bulgarian territory, until it neared Constantinople.

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107 Martens (ibid) 217. Article 12 of the Oukaze provided that:

Au fin d’atténuer les calamités de la guerre et de concilier autant qu’il est possible et sous réserve de réciprocité les exigences de la guerre avec celles de l’humanité, l’autorité militaire se conformera dans ses actes à l’esprit des principes posés par la conférence de Bruxelles de 1874, en tant qu’ils sont applicables à la Turquie et s’accordent avec le but special de la guerre actuel.

108 Ibid, 239.

109 Ibid, 269.

110 Ibid, 283.

111 The Russian Army generally maintained the existing borders, though three new districts were created. See Projet de bases essentielles de l’administration civile des sandjak et des districts (cazas) en Bulgarie, 7 July 1877 quoted in Martens (n 101) 289.

112 Martens (ibid) 290.

113 Ibid, 286.
the capital of the Ottoman Empire, halting, in particular, because of the opposition of the UK.\textsuperscript{114} On 3 March 1878, Russia and the Ottoman Empire signed the treaty of Santo Stefano, one of the results of which was the creation of ‘Great Bulgaria’.\textsuperscript{115} Shortly after, however, following the negative reaction of the UK and the Austro-Hungarian Empire, which feared an excessive expansion of Russia, a review of the Santo Stefano treaty was undertaken at the Congress of Berlin (June–July 1878). As a result, the ‘Great Bulgaria’ was divided into two areas: an autonomous principality in the north, whose Christian ruler was to be elected by the Bulgarians, though it remained a vassal of the sultan; and the area in the south known as Eastern Rumelia (Northern Thrace), which remained under Ottoman administration.\textsuperscript{116}

In response to criticism from commentators and from the British and Turkish governments of the conduct of the Russian occupation in ignoring the principles contained in the Brussels Declaration, Martens responded that the conservationist principle enshrined in the Brussels Declaration did not apply to the situation the Russian Army found upon arriving in Bulgarian territory, because there was little there that was worth conserving.\textsuperscript{117} He put this principle in the following terms:

\textit{… En vertu des décisions de cette conference, l’armée d’occupation est tenue de respecter l’ordre des choses établi dans le pays, ses institutions et ses lois. Il n’y avait rien de tout cela en Bulgarie: ni institutions régulièrement organisées, ni lois assurant aux populations la jouissance des droits de l’homme les plus essentiels, ni fonctionnaires qui fussent appelés à veiller aux intérêt des habitants. Le pays était livré à l’anarchie la plus complète …}\textsuperscript{118} (emphasis added)

Martens argued that if the purpose of war had been the conquest of Bulgaria, instead of improving the conditions of Christians in the Balkans, the criticism would have been justified.\textsuperscript{119} In his view, the case of Bulgaria was to be treated differently because, since it had been occupied by Russia, it could never go back to the Ottoman Empire on the basis of the previously

\begin{thebibliography}{99}
\bibitem[114]{Milza} Milza (n 98) 21; Rodogno (n 99) 165.
\bibitem[115]{Crampton} Crampton (n 98) 83.
\bibitem[116]{See} See Crampton (n 97) 83–4; Milza (n 98) 22; Rodogno (n 99) 165.
\bibitem[117]{Ibid} Ibid, 243.
\bibitem[118]{Ibid} Ibid.
\bibitem[119]{Ibid} Ibid, 279.
\end{thebibliography}
prevailing conditions. Instead, Russia’s purpose for going to war imposed on it the duty to take advantage of the period of occupation to establish a new order in Bulgaria with a prevailing Christian element.\(^\text{120}\)

In Martens’ justification of the Russian occupation, one can see the tension between the purposes of an occupant—eager to impose its own system of values within the occupied territory on the presumption that it would be beneficial to the occupied people—and the rationale underlying the law of occupation as being, in essence, a shield against the forcible transformation of territories. At that time, due to the historical context and the underdeveloped status of the law of occupation, the conflict between these two approaches could probably be resolved from a legal perspective in favour of the prevalence of the hegemonic will of the occupying power. Nowadays, Martens’ argument would not be tenable. The law of occupation applies in all circumstances of occupation, regardless of whether the purposes of the occupying power are ‘right’ or ‘wrong’.\(^\text{121}\) If there is nothing to be conserved and if conserving the status quo would be detrimental to the occupied people and beneficial only to its oppressor, as Martens argued, it would still not be permissible for an occupying power to seek to shape the future of an occupied territory, as the law of occupation does not make exceptions in this regard. Moreover, it should be noted that, by virtue of the right to self-determination, as discussed further in Chapters 2 and 3, the right to shape the future of a country belongs to the people inhabiting the territory, not to the occupying power.\(^\text{122}\) If an occupant were to engage in a transformative occupation, it would need to have a specific legal title permitting it to do so.

\(^{120}\) Ibid, 278–9.

\(^{121}\) The Preamble of Additional Protocol I spells out this principle:

> Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

\(^{122}\) Benvenisti \(\text{(n 2)}\).
3.2.2. The British occupation of Mesopotamia and the Mandate (1914–1932)

(a) The occupation (1914–1920)

In October 1914, soon after the outbreak of the war between the Ottoman Empire and the UK, a British Mesopotamian Expeditionary Force (MEF) landed near the city of Basra and occupied it within a month.\(^{123}\) By the end of 1918, the British forces had been able to defeat the Ottoman forces and occupy the three provinces (vilayets) of Basra (November 1914), Baghdad (March 1917), and Mosul (November 1918).\(^{124}\)

For Sir Arthur Wilson—acting civil commissioner in Iraq between 1918 and 1920—the responsibility for the British presence in Iraq laid at the door of Iraqi magnates and tribal chiefs.\(^{125}\) These groups, he wrote, had asked the British government to put an end to the ‘intolerable chaos’ caused by Turkish administration of the country.\(^{126}\) More plausibly, historians have argued that the intervention and occupation of Mesopotamia was prompted by a conglomeration of military and strategic interests relating to the conflict with the Ottoman Empire.\(^{127}\) The protection of British economic interests in the Persian Gulf, the security of the UK’s communications with India, the Empire air route, and the possibility of having access to a potentially vast oil supply for the British navy, are all considerations that should be factored in—to a greater or lesser extent—to explain the establishment and consolidation of what was a rather protracted occupation.\(^{128}\)

125 Mesopotamia Civil Commissioner, *Review of the Civil Administration of Mesopotamia* (His Majesty’s Stationery Office 1920) 1–2.
126 Ibid.
(1920–1923)—described the British forces as ‘liberators’. He put it in the following terms:

No remnant of the Turkish administration now remains in this region. In place thereof the British flag has been established, under which you will enjoy the benefits of liberty and justice both in regard to your religious and to your secular affairs ...129

Along the same lines, the British General Frederick Stanley Maude, upon occupying Baghdad (19 March 1917), issued a proclamation explaining that the British troops had come to Iraq as liberators. A portion of this (quite rhetorical) declaration reads as follows:

But you, the people of Baghdad, whose commercial profession and whose safety from oppression and invasion must ever be a matter of the closest concern to the British Government, are not to understand that it is the wish of the British Government to impose upon you alien institutions. It is the hope of the British Government that the aspirations of your philosophers and writers shall be realised once again. The people of Baghdad shall flourish and enjoy their wealth and substance under institutions which are in consonance with their sacred laws and their racial ideal ...130

In 1918, under the stewardship of Wilson, the British presence in Mesopotamia was gradually consolidated into a civilian administration, which administered Iraq by a system of direct rule.131 Inhabited by the Kurdish ethnic group, the province of Mosul was a distinct entity from traditional Mesopotamia; however, after some years of hesitation, it came to be considered, for both political and economic reasons, ‘vital’ that the territory of Mesopotamia should cover the ‘three wilayats [vilayets] of Basra, Baghdad, and Mosul’.132

129 Review of the Civil Administration of Mesopotamia (n 125) 3.
130 See full text reprinted in Ireland (n 123) 457–8.
131 Tripp (n 127) 38.
Strengthened by the support of local notables (particularly belonging to the Sunni group) and tribal leaders, with whom the British had been quick to create connections through the offering of rewards, the British administration abolished institutions such as the Ottoman elected municipal councils. Furthermore, fundamental to the future formation of the Iraqi State, the British administration began to treat the occupied provinces as one administrative unit, ruling it as a single entity in line with the centralistic model of the administration of India and following the British ‘imperial school’. It created the Departments of Education, Levies and Police, Civil and Medical Service, Commerce and Industry, Public Works, Railways, Finance and Establishment.

For the administration of civil and criminal justice, a special code known as the Iraq Occupied Territories Code was promulgated on 1 August 1915. Although written in Arabic, this code was a novelty for the Iraqis, as it was largely drawn from laws in force in India and replaced the Turkish laws that had been in force for many decades. An instrument through which British Forces could ensure the cooperation of the heads of the tribes was the Tribal Criminal and Civil Disputes Regulations, enacted in February 1916, which governed disputes ‘in the occupied territories in which either or any of the parties was a tribesmen’. To settle these disputes, it established a special jurisdiction vesting the tribal shaykhs with the authority to settle disputes among the members of their tribes, with no right of appeal against their decisions to a different court provided for. The Regulations mentioned were also used to collect taxes on behalf of the British administration. Consequently, the shaykh had become not only the head of his tribe, but also an ‘agent of the central administration’ with sole authority over both civil and criminal matters and no right of appeal against their decisions.

The British Administration gave particular attention to the preservation of archaeological sites. A proclamation issued shortly after the occupation

133 Ibid, 38; Ireland (n 123) 89; Yaphe (n 128) 44.
134 Tripp (n 127) 36.
136 Review of the Civil Administration of Mesopotamia (n 125) 103–4.
137 Ireland (n 123) 82–4. See also Charles Rousseau (n 39) 153.
138 Sluglett (n 124) 169.
139 Tripp (n 127) 38.
140 Sluglett (n 124) 170-1.
of Baghdad required the preservation of ancient monuments and antiquities and prohibited their trafficking. It also forbade the destruction or defacement of any ancient monument or site and the sale of antiques except under licence. The occupation, however, could not continue indefinitely. Soon the Iraqi population began—in varying degrees—to oppose the occupation. The desire for independence was fuelled by the 1918 Anglo-French Declaration, which called for the formation of an indigenous government in Iraq, and the development of the idea of self-determination contained in the US President Wilson’s famous fourteen points. In 1918, for instance, the newly founded religious Society of Islamic Revival gave voice to anti-British sentiment, culminating in the killing of a British officer.

In addition to the Iraqi quest for independence, the transition from occupation to Mandate was—on the British side—prompted by the end of World War I (which in the case of Mesopotamia ended with the Armistice of Mudros) and the desire to keep Iraq under British rule while costing as little as possible. Four days after the end of the war with Turkey, on 3 November 1918, the town of Mosul was entered and occupied by British troops, and the area of British occupation was held to extend over the whole of the province of Mosul. By pursuing this occupation, Wilson noted in his memoirs, General Marshall ‘laid the foundation stone of the future State of Iraq’. After the signing of the armistice, the expression ‘Iraq’ be-

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141 Ireland (n 123) 107.
142 Tripp (n 127) 39–42.
143 The Anglo-French Declaration of 17 November 1918 spoke of the ‘complete and final liberation of peoples who have for so long been oppressed by the Turks, and the setting up of national governments and administrations deriving their authority from the free exercise of the initiative and choice of the indigenous populations’, going on to declare that ‘in the pursuit of those intentions, France and Great Britain agree to further and assist in the establishment of indigenous Governments and administrations in Syria and Mesopotamia’. The text of the Anglo-French Declaration is reproduced in Ireland (n 123) 459–60.
144 On the impact of President Wilson’s fourteen points, see Dodge (n 129) 9–5; Sluglett (n 124) 13–20.
145 Tripp (n 127) 33.
146 Sluglett (n 124) 26–41.
147 Wilson (n 132) 23.
gan to be used in lieu of Mesopotamia by British officials to denote the three vilayets of Basra, Baghdad, and Mosul.\footnote{Ibid, 22.}

Following the 1919 Treaty of Sèvres between the Allied Powers and Turkey, the UK was allotted a class ‘A’ mandate\footnote{Under Article 22 of the Covenant of the League of Nations, a class ‘A’ mandate covers territories formerly controlled by the Ottoman Empire that: have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.} over Mesopotamia.\footnote{Norman Bentwich, ‘Mandated Territories: Palestine and Mesopotamia (Iraq)’ (1921–1922) 2 BYIL 48–9.} The announcement of the Mandate on 5 May 1919,\footnote{Ireland (n 123) 220.} together with the general resentment against British rule,\footnote{Tripp (n 127) 39–44.} prompted a massive revolt led by Senior Sunni and Shiite clerics (normally opposed to one another).\footnote{Ibid, 40–4.} Though the revolt was quashed through the use of aerial bombardments,\footnote{In a letter from Cox to Winston Churchill in June 1921, the latter was informed that: Aerial action is a legitimate means of quelling disturbances and of enforcing the maintenance of order but it should in no circumstances be employed in support of purely administrative measures such as the collection of revenue. See quotation in Sluglett (n 124) 185.} it was fundamental in creating a sense of Iraqi national identity, and in accelerating the passage to a system of ‘indirect’ rule.\footnote{Ibid, 44; Ulrichsen (n 134) 349, 352, 374–6.}

Speaking on the applicability of the Hague Regulations to the occupation of Iraq, Sir Arnold Wilson had the following to say in a presentation he gave before the \textit{Grotius} society in 1932:

\begin{quote}
The only legal guidance afforded to us in initiating a Civil Administration was that offered by the Regulations Respecting the Laws and Customs of War on land … annexed to the Hague Convention of 1907 … These regulations were of no practical value to us; they prohibit
\end{quote}
what no British Army would contemplate doing and inculcate the obvious.\textsuperscript{156}

Wilson went as far as to propose a revision of the 1907 Hague Convention that set out five principles for the building and establishing of a strong civil administration in an occupied territory.\textsuperscript{157} Sir Wilson’s blunt remarks reflect a widely held view at that time, based on auto-interpretation of the applicability and content of normative instruments which was in turn based upon the conviction that the ends justified the means. From an historical perspective, this dismissive attitude can be placed within the wider frame of colonialism. From a legal perspective, it must be criticised, as the Hague Regulations were far from irrelevant.

The following exchange concerning the use of Iraqi oil resources confirms the fallacy of Wilson’s remarks. In a letter to the British Government, the US ambassador to the UK pointed out that any ‘alien territory which should be acquired … must be held and governed in such a way as to assure equal treatment in law, and in fact to the commerce of all nations’.\textsuperscript{158} The American Ambassador expressed concern that the policy of the British administration in Mesopotamia gave the impression that the UK was ‘preparing quietly for exclusive control of the oil resources in this region’.\textsuperscript{159} He indicated that these preparations were difficult to reconcile with the assurances of the British Government that ‘the provisional character of the military occupation does not warrant the taking of decisions by the occupying power in matters concerning the future economic development of the country’.\textsuperscript{160} The UK denied the allegations of the US Government and stressed that it remained fully aware of its obligations as a temporary occupant to protect natural resources.\textsuperscript{161} This exchange shows that the Hague Regulations were indeed considered applicable to the occupation of Mesopotamia, though there is little evidence to suggest that their restraining force was other than insignificant. The practice of the UK in

\textsuperscript{156} Arnold Wilson, ‘The Laws of War in Occupied Territory’ (1932) 18 TGS 17, 39.
\textsuperscript{157} Ibid, 18–19.
\textsuperscript{158} British Foreign Office, ‘Correspondence Between His Majesty’s Government and the United States Ambassador Respecting Economic Rights in Mandated Territories’ (1920–1921) 7 International Conciliation 305 (Correspondence).
\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid.
\textsuperscript{161} Ibid, 312–14.
Iraq was part and parcel of colonialism, a common trademark of many European interventions in various parts of the world. Today, however, the reality is different, and the age of colonialism has passed. Having said that, the more closely current occupations resemble models of the colonial era, the more appropriate it becomes to speak of forms of neo-colonialism.\textsuperscript{162} Another of the functions of the law of occupation is unquestionably that of preventing the resurgence of this deplorable practice in whatever form it may take.

(b) \textit{The Mandate (1920–1932)}

In May 1920 a communiqué was issued indicating that the ‘San Remo Conference’ had decided to entrust Great Britain with the mandate. Revealing the rather paternalistic and overly optimistic nature of the mandate, the communiqué, in part, read:

\begin{quote}
It is the duty of the mandatory Power to ‘act the part of a wise and far-seeing guardian who makes provision for the training of his charge with a view to fitting him to take his place in the world of men’.
\end{quote}

And then rather emphatically, it added:

\begin{quote}
Reconstruction will not be the work of a day, but with a race such as the Arabs, quick to learn and eager to seek advantage from the attainments of science, progress will be rapid. Already the signs of revival are everywhere apparent; security has replaced disorder, the barren waste blossoms into fertility, the poor man is safe from oppression, and the rich enjoys his wealth in peace.\textsuperscript{163}
\end{quote}

Bringing to a close the formal phase of occupation, Sir Percy Cox established a provisional government known as the ‘Provisional Council of State’ in October 1920, led by an Iraqi president.\textsuperscript{164} In this provisional gov-

\begin{footnotesize}
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\item \textsuperscript{163} Wilson (n 156).
\item \textsuperscript{164} Colonial Office, ‘Special Report by His Majesty’s Government in the United Kingdom of Great Britain and Northern Ireland to the Council of the League
\end{itemize}
\end{footnotesize}
ernment, foreign relations and military matters remained under the exclusive control of the High Commissioner.\textsuperscript{165} British Political Officers were appointed as ‘advisers’ to each ministry, who in turn reported to the High Commissioner.\textsuperscript{166}

At the 1921 Cairo Conference, attended by the new British Secretary for Colonies (Winston Churchill) and a number of Iraqi officials, it was determined that Iraq was to become a kingdom and that the Hashemite Amir Faisal—the previous king of Syria whom the French army in occupation of Damascus had deposed following strong popular reaction against the Mandate for Syria, which Faisal had come to accept\textsuperscript{167}—was to be its first king.\textsuperscript{168} A referendum organised by the High Commissioner indicated that 96 per cent of Iraqis supported Faisal’s appointment, though given the exorbitant percentage in a country that had just been unified by the fiat of an occupying power, the argument that the referendum was something of a farce can certainly be posited.\textsuperscript{169}

In the period from 1922 to 1932, the relationship between Iraq and the UK developed through a number of treaties. While these treaties ostensibly replaced the terms of the Mandate, they also served to give effect to it, by making more specific the essence of the provisions and objectives contained in the Mandate.\textsuperscript{170} For Iraq, the treaties recognised its status as a formally independent nation not subordinated to the UK, as the Mandate itself had implied.\textsuperscript{171} For the UK, they were a means of indirect control: a necessary adjustment due to the shift that Iraq underwent from occupied territory to statehood.\textsuperscript{172} Negotiated against a background of mounting opposition to the British presence in Iraq,\textsuperscript{173} the first and most important of these treaties was the Anglo-Iraqi treaty of 10 October 1922, which was

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\textsuperscript{165} Ibid, 13.
\textsuperscript{166} Ibid, 12–13. See also Dodge (n 128) 18–20.
\textsuperscript{168} Ibid, 47–9.
\textsuperscript{169} Sluglett (n 124) 44. See also Wright (n 167) 747.
\textsuperscript{170} Ireland (n 123) 341–5; Dodge (n 128) 22.
\textsuperscript{171} Ireland (ibid) 339.
\textsuperscript{172} Ibid, 338–9; Special Report on the Progress of Iraq (n 164) 15; Dodge (n 128) 22.
\textsuperscript{173} Sluglett (n 125) 49–53.
intended to last for twenty years, though a subsequent protocol modified this to the period ‘until Iraq shall become a member of the League of Nations’.

At the request of the King of Iraq, the UK was to provide ‘advice and assistance’, with the King agreeing ‘to be guided by the advice of His Britannic Majesty’ on all ‘important matters affecting the international and financial obligations and interests’ of the UK. As a mandatory power, Britain was responsible in international law for the defence of Iraq against foreign invasion. To this end, British troops could be stationed in Iraq, though in practice, they also served to protect the route to India and later the Iraqi oilfields. Article III of this treaty outlined certain basic principles around which an Organic Law (Constitution) was to be drafted. Article VIII confirmed the inalienability of Iraqi territory by forbidding its leasing or its cession. Article XI reproduced the text of the Mandate almost exactly, ensuring economic equality ‘to all members of the League’ and, importantly, to any ‘State to which His Britannic Majesty had agreed by treaty that the same rights should be ensured’. Confirming the subordination of Iraq to Great Britain, the treaty required the King to appoint certain British advisers, the terms of which were specified in the annexed agreement. British advisers were attached to each of the ministries.

Confirming Iraq’s quest for independence, the 1922 Treaty was signed only after the British Government had given an assurance that it would do

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174 Special Report on the Progress of Iraq (n 164) 15.
175 See 30 April 1923.
176 See Ireland (n 123) 346–7; Ernest Main, *Iraq From Mandate to Independence* (G Allen & Unwin 1935) 89.
177 Sluglett (n 124) 182.
178 According to Article III of the 1922 Treaty, the text of the Organic Law was to (i) contain nothing contrary to the provisions of the present Treaty; (ii) take account of the rights, wishes, and interests of all populations inhabiting Iraq; (iii) ensure to all complete freedom of conscience and the free exercise of all forms of worship, subject only to the maintenance of public order and morals; (iv) provide that no discrimination of any kind shall be made between the inhabitants of Iraq on the ground of race, religion, or language; (v) secure the right of each community to maintain its own schools for the education of its members in its own language, while conforming to such educational requirements of a general nature as the Government of Iraq shall impose. See text in Ireland (n 123) 372.
179 Ireland (ibid) 342.
180 Wright (n 169) 749.
everything to expedite the process of ‘delimitation of the frontiers of Iraq’ so that ‘Iraq may be in a position ... to apply for admission to membership of the League of Nations’. The 1922 Treaty complied with the requirements of Article 22 of the Covenant of the League of Nations, as recognised by the Council of the League of Nations, which on 27 September 1924 formally accepted a document prepared by the UK, reciting the treaty as the mandate for Iraq.

After several months’ preparation—due to the complex electoral scheme based on an indirect college system whereby registered voters (male tax payers over 21 years of age) voted for electors that voted for the Assembly—the Constitutional Assembly of Iraq was elected on March 1924. As it turned out, however, both British and Iraqi officials became involved in the preparation of the first draft of the Constitution, which was then negotiated between the British Colonial Office, the Iraqi Council of Ministers, and King Faisal I. Under the new constitution, Iraq was to be, like the UK, a ‘constitutional hereditary monarchy’ (Art 2). Islam was the official religion of the State, but ‘complete freedom of conscience and freedom to practise various forms of worship was ensured’ (Art 13). The Constitution also established the principle of judicial review.

Although controlled militarily by the UK since the armistice of Mudros, the fate of the province of Mosul, which was inhabited by the Kurds, who were ethnically different from the Arabs and lived at the frontier with Turkey, was subject of debates and negotiations involving the UK and Turkey. Following the recommendation in a report published on 17 July 1925 by a three-man international commission appointed by the League of Na-

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181 Special Report on the Progress of Iraq (n 158) 23; Main (n 168) 82.
182 Wright (n 169) 747.
183 Sluglett (n 124) 58.
184 Ireland (n 123) 373.
185 Ibid, 374.
187 Ibid.
189 Sluglett (n 124) 75-86.
tions to settle the dispute,\textsuperscript{190} the Anglo-Iraqi Treaty of January 1926 confirmed that Mosul had finally became part of Iraq.\textsuperscript{191}

Revealing Iraqi unease with the protracted British presence in the country, the British Report for the administration of Iraq of 1928 remarked that:

The idea is growing that the Treaty of Alliance concluded with Great Britain in 1922 set up a state of affairs which, if continued, will not only impede the realization of the country’s political aspirations, but will also prove inimical to the economic and social development of the country. The Iraqi critic argues that the government of a country by two governments, one foreign and the other national, is an abnormality which ... is not in practice a workable scheme ...\textsuperscript{192}

On 11 September 1929, the acting High Commissioner informed the Iraqi Government that the British Government was to propose Iraq for membership, unconditionally, of the League of Nations.\textsuperscript{193} The last of the Iraq-UK treaties to be concluded during the Mandate, dated 30 June 1930, represented ‘only limited progress towards national sovereignty’.\textsuperscript{194} It was essentially a treaty of alliance,\textsuperscript{195} which enabled the consolidation of Brit-

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\textsuperscript{190} Ibid.
\textsuperscript{191} Speaking to the House of Commons on 25 March 1920, Lloyd George, the British Prime Minister, outlined the rational for Mosul’s incorporation within Mesopotamia as follows:

But I cannot understand withdrawing from the more important and more promising part of Mesopotamia. Mosul is a country with great possibilities. It has rich oil deposits ... it contains some of the richest natural resources of any country in the world. If we did not undertake the task probably some other country would, and unless some country were to undertake the task, Mesopotamia would be exactly where he is to day, or probably much worse. After the enormous expenditure which we have incurred in freeing this country from the withering despotism of the Turk, to hand it back to anarchy and confusion, and to take no responsibility for its development would be an act of folly and quite indefensible ...

See quotation in Wilson, Loyalties (n 132) 241.
\textsuperscript{192} Main (n 176) 93.
\textsuperscript{193} Dodge (n 128) 37.
\textsuperscript{194} Sluglett (n 124) 123.
\textsuperscript{195} Ibid, 123–4.
\end{flushleft}
ish interests in Iraq. While providing that the UK was to go to the aid of its ally in the event of an invasion (Art 4), it granted the UK rent-free use of four military bases (Art 5); British troops continued to enjoy existing privileges and immunities (Annex, s 2); and Iraq agreed to buy weapons and military equipment, and receive military personnel from the UK. Article 11 of that Treaty stated that:

At any time after 20 years from the coming into force of this Treaty, the High Contracting Parties will, at the request of either of them conclude a new Treaty which shall provide for the maintenance and protection in all circumstances of the essential communications of His Britannic Majesty

Although Britain could not interfere openly with Iraqi internal affairs, it still exercised a role in matters of defence and administration, through the retention of senior British officials at key posts in important ministries. On 28 January 1932, the Council of the League agreed to Iraq’s admission to the League of Nations, subject to the signature of various guarantees, including the upholding of the administration of justice and the general safeguarding of minorities. Full membership took effect after October 1932. According to the historian Peter Sluglett, the UK withdrew from Iraq when it was clear that British interests would no longer be at risk. He put it thus:

By 1932, the security of British interests in Iraq seemed guaranteed. The exploitation of Iraqi oil (still at a very early stage) was firmly in the hands of IPC [Iraq Petroleum Company], an international consortium in which Britain held a majority share. The empire air route was secured by RAF bases ... In Baghdad, a small group of politicians and officials entirely dependent on the British connection has been installed in office, and provided they did nothing which could be

196 Ibid, 119.
197 Ibid, 123.
198 Ibid.
199 Ibid, 156.
200 See, in this regard, Manley O Hudson, ‘The Admission of Iraq to Membership in the League of Nations’ (1933) 27(1) AJIL 133.
interpreted by the British as unfriendly, their positions were fairly secure.\textsuperscript{201}

The UK’s presence in Iraq and the measures it took were justified by the Mandate it had received from the League of Nations. Already at that time, therefore, the transformation of the political structure of a territory could not turn on the mere caprices of the stronger nation, nor operate in a normative vacuum. It was anchored to a normative framework that included the Mandate from the League of Nations and the treaties signed between the UK and Iraq. On the other hand, the unfairness of the approach pursued during the Mandate (at least from a contemporary perspective) is evident. Albeit a signatory of treaties, the Iraqi State, even if it wished to do so, had not the military strength to either repel the uninvited ‘guest’ in their home, or to oppose the ‘revolution’ that was being carried out in its territory. At that time, the international validation which the UK’s project in Iraq had received through the League of Nations was probably sufficient to justify the policies it pursued. From a contemporary perspective, the standard of review must, unquestionably, be higher. The legality of the measures adopted by the relevant international organ such as the Security Council, albeit the embodiment of international legitimacy, should be carefully scrutinised from a substantive perspective because they may negatively affect the life of millions of individuals for years, regardless of the intentions behind their adoption.

3.3. From surrender to the establishment of ‘democratic institutions’

Although in completely different contexts, the practice of transformative occupation continued beyond the colonial era. During World War II, it was brought to an extreme during several Nazi occupations, by, \textit{inter alia}, ‘changing basic laws of the occupied countries and introducing German Law and German courts’;\textsuperscript{202} introducing retroactive changes to penal laws; and compelling courts ‘to render justice in the name of the German

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\item[\textsuperscript{201}] Ibid, 211.
\item[\textsuperscript{202}] Raphaël Lemkin, \textit{Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government: Proposals for Redress} (Carnegie Endowment for International Peace 1944) 12–13. As stated in the 1947 Justice trial ‘[t]he undisputed evidence in this case shows that Germany violated during the recent war every principle of the law of occupation’. See \textit{In re Alstötter and Others} (The
nation’. In the aftermath of World War II, two important cases of transformative occupation can be recorded: those of Germany and Japan. These not only served the military and strategic purposes of the occupying powers, but also contributed to the development of democratic countries by eradicating the regimes that had caused World War II. If it is reasonable to suggest that some credit for the remarkable achievements of Germany and Japan after World War II is to be laid at the doors of the Allied Powers and the policies they sought to pursue in those contexts, then the argument that a transformative occupant should follow these models, and be legally justified if it does so, can reasonably be advanced.

Through an analysis of these two cases of occupation, the next sections acknowledge that a transformative occupation could, in certain instances, be an instrument of ‘democratisation’. At the same time, however, these sections make clear that the occupation of Germany and Japan cannot be regarded as an automatic paradigm for contemporary occupations. If those occupations can teach us anything, it is that there is a duty to reflect on the extraordinary uniqueness of what unfolded at that time, rather than the possibility of its repetition in differing contexts, notwithstanding the desirability—for one reason or another—of successful democratisation processes in the aftermath of deposed brutal regimes.

3.3.1. The Allied Powers’ occupation of Germany (1945–1949)

After six years of hostilities, Germany lay in ruins in 1945, facing the total collapse of both its military forces and government. Allied forces had occupied all of Germany’s territory and there was no government to speak for the German people. The head of an interim German Government, Admiral Karl Dönitz, and the members of his cabinet were arrested as war criminals in May 1945. On 5 June 1945, the US, the UK, and the Soviet Union, together with the Provisional Government of France, issued a joint declaration (Declaration of Berlin), stating that the ‘unconditional surrender of Germany’ had ‘been effected’ and that, due to the non-existence of a German government, they were ‘to assume supreme authority with respect to Germany’. The territory of Germany, including the city of Berlin,
was divided into four zones, each occupied by the US, the UK, France, and the Soviet Union. The Allied Powers considered Germany occupied territory. They exercised no less than 'supreme authority' in their respective zones and in matters concerning 'Germany as a whole' through the 'Control Council', composed of the governors of each of the four sectors.

Finding that 'the Allied armies are in occupation of the whole of Germany', the Potsdam Declaration—a Tripartite Agreement by the US, the UK, and the Soviet Union, signed on 2 August 1945—served to list the 'purposes of the occupation by which the Control Council shall be guided'. Among these purposes were: (i) 'the complete disarmament and demilitarization of Germany'; (ii) 'to convince the German people that they have

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205 Ibid, 49.

207 On the structure and functions of the Control Council, see Jennings (ibid) 112–119.
208 Friedmann (n 204) 261.
suffered a total military defeat’; (iii) ‘to destroy the National Socialist Party ... to dissolve all Nazi institutions, to insure that they are not revived in any form’; and (iv) ‘to prepare for the eventual reconstruction of German political life on a democratic basis’.

The Potsdam Declaration required the abolishment of all Nazi Laws which provided the basis of the Hitler regime or established discrimination; the removal from office of ‘[a]ll members of the Nazi party who have been more than nominal participants in its activities’ and their replacement with persons who could assist in ‘developing genuine democratic institutions’; and the reorganisation of the judicial system ‘in accordance with the principles of democracy, of justice under law, and of equal rights for all citizens’.

In accordance with, and in the pursuit of, the goals set out in the Potsdam Declaration, the Control Council adopted numerous measures; some of which will be recalled here in order to give a sense of the extent of the transformation sought by the Allied Powers. It forbade the ‘carrying, possession or ownership of arms or ammunition by any person’, and dissolved all the German armed forces and ‘military training’. On the political front, the Control Council set aside laws of ‘a political or discriminatory nature’, abolished certain criminal legislation; proclaimed the total dissolution of the National Socialist Party and prohibited its revival; and established a set of comprehensive criteria for the removal from public office of those ‘who have been more than nominal participants in its [Nazi Party] activities’.

The Control Council rearranged the governmental landscape of Germany by abolishing ‘the Prussian State, together with its central government

209 Ibid.
210 See the text of the Potsdam Declaration in Friedmann (n 204) 6.
211 Control Council Order No 2, ‘Confiscation of arms and ammunition, 7 January 1946. This and the following cited documents of the Control Council can be found at <http://www.loc.gov/rr/frd/Military_Law/enactments-home.html> accessed April 2014.
and all its agencies'. Calling for the establishment of ‘a new democratic judicial system’, the Control Council affirmed the principle of ‘equality before the Law’, set out the guarantees of the rights of the accused, and proclaimed the independence of the judiciary. It established ‘Administrative Courts’ and ‘Local and Appellate Labor Courts’ for the ‘settlement of labor disputes’, and it also increased wages, income, and corporation taxes, as well as introducing new taxes. Control Council Law No 10 authorised each occupation sector to establish its own tribunals for the trial of Nazi political and military leaders for war crimes and crimes against humanity.

A distinctive feature of the occupation of Germany, which may have contributed to its success, was the role of the German population itself: a united people with a rich and common history, anxious to put the past behind them, rebuild their country, and live in peace and prosperity, notwithstanding the tragedies of World War II. The Allied Powers’ policy to gradually return power to the German people fostered such determination. By 1947–1948, the United States, followed by the British and the French, held local and then regional elections. The Allied Powers permitted the first elections for a West German Government in 1949. In mid-1948, the military governors of the British, French, and American zones commissioned the prime ministers of the eleven German regional states to convene a national assembly to write a new constitution for Ger-

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221 Control Council Law No 21, ‘Law Concerning German Labor Courts’, 26 April 1946.
224 Control Council Law No 10, ‘Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity’, 20 December 1945, Art II.
226 Ibid, 16.
227 Ibid.
many. Although the military governors provided directives as to some of the key issues, such as federalism and human rights, it was Germans who composed the twenty-five-member committee appointed by the military governors, and completed the draft constitution in fourteen days (10–23 August 1948). Over the ensuing ten months, the assembly, known as the Parliamentary Council, produced the Basic Law, which was approved by the occupying powers on 12 May 1949 and subsequently promulgated by the German parliament. Speaking before a committee of the US Senate, an American scholar remarked that the fact that the ‘German people were allowed to create institutions of their own choosing’, which were ‘founded on their own political, social, and even religious traditions’ was one of the key factors for the ‘success of the Basic Law, the de facto constitution of Germany’.

From the perspective of the jus in bello, there is little doubt that the normative framework that applied to the occupation of Germany constituted a departure from the applicable norms of jus in bello, that is the Hague Regulations. The Allied Powers, not without reflection, considered that the Hague Regulations were not applicable, at least as regards the conservationist principle, because ‘les buts assignés par les vainqueurs à l’occupation de cet Etat ne correspondent pas à ceux d’une occupatio bellica’. An objection could be made, however, that the divergence be-

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230 Ibid.

231 Ibid, 66.

232 Benvenisti (n 2) 161.


234 Irène Couzigou, L’évolution du statut international de l’Allemagne depuis 1945 (Bruylant 2011) 205. See also Jennings (n 206) 135–7, arguing 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’.
etween the goals of the occupants and that of a given normative instrument is a reason for actually applying a given normative instrument, rather than setting it aside. The Nuremberg Judgment demonstrated as much by finding that the Hague Regulations applied to territories occupied by Nazi Germany, notwithstanding the breadth of the goals pursued by the occupiers and their being the antithesis\(^\text{235}\) of those of the Hague Regulations.\(^\text{236}\)

Though admittedly controversial, I would suggest that the Hague Regulations were not formally inapplicable to the occupation of Germany if it is properly considered as an occupation. Instead, they had been implicitly derogated from where they prevented the carrying out of the transformative project defined in the Potsdam Declaration. The adoption in the Potsdam Declaration of a set of provisions specifically concerning and guiding the occupation of Germany may be seen as the creation of an \textit{ad hoc} frame-

\(^{235}\) See Raphaël Lemkin, \textit{Axis Rule in Occupied Europe: Laws of Occupation: Analysis of Government: Proposals for Redress} (Carnegie Endowment for International Peace 1944) 25–7. See also (in the same volume at 389) ‘Announcement concerning General Orders issued by the German Military Commanders’ of 10 May 1940, made in occupied France, which stated that ‘Local law not in conflict with these orders and regulations remains in force unless incompatible with the purposes of the occupation’. See further (in the same volume at 446) ‘Decree of the Fuhrer concerning the Exercise of Governmental Authority in the Netherlands’ of 18 May 1940, stating that ‘The law, heretofore in force, shall remain in effect in so far as compatible with the purposes of the occupation’.

\(^{236}\) The Nuremberg Judgment (n 48) at 249 called for respect of the Hague Regulations on the basis that the circumstances on the ground justified their application:

A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war, because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September, 1939.
work, which in the specific context of the occupation of Germany was, in a sense, more ‘specialis’ than the *lex specialis* normally applicable during an occupation, namely, the Hague Regulations. From a legal perspective, this was possible, I submit, primarily because of Germany’s unconditional acceptance of the terms of surrender and the consequent legitimate assumption of supreme authority by the Allied Powers.

Moreover, the adoption of such an *ad hoc* framework could be regarded as a legitimate exception to it as an exercise of a legitimate right to self-defence by the Allied Powers against an aggressor; by the truly exceptional and tragic context which had brought the occupation about; by the fact that the Allied Powers were at that time at the zenith of their authority being perceived as true liberators, and were in fact all about to become members of the Security Council; the lack of opposition by a people anxious, if not desperate, to open a new chapter in their history; the non-operation of the right to self-determination; and the non-opposition by other states to the project of the Allied Powers. Thus the German precedent may be regarded as authority for the argument that a transformative occupation may, in certain circumstances, come to be regarded as justifiable and eventually succeed. Equally, it is authority for the argument that in different historical, factual, and normative contexts, the repetition of the Allied Powers’ model of transformative occupation would not be justifiable.

3.3.2. The Allied Powers’ occupation of Japan (1945–1952)

On 2 September 1945, aboard the USS *Missouri*, representatives of the Japanese Government signed the Instrument of Surrender, as presented by General MacArthur, Supreme Commander for the Allied Powers (SCAP), which proclaimed the ‘unconditional surrender’ of Japan.\(^{237}\) The Instrument of Surrender stated that the ‘authority of the Emperor and the Japanese Government to rule the state’ was subject to ‘the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effect these terms of surrender’.\(^{238}\)

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Conferring on the occupation a formally conventional nature, the Emperor, on behalf of the Japanese people, signed the Instrument of Surrender, expressing his commitment and that of the Japanese Government ‘to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers’. According to the Potsdam Declaration, Japan was to ‘be occupied’ until: (i) ‘there is convincing proof that Japan’s war-making power is destroyed’; (ii) ‘stern justice shall be meted out to all war criminals’; (iii) ‘the Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people’; (iv) ‘Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established’; and (v) ‘there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government’. The same Declaration requested the Government of Japan ‘to proclaim the unconditional surrender of all Japanese armed forces’, the alternative being ‘prompt and utter destruction’.

Unlike that of Germany, the occupation of Japan was a system of indirect rule, as the Japanese Government and the Diet remained functioning during the occupation. After meeting the Emperor on 27 September 1945, MacArthur was persuaded that retaining the Emperor would facilitate a smooth and successful occupation. In turn, in January 1946, the Emperor made the extraordinary gesture of issuing a statement denying that he had divine attributes, and began to tour the country in an orchestrated effort to boost morale and support for the objectives of the occupation. Only seven months after the beginning of the occupation, general elections were held in Japan on 10 April 1946. Confirming the existence

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239 Ando (n 237) 94–5; Stahn (n 206) 138.
240 See text in Occupation of Japan: Policy and Progress (n 238) 62.
242 Ibid, 55.
243 See, among others, the 6 September 1945 directive from ‘the Department of State, the War Department, and the Navy Department’ instructing General MacArthur that the Emperor was subordinate to SCAP, but that ‘control of Japan’ was to be exercised ‘through the Japanese Government’, ibid 88–9.
245 Ibid, 39.
246 Ibid, 44.
of an indirect occupation, these institutions did not function independently: they received instructions from the Allied Powers/occupying powers through SCAP, who, in turn, implemented the Potsdam Declaration. In seven years of occupation, SCAP issued 2,204 SCAPINs (Supreme Commander for the Allied Powers Instructions), which touched almost all aspects of Japanese society and helped to democratise, demilitarise, and modernise a society that still had feudal traits. By way of example, some of the most significant of these measures can, albeit briefly, be recalled here. To begin with, SCAPIN 93 removed all restraints on organised political activity and abolished the so-called ‘Peace Preservation Law’ and all other ordinances and regulations restricting ‘freedom of thought, religion, assembly, and speech’. This directive also ordered the release of political prisoners and the abolition of the Special Higher Police (Tokkō Keisatsu), which had been responsible for enforcing restrictions on speech and thought. SCAPIN 548 abolished twenty-seven political/security organisations and prohibited any form of organisation that encouraged Japanese aggression and militarism. In accordance with Article 6 of the Potsdam Declaration, SCAPIN 550 ordered the Imperial Japanese Government to remove from public office seven categories of individuals who had been ‘exponents of militarism and militant nationalism’. Through SCAPINs 244 and 1079, SCAP instructed the Japanese Government to dissolve the Zaibatsu, literally the ‘financial clique’, so as to break the influence of these conglomerates on the politics of Japan, and also made the Japanese Parliament pass anti-monopoly legislation.

247 The complete list of the SCAPINs is available at <http://rnavi.ndl.go.jp/kenssei/entry/SCA_1.pdp> last accessed 30 March 2014.
249 See SCAPIN 548 ‘Abolition of Certain Political Parties, Associations, Societies and Other Organizations’ (4 January 1946). See also Dobbins et al (n 225) 42.
250 Ando (n 237) 15.
252 See SCAPIN 244 ‘Dissolution of Holding Companies’ (6 November 1945); SCAPIN 1079 ‘Ordinances and Regulations Affecting the Holding Company
SCAP was also involved in initiating the process of adopting a new constitution. It produced a draft constitution between 4 and 10 February 1946, which was submitted to the Japanese Government. A revised draft was returned to SCAP on 22 April 1946. Thereafter, SCAP submitted a draft constitution to the Japanese Diet on 21 June 1946, which, after some months of deliberation, was adopted on 7 October 1946. The Constitution affirmed the sovereignty of the people and reduced the Emperor to a ‘symbol of the State and of the unity of the People’ (Art 1); proclaimed Japan’s renunciation of war ‘as a sovereign right of the state’; and ‘forever outlawed the maintenance of armed forces’ (Art 9). The document also provided that men and women were equal under the law (Art 14), and that marriage was to be based on mutual consent (Art 24). Recognising the end of ‘the state of war between Japan and each of the Allied Powers’ and the full sovereignty of Japan, the 1952 San Francisco Treaty sanctioned the end of the occupation, requiring the withdrawal ‘of all occupation forces ... from Japan as soon as possible’.

From a normative perspective, the transformative occupation of Japan could be justified on the basis of the combined normative force of the Potsdam Declaration and the acceptance of the Instrument of Surrender by Japan through the signature of no less than the Emperor. This signature meant that SCAP was entitled to implement the Potsdam Declaration in Japan without objections from the Japanese Government, even if it contradicted the Hague Regulations, and endowed the occupation with a quasi-legitimate basis. Moreover, the occupation of Japan proceeded with some support from the Japanese people, nurtured by the Emperor’s defence of the occupation. According to Nisuke Ando, the majority of Japanese people were willing and ready to make the most of the occupation measures. For instance, the elimination of the political power of the for-

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253 Takemae (n 248) 271.
254 See text in Occupation of Japan: Policy and Progress (n 238) 117–132.
256 Ibid.
257 Ibid.
258 Ibid.
259 Ando (n 237) 31.
260 Ibid, 3.
mer military cliques was welcomed by the majority of Japanese people. Though implemented by the US alone, the occupation of Japan had some international support. The Instrument of Surrender had been accepted by the US, the Soviet Union, China, and the UK in ‘the interests of the other United Nations at war with Japan’, and was also signed by Australia, Canada, France, the Netherlands, and New Zealand.

The existence of this framework does not mean that the Hague Regulations were formally inapplicable. As noted by Ando, in some cases, they did apply. It rather suggests that the part of the Hague Regulations which impeded the enactment of the Potsdam Declaration had been implicitly derogated from. In this case, as in that of the occupation of Germany, the argument that a transformative occupation may be justifiable in a given context can be made. Yet again, however, due to the peculiarity of the occupation of Japan and the fact that an ad hoc framework applied to it, such a conclusion cannot automatically be reached when there is a different factual and historical context. Furthermore, the transformative occupation of Japan suggests that in order for a transformative occupation to gain legitimacy and proceed successfully (and relatively peacefully), some form of toleration, if not support, from the people concerned or at least from those in a position of authority to do so within a population, such as the Japanese Emperor, may be necessary.

4. Occupation as implementation of a ‘humanitarian agenda’: the Geneva Convention IV and Additional Protocol I

Confronted with the unprecedented horrors of World War II, the dangers posed to the civilian population by the concept of total war, and the inability of the Hague Regulations to provide comprehensive protection, the

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261 Ibid.
262 Ibid, 63.
264 In 1945, the Swiss jurist Max Huber, at that time president of the International Committee of the Red Cross, observed: ‘War, as it becomes more and more total, annuls the differences which formerly existed between armies and civilian populations in regard to exposure to injury and danger.’ See Commentary to the Geneva Convention IV (n 44) 3–5. On the concept of total war during World War II, see Hew Strachan, ‘Total War: The Conduct of War 1939–1945’ in Roger Chickering (ed), A World at Total War (CUP 2001) 33.
Drafters of the Geneva Convention IV, Relative to the Protection of Civilian Persons in Time of War, sought to strengthen the protection of the population of an occupied territory in essentially two ways. First, they increased the number of rights that an occupant had to respect, some of which were recognised to have an absolute character,\textsuperscript{265} whilst others were to be balanced against considerations of military necessity.\textsuperscript{266} Second, they augmented the tasks of an occupant, which led to the occupant resembling an active governor, busy with ensuring the welfare of the occupied people, rather than merely a stand-by administrator of territory in accordance with the \textit{laissez-faire} philosophy of the nineteenth century. The ‘new tasks’ entrusted to the occupying power—the nature of which suggests that it is possible to speak of a ‘humanitarian mandate’—include the requirement to provide ‘relief schemes’ and ‘facilitate them by all the means at its disposal’ (Art 59); facilitating the functioning ‘of all institutions devoted to the care and education of children’ (Art 50); ensuring the food and medical supplies of the population (Art 55); and maintaining ‘medical and hospital establishments and services, public health and hygiene’ (Art 56). What the drafters of the Geneva Convention IV chose not to do was to enlarge the normative authorities of occupants to accommodate transformative projects. Arguably with an eye to the prolonged occupations of Germany and Japan, the American delegate sought to vest occupants with broader discretion in amending the penal laws of the occupied country. However, this proposal was rejected due to the fear that extending the legislative rights of an occupant could empower and legitimise non-democratic occupants.\textsuperscript{267} The international lawyer Paul de Geouffre de la Pradelle, who was the delegate of Monaco, framed this possibility in the following way:

\begin{quote}
What would be the position in the opposite case, that of an invader other than a democratic Power, who exercised that right? Under the United States amendment the invader could change the penal leg-
\end{quote}

\textsuperscript{265} See Arts 27, 31–34, 37, 38, 47, 49, 50, 55, 56, 58, 69, 70–73, 75–77 of the Geneva Convention IV. See text in Roberts and Guelff (n 60) 311–27.

\textsuperscript{266} These include, the prohibition against compelling protected persons to work unless they are over eighteen years of age, and then only to work when it is necessary either for the needs of the army of occupation, or for the public utility services (Art 28); and the prohibition on the destruction of real or personal property, whether public or private, except where such destruction is rendered absolutely necessary by military operations (Art 53).

\textsuperscript{267} Roberts, ‘Transformative Military Occupation’ (n 3) 588.
islation of the occupied territory. The Committee should think very carefully before amending the wording of the Convention in the way suggested.268

In accordance with this view, the drafters of the Geneva Convention IV did not adopt the concept of transformative occupation.269 What they did in Article 64 was to define the ambit of the legislative competence of an occupying power ratione materiae, indicating that it could legislate for the orderly government of territory, the protection of its own security,270 and the fulfilment of its obligations under the Geneva Convention IV.271 In relation to the latter, the Commentary to the Geneva Convention IV identifies a non-conclusive list of areas in which the occupying power would be entitled to ‘legislate’: child welfare, labour, food, hygiene, and public health, insofar as it is ‘required for the application of the Convention’.272 Notably, the ICRC Commentary emphasises that ‘the powers which the occupying power is recognized to have are very extensive and complex, but these varied measures must not under any circumstances serve as a means of oppressing the population’.273 Article 64 may be thus seen as an expansion of the legislative competence of an occupant ratione materiae, which is logically necessary to comply with the broader tasks conferred on the occupant under the Geneva Convention IV.

Such an expansion is not a teleological one in the sense of having amplified the range of what an occupant can pursue.274 Nor is it a departure from the rationale underlying the conservationist approach, because the breadth of such normative authority does not include, and is quite remote from, the transformation, in one sense or another, of the occupied terri-

270 Kolb and Vité (n 84) 192–4.
271 Benvenisti (n 2) 102. See also Arai-Takahashi, The Law of Occupation (n 269) 116–18.
272 See para 2 of Art 64 in Pictet, Commentary to the Geneva Convention IV (n 44).
273 Ibid.
274 See, for further analysis, Roberts, ‘Transformative Military Occupation’ (n 3) 587; Benvenisti (n 2) 102.
tory. Unlike that of the de jure sovereign of the occupied territory, the normative competence of an occupant is limited to the relationship between the occupant and the occupied people, not between the occupied people and the occupied (legitimate) government. The normative authority of an occupant is ‘enumerated’ as being concerned with a limited number of tasks; ‘functional’ as directed only to the implementation of the duties entrusted by the authorities to an occupant as de facto ruler of the country; and ‘temporary’ in the sense of being granted to tackle issues arising within the temporal framework of the occupation.

In conclusion, I would submit that Article 64 of the Geneva Convention IV has updated the normative authority of occupants to adjust it to evolving perceptions and historical developments, but has not altered its fundamental traits, leaving untouched the prerogatives of the dislodged yet de jure sovereign of an occupied territory, still presumed to be legitimate.\(^\text{275}\)

As the occupant does not have the necessary legitimacy to undertake long-term reforms, which inheres only in the de jure sovereign over a territory, any occupying power seeking to embark on long-term transformative projects would do so illegally in light of Article 64 of the Geneva Convention IV.

The path established in the Geneva Convention IV was subsequently followed by the Additional Protocol I of 1977, which contains several provisions seeking to enhance the humanitarian mandate placed on an occupying power under the Geneva Convention IV. This is obtained not by enlarging the normative authority of the occupants, which remain as set out in the Geneva Convention IV and in the Hague Regulations, but by setting down in detail what is required of the occupying powers. An occupying power is required to ensure that the ‘medical needs of the civilian population’ are constantly satisfied (Art 14); that civilian medical personnel are protected and assisted in order to undertake their tasks in ‘the best possible way’ (Art 15); and to uphold the duty contained in Article 55 of the Geneva Convention IV which instructs the occupying power to make available clothing, bedding, means of shelter, and other supplies essential for the survival of the civilian population as well as ‘objects necessary for religious worship’ (Art 69). Last but not least, Article 75, which may be regarded as reflective of norms of customary international law,\(^\text{276}\) contains a comprehensive list

\(^{275}\) Ibid.

of provisions which incorporate fundamental humanitarian and human rights norms applicable to all individuals affected by an occupation. The subject and wording of Article 75, entitled 'Fundamental Guarantees', are in fact directly inspired by major human rights instruments, and, in particular, the International Covenant on Civil and Political Rights (ICCPR). The ICCPR contains the principle of non-discrimination, several prohibitions relating to the physical and mental well-being of individuals, the prohibition of arbitrary detention, and fundamental due process guarantees.

5. Conclusion

Since the Roman conception of occupation as synonymous with conquest and unrestrained power over the occupied population, substantial limitations have been placed upon the power of occupants over the occupied territory and its people. The result of this complex and multi-faceted process is crystallised in the law of occupation. The raison d'être of this body of law, which justified its consolidation over the centuries, is the protection of the sovereignty of the occupied territory, and the limitation in accordance with the principle of humanity of the harm and suffering that an occupation may bring to the civilian population, without, however, overlooking considerations of military necessity.

The protection of sovereignty was the pillar around which a system of coexistence among European states could be built and maintained in the nineteenth century. As a consequence of this development, from a legal perspective occupation became a mere form of temporary control and administration of enemy territory. Where the ousted sovereign is no longer in a position to return to power, the occupying power remains an administrator of territory; it does not become its sovereign, because it lacks a

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277 Institut de droit international, ‘Bruges Declaration on the Use of Force’, Bruges Session (2 September 2003) <http://www.idi-iil.org/idiE/declarationsE/2003_bru_en.pdf> accessed 15 March 2014. The Declaration states: ‘the occupying power has the obligation to respect the rights of the inhabitants of the occupied territory which are guaranteed by the international humanitarian law and international human rights law, the minimum content of which is codified in Article 75 of the first Additional Protocol’.

278 For further analysis, see Louise Doswald-Beck and Sylvain Vité, 'International Humanitarian Law and Human Rights Law' (1993) 293 IRRC 104.
valid title. Sovereignty continues to rest with the ousted sovereign, which is presumed legitimate. By limiting the normative authority of the occupant, the law of occupation protects not only the norms and institutions of the occupied state but also the right of a people to choose—in the forms and the modalities it deems appropriate—its own political, economic, and social future, free from foreign interference.

The protection of the civilian population under occupation has been strengthened by the Geneva Convention IV and Additional Protocol I, which require the occupying power, in contrast to the Hague Regulations, to actively engage in carrying out a kind of humanitarian mandate. Because of this, it would be injudicious to hold that the law of occupation is about conserving the status quo. On the contrary, the occupying power is vested with authority to enhance its security, carry out a humanitarian mandate, and, arguably, to adopt the necessary legislation to ensure respect for the rights of the civilian population recognised in the Geneva Convention IV and in Additional Protocol I, such as those contained in Article 75 of the latter. This normative framework demands action rather than inaction on the part of the occupying power to do its utmost to tackle issues which emerge during and as a result of the occupation. Nevertheless, its normative authority is limited functionally and temporally by the existence of the occupation. If the occupying power were to go beyond the duties and authorities authorised to it as the holder of a humanitarian mandate, it would end up usurping that independent authority of choice, which international law reserves for sovereign states.

The practice of transformative occupation emerged in parallel to the model of occupation as control and administration of territory, and constitutes a direct challenge to it, as it is based on a diametrically opposite premise. It follows that the purposes of transformative occupants and the law of occupation are difficult to reconcile, and, in most instances, measures enacted in the pursuit of a transformative (reformist) occupation should be considered to be in breach of the law of occupation. The potentially proper purpose or motive of an occupant is insufficient to overcome this tension, given that its actions are carried out through force. It is important for lawyers to single out violations of the law of occupation because, as history teaches us, occupations can turn into annexation, exploitation, or a form of colonialism.

Nevertheless, as a general rule, one should not be too rigid in excluding the possibility of exceptions. Law, and all the more so international law, which operates in a horizontal system of sovereign states and other subjects and actors, must be an instrument of mediation, a bridge between
opposing interests and competing rights, and not serve only as a means of limitation. The historical analysis undertaken in this chapter warns us against the perils of formalism: against the belief in the capacity of a legal regime to be a viable paradigm in any context in which it finds application. Had the Hague Regulations been rigorously followed during the occupations of Germany and Japan, the dreadful possibility of a return to power of the regimes that had caused World War II and the maintenance of the oppressive legal systems they had created could not have been excluded.

What may be necessary is the carving out of legally justifiable exceptions on a case-by-case basis by those in the position of authority to do so. To be legally valid, however, the enlargement of the normative power of an occupant in a given situation to accommodate a given transformative project must be anchored to a valid legal title. An occupying power could, for instance, gain the consent of the affected population, or at least the ability to influence the political and economic choices of the occupied country, by engaging in a sort of humanitarian occupation, by giving material help to the civilian population to rebuild their country, improving the living conditions and adopting legislation to reform oppressive penal systems, and by holding referendums on far-reaching reforms. In addition to the consent of the occupied people, other potential justifications for a state to embark on a transformative occupation may include the (i) advancement of human rights; (ii) the enablement of the exercise of the right to (internal) self-determination by an oppressed people, as claimed during the French revolution; and (iii) compliance with Security Council Resolutions. The first two of these three possible grounds for a transformative occupation are discussed in the next chapter. As it played a prominent role in the case of the occupation of Iraq, the third and last of these possible grounds is explored in detail in Chapters 3, 4 and 5.
Their application [of human rights norms], by no means free of difficulty, offers some important opportunities ... occupying powers can justify certain transformative policies on the basis that these are the best way to meet certain goals and principles enshrined in international human rights law, including the right of self-determination.

—Adam Roberts, AJIL, 2006

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

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

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

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


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

There is no single body able to create laws internationally binding upon everyone, nor a proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the law. One is
With regard to occupations, these developments have influenced the content of the applicable international law in two fundamental respects. First, the issue of the legality of the very existence of an occupation, namely whether an occupier is entitled to remain in the occupied territory, as opposed to the question of identifying its rights and duties under the law of occupation, does arise and cannot be left aside. This question must be looked at afresh, not in light of the law of occupation, which does not cover it, but in light of the international law rules on the use of force, the principles of sovereignty and non-intervention, as well as the right to self-determination. Second, the type and quantity of international law norms applicable during an occupation has grown significantly. The international law of occupation now extends beyond the realm of international humanitarian law (IHL) and encompasses a multitude of norms belonging to different legal regimes within international law, which includes human rights law, the right to self-determination, and, in some cases, resolutions of the Security Council. Albeit not binding, a not insignificant role in clarifying the duties of a contemporary occupying power is also played by

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resolutions of the General Assembly, which has insisted on the application of human rights during an occupation and on the protection of the right to self-determination during occupation.8

Focusing on this evolution does not imply that a new law of occupation has replaced the traditional one. The law of occupation maintains a pivotal role in defining the authority and duties of an occupant, due to its having been crafted specifically for situations of occupation, as reflected in the quantity and detail of its provisions, and its status as customary international law. Instead, what has occurred is that a new multi-layered stratum of law has been rendered applicable to situations of occupation and must be added to, and duly taken into account when assessing the rights and duties of an occupant. What exactly this new stratum consists of, and how it interacts within its various branches and with the law of occupation is difficult to assess; and, of course, such assessment may depend on the circumstances of each occupation and the issues to be tackled.9

With the exception of the relationship between resolutions of the Security Council and other provisions applicable to an occupation, which is tackled in the next chapters as the issue arose specifically in the context of the occupation of Iraq, this chapter discusses the content of this new stratum and how its various branches interact, as well as the related consequences.

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1.1 The issue of the legality of the existence of an occupation

Under the traditional distinction between *jus ad bellum* and *jus in bello*, now crystallised in Article 4 of Additional Protocol I,\(^{10}\) to which scholars rightly draw attention as necessary to ensure equal and indiscriminate protection to all belligerents under the laws of war,\(^{11}\) the law of occupation applies to an occupation regardless of its lawfulness.\(^{12}\) As stated by the US Military tribunal in the *List et al.* 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 ... Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.\(^{13}\)

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\(^{10}\) Article 4 of Additional Protocol I reads:

> The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.


\(^{13}\) *US v Wilhelm List et al.* (Hostage case) (US Military Tribunal, 19 February 1948) 15 AD Case No. 215, 632, 647.
In accordance with this approach, the ICJ in the *Wall Advisory Opinion* found that violations of IHL, international human rights norms and the right to self-determination had been committed without even considering whether the existence of the occupation in which such violations were carried out was itself a violation of international law. Likewise, in the *Armed Activities* case, the ICJ concluded that Uganda, as an occupying power, had taken measures in violation of international human rights law and IHL in the occupied territory, but the Court did not consider their invalidity as stemming from the fact that the use of force leading to the occupation was itself unlawful.

Thus, the distinction between *jus ad bellum* and *jus in bello* constitutes a well-motivated exception to the general principle *ex iniuria ius non oritur*. But the existence of this distinction does not imply that the question of the legality of an occupation does not arise in international law. Quite to the contrary, the question of whether a state has the right to remain in occupation of a given territory is not a situation unregulated by international law; nor is it one in respect of which contemporary international law, both the guardian of the right to sovereignty of a state and the protector of a people’s right to self-determination, can be described as non-committal. In the same manner as any factual situation governed by international law, a situation of belligerent occupation may—depending, of

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15 Uganda was found in violation of the provisions of the ICCPR, the African Charter on Human and People’s Rights, the Convention on the Rights of the Child, as well as its accompanying Optional Protocol, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168, paras 219–220 and 345 (Armed Activities).


course, on the circumstances—be legal or illegal (or may become illegal at some point, even if it were initially legal). A situation of occupation is not illegal as such. It may, however, be found to be illegal—unless, of course, there are circumstances justifying its continuation, such as the exercise of self-defence, or when justified or endorsed by the Security Council—when it rests on an unlawful recourse to force, when it violates the territorial integrity of a state or of an independent territory, when it seeks to annex a territory, or when it is directed at depriving a people of its right to


20 Ben-Naftali (n 19) 570. See also Derek W Bowett, ‘International Law Relating to Occupied Territory: A Rejoinder’ (1971) 87 Law Quarterly Review 473, 475.


22 UNSC Res 269 (12 August 1969) UN Doc S/RES/269 paras 3 and 4 read:

Decides that the continued occupation of the Territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations, a violation of the territorial integrity and a denial of the political sovereignty of the peoples of Namibia; Recognizes the legitimacy of the struggle of the people of Namibia against the illegal presence of the South African authorities in the Territory ...

23 In the Preamble of UNSC Res 661 (6 August 1990) UN Doc S/RES/661, the Security Council expressed its determination to ‘bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait’; while in para 1 of the same Resolution, the Security Council determined that the ‘annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity’, and reiterated its determination ‘to bring the occupation of Kuwait by Iraq to an end’ and to ‘restore the sovereignty, independence and territorial integrity of Kuwait’ and ‘the authority of the legitimate Government of Kuwait. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 54, para 54 (Namibia Advisory
self-determination for an indefinite period of time and no steps are taken to comply with the corresponding duty.\(^{24}\)

If an occupation is found to be illegal, a number of legal consequences for the occupying power and for third states\(^{25}\) flow from that finding, including, first of all, that the occupying power would be normally required to remedy the unlawful act by withdrawing its forces and putting an end to the occupation.\(^{26}\) This means that the performance of the \textit{jus in bello} duties of an occupying power should not serve as an excuse for the occupying power to remain in the occupied territory. This is also the case because the continued presence of the occupying power, whilst ensuring some protection for the civilian population, may cause it further anguish. After all, the law of occupation is a \textit{faute de mieux} remedy, not a panacea. Further, the civilian population may be in a position to remedy by itself if the occupying power leaves sooner rather than later. It is for this reason that the distinction between \textit{jus ad bellum} and \textit{jus in bello}, fundamental as it certainly is, should not be carried to the point of concluding that a significant violation of the \textit{jus ad bellum} affecting the legality of the existence of an occupation could be ignored by an occupant (or by third states) and bears no consequences for the continuation of an occupation.

In the case of Iraq, the occupation was never intended, let alone directed, to annex Iraq and thus no claim of illegality can reasonably be made in this regard. In relation to the question of whether it was illegal on the ground that the use of force which precipitated the occupation was itself illegal, or on the basis that it also represented a potential denial of the right to self-determination of the Iraqi people, the analysis must be more nu-
anced, paying due consideration to the role played by the Security Council. This analysis will be conducted in Chapter 3.

1.2. The applicability of human rights law

Although it would be unwise to regard the matter as unanimously accepted,\(^27\) it is fair to suggest that contemporary international law has come to recognise the applicability of human rights treaties to situations of occupation.\(^28\) This development is not the result of the application of a clear-cut rule of international law. Instead, as often happens in international law, it stems from an interpretative process carried out by a number of actors spanning many years and, to a certain extent, still continuing today.\(^29\) As early as 1967, the Security Council adopted Resolution 237 in connection with the Six-Day War, stressing that ‘essential and inalienable


human rights should be respected even during the vicissitudes of war’.\(^{30}\)
Shortly after, and having taken stock of the Teheran United Nations Conference on Human Rights,\(^{31}\) the General Assembly passed Resolution 2443 calling for respect for human rights in the ‘Occupied Territories’, and setting up a ‘Special Committee’ to investigate any such violations.\(^{32}\) Since then, the General Assembly has consistently upheld the applicability of human rights to situations of armed conflict,\(^{33}\) and in particular to occupations.\(^{34}\)

Despite these progressive views or, perhaps, in response to them, some scholars have taken a more cautious approach to the problem of the compatibility between international humanitarian and human rights law. In 1979, speaking on the law applicable during an occupation, Gerald Draper wrote that ‘human rights do not operate between detaining power and POW or between the occupant and the enemy civilian in occupied territory. There is no society and government-governed relationship in such cases’.\(^{35}\) Along the same line, Yoram Dinstein remarked that ‘the government of an occupied territory ... is not the same as a state’s ordinary government

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33 See among others, UNGA Res 2675 (XXV) (9 December 1970); UNGA Resolution 2727 (XXV) (15 December 1970); UNGA Res (XXIX) (14 December 1974).


of its own territory’ and that ‘Most peacetime human rights are suspended in time of belligerent occupation’. 36 Shortly thereafter, however, Thomas Buerghental called for the application of the International Covenant on Civil and Political Rights (ICCPR) 37 in territories where a state ‘maintains actual civil or military control over a given territory ... irrespective of whether it has formally annexed the territory or has a legal right to occupy or control it’. 38 Other international lawyers have followed suit. 39

The practice of international and regional bodies has been consistent in upholding the applicability of human rights treaties during occupation. Such bodies have stressed either the compatibility between international humanitarian and human rights law or the fact that a state could be held accountable for human rights violations perpetrated in occupied territories because it had jurisdiction over them.

In the Nuclear Weapons Advisory Opinion, the ICJ found that, while certain provisions of the ICCPR were subject to derogations in wartime, Article 4 of the ICCPR (right to life) was not one of these, and that it could therefore, in principle, be applied in a wartime situation. 40 Although the ICJ went on to conclude that this provision should be interpreted in light of IHL as lex specialis, its conclusion demonstrates that an international human rights instrument is applicable to a context governed by IHL, which, of course, includes cases of occupation.

In this vein, the Human Rights Committee (HRC), in the two reports it published concerning Israel in 1998 and 2003 respectively, found that the ICCPR applied to occupied Palestinian territories, notwithstanding Is-

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39 See also Meron, ‘Human Rights in Time of Peace’ (n 29) 1-22.
40 The ICJ stated, inter alia, that ‘In principle, the right not arbitrarily to be deprived of one’s life applies to hostilities’ and that ‘The 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’, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, paras 25, 134–7 (Nuclear Weapons Advisory Opinion).
rael's opposition. According to the HRC, Israel could be held accountable for human rights violations because the occupied territories fell ‘within the ambit of State responsibility of Israel under the principles of public international law’, and because IHL did not impede the concomitant application of international humanitarian law and human rights treaties.

The HRC reverted to these issues in its General Comment No. 31 (May 2004), where regarding the responsibility of a state for its conduct towards the population of the occupied territories, it held that:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party ...

This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, re-

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42 2003 HRC Report (n 41) para 11. Furthermore, the HRC in an earlier report pointed ‘to the long-standing presence of Israel in these territories, Israel’s ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein’, UNCHR ‘Concluding Observations of the Human Rights Committee’ (18 August 1998) UN Doc CCPR/C/79/Add.93, para 10.

43 In its report of 2003, the HRC stated that:

The Committee reiterates the view, previously spelled out in paragraph 10 of its concluding observations on Israel’s initial report (CCPR/C/79/Add.93 of 18 August 1998) ... that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States’ parties under Article 2, Paragraph 1, of the Covenant for the actions of their authorities.

gardless of the circumstances in which such power or effective control was obtained'.

Building on its previous holding in the Nuclear Weapons Opinion and on the practice of the HRC, the ICJ in the Wall Advisory Opinion held that the ICCPR was applicable in the occupied territories for three reasons: (i) Israel’s exercise of jurisdiction over these territories and their citizens; (ii) that such conclusion was justified based on the practice of the HRC; and (iii) a detailed analysis of the travaux préparatoires of the ICCPR. The Court also determined the applicability of the ICESCR based on the practice of the Committee on Economic, Social and Cultural Rights and the fact that ‘the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction’. Likewise, the ICJ concluded in favour of the applicability of the Convention on the Rights of the Child (CRC) during an armed conflict. It found Israel, as the occupying power, to be in breach not only of IHL norms but also of several human rights norms due to the construction of a wall in occupied territory and the consequences associated with it.

This approach was also followed in the Armed Activities case, where the ICJ held that both branches of international law, namely international human rights law and international humanitarian law, would have to be

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44 UNCHR, ‘General Comment No. 31 Nature of the General Legal Obligation Imposed on State Parties to the Covenant’ (26 May 2004), UN Doc CCPR/C/21/Rev.1/ADD.13, para 10.
45 Wall Advisory Opinion (n 14) para 106.
46 Ibid, para 109.
47 Ibid.
48 In discussing the travaux préparatoires of the ICCPR, the ICJ found that the expression ‘within their jurisdiction’ contained in Article 1 was not intended to ‘allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting vis-à-vis their state of origin, rights that do not fall within the competence of that State, but of that of the State of residence.’ Ibid, para 109.
50 Wall Advisory Opinion (n 14) para 106.
51 Ibid, para 113.
52 Ibid, paras 114–137.
‘taken into consideration in occupied territories’, and determined that Uganda was ‘responsible for violations of international human rights law and international humanitarian law in the occupied territory’.

Alongside the case-law of the ICJ, the practice of the European Court of Human Rights (ECtHR) has also embraced the principle that a state must comply with its human rights obligations in occupied territory. In the Loizidou case, when discussing the applicability of the European Convention on Human Rights in the occupied territory of Northern Cyprus, the ECtHR concluded that in light of the ‘object and purpose of the Convention’ the ‘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’. In Banković, the ECtHR excluded the responsibility of several European states in connection with the bombing in 1999 of the building hosting Radio Television Serbia in Belgrade because the territory of the FRY, not a member of the Council of Europe, fell outside the espace juridique of applicability of the European Convention on Human Rights. However, the ECtHR distinguished the factual scenario before it from that of a situation of occupation where the European Convention applied as demonstrated by its earlier case-law. It concluded as follows:

... the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government. (emphasis added)

53 Armed Activities (n 15) para 216.
54 Ibid 220. Uganda was found in breach of the provisions of the ICCPR, the African Charter on Human and People’s Rights, the CRC, and the Optional Protocol to this Convention.
55 Loizidou v Turkey (Preliminary Objections) App no 15318/89 (ECtHR, 23 March 1995) para 62.
56 Banković and Others v Belgium and 16 Other Contracting States App no 52207/99 (ECtHR, 19 December 2001) para 80.
This principle has been followed consistently.\footnote{9 JCSL 240-245; Ralph Wilde, ‘The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq’ (2005) 11 ILSA Journal of International & Comparative Law 485, 493.} In the recent \textit{Al-Skeini} judgment, the ECtHR recalled the settled case-law of the ECHR proscrib-\footnote{58 In \textit{Assanidze v Georgia}, as a part of a legal analysis concerning the extent of its jurisdiction, the ECtHR stated that ‘In addition to the State territory proper, territorial jurisdiction extends to any area which, at the time of the alleged violation, is under the “overall control” of the State concerned ... notably occupied territories (see \textit{Cyprus v. Turkey} App no 25781/94, ECtHR 2001-IV), to the exclusion of areas outside such control (see \textit{Banković and Others}, cited above)’, \textit{Assanidze v Georgia} App no 71503/01 (ECtHR 8 April 2004) para 138. In \textit{Ilascu v Moldova}, the ECtHR held that:

From the standpoint of public international law, the words “within their jurisdiction” in Article 1 of the Convention must be understood to mean that a State’s jurisdictional competence is primarily territorial (see \textit{Banković and Others}, cited above, § 59), but also that jurisdiction is presumed to be exercised normally throughout the State’s territory. This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. \textit{That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned ...} (emphasis added)

\textit{Ilascu v Moldova} App. no. 48787/99 (ECtHR 8 July 2004) paras 312–314. In \textit{Issa and others v Turkey}, a case concerning the conduct of Turkish forces during cross-border incursions in northern Iraq, the ECtHR indicated that once individuals come within an area under the control of a Contracting State, those individuals are deemed to be within the legal space of that state. It argued that the “concept of “jurisdiction” within the meaning of Article 1 of the Convention was not necessarily restricted to the national territory of the High Contracting Parties, and that ‘in exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there may amount to exercise by them of their jurisdiction...’ It concluded, however, that this was not the case since, despite the large number of troops involved in military operations; it did not appear that Turkey exercised effective overall control of the entire area of northern Iraq, \textit{Issa and others v Turkey} App no 31821/96 (ECtHR 30 March 2005). See also \textit{Medvedyev and Others v France}, App no 3394/03, Judgment of 29 March 2010, para 64; \textit{Al-Skeini v The United Kingdom} App no 55721/07 (ECtHR, 7 July 2011) para 138.}
ing that ‘when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory’ then:

The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.\(^{59}\)

Another recent recognition of this position can be found in the military law manual of Great Britain, a member of the Council of Europe and thus party to the European Convention. According to this manual:

an occupying power is also responsible for ensuring respect for applicable human rights standards in the occupied territory. Where the occupying power is a party to the European Convention on Human Rights, the standards of that Convention may be applicable, depending on the circumstances, in occupied territories.\(^{60}\)

Although the insertion of the phrase ‘depending on circumstances’ may leave room for exceptions, this provision undeniably supports the view that human rights instruments, such as the European Convention, apply during occupation.

By contrast, some countries finding themselves in the position of occupying powers have sharply criticised this trend. The government of Israel has contested the applicability of human rights treaties before various international committees, providing several arguments in support of its contention.\(^{61}\) Likewise, the United States challenged the applicability of

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59 Ibid (\textit{Al-Skeini}) para 138.

In its Concluding Observations on Israel’s Initial Report, the Committee questioned Israel’s position regarding the applicability of the Covenant to the West Bank and the Gaza Strip. Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction. This position is
human rights treaties to territories under occupation. In a document comprising the Second and Third Periodic Reports to the HRC, which covered the years of the occupation of Iraq (2003–2004), the United States did not mention the human rights situation in Iraq. Instead it referred to the ‘continuing difference of view between the Committee and the United States concerning certain matters in relation to the importance and scope of provisions of the Covenant’.  

1.3. The coordination between human rights law and international humanitarian law

Once it is concluded that a given human rights treaty is applicable to an occupied territory, in order to understand the precise content of the obligations impinging on an occupying state, it remains to be determined how the obligations stemming from such treaties coordinate with IHL norms, of which the law of occupation is a part.

This is not a problem that affects any case involving the application of human rights law to a situation of occupation, because more often than not, as shown in the Wall Advisory Opinion and in the Armed Activities based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in Israel’s view, the Committee’s mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights. Israel has constantly contested the applicability of international human rights instruments in occupied territories. This denial was based on three arguments (i) that the simultaneous application of IHR law and IHL is a contradiction in terms as the applicability of the latter in the Occupied Territories excludes the applicability of the former; (ii) that the jurisdictional clauses of the human rights treaties should be construed as limited to the sovereign territory of the State parties; and (iii) the transfer of governmental authorities thereto under the Oslo accords, absolves the State of Israel from any responsibilities with regard to the human rights of the Palestinians.


case, the issue of coordination will remain peripheral as the regimes of IHL and human rights law apply concomitantly and independently from one another. Moreover, in some cases, there is no problem of coordination because human rights law and IHL not only apply concomitantly but also complement each other. In some cases, it is possible to speak of a convergence between norms belonging to the two regimes, in the sense that they have a common interest in protecting individuals and their rights, rather than of a divergence. Human rights law may also supplement IHL,

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64 Theodor Meron noted that international humanitarian and human rights law ‘are inspired by the same principle of humanity and share the same objective: effective and complete protection of the human person in time of armed strife and in times of tranquility’, Meron (n 29) 1, 8.

65 In the Coard case, which concerned the detention of an individual by US military forces during the 1983 US invasion of Grenada, the Inter-American Commission of Human Rights held that:

> while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential occupation of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a ‘common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,’ and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict and this is reflected, inter alia, in the designation of certain protection pertaining to the person as peremptory norms (ius cogens) and obligations erga omnes, in a vast body of treaty law, in principles of customary international law, and in the doctrine and practice of international human rights bodies such as this Commission. Both normative systems may thus be applicable in the situation under study.


66 Dinstein (n 9) 81–2. See also generally Alexander Orakhelashvili, ‘The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism or Convergence’ (2008) 19 EJIL 161, 162-8. In the Kunarac case, the Trial Chamber held that ‘notions developed in the field of human rights can be transposed in international humanitarian law only
given that human rights law is generally broader than IHL and can thus offer solutions to problems not covered, or only partially covered, by IHL.\textsuperscript{67} The problem of coordination does arise, however, in those cases in which the norms of IHL and human rights law governing the same issue diverge. In the \textit{Nuclear Weapons Advisory Opinion}, the ICJ determined that the meaning of arbitrary deprivation of life contained in Article 4 of the IUCPR should be interpreted in light of the norms of IHL, consonant with the application of the rule of \textit{lex specialis}.\textsuperscript{68} The ICJ put it as follows:

In principle, the right not arbitrarily to be deprived of one’s life applies to hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable \textit{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.\textsuperscript{69}

\begin{footnotesize}
\begin{itemize}
\item[67] Dinstein (n 9) 84–5. Arai-Takahashi (n 34) 405–6. Andrea Bianchi pointed out that there are certain provisions that are more specific in human rights law than under international humanitarian law. In this regard, he remarked that:

\begin{quote}
the notion of inhumane treatment or the right to protection from arbitrary detention under international humanitarian law do not enjoy the same degree of specificity that they have acquired in human rights law, due to more detailed regulation and judicial interpretation.
\end{quote}

According to this author, the two regimes should be complementary and mutually supportive, rather than being considered in contradistinction with each other. See Andrea Bianchi, ‘Dismantling the Wall: The ICJ’s Advisory Opinion and its Likely Impact on International Law’ (2005) 47 GYIL 343, 370–3.

\item[68] \textit{Nuclear Weapons Advisory Opinion} (n 40) para 25. For further analysis see Anna Guellali, ‘Lex specialis, droit internationale humanitaire et droits de l’homme: leur interaction dans les nouveaux conflicts armés’ (2007) 111(3) RGDIP 539–74.

\item[69] \textit{Nuclear Weapons Advisory Opinion} (n 40) para 25.
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Jochen Frowein has suggested that this passage may be interpreted to mean that the *lex specialis* rule applies only in the case of a specific contrast among provisions and not as a general rule resulting in the exclusion of human rights law in favor of IHL.\(^70\) Seeking to draw a general principle guiding the relationship between international humanitarian and human rights law, the ICJ stated that:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.\(^71\)

Despite this welcome effort on the part of the ICJ to simplify a rather complex matter, some aspects of this passage remain ambiguous.\(^72\) To begin with, it is not clear, given the number and breadth of the provisions of both systems, which matters fall exclusively under the purview of one regime, and which fall under the exclusive purview of the other. This difficulty is accentuated by the fact that an occupying power is vested with some law-making powers. It could be argued that certain rights, such as the right to vote, freedom of association and freedom of expression, which are not regulated by the law of occupation, are ‘human rights matters’ only, in the sense of the passage quoted above. Yet, as long as an occupation lasts, the occupying power may enact

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\(^71\) *Wall Advisory Opinion* (n 14) para 106.

legislation trumping such rights. In this scenario, it is not immediately clear in which category the legislation of the occupying power should be placed and whether the *lex specialis* rule would govern these issues.

Secondly, one cannot but wonder whether the above passage should be interpreted to mean that the whole of IHL is *lex specialis* to international human rights law, as the phrasing employed may suggest, or whether the *lex specialis* rule applies only in cases in which there is a specific contrast among rules, as shown in the *Nuclear Weapons Advisory Opinion*. Arguably, the position of the ICJ becomes clearer by reviewing what it actually did in the Opinion. By repeatedly finding that the wall breached both human rights and humanitarian law provisions in relation to the same conduct, the ICJ supported, in fact, the latter interpretation, namely that these branches of international law can apply concomitantly. In so doing, the ICJ confirmed that the role of the *lex specialis* rule is limited to that of determining which rule prevails in a case of conflict, rather than prioritising one entire legal regime at the expense of the other.73

In conclusion, it could be said that defining the relationship between IHL and human rights law appears to be complex and multi-faceted, and is, arguably, difficult to capture in one formulation. Fully unravelling the issue will require a case-by-case interpretation. It is, however, way off the mark to label this relationship as one of mutual exclusion, because, as the jurisprudence of the ICJ shows, international humanitarian and human rights law apply concomitantly. Neither can the relationship be categorised as one of mere convergence, because, in fact, the regimes do diverge74 and pull in different directions in some instances.75 What seems

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consolidated—at the current stage of the international practice—is that the two bodies of rules of IHL and human rights law apply concomitantly to a situation of occupation, and—in a case of a clash among norms—the one belonging to the more specific legal regime, that is the norms of IHL, will prevail over the other.

2. Some contemporary arguments for transformative occupation

2.1. Advancing human rights

As quoted at the beginning of this chapter, Adam Roberts in his seminal article on transformative occupation, contemplated the possibility of an occupying power being justified in carrying out ‘transformative policies’ on the basis that ‘these are the best way to meet certain goals and principles enshrined in international human rights law, including the right to self-determination’. On a similar note, Gregory Fox has observed that—at first glance—the conservationist principle may be thought of as ‘regressive and even anachronistic’ when confronted with the possibility of ensuring ‘greater protection of human rights and the introduction of democratic politics’. On the other hand, Fox has also, rightly, stressed that it is ‘one thing to say that occupiers should refrain from neglecting or mistreating inhabitants. It is quite another to grant them licence to become agents of constitutional revolutions’.

Eyal Benvenisti seems to be open to the possibility of a pro-human rights occupation when he argues that ‘human rights law may strengthen the lawmaking function of occupants’ and ‘enlarge’ it. Interestingly, he cites Marco Sassòli’s view (though without any specific comment thereon) that an occupant should introduce as many changes as are necessary under its human rights obligations. In the ICRC Expert Report on Occupation, a majority of the experts agreed that some changes could be effected

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76 Roberts (n 1) 620.
78 Ibid.
80 Ibid, 104.
in an occupied territory to meet human rights standards and that while there exists a ‘certain amount of flexibility’ to implement human rights law in occupied territory, it ‘should not be interpreted as giving it a blank cheque to change legislation and institutions in the name of human rights’ in order to make them accord with the legal and institutional ideas of the occupying power.\footnote{Expert Meeting Report, ‘Occupation and Other Forms of Administration of Foreign Territory’ (ICRC 2012) 69 (ICRC Expert Report on Occupation).} Accordingly, ‘human rights law should not be invoked in order to justify transformative occupation’.\footnote{Ibid.} A more cautious approach has been expressed by Yoram Dinstein. He has voiced support for the repeal by British troops of certain discriminatory measures passed in the occupied Dodecanese islands when the islands were controlled by Fascist Italy. However, this was on the basis of Articles 27 and 64 of the Geneva Convention IV, not on the basis of an autonomous normative authority grounded in the protection of human rights, even though, arguably, the abolition of discriminatory norms could be based on human rights norms as well.\footnote{Dinstein (n 9) 113. See also Kolb and Vité observing that: \begin{quote} depuis la fin de la seconde guerre mondiale il est admis que l’occupant ne doit pas appliquer ou laisser inaltérées des législations internes oppressive et discriminatoires comme la législation national-socialiste de Nuremberg. \end{quote} They link the possibility of these reforms, however, not to an autonomous duty of protection under human rights law, but to the fact that ‘la population ne serait pas protégé comme le prescrit le droit de l’occupation si des modifications législatives les libérant du joug de l’oppression et de la privation de droits étaient interdites’, Kolb and Vité (n 63) 268.}

The argument that an occupant should act as a kind of protector of the human rights of a people from the sovereign of that people by amending local legislation or setting it aside may be a legitimate aspiration. But from the perspective of the inhabitants of the occupied territory, it could already be an important relief if the occupant itself would take all possible precautions to protect their security from its own conduct. The problem remains, however, of clarifying the specific content and nature of the human rights reforms an occupant should be introducing in the occupied territory, and whether its authority/duty to do so should be limited to taking measures having effect solely during the occupation or also after it. It is one thing to protect human rights during an occupation, which could be
done by suspending or declaring as inapplicable discriminatory norms for the duration of the occupation and passing legislation mandating respect for human rights on the part of occupation forces; it is quite another to try to impose the protection of human rights on the sovereign coming (or returning) to power after the end of the occupation by amending local laws.

Gregory Fox has pertinently noted that human rights treaties may impose three distinct sets of obligations on occupying states, namely to: (i) refrain from violating protected rights; (ii) ensure that others within their jurisdiction refrain from such violations; and (iii) act affirmatively to ensure that procedures for the protection of rights exist.\(^85\) Regarding the first two sets of obligations, it can be argued that throughout an occupation, an occupying power should be entitled to ‘legislate’ interstitially in order to create the conditions for its own adherence to applicable human rights norms and to take measures to protect the inhabitants of the occupied territory against acts of violence,\(^86\) as well as to address and deal with such violence by any third party,\(^87\) and to prevent its occurrence,\(^88\) including in situations of detention.\(^89\) These measures would demonstrate the occupant’s efforts to comply with its obligations under international treaties such as the ICCPR and the ICESCR in occupied territory.\(^90\) Moreover, compliance with human rights during an occupation would require ensuring the right to food, the right to work,\(^91\) and that the ‘health, education, and employment situation’ of the inhabitants of the occupied territory ‘continue in as uninterrupted a manner as possible’.\(^92\) At times, such interstitial legislation may overlap with legislation that is permissible under the law of occupation. In the Armed Activities case, the ICJ held that respect

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\(^85\) Fox, ‘Transformative Occupation and the Unilateralist Impulse’ (n 77) 259.
\(^86\) Lubell (n 28) 326.
\(^87\) The ICJ stated that an occupying power has the obligation to ‘protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party’. Armed Activities (n 15) para 178.
\(^88\) According to the ICJ, the responsibility of an occupying power is ‘engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account’, Armed Activities (n 15) para 179.
\(^89\) Ibid 328.
\(^90\) ICRC Expert Report on Occupation (n 82) 65.
\(^91\) Wall Advisory Opinion (n 14) paras 130, 133, and 134.
\(^92\) Lubell (n 28) 330.
for ‘Article 43 of the Hague Regulations of 1907’ includes ‘the duty to secure respect for the applicable rules of international human rights law and international humanitarian law’. Moreover, from a contemporary perspective, the protection of human rights in occupied territory may be regarded as essential to ensure security within the occupied territory and to achieve an ‘orderly government of territory’. To give an example, an occupying power may legitimately intervene under the law of occupation to prevent the stoning of a woman for adultery on the basis that, in its view, it is necessary for reasons of public safety. Moreover, an occupying power, in accordance with its duty to ensure the non-discrimination of all ‘individuals within its territory and subject to its jurisdiction’ under Article 2(1) of the ICCPR, could suspend all discriminatory legislation in place in a given territory. Acting under Article 10 of the ICCPR, it should also adapt norms to ensure that ‘all persons deprived of their liberty’ be treated by the occupation forces ‘with humanity and with respect for the inherent dignity of the human persons’ throughout the occupation.

That said, it is a different issue whether an occupant should be granted an additional and autonomous normative authority, based on the advancement and protection of human rights and the eventual introduction of a democratic system, which would enable the occupant to amend or replace local laws with new legislation directed to have effect also, or rather principally, beyond the end of the occupation. In his course at the Hague Academy of International Law, Alessandro Migliazza, argued in favour of human rights reforms as follows:

93 *Armed Activities* (n 15) para 178. Suggesting, however, that Article 43 of the Hague Regulations prevents from amending existing norms out of respect for human rights obligations see the opinion of Lord Brown in the *Al-Skeini* case stating: ‘So far as this being the case, however, the occupants’ obligation is to respect “the laws in force”, not to introduce laws and the means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied. *R (on the application of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58, para 129.

94 Cf Milanović (n 73).


96 Lubell (n 28) 330.
le droit international reconnaît désormais à l’occupant tout pouvoir, en lui imposant même le devoir, de modifier les institutions et l’administration du territoire occupé si cela est nécessaire pour la sauvegarde des droits de l’homme.97

More recently, but in the same vein, Marco Sassòli stated that an occupying power ‘has an obligation to abolish legislation and institutions which contravene international human rights standards’.98 Under this hypothesis, while claiming to protect human rights, an occupant could not only suspend or repeal a given applicable law so as to prevent the harming of individual rights during an occupation; it could also go as far as replacing existing local laws and institutions with new laws and/or institutions of its own making and design, having effect well beyond the occupation and thus resulting in an alteration of the relationship between the indigenous government gaining power after the occupation and its citizens. The occupant would, then, be acting as a legislator in the same way, but not with the same authority, as an indigenous legislation. Once incorporated into the domestic law, human rights-oriented legislation issued by the occupant would remain in force after the end of the occupation unless and until the returning (legitimate) sovereign opted to remove it. However, it cannot be guaranteed that the returning sovereign would be able to make the necessary reforms in a timely and comprehensive manner. Hence, reforms introduced under the guise of protecting human rights during an occupation may interfere with the jurisdiction of the incoming sovereign, cementing a force-based transformation in the relationship between the legitimate sovereign over that territory and its people.

A further danger with such expansive legislation, despite its apparent attractiveness, is that it would elevate to the rank of law what is, at best, a sort of ‘amateur’ legislation, resulting from the work (and opinions) of a few foreign officials operating with urgency and secrecy in the ‘cubicles’ of an occupation administration, rather than in the halls of a parliament on the basis of an informed and transparent legislative process participated in by the citizens of the territory concerned.

Moreover, such a distinct normative authority enabling an occupying power to legislate in the name of human rights, has not, as yet, emerged in contemporary international law. As Adam Roberts has aptly recalled,

98 Sassòli (n 81) 676–7.
Mexico’s proposal during the drafting of the Geneva Convention IV, suggesting that an occupying power could modify the legislation of an occupied territory only if the legislation in question was in breach of the ‘Universal Declaration of the Rights of Man’, was rejected. In addition, the reasons Alain Pellet gave in response to Migliazza’s argument mentioned above are, in essence, still valid today: (i) ‘the conception of human rights can be very different from one people to another’; and (ii) the ‘occupier is not the territorial sovereign’. Hence, an occupant ‘cannot legislate for the occupied people as he does with his own frontiers’.

Indeed, if international law were to grant such an additional normative authority to an occupying power on a general basis, such that it could change local laws to make them compliant with human rights norms, it would simultaneously take that same power away from the ousted sovereign and from the local people, who should have the right to freely choose the entity legislating on their behalf in accordance with the right to self-determination. Moreover, vesting an occupying power with the authority to pass legislation that has effect beyond the timeframe of the occupation would directly contradict Article 2 of the ICCPR, which limits the exercise of a state’s authorities and duties under the ICCPR in respect of individuals under its jurisdiction at the time of enacting a given normative measure.

In view of the foregoing, it is suggested that for human rights-oriented legislation adopted by an occupant to be considered valid, it must be anchored to, and justified by compliance with, applicable human rights norms binding the occupant, or brought under one of the fields in which an occupant is recognised as having authority to legislate under the law of occupation and be within the limits of such authority. If, outside of these parameters, an occupant were to adopt human rights legislation, or any other legislation, directed to display the bulk of its effects after the end of the occupation by incorporating it into the domestic laws of the occupied

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99 Ibid, 588.
101 Ibid, 201.
102 Ibid.
103 Christopher Greenwood, ‘The Administration of Occupied Territory in International Law’ in Emma Playfair (ed), *International Law and the Administration of Occupied Territories* (OUP 1992) 247; Fox, Transformative Occupation and the Unilateralist Impulse (n 77) 261.
country, it would be acting *ultra vires*—unless, specifically authorised by the Security Council—exercising a role which is not its own.\textsuperscript{104} Whilst human rights law may certainly be a basis for reforms required during an occupation in order to protect the civilian population from the occupant or, for instance, from courts or enforcement agencies of the dislodged regime that may still operate during the occupation, it cannot become a justification for long-lasting transformative policies which the local population has not asked for and with which it may not agree.

**2.2. Enabling self-determination**

Originally used only in the context of colonialism,\textsuperscript{105} the applicability of the right to self-determination, that is ‘the right of a people to work out their own constitutional and political arrangements without interference from the outside’\textsuperscript{106} has progressively spread to the sphere of occupation.\textsuperscript{107} Common Article 1 to the ICCPR and the ICESCR states that ‘[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development’. The lack of any qualifying wording suggests that this right could find application in contexts other than colonialism insofar as the entity claiming respect for it is a people according to international law.\textsuperscript{108} General Assembly Resolution 2625 of 24 October 1970 made this clear when speaking of the existence of the right to self-determination in cases of ‘subjection of peoples to alien subjugation, domination and exploitation’, and recalled that ‘[e]very State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] ... of

\begin{footnotesize}
104 Fox, Transformative Occupation and the Unilateralist Impulse (n 77) 262.
105 Ibid. See also Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960).
\end{footnotesize}
their right to self-determination’. Over the years, the General Assembly has consistently affirmed the existence of the right to self-determination in cases of occupation. The Final Act of the Conference on Security and Cooperation in Europe of 1975 and the African Charter on Human Rights of 1981 were instrumental in upholding the view that self-determination was applicable in situations other than those arising in the context of colonialism.

The existence of the right to self-determination for a people under occupation has received recognition in relation to the occupation of the Pales-

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111 Crawford, ‘The Right of Self-Determination’ (n 110) 31. Article VIII of Act of the Conference on Security and Cooperation in Europe under the title ‘Equal Rights and self-determination of peoples’ provides, _inter alia_, that:

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States. By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economical, social and cultural development.

Final Act of the Conference on Security and Cooperation in Europe (1 August 1975) 14 ILM 1292.

tinian territory, and in the practice of the ICJ. Most importantly, in the *Wall Advisory Opinion*, the ICJ considered the right to self-determination to be a right of the Palestinian people applicable during an occupation, in concomitance with other norms of international law, before reaching the seminal conclusion that the right had been violated. The Court found that the construction of a wall in occupied Palestine and the consequences associated with it not only breached human rights and IHL norms, but also the right to self-determination. The existence and recognition of the right to self-determination of a people under occupation imposes a duty, as long as the occupation lasts, on the occupying power to respect such a right and enable its pursuit by the occupied people.

The problem is to understand what such a duty involves. It could be said, taking the view that occupation is a denial or a suspension of self-determination, that the only way for the occupying power to comply with this duty is to put an end to the occupation. Indeed, according to Marco Sassòli, for instance, an occupying power cannot implement the right to self-determination because this right is ‘too close to the wishes of the people’. Thus, the occupying power should not legislate, but withdraw. However,

113 Dinstein (n 9) 15–16.
114 In the *Namibia Advisory Opinion* (n 23) para 52, the ICJ held:

Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.

In its Advisory Opinion on Western Sahara, the ICJ recognised the development of the ‘right of non-self-governing peoples to self-determination which requires a free and genuine expression of the will of the peoples concerned’, *Western Sahara (Advisory Opinion) [1975]* ICJ Rep 12, paras 54–9. The ICJ also made clear that the right of peoples to self-determination is an *erga omnes* right. The ICJ stated that ‘[t]he principle of self-determination ... is one of the essential principles of contemporary international law’ which gives rise to an obligation to the international community as a whole to permit and respect its exercise, *Case Concerning East Timor (Portugal v Australia) (Merits) [1995]* ICJ Rep 90, para 29. See also *Wall Advisory Opinion* (n 14) para 88.

115 *Wall Advisory Opinion* (n 14) paras 115–122.
116 Ibid, para 122.
117 Cassese (n 107).
118 Sassòli (n 81) 677.
119 Ibid.
if the occupying power does not withdraw, it still has to respect this right throughout the occupation. The occupying power may then be expected to give effect to this right by putting in place measures which progressively enable the exercise of such a right on the part of the occupied people. For instance, these measures should, as indicated above, give the occupied people the possibility of holding elections or transferring power to an indigenous representative political entity and should be accompanied by the occupying power refraining from adopting measures which have a lasting impact on the form of state and government of the occupied territory. From this perspective, compliance with the law of occupation is also a way of protecting the right to self-determination. The limits that the law of occupation place on the normative authority of an occupying power, if strictly adhered to, protect the right to self-determination of a people in the same way that they protect the sovereignty of the ousted sovereign, that is by impeding the occupant from taking fundamental decisions for the political and economic future of the occupied territory in lieu of the people of the territory concerned.

Realistically speaking, however, it must be acknowledged that the occupying power will often be involved in conduct that hampers the exercise of this right, such as restraining freedom of movement, assembly, or speech. As an occupant could be said to be entitled to take such coercive measures under the law of occupation for reasons of security, the norms of the law of occupation would prevail as lex specialis over human rights norms and, by the same token, the right to self-determination. Because of the consequences associated with such security measures, their validity should be closely scrutinised, as with any use of force, on the basis of a proportionality test between the legitimate security objective pursued by the occupant and the harm caused to human rights and the right to self-determination by the measures employed.

Robert Kolb and Sylvain Vité have aptly called the right to self-determination a shield against ‘réforme de structure’, protecting the free sovereign choice of a people in political, cultural, social, and economic matters,120 as well as effectively reinforcing the conservationist principle,121 while the argument is also made that because of this right, an occupation should end within a reasonable time.122 The right to self-determination is unquestion-

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120 Kolb et Vité (n 63) 272.
ably a limit to transformative projects in the sense that if the dislodged
government is no longer in a position to return to power, an occupant still
cannot behave as if the occupied territory were its own, as sovereignty re-
 mains with the people within the territory. On the other hand, Antonio
 Cassese has argued that an occupying power may facilitate the realisation
of the right to self-determination through the organisation of elections to
select a government or to nominate a committee to draft a constitution,
through the empowerment of local institutions, or through the engage-
ment in a peace process with local authorities. The problem with this
list, however, is that it presents the risk that, instead of enabling a free
process of self-determination, the occupant may make choices that end up
influencing its outcome, which becomes increasingly likely particularly if
the occupying power remains in the occupied territory for long time.

Construing the right to self-determination as a shield against foreign
intervention and occupation suits the archetypal case of a despotic regime
seeking to impose its own values on an occupied territory. In this kind
of scenario, it appears obvious that the greater the protection against for-
eign interference, the better. What the historical perspective outlined in
Chapter 1 reveals, however, is the presence of situations, admittedly rather
exceptional, in which the inverse scenario could unfold.

The occupant, a seemingly democratic nation, may seek the transfor-
mation of the political regime of the occupied territory from despotic to
democratic, creating the conditions for the occupied people to take charge
of its future. Correctly, however, the law of occupation—whose task is,
as with any normative instrument, to set general rules, not specific poli-
cies—does not distinguish among occupants on the basis of their system
of government or the nature of their ambitions. Grounded in historical ex-
perience, it simply sides with caution, setting down a general prohibition
against transformative projects.

Yet, from a legal perspective, what is different cannot automatically
be treated as if it were equal. The question then of whether an exception
should be made to accommodate transformative projects in cases where
the occupant may effectively contribute to enabling a people’s exercise of
its right to self-determination does arise and is a legitimate one. As noted
by Eyal Benvenisti, an occupant ‘may in fact be instrumental in facilitat-

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Davis Journal of International Law & Policy 23, 44. See also Benvenisti (n 79) 215–16.
124 Cassese (n 107) 147–50.
ing the exercise of this right [self-determination] if the state it occupied was not constituted according to the principle of self-determination'.\(^\text{125}\)

The pitfall of this view is not that it is incorrect; it is that, paradoxically, the opposite could also be true: an occupying power may—for a number of reasons—act in a manner which is not instrumental to the pursuit of a process of self-determination of an occupied people. On a closer look, in fact, Benvenisti’s point represents neither a truth, nor the expression of a prescriptive norm, but an ingenious policy argument, primarily challengeable by a different policy perspective. Thus, caution is necessary before channelling such a view into a legal rule of general application.

Ultimately, whether an occupying power could be instrumental in enabling a people’s right to freely determine its future by setting aside the institutions and law of a despotic ruler and preventing its return, is an eminently political question to be examined on a case-by-case basis. Tackling this question does not require ‘liberal’ interpretations of an existing framework, which may only correspond to the interpreter’s personal preferences, if not bias in favour of one occupant over another. It demands a realistic assessment of the formidable complexity of this question and an evaluation by the competent international organs, such as the Security Council, as to how the question should be answered and what measures should be taken, while acting within the framework set by international law.

3. Conclusion

Contemporary international law has witnessed the shift from the law of occupation to the international law of occupation whereby the international law applicable to a belligerent occupation has become a complex network of provisions stemming from various branches of international law. This new stratum of law applies in conjunction with the law of occupation and, in certain instances, such as in the case of binding resolutions of the Security Council, may amend it. The concomitant application of norms of differing origins brings about problems of coordination among legal regimes. It also leads to the conclusion that a comprehensive analysis of a case of occupation cannot be limited to the application and interpretation of IHL, but must be approached by a general international law perspective.

\(^{125}\) Benvenisti (n 79) 18.
It is said that an occupation is ‘temporary’ in nature—which is often considered to imply that the occupation should be of short duration. While an occupation is temporary in the sense of being provisional, there is actually no requirement in the traditional law of occupation that it be of short duration. The law of occupation does not require the occupying power to withdraw from the occupied territory. Were it left solely to this body of law, an occupation might effectively continue indefinitely. A remarkable achievement of contemporary international law, as opposed to the law of occupation, is the possibility of challenging the very existence of an occupation. This challenge, if successful, can then become a duty imposed on the occupying power to put an end to it. This duty, however, would not impede the application of the law of occupation. The latter applies regardless of whether the underlying occupation is legal or not. If it were otherwise, the occupying power would be at liberty not to comply with its duty to protect the civilian population—clearly an untenable outcome.126

Contemporary international law has evolved in the sense of making the occupant an effective administrator of territory concerned with ensuring adequate protection of the rights of the peoples and individuals under occupation through the taking of appropriate measures. This proactive role accords with the stronger role that governments exercise in national jurisdictions. It is not synonymous with the transformation of the occupied territory, however, which remains prohibited in contemporary international law. The historically well entrenched reasons and norms prohibiting transformative occupation have not been dislodged. Moreover, the right to self-determination adds to them, confirming the necessity of that prohibition in order to enable a people to choose its future free from foreign interference. While, in exceptional circumstances, an occupying power may be justified in introducing reforms to enable a people to freely determine its future by removing the internal obstacles to such a determination, it may still be in breach of that right if it goes as far as determining what that future should be.

Coalition forces will make the country safe, and will work with the United Nations to help Iraq get back on its feet ... As we made clear from the start, this is not a war of conquest. This is a campaign that will end dictatorship, remove the weapons of mass destruction and liberate the Iraqi people so you can determine your own future—a better future

—Tony Blair, British Prime Minister, 4 April 2003

The previous chapter mapped out the normative framework that applies to an occupation under contemporary international law, whether such an occupation arises during, or as a result of, an international armed conflict. Although the law of occupation remains paramount due to the quantity and specificity of its provisions, it is no longer the only area of international law that governs the conduct of an occupying power. Under contemporary international law, as influenced by the practice of states and international institutions, the law applicable to an occupation has become a complex and multi-sourced framework. Far from involving the mechanical addition of new rules, this modern framework requires the interpretation of a broad set of rules and principles, determining any hierarchy between them, and coordinating these norms and the legal regimes to which they belong.

With these considerations in mind, this chapter examines the initial phase of the occupation of Iraq. It considers why it is possible to speak of an ‘occupation’ in the whole of the territory of Iraq (and before that, in Baghdad) and attempts to understand at what point this characterisation became appropriate. It then discusses the purposes of the occupation, demonstrating that the occupying powers in Iraq intended, albeit not without some initial hesitation, to carry out nothing less than a process of ‘nation transformation’. A critical review of Security Council Resolution No. 1483, including an analysis of the Council’s role in defining the normative framework applicable during the occupation and in shaping the authorities and responsibilities of the main actors involved in it will complete the chapter. Bearing in mind the variety and complexity of the issues to be addressed, it may be useful to begin the analysis with a recapitulation of the pertinent facts.

1. **Chronology of key events**

Following the issuance of an ultimatum on 17 March 2003 and a failed decapitation strike ordered by President Bush on 19 March which targeted Dora Farms (in southern Baghdad), where US intelligence believed—erroneously, as it turned out—that Saddam Hussein was conducting a leadership meeting, a US-led coalition (Coalition Forces) commenced ‘Operation Iraqi Freedom’ by invading Iraq on 20 March 2003. On 5 April, US forces took control of the airport of Baghdad, while UK...

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3 Feith (n 2) 392.

4 Ibid.


6 The countries directly participating in Operation Iraqi Freedom from the beginning were the US, the UK, Australia, and Poland, subsequently supported by Spain, Denmark, and a number of other countries. See David Turns, ‘The International Humanitarian Law Classification of Armed Conflicts in Iraq since 2003’ in Raul A ‘Pete’ Pedrozo (ed), *The War in Iraq: A Legal Analysis*, International Law Studies (Blue Book) Series No. 86 (Naval War College 2010) 108.

7 Tripp (n 2) 274.
forces gained control of southern Iraq and, on 7 April, entered Basra. The Iraqi regime had collapsed by 9 April when US forces captured Baghdad. On 14 April, the Coalition Forces took control of Tikrit, the last stronghold of Saddam Hussein. The following day, US representatives met with a number of Iraqis belonging to the country’s main groups (Shiites, Sunnis, and Kurds) at the Tallil air base near Nasiriyah, where they agreed on a thirteen-point statement calling for a democratic and federal Iraq, based on the ‘rule of law’. In contrast, in the nearby city of An Nasiriyah, thou-

8 Ibid.
9 Ibid. See also Ali A Allawi, The Occupation of Iraq (Yale University Press 2007) 93–5; Turns (n 6) 108.
11 According to Douglas Feith, approximately eighty people ‘selected by Garner and his advisers as potential leaders of the new Iraq’ participated at the Nasiriyah conference. See Feith (n 2) 416. The 13-point statement is described as the ‘Nasiriyah Statement’ in Resolution 1483. The 13 points are:

1. Iraq must be democratic. 2. A future government should not be based on communal identity. 3. A future government should be organised as a democratic federal system, but on the basis of countrywide consultation. 4. The rule of law must be paramount. 5. Iraq must be built on respect for diversity, including respect for the role of women. 6. The meeting discussed the role of religion in state and society. 7. The meeting discussed the principle that Iraqis must choose their leaders, not have them imposed from outside. 8. That political violence must be rejected and that Iraqis must immediately organize themselves for the task of reconstruction at both local and national levels. 9. That Iraqis and the coalition must work together to tackle the immediate issues of restoring security and basic services. 10. That the Ba’ath party must be dissolved and its effect on society must be eliminated. 11. That there should be an open dialogue with all national political groups to bring them into the process. 12. That the meeting condemned the looting which had taken place and the destruction of documents. 13. That the Nasiriyah meeting voted to hold another meeting in 10 days in a location to be determined with additional Iraqi participants to discuss procedures for developing an Iraqi interim authority.

sands of Iraqis protested the US presence in Iraq. On 16 April, General Franks, commander of the Coalition Forces, issued a leaflet containing his ‘Freedom Message to the Iraqi People’ (Freedom Message), in which he stated that the ‘Coalition Forces in Iraq have come as liberators, not as conquerors’, and announced the establishment of the CPA. On 21 April, retired General Jay Garner arrived in Iraq to lead the CPA’s Office for Reconstruction and Humanitarian Assistance (ORHA), which was responsible for the country’s immediate humanitarian and reconstruction needs. On 1 May, from the deck of the USS Abraham Lincoln, President Bush declared the end of ‘major combat operations’ and five days later appointed Ambassador Paul L Bremer as the head of the CPA. On 8 May, the US and the UK notified the Security Council that they had created the CPA in order to exercise temporary governmental powers in Iraq. They also submitted a draft Resolution that, inter alia, referred to themselves as ‘occupying powers’. On 22 May, the Security Council—by


16 Statement made by the White House Press Secretary, 6 May 2003 <http://www.whitehouse.gov/news/releases/2003/05/20030506-5.html> accessed 10 January 2014.

17 UNSC ‘Letter from the Permanent Representatives of the UK and the USA to the UN addressed to the President of the Security Council’ (8 May 2003) UN Doc S/2003/538 (8 May Letter). The 8 May Letter was followed, on 9 May, by a draft Resolution (9 May Draft). The 9 May Draft stated: Noting the letters ... from the Permanent Representatives of the United States of America and the United Kingdom to the President of the Security Council and recognizing the specific authorities, responsi-
fourteen votes to none, with Syria not participating—adopted Resolution 1483, which recognised the status of the US and the UK as occupying powers in Iraq.

2. The legal status of the Coalition Forces in Iraq in April 2003

2.1. Occupation versus debellatio

Although Resolution 1483 considered the post-invasion situation in Iraq as an ‘occupation’, some commentators have argued that the notion of debellatio is a more accurate description. On the basis that the Iraqi army was defeated, Iraqi national institutions were abandoned, and none of Iraq’s allies took military action against the Coalition Forces on its behalf, this claim is not without merit and therefore deserves consideration.

Debellatio can be defined as ‘one of the different ways of ending a war and of acquiring a territory’. In a situation of debellatio, ‘one of the belligerencies, and obligations under applicable international law of these states as occupying powers ...’


18 UNSC Verbatim Record (22 May 2003) UN Doc S/PV/4761, 2.
19 UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483, Preamble.

21 According to Karl-Ulrich Meyn, ‘Debellatio’ in Rudolf Bernhardt (ed), Encyclopedia of Public International Law (Elsevier Amsterdam 1992) 166:

[T]here are three possible alternative meanings of debellatio in international law. The first is that debellatio indicates the change wrought by the conquest and total subjugation of a State together with that State’s annexation by the conqueror. The second view is that debellatio corresponds to the total defeat of an enemy State, its occupation, and the elimination of a vital component of Statehood; in this view,
different states has been defeated so totally that its adversary or adversaries are able to decide what the fate of the territory of that state and of the state authorities concerned will be'.

Unlike occupation, which is temporary, debellatio occurs only when a state is finally defeated, as the sometimes associated term ultima victoria suggests.

While a situation of debellatio may also come about in the context of contemporary wars due to the nature and destructiveness of modern weapons, the concept is no longer used in international law, having been superseded by the concept of occupation. Eyal Benvenisti has correctly suggested that debellatio is now in desuetude because the traditional doctrine of debellatio, which equated the dissolution of the governing institutions with the dissolution of the state and the consequent passing of title to territory to the conquering army, cannot stand in contemporary international law.

By virtue of the right to self-determination, sovereignty over a state remains with the people of that state, even after the military defeat of their government. Furthermore, the doctrine of debellatio contradicts a cardinal principle of contemporary international law, whereby the use of force against a nation cannot lead either to its acquisition or to its extinction.

Resolution 1483 implicitly confirmed this point by stressing that Iraq was a sovereign state.

Melissa Patterson argues that the situation in Iraq might nonetheless be regarded as a modern form of debellatio, in which title to territory does not pass to the victorious country. In this scenario, the ‘internal sover-

debellatio implies the extinction of the old State, but it leaves open the legal future of the occupied territory (annexation or the founding of one or more new States). The third view is that debellatio only describes a factual situation and that even the elimination of all the States organs combined with the occupation of the territory does not exclude the continuing existence of that State.

22 Ibid.
26 UNSC Res 1483 (n 19) Preamble.
27 Patterson (n 20) 488.
eighty’ of a country rather than its territory would pass to the military victor—namely, the ‘ability to control affairs within these borders’ resulting from the ‘total defeat and disintegration of the governing regime’. In this situation of *debellatio*, the only limit upon the power of the victorious country would be the right of the people of the defeated state to self-determination.

This view, however, is unpersuasive from both a legal and a factual perspective. What Patterson calls ‘internal sovereignty’—that is, the ability to control the affairs of the defeated country—is nothing but the *de facto* sovereignty that flows from military victory. Under international law, *de jure* sovereignty, as a legal entitlement to control the affairs of a country, can arise only from what Patterson calls ‘external sovereignty’—or sovereignty over a country—and not from occupation. If title to territory does not pass to the victorious country, as Patterson’s version of *debellatio* postulates, neither does *de jure* sovereignty. What remains in the hands of the victorious countries is thus merely *de facto* sovereignty within the controlled territory, which is still an occupation, even if the ability of the winning army to impose its will in that territory is factually unrestrained. This situation is nothing but temporary control of territory and, contrary to Patterson’s proposition, the law of occupation applies in *toto* as a consequence.

Furthermore, upon closer examination, the factual scenario of Iraq in April 2003 does not support the application of the doctrine of *debellatio* in whatever form it is presented. It is doubtful that Iraq could be regarded as a completely defeated nation in the same way as, for example, Germany was at the end of World War II. The collapse of the Iraqi government was partially a consequence of individuals fleeing from government offices; it did not involve the physical destruction of government buildings, or the killing or capture of most high-level Iraqi politicians and security officials. President Bush himself spoke only of the end of major combat operations. In short, nothing comparable to an unconditional surrender occurred in Iraq. The defeat of governmental institutions did not equate

28 Ibid, 477–82.  
29 Ibid, 478.  
31 See White House Press Release (n 15).  
32 Brett McGurk, a legal counsel for the CPA, observed in ‘A Lawyer in Baghdad’ (2004) 7 The Green Bag 51, 52: ‘The unconditional surrender of Ger-
to the defeat of the nation, and some Iraqi groups still continued the fight against the Coalition Forces. Moreover, as of mid-April 2003, a portion of the Iraqi population began openly protesting against the occupation, and an insurgency gradually mounted in the following months. Contrary to what one would expect in a situation of *debellatio*, even the factual powers of the CPA were far from unrestrained. After the first few months of the occupation, CPA officials were unable to leave the CPA's headquarters, located in the heavily fortified ‘Green Zone’ in the centre of Baghdad, without military escorts. Bremer was unable to travel in Baghdad, let alone elsewhere in Iraq, without a huge security apparatus. In light of these circumstances, labeling the situation in Iraq as *debellatio* is an overstatement, notwithstanding the rapidity with which the Coalition Forces had ousted Saddam Hussein and his government from power. The next section considers why it is more accurate to characterise the situation in Iraq as an occupation, and discusses the starting point of that occupation.

many and Japan supported the application of *debellatio*, a concept that is discredited in the international legal community and would not easily transfer to Iraq. No Coalition member, in any event, argued that *debellatio* applied in Iraq.’

33 Testifying before the US Senate Committee on Foreign Relations on 22 May 2003, Paul Wolfowitz, Deputy Secretary of Defense, described the situation in Iraq thus: ‘In short, while major combat operations have ended American soldiers continue to be shot at almost daily. While we have made substantial progress in catching the people on the backlist, there is still additional work that needs to be done. We face in Iraq, a situation where a substantially defeated enemy is still working hard to kill Americans and to *kill Iraqis who are trying to build a new and free Iraq because they want to prevent Iraqi society from stabilizing and recovering*’ (emphasis added). See US Senate Committee on Foreign Relations, ‘Hearing (Iraq Stabilization and Reconstruction: US Policy and Plans)’ (22 May 2003) 18.

34 See Oliver (n 12).

35 For an analysis of the origin of the insurgency and the motives behind it, see International Crisis Group, ‘In Their Own Words: Reading the Iraqi Insurgency’ (Middle East Report No 50, 15 February 2006); United States Institute of Peace, ‘Who are the Insurgents: Sunni Arab Rebels in Iraq’ (Special Report 134, April 2005). See also the analysis conducted in § 2 of Chapter 4.

2.2. The establishment of the occupation

Through the issuance of Resolution 1472 on 28 March 2003—shortly after the beginning of Operation Iraqi Freedom—the Security Council took steps to prevent the occurrence of a humanitarian crisis in Iraq. It did so by recalling that, under Article 55 of the Geneva Convention IV, the ‘Occupying Power has the duty of ensuring the food and medical supplies of the Population’ and must ‘bring in the necessary foodstuffs, [and] medical stores ... if the resources of the occupied territory are inadequate’.37 Further, it called on ‘all parties concerned’ to strictly abide by their obligations ‘under international law, in particular the Geneva Conventions and the Hague Regulations’, which clearly includes what we have termed the law of occupation.

By recalling the norms applicable to an occupation, the Security Council, although not yet identifying Iraq as occupied, drew attention to the possibility that the situation could potentially transform from invasion to occupation and that certain portions of Iraq’s territory could have already become occupied territory during Operation Iraqi Freedom. Consistent with this approach, then UN Secretary-General Kofi Annan, in his annual address to the Commission on Human Rights on 24 April 2003, argued that Coalition Forces should be considered ‘Occupying Powers’ already at that time. He stated:

I hope the Coalition will set an example by making clear that they intend to act strictly within the rules set down by the Geneva Conventions and the Hague Regulations ... and by demonstrating through their actions that they accept the responsibilities of the occupying power for public order and safety, and the well-being of the civilian population.38

While this position angered US officials by contradicting the rhetoric of ‘liberation’ underlying Operation Iraqi Freedom, Annan’s analysis of the situation in Iraq was, for the reasons that follow, legally correct.

For some scholars the occupation had already commenced in early April 2003, at least in the areas that had gradually come under the control of the Coalition Forces, as a consequence of the deployment of ground forces in Iraq. Others have identified the occupation as starting on 16 April 2003, the date on which the CPA was created, while still others have suggested that Coalition Forces were occupying powers only as of May 2003, as reflected in Resolution 1483. Recently, the ECtHR took this last viewpoint, holding that the US and UK became occupying powers in Iraq after the end of major combat operations on 1 May. In accord with the first group of scholars, the following arguments can be tendered.


43 Al-Jedda v United Kingdom, App no 27021/08 (ECtHR, 7 July 2011) para 77. On the same lines, for the reasons mentioned in the text, the ECtHR may have erred when placing the beginning of the occupation in the month of May 2003 by stating that ‘Major combat operations in Iraq ceased at the beginning of May 2003. The United States and the United Kingdom there-
As the normative instruments that define and govern a belligerent occupation are applicable only during an international armed conflict, a prerequisite for demonstrating the existence of a ‘belligerent occupation’ is the existence of such a conflict.44 Tellingly, the Hague Regulations, annexed to Convention IV, includes the rubric ‘Section III: Military authority over the territory of the hostile State’ (emphasis added). A belligerent occupation is therefore inextricably linked to the existence of an international armed conflict—namely, an inter-state war.45 It is not possible to speak of the existence of a belligerent occupation—within the meaning of the existing norms of international humanitarian law—during a non-international armed conflict.46

With the invasion of Iraq, there is little doubt that an international armed conflict, pitting the US and the other countries participating in Operation Iraqi Freedom against Iraq, broke out in March 2003.47 David Turns

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46 Ibid.
argues that this conflict had already ended in May 2003, when President Bush announced the end of major combat operations and brought about a situation of *debellatio*, which was then followed by a phase of belligerent occupation.\(^{48}\) However, in response, it can first be noted that there was no *debellatio* for the reasons outlined earlier. And secondly, that as long as an occupation lasts and otherwise is agreed, the relationship between occupying state and occupied state remains one of hostility.\(^{49}\) An occupation, which amounts to forcible control by a state of enemy territory, is in and of itself, a manifestation of a state of war.\(^{50}\) Further, a distinction should be drawn between the cessation of hostilities and the formal termination of an armed conflict. For an international armed conflict to formally end, it is necessary that, in one way or another, the belligerents agree to terminate it, or at least to behave in such a way that they can resume the status *quo ante*—that is, the status of formal peace that existed between them before the conflict broke out. A temporary suspension or a halting of hostilities is not, in and of itself, a factor that ends an international armed conflict from a legal perspective—even though it may certainly be a step towards that end. It also true to say, however, that the ‘general close of hostilities’ may be regarded as the moment in which the law of armed conflict ceases to apply in whole or in part.

But nothing of the sort, from either a factual or a legal perspective, occurred in Iraq. An international armed conflict, albeit of lesser intensity than during the invasion phase, continued until at least June 2004;\(^{51}\) with

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49 Dinstein (n 45) 32.

50 Ibid.

51 Dinstein (n 45) 481–2; Colassis (n 40) 457, 460; Michael N Schmitt, ‘Iraq (2003 Onwards)’ in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 361. It is a different issue whether this conflict
Coalition Forces involved in quashing pockets of resistance\textsuperscript{52} and in fighting ‘Sunnis, Shiites, and Saddam’s insurgents all at the same time’.\textsuperscript{53}

Next, the specific question of the existence of an occupation in Iraq in April 2003 will be examined. The reference norm for the determination of the existence of an occupation is Article 42 of the Hague Regulations,\textsuperscript{54} which defines an occupation in the following terms:

 Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.\textsuperscript{55}

According to a textual interpretation of this norm, an occupation consists of control over a territory rather than of control over persons.\textsuperscript{56} An occupying army is a ‘hostile army’, which means that its control of territory is not based on consent but on the use force against the occupied country (or territory) with which the occupant is at war. Moreover, it must have established its authority (in one way or another) over a territory (although not necessarily over the entire state);\textsuperscript{57} and it must be in a position to exercise such authority.\textsuperscript{58} Since the Coalition Forces had invaded Iraq, fought against its forces, and overthrown its government, there seems to be little doubt that they comprised a hostile army in relation to the State of Iraq.
headed by Saddam Hussein. As the fulfilment of the legal criteria for the existence of an occupation depends on the legal and objective evaluation of the relevant facts, it is irrelevant that the Coalition Forces presented themselves as ‘liberators’.

The establishment of authority within the meaning of Article 42 of the Hague Regulations may be described as the successful replacement by an enemy army of the government of a territory, which, as a result of the military strength of the occupying army, has been rendered incapable of publicly exercising its authority and resisting the occupation. It is difficult to see how such a replacement of authority could occur without the presence of troops materially carrying it out. By dislodging the previous ruler of that territory from power, an occupant becomes the de facto sovereign of the territory. International law recognises such a factual scenario by placing governmental authorities and duties on the occupying power, and on it alone, which enables the legal exercise of jurisdiction over the people inhabiting or operating within that territory. To confirm the existence of an occupation, however, its effectiveness must be proven as well. Only if the


60 As stated by the ICRC, ‘for the applicability of the law of occupation, it makes no difference whether an occupation has received Security Council approval, what its aim is, or indeed, whether it is called an “invasion”, “liberation”, “administration” or ‘occupation’ ... it is solely the facts on the ground that determine its application’. See ICRC, ‘Occupation and international humanitarian law: questions and answers’ <http:/ /www.icrc.org/eng/resources/documents/misc/634kfc.htm> accessed on 10 April 2014.


62 Ferraro (n 54) 143–7.

army stationed within a territory (or an entire state) has achieved effective control over that territory (rather than over its population)\(^6^4\) and is capable, if it so wishes, of enforcing its will everywhere within the occupied territory within a reasonable time, it is possible to speak of the existence of a belligerent occupation.\(^6^5\) Determining the existence of an occupation

It follows from the definition that belligerent occupation must be both actual and effective, that is, the organized resistance must have been overcome and the force in possession must have taken measures to establish its authority. *It is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district. It is immaterial whether the authority of the occupant is maintained by fixed garrisons or flying columns, whether by small or large forces, so long as the occupation is effective.* The number of troops necessary to maintain effective occupation will depend on various considerations such as the disposition of the inhabitants, the number and density of the population, the nature of the terrain, and similar factors. The mere existence of a fort or defended area within the occupied district, provided the fort or defended area is under attack, does not render the occupation of the remainder of the district ineffective. *Similarly, the mere existence of local resistance groups does not render the occupation ineffective.* (emphasis added)

\(^6^4\) Benvenisti, *The International Law of Occupation* (n 24) 43–51. See also Eyal Benvenisti and Guy Keinan, ‘The Occupation of Iraq: A Reassessment’ in Raul A ‘Pete’ Pedrozo (ed), *The War in Iraq: A Legal Analysis* (International Law Studies (Blue Book) Series No. 86, Naval War College 2010) 263, 264–5. See also *Prosecutor v Duško Tadić* (Judgment) ICTY-94-1-T (7 May 1997) para 580. In *R. (on the application of Al-Skeini and Others) v Secretary of State for Defence*, [2007] UKHL 26, paras 64-84; 115-32, the House of Lords found that although the UK was the occupying power in that part of Iraq (para 129) it lacked effective overall control over Basra within the meaning of the ‘ECHR jurisprudence’ for the purpose of establishing jurisdiction over the alleged human rights violations by British soldiers. But, as noted by Marko Milanović, ‘a belligerent occupation without effective control ... is simply no longer an occupation’. See Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 146.

involves assessing whether the relevant facts meet the legal criteria contained in Article 42 of the Hague Regulations.\textsuperscript{66} Because of the content of Article 42 of the Hague Regulations, the establishment of an occupation administration is not a precondition to the applicability of the law of occupation. If it were, it would be tantamount to granting an occupying power that failed to, or chose not to, establish such an administration a licence to control territory forcibly and indirectly without subjecting it to the law of occupation. The existence of an administration can, however, be proof of the existence of an occupation.\textsuperscript{67} This is confirmed in the judgment of the ICJ in the \textit{Armed Activities} case which, in addition, did not discard the possibility that an occupation could also be exercised indirectly. Deciding upon the Congo’s claim that Ugandan forces had ‘set up an occupation zone, which it administered both directly and indirectly’, the ICJ held that for an occupation to exist, it is not sufficient that troops be stationed in a given territory. Instead, it needs to be shown that:

there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening States ... In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it

\begin{footnotesize}
\begin{enumerate}
\item[66] See \textit{Prosecutor v. Mladen Naletilić aka “Tuta”, Vinko Martinović aka “Stela” (Judgment)}, ICTY-IT-98-34-T (31 March 2003) para 211. And, for further analysis see Ferraro (n 54) 135.
\item[67] \textit{Naletilić and Martinović} (n 66) para 217.
\end{enumerate}
\end{footnotesize}
be relevant whether or not Uganda had established a structured military administration of the territory occupied.68

The ICJ found that Uganda had established authority over the province of Uturi, noting that it was undisputed that General Kazini, commander of the Ugandan forces in the Congo, had created a new province (Kibali-Uturi), appointed a provisional governor to run it, and had given her instructions on how to administer the newly created province.69 Viewing General Kazini’s conduct as ‘clear evidence’, the Court found that Uganda had both ‘established’ and ‘exercised authority in Ituri as an occupying power’.70 The Court dismissed Congo’s argument that an occupation existed due to ‘indirect administration’ by various Congolese factions under the supervision of Ugandan officers because there was insufficient evidence to demonstrate that Ugandan forces controlled the rebel forces.71 The Court further held that Ugandan troops stationed at the Kisangani airport exercised only administrative control and there was no evidence that their presence at the airport constituted an occupation.72 However, it was the lack of evidence rather than the denial of the possibility of an indirect occupation that led the ICJ to its conclusions.73

Some commentators have been puzzled by the ICJ’s remark that it found the existence of the occupation in Ituri because the ‘occupying army’ had ‘actually substituted its authority for that of the ousted or defeated government’.74 These commentators argue that the Court may have unduly narrowed the notion of occupation so as to exclude from its purview cases in which a foreign army has only ‘the potential capacity, not actu-

69 Ibid, para 175.
70 Ibid, para 176.
71 Ibid, para 177.
72 Ibid.
74 Andrea Bianchi and Yasmin Naqvi, International Humanitarian Law and Terrorism (Hart 2011) 84.
ally exercised ... to substitute its authority’. 75 In my view, not too much should be read into the Court’s rather succinct analysis of the situation. 76 The ICJ was not ruling on whether the establishment of authority needed to be actual or potential, but simply recorded the situation before it, where an establishment of authority had taken place. In any case, it should be noted, that the approach of the ICJ—namely, favouring ‘actual establishment’ over ‘potential establishment’ of authority—has a solid foundation not only in the text of Article 42 of the Hague Regulations, which defines territory as occupied only where ‘authority has been established’, 77 but also in Article 43 of the Hague Regulations. This norm, by speaking of the ‘authority of the legitimate power having in fact passed into the hands of the [Occupying Power]’, makes clear that it is actual establishment rather than potential transfer of authority what occurs in a case of occupation.

By contrast, if there is only the potential for establishing authority, while there is undoubtedly strong external interference or pressure over a given territory—which, depending on the circumstances, may itself be unlawful under international law—there is no occupation of territory in the specific sense employed under the law of occupation because there has not been a transfer of authority. Until the actual establishment of authority by the occupying army, that is until the local government is dislodged from power and replaced by the occupying army, the existing governmental authority—fragile and battered as it may be—remains in place: tertium non datur. Allowing a state to rule a foreign territory when it has not succeeded in establishing its authority therein may be an unjustified normative reward, making it easier for a state to exercise control over foreign territories and to subject the local population to its whims and legislation. The granting of so broad an authority may be equated to an instance of ‘normative discount’, whereby the law would be accomplishing for a state what its army did not, or could not do: dislodging the indigenous government.

What may instead remain at the ‘potential’ level, at least in the initial phase of an occupation, is the concrete exercise of authority once the existence of an occupation is established in a given territory. An army may already be an occupying army if, as a result of a successful battle, it has

75 Ibid. See also Vaios Koutrolis, Le début et la fin de l’application du droit de l’occupation (Editions Pedone 2010) 49.
76 According to Tristan Ferraro (n 54) 150, however, the ‘ICJ’s interpretation is too narrow and does not reflect lex lata, which continues to emphasize the ability to exert authority, not the actual exercise of authority’.
77 For further analysis see Ferraro (n 54) 143–4.
caused the enemy to flee and establishes itself unchallenged in the en-
emy’s seat of government—even though that army may not, at that point,
have begun, for example, to exercise its newly acquired authority by giving
instructions to the local population.

In this respect, the reasoning of the ICJ is not clear-cut. The ICJ stated
that in order to determine whether Uganda was an occupying power, it
had to examine whether there was sufficient evidence to demonstrate
that its authority ‘was in fact established and exercised’; and concluded
that ‘Uganda established and exercised authority in Ituri as an occupying
Power’.78 But this latter phrase contradicts the ICJ’s more nuanced asser-
tion, only one paragraph earlier in the same judgment, that an ‘occupation
extends only to the territory where such authority has been established
and can be exercised’.79 The latter formulation correctly mirrors Article 42
of the Hague Regulations, and it is the same phrase used by the ICJ in the
Wall Advisory Opinion.80 It indicates that once its authority is established
over a given territory, an occupying power needs only to be in a position
to exercise authority; it does not need to immediately exercise it for an oc-
cupation to be in place. The ICJ’s use of somewhat differing formulations
between the two paragraphs of the two judgments is a source of confusion.
Bearing in mind that the ICJ expressed adherence to its case law in the
Wall Advisory Opinion, it would be excessive to read a change of jurispru-
dence into the somewhat imprecise drafting. The evidence in the Armed
Activities case demonstrated that the occupant in Ituri actually exercised
authority therein, a fact which the ICJ simply took note of.

78 Armed Activities (n 68) para 173.
79 Ibid, para 172.
80 Legal Consequences of the Construction of a Wall in the Occupied Palestinian
Territory (Advisory Opinion) [2004] ICJ Rep 136, para 78, which reads:

The Court would observe that, under customary international law as
reflected (see paragraph 89 below) in Article 42 of the Regulations
Respecting the Laws and Customs of War on Land annexed to the
Fourth Hague Convention of 18 October 1907 (hereinafter ‘the Hague
Regulations of 1907’), territory is considered occupied when it is actu-
ally placed under the authority of the hostile army, and the occupation
extends only to the territory where such authority has been established
and can be exercised. (emphasis added)
2.3. The existence of an occupation in Iraq as of mid-April 2003

Applying this legal framework to the case of Iraq, the occupation in Iraq can be considered to have already been established as of mid-April 2003. In a press conference given on 11 April, Sir Alan West, the First Sea Lord, proclaimed:

[E]vents have moved on at a remarkable pace, in particular over the last few days. We have all seen the extraordinary pictures in Baghdad, Mosul and Kirkuk of people tasting freedom, in many cases for the first time in their lives. Saddam Hussein has gone to ground, as have his murderous henchmen. The regime has collapsed.81

On 12 April, in a CENTCOM press briefing, General Brooks affirmed: ‘The regime is in disarray and no longer in control of Iraq and the coalition remains focused on the objectives of the campaign.’82 On 16 April, in his Freedom Message to the Iraqi people, General Franks spoke as though the Coalition Forces had definitively acquired control over the whole of Iraq. In a manner reminiscent of General Maude’s announcement in 1916 in Baghdad (previously discussed in Chapter 1), General Franks stated, ‘Our stay in Iraq will be temporary, no longer than it takes to … establish stability and help the Iraqis form a functioning government that respects the rule of law’.83 Moreover, asserting that it was ‘essential that Iraq have an authority to protect lives and property, and expedite the delivery of humanitarian aid to those who need it’, General Franks announced that he would be ‘creating the Coalition Provisional Authority to exercise powers of government temporarily, and as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction’.84 The following instructions were then issued:

83 Freedom Message (n 13) 795.
84 Ibid.
Members of the armed forces and security organizations shall lay down their arms ... They shall obey the orders of the nearest Coalition military commander ... All other Iraqis should continue their normal daily activities; officials report to their places of work until told otherwise ... The Arab Socialist Renaissance Party of Iraq ... is hereby disestablished. Property of the Ba'ath party should be turned over to the Coalition Provisional Authority ... Coalition Forces are here to ensure safety and security, and to help the people of Iraq create a better future for their country.85

The content and assertiveness of the Freedom Message can be regarded as the completion of the establishment of authority by General Franks over the whole territory of Iraq on behalf of the states comprising the Coalition Forces. With the delivery of the Freedom Message, the states comprising the Coalition Forces made it clear that they were the new rulers of Iraq, albeit temporarily. This is not to say that Coalition Forces had acquired absolute control over Iraq. It is to underline that from the moment of its delivery onwards, the CPA had begun asserting its authority over the whole territory of Iraq. Having dislodged Saddam Hussein's government, the CPA was, albeit temporarily, the new government of Iraq and could exercise its own prerogatives stemming from the newly acquired position of authority, recognised under the law of occupation.

Not only, therefore, did the Freedom Message mark the definitive establishment of authority by the Coalition Forces; it is also an indication that, by that day, the Coalition Forces were exercising their authority over the whole of Iraq simultaneously. This is clearly evidenced by the fact that in the Freedom Message General Franks also proclaimed the disestablishment of the Ba'ath Party (which had been the ruling Iraqi party since 1968) and the seizure of its assets; gave precise orders to both the military and security organisations (which were required to lay down their arms); instructed Iraqi civilians to return to their ordinary lives; and made it clear that the Coalition Forces were there to ‘help’ to create a better future for the Iraqis—although nobody had invited them to do so. Furthermore, the Freedom Message was accompanied by two documents, the ‘Instructions to the Iraqi Armed Forces’ and the ‘Instructions to the Citizens of Iraq’, which were the first acts of governments of the new rulers of Iraq.86 All of

85 Ibid.
86 See Instructions to the Citizens of Iraq (16 April 2003) and Instructions to Iraqi Armed Forces (16 April 2003). The two documents are reproduced in
this leaves little room for doubt that, as of 16 April, there was a new authority governing Iraq which had substituted its own authority for that of the defeated Iraqi government and had begun to exercise it over the whole of Iraq.

Subsequent events suggest that the Coalition Forces were able to implement the Freedom Message in significant part. The Coalition Forces asserted their authority within the territory of Iraq,87 and were able to execute their will88 whenever necessary to achieve their purposes, even

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Talmont (n 13) at 796 and 798 respectively.

87 In one of the daily press releases issued by the entity in command of Operation Iraqi Freedom (Centcom), General Brooks described the conduct of Coalition Forces thus:

Coalition forces are interdicting free movement by regime members or paramilitary elements ... Last night, coalition special operations forces captured another key member of the regime, Samir Abd al-Aziz al-Najim ... He was a Ba’ath Party official, a regional command chairman for the Baghdad district, and is believed to have first-hand knowledge of the Ba’ath Party central structure. The coalition is pursuing other regime leaders.


88 General Brooks clarified that:

The coalition is expanding areas of influence throughout the country and concentrating efforts on security and stability. Gradually, the indications of every-day life are returning in Iraq, and the Iraqis are adjusting to the freedom from the tyranny of the regime. Today, the coalition is operating throughout Iraq to remove the final remnants of the regime from any areas of influence. The free Iraqi people are making their voices heard in seeking an end to bloodshed and the removal of foreign fighters, who put the population at risk […] Concurrently, the coalition is focused on creating conditions for long-term stability throughout the country and establishing systemic and infrastructural bases for a free and democratic Iraq.
though pockets of resistance remained. On 24 April 2003, Lieutenant General McKiernan issued a proclamation to the ‘People of Iraq’ designed to prevent individuals from representing themselves as controlling civilian institutions, over which the ‘Coalition Authority retain[s] absolute authority within Iraq’. 

In light of these circumstances, it appears possible to conclude that, by the second half of April 2003 at the latest, the Coalition Forces had achieved effective control over the bulk of the territory of Iraq and the countries comprising the Coalition Forces had thereby acquired the status of occupying powers.

3. **The status of the Coalition Forces during the looting of Baghdad**

As the occupation of a territory cannot occur overnight, the conclusion reached in the previous section presupposes that before mid-April 2003 some parts of Iraq were already under the control of the Coalition Forces. Determining the exact moment that the occupation commenced in each of Iraq’s cities is beyond the purpose of this study. Nonetheless, the gravity and magnitude of the events that occurred in Baghdad after the collapse of the regime—including the looting of public buildings and cultural prop-

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89 General Brooks said:

> The focus of the coalition’s operations in the last 24 hours has been on eliminating the remaining pockets of resistance, locating key regime leaders, and increasing military contributions to humanitarian assistance. Special operations forces have been active in expanding security in the northern Iraq areas of Mosul, Irbil and Kirkuk ... At this point, there are no burning oil wells in Iraq.


90 ‘Proclamation to the People of Iraq’ (23 April 2003). See text reproduced in Talmon (n 13) 800. On 24 April 2003, the American military blocked the initiative of an Iraqi politician who had appointed himself as the new major of Baghdad, see Michael Gordon and John Kifner, ‘After Effects: Reconstruction; U.S. Warns Iraqis against Claiming Authority in Void’, *NYT* (New York, 24 April 2003).
erty, and the apparent uncertainty of the Coalition Forces regarding their obligations—are such that it is necessary to at least examine the situation in Baghdad, the capital city of Iraq, in order to determine the status of the Coalition Forces in that area at the time. Once that status is ascertained, it will then be possible to gauge the nature of the legal obligations of the Coalition Forces in relation to those events.91

3.1. Key events

One of the expectations underlying Operation Iraqi Freedom and post-invasion planning was that the Iraqis would welcome the Coalition Forces as liberators.92 Although the Coalition Forces were, in effect, welcomed as such in some instances,93 this remained the exception rather than the rule.94 The first days of the Coalition Forces in Iraq, as televised worldwide, unveiled a quite different scenario: chaos, widespread looting, and arson plagued Iraq’s major cities.95 In Baghdad in particular, several government buildings, the National Museum, the National Library, the University, hospitals, embassies, hotels and villas were pillaged and burned between 8 and 13 April.96 Targeted government buildings included those housing the Ministries of Education, Culture, Foreign Affairs, Industry, Information,

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94 Tripp (n 2) 274.
95 Ibid 275.
Irrigation, Planning, and Trade. According to one commentator, the ministries were targeted by certain segments of the Iraqi population intending to ‘destroy any paper trail that could be used against individuals and entities, and to make the task of governing Iraq that much more difficult’. The Ministry of the Interior and the Ministry of Oil, as the only buildings guarded by US forces, remained untouched. By 13 April, US troops had restored a degree of order in Baghdad, although some looting continued.

Although the initial estimate of the director of the National Museum of Baghdad that some 170,000 artefacts had been stolen proved to have been exaggerated, the loss of, and damage to, Iraqi cultural property was substantial. Eleanor Robson, a professor of classical studies, compared the demolition of Iraq’s cultural heritage to the Mongols’ sacking of Baghdad in 1259 and to the fifth-century destruction of the so-called library of Alexandria. The failure of the US forces in Baghdad to prevent this widespread theft and destruction enraged the Iraqi people and undermined their confidence in, and respect for, the US. As a result, the US reacted quickly to seek to control the damage. On 22 April, a joint inter-agency coordination group (JIACG) headed by US Colonel Bogdanos launched an investigation into the stolen antiquities with the aim of their recovery. The final report on the recovery mission submitted by Colonel Bogdanos in September 2003 listed some 13,500 items that had been stolen from the

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97 Ibid, 115.
Iraqi National Museum\textsuperscript{104} and 3,411 artefacts that had subsequently been recovered.\textsuperscript{105}

\subsection*{3.2. The extent of the Coalition Forces’ control over Baghdad}

In a press release dated 12 April 2003, Human Rights Watch, alarmed by the ongoing looting in Baghdad, warned that international law demands that an occupying power ensure public order and security in areas under its control.\textsuperscript{106} Amnesty International followed suit and reiterated the warning.\textsuperscript{107}

While some academics have argued that the Coalition Forces were already bound to stop the looting by the law of occupation upon their arrival in Baghdad,\textsuperscript{108} others have touched on this issue only in passing;\textsuperscript{109} and yet others have neglected it entirely, discussing only the distinct duty relating to the specific protection of cultural property arising under the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict and its applicability to the Coalition Forces.\textsuperscript{110}

\textsuperscript{104} Ibid.

\textsuperscript{105} Sasha P Paroff, ‘Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the Inadequacies of International Protection of Cultural Property’ (2004) 53 Emory Law Journal 2021, 2029. The Security Council sought to encourage these efforts, Paragraph 7 of UNSC Res 1483 (n 19) provided that:

\begin{quote}
... all member States shall take appropriate steps to facilitate the safe return to Iraqi institutions, of Iraqi cultural property and other items of archaeological, historical, cultural rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq.
\end{quote}


\textsuperscript{108} Miller (n 99) 69.


According to Yoram Dinstein, the possibility of a hiatus between the invasion stage and the occupation phase should be considered.\footnote{Dinstein (n 47) 486.} For Dinstein, it was during this hiatus period that the ‘rear echelons had not yet established effective control in Baghdad’, and as a consequence, the Iraqi looters could ‘act freely’.\footnote{Ibid.} Clearly, the situation at the time was not stable because of the transition from invasion to occupation.\footnote{In Lepore, the Italian Supreme Military Tribunal described the difference between invasion and occupation as follows: The two institutions [invasion and occupation] may offer identical aspects in substance, but they differ clearly in their legal effects. Both presuppose the presence of armed forces of one State upon the territory of another enemy, State. But while in the case of occupation there is a true transfer of the authority and of the administrative Invasion is usually of a transitory nature and constitutes in most cases the preliminary basis for an occupation. 

Re Lepore, Supreme Military Tribunal, 19 July 1946 in 13 IRL 354, 355.} Yet, for the reasons that follow and considering also the overwhelming military force of the Coalition Forces,\footnote{Taking into account the precariousness of a situation but also underscoring the importance of compliance by an invading army in control of parts of hostile territory with the norms applicable in an occupied territory, the Eritrea-Ethiopia Claims Commission stated: On the one hand, clearly an area where combat is ongoing and the attacking forces have not yet established control cannot normally be considered occupied within the meaning of the Geneva Conventions of 1949. On the other hand, where combat is not occurring in an area controlled even for just a few days by the armed forces of a hostile Power, the Commission believes that the legal rules applicable to occupied territory should apply. 

Eritrea-Ethiopia Claims Commission, Partial Award: Central Front - Eritrea’s Claims 2, 4, 6, 7, 8 & 22 [2004] 26 RIAA 115, para 57.} the argument that at that time, Coalition Forces in Baghdad were already an occupation force can be advanced.

In fact, on closer examination, there are signs that by 9 April 2003 the US presence in Baghdad had already begun to shift from invasion to occupation. The first was that the Coalition Forces had dislodged the Iraqi government, which was based in that city. Secondly, though still involved in eliminating pockets of resistance, US forces were gaining effective control...
over major parts of Baghdad. Reportedly, ‘U.S. forces were moving at will within and around Baghdad’ by 9 April,\(^\text{115}\) and Major General McChrystal was quoted as saying, ‘We are sitting in the center of the city with almost an armor brigade right now, which is extraordinary.’\(^\text{116}\) In a CENTCOM press briefing of 10 April, General Brooks spoke of the situation in Baghdad as follows:

We've had a number of localized pockets of resistance, and some combat operations that are more substantial through the city, as we engage targets of regime leadership and paramilitary forces ... At the same time ... we're conducting assessments of the utility systems in the city, the sanitation capability, the hospitals to see if we can very rapidly infuse water, electricity, sanitation into those areas and to those facilities so that we can return quality care to the people of Baghdad.\(^\text{117}\)

On 11 April, General Brooks similarly stated:

In Baghdad, operations continue to clear any remaining elements. There still is resistance inside of Baghdad in local pockets, and our efforts really are intended to increase the conditions of stability and security in the areas we've moved through in the city.\(^\text{118}\)

By beginning to undertake ‘assessments of the utility system in the city’, the Coalition Forces acted as though they were already in control of Baghdad and demonstrated an intention to remain there and govern, which included assuming the related responsibilities. In certain instances—presumably when they thought it was necessary or useful—Coalition Forces did not hesitate to exercise their authority in the controlled territory. They


\(^\text{116}\) Ibid. On the level of control over Baghdad achieved by the Coalition Forces see also Bensahel et al (n 14) 83.


succeeded, for example, in protecting the Ministry of Oil and the Ministry of the Interior from being ransacked.\textsuperscript{119} Thus it seems plausible to suggest that the Coalition Forces had taken effective control over at least parts of Baghdad as of 9–10 April and that they could be deemed to be an occupying force at least with regard to those parts of the city over which they were able to display such control. If this suggestion is accurate, it follows that the Coalition Forces were bound to comply with the law of occupation. Under Article 43 of the Hague Regulations, which requires an occupying power to ‘restore, and ensure, as far as possible, public order and safety’, the Coalition Forces should have taken steps to bring to an end the ongoing looting and ransacking of Baghdad—and this is a duty that must be highlighted against a background of comments from sources in the US administration downplaying its significance.

A number of US officials suggested that the looting was unexpected and that the Coalition Forces largely ignored their duties in this regard or did not consider them a priority.\textsuperscript{120} US Deputy Secretary of State Richard Armitage argued that the Coalition Forces in Baghdad were equipped only for combat operations, while the ‘tens of thousands of U.S. troops’ intended to stabilise the country were on their way.\textsuperscript{121} This was followed by Major General David Petreus, who was reported as saying, ‘We should discourage looting, but we’re not going to stand between a crowd and a bunch of mattresses.’\textsuperscript{122} In a press conference on 11 April, US Secretary of Defense Donald Rumsfeld dismissed journalists’ concerns about the looting, stating that ‘Stuff happens’ and ‘Free people are free to make mistakes and commit crimes and do bad things’.\textsuperscript{123} The Bogdanos Inquiry attributed

\begin{footnotesize}
\begin{itemize}
\item[119] Patrick Cockburn, \textit{The Occupation (War and Resistance in Iraq)} (Verso 2006) 75. See also Paroff (n 105) 2025–7; Robert Fisk, ‘Untouchable Ministries’ \textit{The Independent} (London, 16 April 2003).
\item[121] See Bensahel et al (n 14) 84; Peter Slevin and Bradley Graham, ‘U.S. Military Spurns Postwar Police Role’ \textit{Washington Post} (Washington, 10 April 2003); Michael T. Gordon, ‘Baghdad’s Power Vacuum is Drawing Only Dissent’ \textit{NYT} (New York, 21 April 2003).
\end{itemize}
\end{footnotesize}
the delay in securing the protection of the Iraqi National Museum to the fact that US forces ‘became engaged in intense combat with Iraqi forces fighting from the museum grounds and from a nearby Special Republican Guard compound’.\textsuperscript{124} Reportedly, CENTCOM ignored calls to position additional troops to protect certain key sites.\textsuperscript{125} On the other hand, in an interview given some time after these events, Bremer described the US attitude as follows:

We had 40,000 American troops in Baghdad at that time, but they didn’t have orders to stop the looting. So the problem wasn’t immediately the question of the number of troops. It was what are their rules of engagement, as the military calls them ... And that problem, I think, that—the fact that we didn’t stop that looting right away in the very beginning, the first month or so of—after liberation, left the impression with a lot of Iraqis, and perhaps with insurgents, that we were not prepared forcefully to enforce law and order. And I think that was a mistake.\textsuperscript{126}

It has been suggested, however, that the Coalition Forces did not stop the looting simply because they did not have enough troops.\textsuperscript{127} If this were

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\textsuperscript{124} Phuong (n 100) 987.

\textsuperscript{125} Allawi (n 9) 94; Sandholtz (n 110) 185. Reportedly, Coalition Forces had been warned as to the sites that should be protected by the Office for Reconstruction and Humanitarian Assistance (ORHA). During March, the ORHA had sent a list of sixteen key sites, each of which ‘merits securing as soon as possible to prevent further damage, destruction and or pillage of records and assets’. First on the list was the Central Bank; second was the National Museum, the looting of which would cause ‘irreparable loss of cultural treasures of enormous importance to all humanity’. The ORHA’s warnings were contained in documents seen by reporters for \textit{The Observer}, see Paul Martin, Ed Vulliamy, and Gaby Hinsliff, ‘After Saddam: US Army was Told to Protect Looted Museum’ \textit{The Observer} (London, 20 April 2003). Adam Roberts in ‘The End of the Occupation: Iraq 2004’ (2005) \text{54(1)} ICLQ 27, 28 stated that: ‘The failure to control widespread looting in Iraq in late April and early May 2003 was symptomatic of the lack of preparation.’ See also Roberts, ‘Transformative Military Occupation’ (n 13) 614; Sassòli (n 40) 668.

\textsuperscript{126} Fox News interview with Paul Bremer (31 July 2006). Transcript is on file with the author.

\textsuperscript{127} According to John F Burns, ‘Looting and a Suicide Attack as Chaos Grows in Baghdad’ \textit{NYT} (New York, 11 April 2003) A1: ‘American commanders have said
proven to be the case, the responsibility of the Coalition Forces should be proportionately mitigated. As Yoram Dinstein has remarked, much depends on examining the ‘prevailing circumstances’ existing at the relevant time.\footnote{Dinstein (n 45) para 94.} The necessary limitations of the enquiry that can be conducted here, coupled with the fact that these events occurred when the invasion phase was ending and the occupation was beginning, mean that it is difficult to draw definite conclusions. Moreover, it should be recalled that Article 43 of the Hague Regulations contains the wording ‘as far as possible’. This qualification accommodates the possibility that an occupying power may not have the material ability to comply fully with its duties under Article 43. This lack of capacity may occur, for instance, at the very beginning of an occupation when an occupant’s control over a territory may be far from full, or when a situation of occupation lasts for a few days only.\footnote{The Eritrea-Ethiopia Claims Commission stated:}

\begin{quote}
The Commission also recognizes that not all of the obligations of Section III of Part III of Geneva Convention IV (the section that deals with occupied territories) can reasonably be applied to an armed force anticipating combat and present in an area for only a few days. Nevertheless, a State is obligated by the remainder of that Convention and by customary humanitarian law to take appropriate measures to protect enemy civilians and civilian property present within areas under the control of its armed forces. Even in areas where combat is occurring, civilians and civilian objects cannot lawfully be made objects of attack.
\end{quote}

\footnote{Eritrea-Ethiopia Claims Commission, Partial Award: Western Front, Aerial Bombardment and Related Claims - Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 & 26 [2005] 26 RIAA 291, para 27.}

However, in order to comply with its duties, an occupant must, logically at least, try to restore public order and security in those areas under its control. Hence, Coalition Forces should not be blamed if they tried to restore public order and security in the face of the growing looting, but failed to do so because of the fluidity of the situation and their yet scarce grip on the territory. By contrast, if it is true, as some commentators have suggested,\footnote{See Thomas E Ricks, \textit{Fiasco} (Penguin Books 2006) 136–8, 150–2; George Packer, \textit{The Assassins’ Gate} (Faber and Faber 2006) 135–42; Charles Ferguson, \textit{No End in Sight} (PublicAffairs 2008) 106–38.}
that US forces effectively controlled portions of Baghdad and yet stood by
while the looting took place, then their conduct can be censured as a fail-
ure to even attempt to perform a chief duty under the law of occupation. 131
Compliance with this duty was not synonymous with ‘shooting looters’, as
Bremer offhandedly suggested some time later. 132 Such conduct would not
have been proportionate to the threat they posed. 133

What is puzzling in the Coalition Forces’ behaviour is that they do not
appear to have displayed the same degree of attention to key public, po-
itical, and cultural sites in Baghdad as they displayed in protecting the
Ministries of the Interior and of Oil. For one commentator, the attitude in-
herent in Secretary of Defense Rumsfeld’s remarks unveils the ‘Coalition’s
indifference to the widespread destruction of Iraq’s cultural legacy’ 134—an
issue that, as Bremer’s comment above hints, would not be countered by
the suggestion of insufficient resources on the part of the Coalition Forces.
And if this were to prove to be the case, not only would the decision of
those leading the US forces be legally unsound, but, if tolerated, may rep-
resent a dangerous precedent.

Marco Sassòli has suggested that, in order to deal with the looting and
other problems that occurred at the beginning of the occupation of Iraq,
‘the occupying powers should have deployed troops more familiar with
law enforcement’, such as those from the French gendarmerie, the Italian
Carabinieri, and the Spanish Guardia Civil. 135 There is certainly some merit
in this suggestion. The more specialised and professional a military unit is,
the more successfully it can perform the tasks assigned to it.

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also Sassòli (n 40) 667; Hamada Zahawi, ‘Redefining the Laws of Occupa-
Review 2295, 2319.

132 Sanchez (n 53) 178. On the debate regarding how to respond to and curb the
looting, see Edmund Andrews and Tom Shanker, ‘After Effects: Law and
Order—U.S. Military Chief Vows More troops to Quell Iraqi Looting’ NYT
(New York, 15 May 2003).

133 On the use of force in occupied territory see generally ICRC Expert Meeting
Report, Occupation and other forms of administration of foreign territory:
port on Occupation).

134 Allawi (n 9) 94.

135 Sassòli (n 40) 668. See also Anthony Rogers, Law on the Battlefield (2nd edn,
Manchester UP 2004) 159.
Nonetheless, it may be questioned whether such forces, assuming that they were available, would have been sufficiently robust to face thousands of looters. Switching forces as a reaction to the context may be tantamount to shuffling soldiers from their duties when confronting civilian personnel and property. Apart from the advantages of deploying forces that are as professional as possible, there is no reason why normal soldiers should not, at least in emergency situations, be prepared to undertake some ‘civilian tasks’—the contemporary demand for which is on the rise in connection with an increase in urban warfare. Combat operations and situations of occupation may replace each other relatively quickly or may coexist in a given country, particularly when the theatre of operations is, as in the case of Iraq, a rather broad one and the pace of operations, as in modern warfare, is rapid. In this scenario, the same soldier may happen to be involved, almost concomitantly, in both combat operations and civilian/occupation tasks, and will necessarily have to deal with both combatants and civilians. Because an occupation is part and parcel of the international armed conflict that brought it about, the very fact that there is an occupation—a temporary situation due to the uncertainty of the hostilities—suggests that hostilities have not necessarily ceased. The presence of military personnel prepared to undertake both civilian/occupation tasks and combat operations, therefore, is a necessity rather than a matter of choice.\(^{136}\) In accordance with Article 1 of the 1907 Hague Convention IV, ‘Respecting the Laws and Customs of War on Land’,\(^ {137} \) it is for military commanders to provide their troops with adequate instructions and rules of engagement applicable in their encounters with the civilian population and, more specifically, in circumstances of occupation.\(^ {138} \)

136 Speaking in regard to ‘duality of hostilities’ see Dinstein (n 45) paras 231–7. See also the United States Manual of the Law of Land Warfare (n 63) para 352, which, in relevant part, states ‘Invasion is not necessarily occupation, although occupation is normally preceded by invasion and may frequently coincide with it’.

137 Article 1 reads: ‘The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.’ See text in Roberts and Guelff (n 55) 70.

138 Kolb and Vité observed: ‘les agents chargés du maintien de l’ordre devraient être formés en conséquence’ and called for the adoption of specific rules of engagement ‘selon que les forces de l’ordre sont appelées à mener des combats ou des opérations de police’. See Kolb and Vité (n 58) 366.
A further question is whether, in addition to Article 43 of the Hague Regulations, the Coalition Forces were required to comply with Article 4(3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict (Cultural Property Convention). Article 4(3) provides:

The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.\textsuperscript{139}

The significance of this provision is that it places a distinct duty upon military forces—that is comparable to the duty placed upon a law enforcement agency—to stop the theft or destruction of cultural property, regardless of who commits it.\textsuperscript{140} This provision is innovative because international law has traditionally required forces to repress crimes against cultural property only when they were committed by their own components. Unlike Article 5 of the Cultural Property Convention, which is specifically headed ‘Occupation’ and expressly deals with the scenario of a ‘High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party’, Article 4(3) addresses the ‘High Contracting Parties’ in general. It does not specify a particular instance in which it is to be applied. The general character of its formulation may suggest that it applies in any circumstance in which cultural property is at risk.\textsuperscript{141} Hence, commentators have argued for the application of Article 4(3) to situations of occupation, observing that the danger of stealing or destroying cultural property is at its zenith during an occupation, and thus it is in those instances that compliance with Article 4(3) can be most effective.\textsuperscript{142}

\textsuperscript{139} Roberts and Guelff (n 55) 375.
\textsuperscript{141} For an argument that it applies before the occupation stage, see Benvenisti, \textit{The International Law of Occupation} (n 24) 251.
Broad as the application of Article 4(3) may be *ratione materiae*, it is necessary, however, to first ascertain whether this norm formally bound the Coalition Forces in April 2003. As neither the US nor the UK were parties to the Cultural Property Convention, it must therefore be considered whether Article 4(3) reflected a norm of customary international law at that time. Some authors suggest that Article 4(3) may already have crystallised as customary international law by 2003. It seems difficult, however, to argue for the customary status of this Convention in 2003 when the number of ratifications totalled 104 and excluded both the US and the UK. Compounding this difficulty, the 2006 International Committee of the Red Cross (ICRC) study, which identifies the number and content of existing customary international law rules, is silent on whether Article 4(3)—or at least the prohibition contained therein—constitutes a rule of customary international humanitarian law. Although the ICRC study indicates that an occupying power must prevent the illicit export of cultural property and must return illicitly exported property, it does not provide any indication of a positive duty on an occupying army to stop, let alone to prevent, crimes committed in an occupied territory by actors who are not members of its own armed forces. And while the study is not necessarily dispositive, it does provide an authoritative indication as to which norms form part of customary international law that is difficult to rebut in the case of the Cultural Property Convention considering, *inter alia*, the number of ratifications that it had received by April 2003.

Even if Article 4(3) of the Cultural Property Convention did not bind them, the Coalition Forces were bound by both treaty law and customary international law to apply Article 43 of the Hague Regulations, which re-

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143 Francesco Francioni, ‘The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq’ in Barbara T Hoffman (ed), *Art and Cultural Heritage: Law, Policy and Practice* (CUP 2006) 38–9. See also Wayne Sandholtz (n 110) 238; Phuong (n 100) 987. For the view that Article 4(3) is not a norm of customary international law, see Patty Gerstenblith, ‘From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century’ (2005–06) 37 GJIL 308–11. For the view that there is no obligation upon an occupying power to prevent or stop damage to cultural property in occupied territory, see Paroff (n 105) 2047–52.

144 For a detailed list of the states parties to the Cultural Property Convention and the respective dates of accession, see the database of the International Committee of the Red Cross <http://www.icrc.org/ihl> accessed 20 August 2013.
quired them to ‘restore, and ensure, as far possible, public order and safety’. Compliance by the Coalition Forces with the duty enshrined in Article 43 may have stopped, or at least reduced, the looting of, and damage to, Iraqi cultural property.

4. **The role of the Office of Reconstruction and Humanitarian Assistance**

The first entity through which the US and the UK tried to deal with the civilian issues arising in the aftermath of the invasion was the ORHA, which was established by an order of President Bush dated 20 January 2003.\(^\text{145}\)

The ORHA was the civilian branch of the CPA. General Garner, head of the ORHA, reported to General Franks, commander of the CPA.\(^\text{146}\) The personnel of the ORHA arrived in Baghdad on 21 April after receiving clearance from General Franks.\(^\text{147}\)

The ORHA was not tasked with the administration of Iraq, which remained with the CPA. Its primary focus was to deal with short-term issues of reconstruction and humanitarian assistance, such as repairing war-damaged infrastructure like oil fields, hospitals, roads and telecommunications networks arising in the aftermath of the invasion. It was also concerned with establishing links with the UN specialised agencies and with the NGOs operating in Iraq.\(^\text{148}\) Significantly, the ORHA was part of an initial plan devised within the US administration which did not foresee a formalization of the occupation, but rather a swift transfer of power to an

\(^{145}\) See ‘National Security Presidential Directive No. 24’ (20 January 2003). Although the text of this Directive has not yet been made public, there are numerous references to it in the literature. See, among others, Feith (n 2) 348–9; Ferguson (n 130) 71–2.


Iraqi interim administration. In a speech to the House of Commons on 14 April, then British Prime Minister Tony Blair made specific reference to this plan and described the ORHA’s tasks as follows:

In the first phase, the coalition and the Office of Reconstruction and Humanitarian Assistance will have responsibility under the Geneva and Hague conventions for ensuring that Iraq’s immediate security and humanitarian needs are met. The second phase ... will see the establishment of a broad-based, fully representative Iraqi interim authority ... The third phase will then bring into being a fully representative Iraqi Government, once a new constitution has been approved, as a result of elections which we hope could occur around a year after the start of the interim authority.

Consistent with this plan, during a US and UK sponsored conference in Baghdad on 28 April, Garner pledged that the US would relinquish governmental power to an Iraqi administration by mid-May. However, this plan did not come to fruition for reasons that will be outlined in the next section; nor did the ORHA deal with the expected humanitarian crisis for the simple reason that such a crisis did not materialise. In his testimony before the US Congress, Garner described the ORHA’s activities and results in the following terms:

149 Feith (n 2) 411.
151 See Jane Perlez, ‘Iraqis Set to Meet to Pick Transitional Government’ NYT (New York, 29 April 2003). Furthermore, it can be recalled that, in accordance with that initial plan, on 16 April 2003 General Frank had given the order to withdraw American war fighting units from Iraq within sixty days. According to General Sanchez (n 53) 168: ‘... that order would have reduced American presence to fewer than 30,000 troops by the first of August.’
152 Garner stated that the ORHA had planned for a humanitarian crisis, which did not materialize, and that a key hurdle faced by his unit was the protection of infrastructure of Iraq. The reasons for this problem were that ‘a country the size of California had no power, shortage of water, no police, no communications, and [seventeen] of the [twenty-three] ministries had been destroyed mostly by looting, not by military damage or collateral damage’. See Garner Statement (n 147) 22.
[The ORHA staff] restored basic services to 80 percent of Iraq. They restarted all the schools; returned the police forces to duty; installed town councils in 17 of the 26 cities above 100,000 people, re-established the ministries with interim leadership, found workplaces for the ministries, began the refurbishment of buildings, and, very importantly, they avoided epidemics and met all the pressing health needs.153

Despite the encouraging results that it initially obtained—at least according to Garner—the ORHA’s mission in Iraq lasted less than a month. The ORHA was subsequently blamed for much of the widespread confusion and inefficiency that persisted in the aftermath of the invasion.154 In particular, Garner was criticised for letting certain Ba’ath party leaders remain in power155 and for reinstating some of them in the Iraqi ministries.156 Although, as observed by Marc Warren, the OHRA was designed for ‘consequence management’ rather than for the administration of occupied territory,157 as an extension of the occupying powers its conduct was subject to the law of occupation. For all of its shortcomings, the ORHA’s plan of action and conduct appears to have been consistent with the requirements under that law, seeking as it did to carry out humanitarian tasks and to let the Iraqis try to take charge of their future—at least in the short period under consideration (no more than 20 days). The key prerogative during that time (and in the years that followed) was to ensure and maintain security. As the ORHA had no power over the military side of the CPA, and as it had arrived in Iraq only on 21 April 2003, when a significant part of the looting had already taken place, it would be unwarranted to fault that body for breaches of the law of occupation which took place before its arrival and that, in any case, it could not stop.

153 Ibid.
154 Diamond (n 37) 34.
155 Allawi (n 9) 104.
5. The Coalition Provisional Authority

5.1. The CPA as an occupation administration: legal basis and structure

Nominated Presidential Envoy in Iraq on 9 May 2003, and designated ‘Administrator of the CPA’ on 13 May 2003, Paul Bremer arrived in Baghdad on 12 May and replaced General Franks as the head of the CPA.

Although considered a US governmental authority by the US Congress for the purpose of appropriating its operational funds and apportioning them to the US government, and ‘an instrumentality of the United States for the purposes of the False Claims Act’, the CPA was first and foremost an occupation administration established under international law. While its existence was recognised by Resolution 1483, it was not established by the Security Council, but by General Franks on behalf of the occupying powers.

158 See ‘Letter from US President George W. Bush to Ambassador L Paul Bremer’ (9 May 2003) in Talmon (n 13) 808.

159 The US Secretary of Defense designated Bremer ‘head of the Coalition Provisional Authority, with the title of Administrator’. He set out Bremer’s tasks as follows:

You shall be responsible for the temporary governance of Iraq, and shall oversee, direct and coordinate all executive, legislative and judicial functions necessary to carry out this responsibility, including humanitarian relief and reconstruction and assisting in the formation of an Iraqi interim authority.

See US Secretary of Defense (Donald Rumsfeld), ‘Designation as Administrator of the Coalition Provisional Authority’ (Memorandum for Presidential Envoy to Iraq, 13 May 2003) reproduced in Talmon (n 13) 809.


162 See s 2.3.
As part of what the 1906 version of Lassa Oppenheim’s textbook on international law already called the ‘right of administration’, an occupying power has the authority to establish an occupation administration both for its own security and in order to comply with its duty under the law of occupation. Exercising that right was what General Franks did through the Freedom Message with the creation of the CPA. In the 8 May Letter to the Security Council, the US and the UK pledged to ‘strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq’. The two countries informed the Council that, ‘In order to meet these objectives and obligations in the post-conflict period in Iraq, they had established the CPA ‘under existing command and control arrangements through the Commander of Coalition Forces’. The CPA was the de facto government of Iraq and ‘senior CPA advisers’ were appointed to each of the Iraqi ministries.

Bremer’s status as a Presidential Envoy made him the highest US official in Iraq with full authority over ‘all U.S. government personnel, activities and funds there’. Despite this, Bremer had no formal hierarchical au-

164 See, in this regard, Wolfrum (n 48) 20–2.
165 See s 2.3. above.
166 See 8 May Letter (n 17).
167 The 8 May Letter (ibid) stated:

The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. We will act to ensure that Iraq’s oil is protected and used for the benefit of the Iraqi people. In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.
168 Bensahel et al (n 14) 107.
authority over the Coalition Forces.\textsuperscript{170} Grouped under the military command known as the Combined Forces Land Component Command (CFLCC), and later renamed the Combined Joint Task Force 7 (CJTF-7), the Coalition Forces were headed by Lieutenant-General Ricardo Sanchez. The CJTF-7 reported to the US Secretary of Defense through the military chain of command, but not to the CPA.\textsuperscript{171}

Despite the lack of a formal relationship of subordination, the CJTF-7 was to coordinate its operations with the CPA, enforce the CPA's directives,\textsuperscript{172} and protect the security of the CPA's premises and personnel.\textsuperscript{173} General Sanchez even attended daily morning meetings with Bremer.\textsuperscript{174} In its first Regulation, the CPA asserted its authority over the Coalition Forces, making clear that:

As the Commander of Coalition Forces, the Commander of U.S. Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq's territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally.\textsuperscript{175}

The CPA was organised into four regional branches: Baghdad Central; North; South Central; and South East.\textsuperscript{176} By the end of 2003, it comprised eighteen offices, set up in each of Iraq's eighteen governorates.\textsuperscript{177} Although

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\textsuperscript{170} Sanchez (n 53) 179–80.
\textsuperscript{171} Bensahel et al (n 14) 118–9.
\textsuperscript{172} The 13 May 2003 Memorandum of the Secretary of Defense that defined the role of Coalition Forces in the following manner:

As the Commander of Coalition Forces, the Commander of U.S. Central Command shall directly support the Coalition Provisional Authority by deterring hostilities, maintaining Iraq's territorial integrity and security, searching for, securing and destroying weapons of mass destruction, and assisting in carrying out U.S. policy generally.

Donald Rumsfeld, Memorandum for Presidential Envoy to Iraq, 13 May 2003, see above (n 159). See also Sanchez (n 53) 197.
\textsuperscript{173} Bremer (n 169) 12.
\textsuperscript{174} Sanchez (n 53) 188–9.
\textsuperscript{175} Coalition Provisional Authority, ‘(CPA) Regulation No. 1’ (CPA/REG/16 May 2003/01) s 1(3).
\textsuperscript{176} Bensahel et al (n 14) 116. For a detailed map of the CPA's structure, see Hilary Synnott, \textit{Bad Days in Basra} (I B Tauris 2008) 277.
\textsuperscript{177} Bensahel et al (n 14) 116.
\end{flushleft}
certain regional offices were headed by non-US personnel and certain areas had been placed under the control of non-US Coalition Forces, the CPA office headed by Bremer in Baghdad had sole authority over all of the CPA offices around Iraq.

The CPA had a unitary and highly centralised structure, although it was functionally divided along territorial lines. From a normative perspective, the centralised nature of the CPA was crystallised in Regulation No. 1, signed by Bremer pursuant to his authority as ‘Administrator of the Coalition Provisional Authority’.\(^\text{178}\) Section 1(2) of that Regulation stated that the CPA ‘is vested with all executive, legislative and judicial authority necessary to achieve its objectives under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war’.\(^\text{179}\) Moreover, essentially concentrating all of the CPA’s power in Bremer as its administrator, the section confirmed that, ‘This authority shall be exercised by the CPA Administrator’.\(^\text{180}\) Similarly, section 3(2) of the Regulation provided that the CPA could issue both Regulations and Orders, which could only be promulgated with ‘the approval or signature of the Administrator’.\(^\text{181}\)

5.2. The CPA’s purposes: nation-transformation

The appointment of a civilian leader as head of the CPA was part of the evolution of the role and responsibilities of the occupying powers after a major phase of combat operations had ended, and a new phase focused on the governance of Iraq was beginning. More strikingly, that appointment marked a rapid change of attitude and policy on the part of the occupying powers. It brought about a shift from an indirect, almost ‘hands-off’ approach to the ruling of Iraq—exemplified by the US administration’s plan to immediately relinquish power to an ‘Iraqi interim authority’\(^\text{182}\)—to the

\(^{178}\) CPA, ‘Coalition Provisional Authority Regulation Number 1’ CPA/REG/16 May 2003/01 (Regulation 1) s 1(1). See text in Talmon (n 13) 3–4.

\(^{179}\) Ibid, s 1(2).

\(^{180}\) Ibid.

\(^{181}\) Ibid, s 3(2).

\(^{182}\) For a detailed analysis of the plan to set up an interim Iraqi administration, see Feith (n 2) 401–14.
direct rule of Iraq for an indefinite period of time under Bremer’s stewardship.\textsuperscript{183}

In his memoirs, Bremer criticised the plan to transfer power to the so-called Iraqi Interim Authority as a ‘reckless fantasy’.\textsuperscript{184} According to Bremer, the installation of a truly representative government in Iraq could result only from an incremental process.\textsuperscript{185} He did not believe that the so-called ‘G-7’, a group of seven political leaders predominantly comprising former exiles belonging to the parties that had opposed Saddam Hussein’s regime and cooperated with the US government before the invasion, was legitimate and representative enough to be the nucleus of an Iraqi transitional government.\textsuperscript{186} Writing of a meeting with the members of the G-7 on 22 May 2003, Bremer recalls saying to them:

\begin{quote}
It is the Coalition’s intent to establish a transitional government as soon as it can be done … but the process will be incremental and must have as its goal a truly representative group. This body is not representative. There is only one Arab Sunni leader among you … there are no Turkmen here, no Christians, no women.\textsuperscript{187}
\end{quote}

\begin{footnotes}
\footnotetext[183]{Patrick E Tyler, ‘In Reversal: Plan for Iraq Self-Rule has Been Put Off’ \textit{NYT} (New York, 17 May 2003). See also Sanchez (n 53) 89.}
\footnotetext[184]{Bremer (n 169) 45.}
\footnotetext[185]{Ibid. General Sanchez, the head of Coalition Forces, put it thus: Part of the Bush administration’s plan was to place key expatriates in charge of the new Iraqi Government … Ambassador Bremer, however, determined this approach was wrong, and he began to push for an interim governing council comprised of a more representative group rather than these already-designed key expatriates. The text is reproduced in Sanchez (n 53) 89.}
\footnotetext[186]{The G-7 comprised: Ahmad Chalabi, a Shiite, leader of the Iraqi National Congress; Ayad Allawi (the future Prime Minister of Iraq), a secular Shiite, leader of the Iraqi National Accord; Massoud Barzani, a Kurd, head of the Kurdish Democratic Party; Jalal Talabani (President of Iraq from 2005 to the present), a Kurd, leader of the Patriotic Union of Kurdistan; Naseer Chaderchi, a Sunni, head of the National Democratic Party; Ibrahim al-Jaafari (Prime Minister of Iraq in 2005), a Shiite, of the Islami Dawa Party; and Adel Mahdi, a Shiite, leader of the Supreme Council for the Islamic Revolution in Iraq. See Bremer (n 169) 46.}
\footnotetext[187]{Ibid, 45.}
\end{footnotes}
Strikingly, while Bremer did not consider the G-7 to be an acceptable body to lead Iraq, he did not seem to have similar concerns about the CPA’s entitlement and ability to carry out an equally important function. In fact, the strategy that took shape under Bremer’s leadership of the CPA was broader, more ambitious, and longer-lasting than that of the ORHA. Bremer (and presumably other officials within the US government) believed that, to have a democratic and stable Iraq, it was neither sufficient nor desirable to replace Saddam Hussein’s regime with a government composed of exiles and installed by the CPA; it was necessary to engage in a process of ‘nation-building’:

I knew it would take careful work to disabuse both the Iraqi and American proponents of this reckless fantasy—what some in the administration were calling ‘early transfer’ of power—animated in part by their aversion to ‘nation-building’. I mentioned to the President giving Iraq a stable political structure would require not just installing democratic institutions, but also create what I called the social ‘shock absorbers’, institutions which form civil society—a free press, trade unions, political parties, professional organizations. These, I told the President, are what help cushion the individual from an overpowering government.

The Bush administration’s vision for Iraq had always been that of a democratic, free, and prosperous Iraq, which could be at peace both within its own borders and with its neighbours, as well as serve as a model for other countries, particularly in the Middle East. But it is with Bremer at

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188 Feith (n 2) 396, 436–7.
189 Bremer (n 169) 12.
190 When testifying before the US Senate Committee on Foreign Relations, Marc I Grossman, the Under Secretary of State for Political Affairs, stated: ‘We seek an Iraq that is democratic, unified, multi-ethnic, with no weapons of mass destruction, which has cut its links to all terrorists, and is at peace with its neighbours.’ See Committee on Foreign Relations, ‘The Future of Iraq’ (US Senate Hearing 108-43, 11 February 2003) (BiblioGov 2010) 20.
191 When appearing before the US Senate Committee on Foreign Relations, Paul Wolfowitz, the Deputy Secretary of Defense, testified:

... we are equally committed to getting right the process of helping Iraqis establish an Iraq that is whole, free and at peace with itself and its neighbours. We are committed to helping Iraqis build what could
the helm of the CPA that the Bush administration’s aspirations for the future of Iraq were to be effectively and steadily implemented. Engaging in a sort of ‘revolution from above’ (and from outside),\textsuperscript{192} the CPA embarked on its ambitious ‘nation-building’ programme, first, by issuing a plethora of written ordinances, and then by supporting the preparation of an interim democratic and human rights-oriented constitution based on Western models.\textsuperscript{193}

The notion of ‘nation-building’ aptly reflects the US ideal of shaping a new, democratic, and non-threatening Iraq out of the ashes of the ‘old’ Iraq that was headed by Saddam Hussein.\textsuperscript{194} But caution is needed when using this term, for what constitutes ‘nation-building’ to one is ‘occupation’ to another. The fact that for the Iraqi people, nation-building was, first of all an occupation, should not be downplayed. While there may be little doubt that many Iraqis were relieved by the removal of Saddam Hussein, it is also true that part of the Iraqi population neither wanted nor accepted the continuation of the occupation. Therefore, to this part of the population, the idea that, in addition to the removal of Saddam Hussein, Iraq needed to be reshaped by foreign powers through ‘nation-building’ must have been anathema.

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be a model for the Middle East – a government that protects the rights of its citizens, that represents all ethnic and religious groups, and that will help bring Iraq into the international community of peace-seeking nations.


\textsuperscript{192} Synnott (n 176) xii.

In his testimony before the US Senate Committee on Foreign Relations, Bremer warned: ‘Mr. Chairman ... Moving Iraq from 35 years of tyranny to democracy will not be easy ... it needs to be taking place in the framework of a clear, legal, and political process. And that process must involve writing a constitution.’ See US Senate Committee on Foreign Relations, ‘Iraq: Next Steps—What Will an Iraq 5-year Plan Look Like?’ (US Senate Hearing 108-278, 24 September 2003) (BiblioGov 2010) 23.

According to Francis Fukuyama, the concept of ‘nation-building’ refers to the ‘constructing of a new political order in a land of new settlement without deeply rooted peoples, cultures and traditions’, or to the natural ‘prescription’ to be adopted in the case of failed states. Not only is the characterization of a state as ‘failed’ more of a political description rather than a legal one: under international law, a government, not a state, may be labeled as ‘failed’ when it is no longer capable, for one reason or another, to control its territory. However, the circumstance that a country is described as a ‘failed state’ or having a failed government, does not legitimise the intervention of an external actor to build a new state or government in lieu of the failed one. At any rate, for the reasons that follow, Iraq did not qualify for such a characterisation.

Despite being a badly damaged country following years of UN sanctions, Saddam Hussein’s regime, Operation Iraqi Freedom, and the looting that occurred in the aftermath of that operation, Iraq was not a ‘failed state’. The label of ‘failed state’ is often associated with states such as Somalia and Afghanistan, where conditions were hardly comparable to those in Iraq in 2003. Iraq was an Arab nation with strong historical and cultural roots, as well as a common language (although, within Iraq, the Kurdish group traditionally regarded itself as an independent people struggling for

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197 David Caron, ‘If Afghanistan has Failed, then Afghanistan is Dead: “Failed States” and the Inappropriate Substitution of Legal Conclusion for Political Description’ in Karen J Greenberg (ed), The Torture Debate in America (CUP 2006) 214–22. See also generally ICRC Expert Report on Occupation (n 133) 70–1.

their independence). Iraq had its own Constitution, its own civil and criminal codes of substantive and procedural law, and (despite the abuses in Saddam Hussein’s era) a comprehensive judicial system. It had a bureaucracy, schools, universities, hospitals, an army, and a very important source of income: oil. Taking all of these circumstances into account, it is difficult to maintain that Iraq, for all of its problems, was a state that needed to be rebuilt afresh by foreign intervention. Nor is it accurate to characterise the project upon which the CPA embarked as the building of a new nation from scratch, as the term ‘nation-building’ may imply. Arguably, a more appropriate characterisation would be to depict the CPA’s project as the ambition to transform the political and economic structure of the country into that of a democratic nation that not only protected the rights of Iraq, but also better suited the short-term and long-term political, security, and presumably economic interests of the nation-builders/occupiers.

Bringing all of this about did involve some degree of nation-building in the sense of creating new institutions and introducing new laws. But, more than that, it involved transforming the existing reality by dismantling

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199 See, in this regard, the speech given at the 2003 opening session of the UN General Assembly by Ahmed Chalabi, President of the Iraqi Governing Council, in which he affirmed:

Complementing our belief in federalism, and in contrast with the vain and false nationalist excesses of the previous regime, we declare that Iraq is one nation, permanent and whole. Nothing in this declaration belittles the continuity of our Arab and Muslim heritage, or contradicts the sentiments of many Iraqis about their own culture and national identity. Rather, it confirms that all the territory of Iraq – from its mountains in the far north to its marshes and the Gulf in the extreme south, including its rivers, plains and deserts – is a lasting, indivisible unit. This is an expression not only of the true beliefs of most Iraqis, but also of a key political principle and point of reference that will help the country recognize realities on the ground and avoid further upheaval.


what still existed of Saddam Hussein’s regime, repealing its institutions and its Constitution, as well as amending many of its laws or declaring that they were no longer in force. This is precisely what the CPA sought to accomplish through its manifold and detailed creation of norms, as will be discussed in Chapter 4.

The project that took form and substance under Bremer’s leadership of the CPA had a fundamentally transformative character, aiming to make Iraq something that it had never been before. On this point, it seems more appropriate to characterise the CPA’s project in Iraq as ‘nation-transformation’ rather than ‘nation-building’ as such. The retention of the term ‘nation’ in the proposed terminology is not accidental. As the review of the CPA-issued legislation in the next chapter will demonstrate, the project that the CPA purported to undertake was more far-reaching than the mere modification of the architecture of the Iraqi State by imposing a new layer of norms and institutions that resembled those of a democratic state. Rather, it involved—as Bremer described—a deeper transformation affecting Iraq as a nation, such that it could become a country based on the rule of law, the protection of human rights, a system of checks and balances, a market economy and a free media.

This view is made explicit in an internal CPA document recently made available to the public by Hilary Synnott, the UK Ambassador in charge of the CPA in Southern Iraq. The document, which dates July 2003 and is entitled ‘CPA Vision’ and signed by Bremer in July 2003, states:

At the core of this new Iraq is the development of a democratic, accountable, and self-governing civil society respectful of human rights and freedom of expression. The future prosperity of Iraq’s citizens depends on the use of Iraqi resources to foster the development of a market-based economy. This needs to be done in a manner that is economically, socially and environmentally sustainable for the long term benefit of all Iraqi people.201

The objectives that the CPA aimed to achieve on matters of governance comprised: (i) ‘A constitution drafted by Iraqis and approved by Iraqis’; (ii) ‘Institutions and processes to conduct free and fair elections’; (iii) ‘Open and transparent political processes’; (iv) ‘Measures to improve the effectiveness of elected officials, including a strengthened local government system’; (v) ‘Effective and fair justice systems’; (vi) ‘Respect for the rule of

201 See the text of the ‘CPA Vision’ in Synnott (n 176) 272.
law and human rights'; and (vii) ‘Creation of a vibrant civil society’. A process of this magnitude would impact not just on the structure of the government but on Iraq as a nation as well. From the perspective of international law, therefore, the occupation of Iraq may be defined as falling within the category of ‘transformative occupation’, the characteristics of which were outlined in Chapter 1. Calling it ‘nation-transformation’ or, in legal terminology, ‘transformative occupation’ highlights the crucial aspect that what was being sought in Iraq through the means of a belligerent occupation, was nothing less than the modification of the political, economic, and, to an extent, social structure of the Iraqi society.

5.3. The CPA’s self-definition of its authority and objectives: Regulation 1

In line with the ambitious agenda that the CPA had set for itself, section 1(1) of Regulation 1, the first normative instrument issued by the CPA, laid out the objectives of the CPA as follows:

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. (emphasis added)

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202 Ibid.

203 Roberts (n 13) 580 defined ‘transformative occupation’ as occupation undertaken by ‘those whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule’. For Peter Danchin, the ‘very purpose of regime change and occupation was to transform Iraq’s political order to bring it from the zone of politics into the zone of law of civilized nations’, see Peter G Danchin, ‘International Law, Human Rights and the Transformative Occupation of Iraq’ in Hilary Charlesworth, Brett Bowden, and Jeremy Farrall (eds), Great Expectations: The Role of International Law in Restructuring Societies after Conflict (CUP 2009) 77.

204 Although Regulation 1 refers to UNSC Res No. 1483 (n 19), Regulation 1 was issued one week before Resolution 1483. While it might be suggested that Regulation 1 was issued later than Resolution 1483 and was simply misdat-
Under this provision, the tasks of the CPA were not only broad, ranging from security to sustainable reconstruction and development, but were also transformative in character. The use of the verb ‘to create’ suggests that the CPA’s project envisaged building something new—representative local and national institutions for governance. This project is probably as close as one can get to the notion of bringing ‘democracy’ to Iraq, without explicitly stating it. To achieve these objectives, the CPA, through section 1(2) of Regulation 1, vested itself with ‘all executive, legislative and judicial authority necessary to achieve its objectives’, although this was to be ‘exercised under relevant UN Security Council Resolutions, including Resolution 1483 (2003), and the laws and usages of war’.

By indicating that the CPA was vested with all the legislative authority ‘necessary to achieve its objectives’, Regulation 1 was going well beyond the law of occupation, which links to and limits the law-making authority (and also the executive and judicial authority) of an occupying power to what is necessary to comply with its duties under the law of occupation and to considerations

ed, the handwritten signature and date by Ambassador Bremer at the end of Regulation 1 confirms its date as 16 May 2003. One explanation could be that the CPA’s leadership already knew that Resolution 1483 would be enacted and knew the number of the Resolution and its content, which accords with the fact that two of the proponents of Resolution 1483 (the US and the UK) were behind the CPA. What is less easily explained is that Regulation 1, while referring to Resolution 1483, crafted an authority for the CPA that is broader than that created under the Resolution—an authority that was never subsequently amended to reflect the actual wording of Resolution 1483. Although mostly identical, there are two significant differences. First, s 1 of Regulation 1 does not contain the limit that the CPA’s activity must be exercised in a manner consistent with the ‘Charter of the United Nations and other international law’. Second, Regulation 1 includes an additional sentence that reads ‘... advancing efforts to restore and establish national and local institutions for representative governance’, thus going one step further in the process of allowing the CPA to establish democratic institutions. Since the CPA’s powers should be exercised in accordance with Resolution 1483 and because of the binding nature of this Resolution, there is little doubt that Resolution 1483 should be regarded as having replaced Regulation 1. It remains puzzling, however, that the CPA did not amend it in light of Resolution 1483. See Regulation 1 (n 178).

Ibid, s 1(i).
of military necessity. Likewise, section 2 of Regulation 1 granted the CPA almost unlimited authority to amend Iraqi laws. It provided that ‘unless suspended or replaced by the CPA’:

[the] laws in force in Iraq as of April 16, 2003 [the date of the Freedom Message] 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.

This provision marked the prevalence of the CPA’s laws over Iraqi laws in any case of conflict. Despite the boldness of its provisions, however, the effective normative relevance of Regulation 1 remained rather limited. The subsequent CPA-enacted legislation made constant reference to Security Council Resolution 1483 as its legal basis and made only scant reference to Regulation 1. Tellingly, section 1(2) of Regulation 1 had only acknowledged what, in fact, was mandatory—namely that the activity of the CPA had to be ‘exercised under relevant U.N. Security Council resolutions, including Resolution 1483(2000), and the laws and usages of war’.

Any evaluation of the practice of the CPA must therefore be based on compliance with Security Council Resolutions and the law of occupation, and not on its consistency with the self-serving Regulation 1, which merely reflects the ambitions of the CPA, rather than adherence to international law.


6.1. The quest for a Security Council resolution by the occupying powers

In April 2003, the US and the UK started a diplomatic campaign to convince as many states as possible to deploy military personnel to Iraq. Although some states contributed troops because of their support for the


207 Regulation 1 (n 178) s 2.
war against Iraq,\footnote{This is, e.g., the case for Poland and Spain. See, in this regard, Robert Strzelecki, ‘Lessons Learned: Multinational Division Central South’ (Nov–Dec 2005) Military Review 32; Paz Andrés Sáenz de Santa María, ‘Spain and the War in Iraq’ (2004) 10 SYIL 39, 48–55.} many nations remained reluctant to do so without a mandate from the Security Council. The reasons for this reluctance to contribute troops were the result of broad public opposition to the invasion of Iraq,\footnote{See Liesbeth Lijnzaad, ‘How not to be an Occupying Power: Some Reflections on UN Security Council Resolution 1483 and the Contemporary Law of Occupation’ in Liesbeth Lijnzaad, Johanna van Sambeek, and Bahia Tahzib-Lie (eds), Making the Voice of Humanity Heard (Martinus Nijhoff Publishers 2004) 291, 298–9.} a wish to avoid legal responsibilities and obligations; and the stigma, particularly from the perspective of domestic policy, that might be attached to the status of ‘Occupying Power’ or to the support of an occupation.\footnote{See Lijnzaad (n 209) 299; Thürer and MacLaren (n 66) 759–61; Zwanenburg (n 42) 753–4.} Moreover, from a financial perspective, the CPA could not support the reconstruction of Iraq with the income derived from the selling of Iraqi oil on the international markets. The ban on the sale of oil, which the Security Council had imposed on Iraq in Resolution 661 of 6 August 1991\footnote{UNSC Res 661 (6 August 1991) UN Doc S/RES/661.} to force Saddam Hussein’s government to disarm, was still in force. Linked to this was the problematic possibility that creditors of the former regime would start legal proceedings to collect the money owed to them if the occupying powers were to begin to do so.\footnote{Felicity Barringer and Neela Banerjee, ‘Who’ll Control Iraq’s Oil?’ \textit{NYT} (New York, 9 April 2003). See also R Dobie Langenkamp and Rex J Zedalis, ‘An Analysis of Claims Regarding Transferable “Legal Title” to Iraqi Oil in the Immediate Aftermath of Gulf War II: Paradigm for Insight on Continuation of UN Juridical Regime Following the Initiation of Belligerent Occupation’ (2003) 63 ZaöRV 605–7; Colum Lynch, ‘US to Propose Broader Control of Iraqi Oil Funds’ \textit{Washington Post} (Washington, 9 May 2003).}
tarian aid, and to eliminate weapons of mass destruction’. They called upon the UN to lift the economic and civilian sanctions against Iraq, to end the ‘Oil for Food’ programme, and to play a ‘vital role’ in Iraq. After a second draft Resolution, which was also supported by Spain, and following several rounds of negotiations, the Security Council reached a compromise and approved Resolution 1483 by a unanimous vote of fourteen, with one member (Syria) not present.

6.2. The status and functions of the CPA

Issued under Chapter VII of the UN Charter upon a finding that the situation in Iraq, ‘although improved, continues to constitute a threat to international peace and security’, Resolution 1483, in line with its immediate predecessor Resolution 1472, affirmed the territorial integrity and sovereignty of Iraq, and recognised ‘the specific authorities, responsibilities, and obligations’ of the US and the UK ‘as occupying powers acting under unified command’. In contrast with previous instances of occupation in which the Security Council had called for the withdrawal of the occupation forces, not only did the Security Council not call for the withdrawal of the Coalition Forces, but it also entrusted the CPA with a crucial role in the administration and rebuilding of post-Saddam Iraq and in the creation

213 For the text of the 8 May Letter, see (n 17).
214 Ibid.
217 UNSC Res 1472 (n 37) para 1.
218 UNSC Res 1483 (n 19) Preamble. See also UNSC Res 1472 (n 37) Preamble.
219 UNSC 1483 (n 19) Preamble.
of conditions that would enable the Iraqi people to exercise their right to self-determination.\textsuperscript{221}

In light of the seemingly supportive attitude of the Security Council towards the occupying powers in Iraq, we should first examine whether the Security Council through Resolution 1483 gave \textit{ex post facto} legitimisation to the invasion of Iraq and/or to the presence in Iraq of the CPA.

### 6.2.1. Reappraising the legality of the CPA’s presence in Iraq

After the adoption of Resolution 1472, the Russian Ambassador to the UN emphasised that its adoption ‘in no way signifies any type of legitimization of the military action being carried out by the coalition in violation of the Charter of the United Nations’.\textsuperscript{222} In line with this assertion, Resolution 1472, although issued under Chapter VII of the UN Charter at the time of the unfolding of Operation Iraqi Freedom, did not make any determina-
tion pursuant to Article 39 of the Charter on whether there was ‘any threat to the peace, breach of the peace, or act of aggression’.

Resolution 1483 does not discuss the legality of the invasion either. The resolution was passed under Chapter VII of the Charter based on a determination that the situation in Iraq was a ‘threat to international peace and security’, not a breach of the peace. Upon a literal reading, nothing in Resolution 1483 suggests the Security Council’s approval of the invasion, nor does anything to condemn it. Not surprisingly, considering the intricacy of the issue and the divisions within the Council, the Resolution avoids any explicit or implicit reference that could signify either stance,\(^{223}\) and the states voting on it similarly avoided such expressions in their declarations of vote.\(^{224}\) Resolution 1483 does refer to the US and the UK as the ‘Occupying Powers’, but under international law the authorities and duties of an occupying power exist regardless of whether the use of force that resulted in the occupation was lawful or not. Consequently, no clear indication of an \textit{ex post facto} authorisation of the invasion appears to stem from Resolution 1483.\(^{225}\)

If it is then correct to hold that the Security Council did not validate the invasion of Iraq, the question arises whether it eventually validated the ensuing occupation. Scholarly opinions in this area can be divided into three distinct categories. Consistent with the principle \textit{ex iniuria jus non oritur}, some scholars have suggested that the Security Council could not cure the illegality of the invasion, nor consequently that of the CPA’s foundation, since the use of force that brought about its formation constituted


a violation of a peremptory norm of international law. In this regard, it has been observed that the effects of the illegal use of force would be suspended in order to enable the CPA to accomplish the tasks entrusted to it by the Security Council as long as it was necessary to achieve them.

At the opposite extreme, some have argued that Resolution 1483 amounts to a legalization of the occupation of Iraq by authorising the CPA to govern Iraq and granting it a specific mandate, instead of requesting it to withdraw. By this account, the presence of the CPA in Iraq would be legally justified even if the underlying use of force were not.

Finally, some have taken an intermediate position—a position favoured by the present writer—suggesting that the Security Council not only avoided addressing the issue of the legality of Operation Iraqi Freedom entirely, but also that of the existence of the CPA. According to this perspective, the Security Council neither sanctioned the illegality of the existence of the occupation, nor recognised it as lawful, but simply took note of a factual situation that included the existence of an occupation.


230 Stahn (n 223) 817–18; Tanzi (n 225) 480.

231 Frederic Dopagne and Pierre Klein, ‘L’attitude des Etats tiers et de l’Onu à l’égard de l’occupation de l’Iraq’ in K Bannelier, O Corten, T Christakis, and
Neither Resolution 1483 nor the declarations made after its adoption shed light on whether the occupation can be regarded as legal or illegal. Taking note of the factual scenario in Iraq, Resolution 1483 defined the normative framework applicable to the CPA’s occupation of Iraq. That is, it constructed a framework through which the occupying powers would be required to address the Iraqi crisis that they had brought about, without the Resolution having to deal with the issue of the legality of the occupation’s existence. In the peculiar circumstances in which the measures available to it (such as requesting the end of the occupation) were curtailed by the fact that the occupying powers were permanent members of the Security Council and thus could veto any proposed unfavourable measure, the Security Council had to operate more out of necessity rather than choice. It had to attain an innovative approach that could help move the Iraqi crisis forward, without dealing with the contentious and divisive issue of the use of force against Iraq. It could not sanction the apparent illegality of the occupation and request the occupying powers to withdraw. Indeed, just as no draft Resolution of censure would have had any chance of adoption given the powers of veto of the occupying powers, so it appears improbable that the Security Council could have endorsed the validity of the occupation, since other members would have been likely to have opposed it as an ex post facto legitimisation of an invasion that they had strenuously opposed. Thus Resolution 1483 constitutes neither a censure nor a validation of the occupation. It essentially reflects a compromise intended to appease all of the Security Council’s permanent members—members with opposing views concerning Operation Iraqi Freedom—and offers a ‘basis for practical steps on the

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232 Villani (n 225) 166.

233 Stahn (n 223) 817–18.

234 Iovane and de Vittor (n 225) 26.


ground in order to improve the conditions for the Iraqi people and to stabilise the political and economic situation’.  

Though a compromise, Resolution 1483 did carry with it significant legal consequences. The Security Council established a normative framework that required the CPA to exercise a constructive role in Iraq so that it could contribute to the Security Council’s mission under Chapter VII of the UN Charter. It vested the CPA with ‘new and clean clothes’ that would enable it to do just that—but it did not wash and put away the ‘old clothes’ with the consequence of leaving in place possible stains of illegality. The Security Council ignored those stains so that they could not taint the course of conduct upon which, by choice or necessity, it had embarked upon in tackling the Iraqi crisis. As a consequence, the Security Council had essentially left it to states, as the natural judges of compliance with international law by its subjects, to decide how to handle the question of the legality of the occupation: whether to raise it in the appropriate forums, to ignore it, or to acquiesce to it.

Because of the content of Resolution 1483, the CPA could reasonably claim that its presence in Iraq was required to execute the tasks assigned to it by the Security Council, and thus only by finding that Resolution 1483 was itself illegal could a domestic court of law have annulled, for example, a transaction involving the CPA and a third party. The Security Council’s recognition of, and allocation of responsibilities to, the CPA was a solid basis for its presence in Iraq and for cooperation between the CPA and third-party states. Had the occupation been found illegal on the basis of an illegal use of force, it would have been unlawful for third-party states to aid or assist the states occupying Iraq. The role entrusted to the CPA by the Security Council meant that states and corporations eager to enter into legal relations with the CPA were given a legitimate basis on which to do so—at least in so far as their cooperation and support concerned those areas, and was directed to achieve those goals, specifically contemplated in Resolution 1483 or reasonably falling under the purview of this Resolution.

238 UN Doc S/PV/4761 (n 18) 5. For further analysis, see Anne Lagerwall, ‘L’administration du territoire irakien: un exemple et d’aide au maintien d’une occupation résultant d’un acte d’agression?’ 2006 RBDI 249–73.
239 For a detailed analysis, see Dopagne and Klein (n 231) 311.
241 UNSC Res 1483 (n 19) para 1, appealed to ‘UN member States to assist the people of Iraq in their efforts to reform their institutions and rebuild their
Several declarations rendered by diplomats after the adoption of Resolution 1483 confirm that one of the reasons for its adoption was the creation of a viable normative framework for cooperation in the administration and reconstruction of Iraq between the CPA and UN member states. The US Ambassador to the UN spoke of a ‘flexible framework ... 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’. In the same vein, the French Ambassador stated: ‘We believe that [Resolution 1483] now provides a credible framework within which the international community will be able to lend support to the Iraqi people. That is why we supported it.’ Likewise, the Russian Ambassador opined that Resolution 1483’s ‘significance is primarily that it creates an international legal basis for joint efforts to be made by the entire international community to deal with the Iraqi crisis and outlines clear guidelines and principles for those efforts’. Speaking on 17 July 2003 before the Spanish Parliament, the Spanish Minister of Defence stated that, after countless negotiations, a text was finally accepted that is ‘the key to understanding the mission that our armed forces will perform in Iraq and to fully legitimizing such mission in accordance with international law’.

Resolution 1483 sought to facilitate the contribution of third-party states to the realisation of its objectives and in support of the countries occupying Iraq in two fundamental respects. First, it distinguished between the states that were occupying powers and those that were not, even though they were ‘working now’ under the CPA, or that may work under it ‘in the future’. By doing so, the Security Council made clear that the mere fact of providing support to an occupation administration does not automatically make a state an occupying power. Yet Resolution 1483 was not conclusive country and to contribute to conditions of stability and security in Iraq’.

242 UN Doc S/PV/4761 (n 18) 3.
243 Ibid.
244 The British Ambassador to the UN asserted that ‘the Resolution gives a sound basis for the international community to come together, in the interests of the Iraqi people, consistent with international law. We look forward to increased international and United Nations involvement’. The Spanish Ambassador spoke of ‘an appropriate legal framework for dealing with the special, anomalous and grave situation facing the international community’. See UN Doc S/PV/4761 (n 18) 4–6.
245 Paz Andrés Sáenz de Santa María (n 208) 39.
246 Ibid.
on the matter: it did not exclude the possibility that countries operating within Iraq and forcibly controlling portions of it (such as Poland),\footnote{Lijnzaad (n 209) 301–3.} could also be found to be occupying powers. In this regard, it is worth recalling that the ICRC, in the aftermath of Operation Iraqi Freedom, identified various countries in addition to the US and the UK as occupying powers in Iraq (although, in line with its standard policy, it did not reveal their names). The ICRC considered as a criterion that ‘the national contingents in question had been assigned responsibility for, and were exercising effective control over, a portion of Iraqi territory’, and thus could exercise ‘control over protected persons and in interacting with these persons would have to respect the law of occupation’.\footnote{See the ‘Remarks of Jean-Philippe Lavoyer’ in Dennis Mandsager, Joshua L Dorosin, and Jean-Philippe Lavoyer ‘\textit{Jus in bello}: Occupation Law and the War in Iraq’ (2004) 98 ASIL Proc 117, 121–3.}

Second, the Security Council appealed to member states ‘to assist the people of Iraq in their efforts to reform their institutions and rebuild their country and to contribute to conditions of stability and security in Iraqi in accordance with this resolution’.\footnote{UNSC Res 1483(n 19) para 1.} Further, it welcomed the ‘willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority’. As a result of this framework, countries willing to support the occupation administration could justify their presence in Iraq by relying on the wording employed in Resolution 1483, even though this did not preclude them from being found to be occupying powers. Italy and Spain’s participation in the occupation of Iraq provides a good example of the effects of Resolution 1483.

After the adoption of the Resolution, Italy sent military troops to Iraq as part of an operation called \textit{Antica Babilonia}. During the course of 2003, Italy had around 3,000 soldiers in Iraq and, operating under the overall authority of the CPA, it controlled the province of Dhi Qar in the South of Iraq, where it worked on the maintenance of security.\footnote{Ministero della Difesa, \textit{Operazione \textit{Antica Babilonia}: Primi Ammaestramenti} (Roma 2007) 14.} Although Italy can be regarded as an occupying power because of this forcible control of a portion of Iraq’s territory on behalf of the CPA, Italy always claimed that its role was only that of a peacekeeping force which was acting in com-
piance with a Security Council Resolution (1483). On 8 May 2003, the Italian Under-Secretary of State for Defence, speaking at the Chamber of Deputies (a branch of the Italian Parliament), countered that:

The Mission at issue will involve ... the provision of the necessary humanitarian aid ... and immediately restore the functioning of the infrastructures and services ... the military part will have to guarantee ... the security framework. It is and will be a mission aimed at facilitating the operations of humanitarian assistance and rebuilding the country, while favouring the timely establishment of a provisional Iraqi Government. It is not aimed, as the questioner affirmed, at military control of the territory.

As for Spain, which in May 2003 had around 1300 soldiers in Iraq, it may be recalled that the Ministry of Defence, speaking after the adoption of Resolution 1483, declared before the Spanish Parliament that:

*We are not an occupying power ...* The occupying powers are the United States of America and the United Kingdom, to whom occupying power status and later on, authority, pertains. Other, non-occupying States ... are currently working there or perhaps will in the future. What will Spain’s work be? *A peacekeeping mission.* (emphasis added)

These statements reveal that Resolution 1483 did much to minimise the possible claim of illegality of the occupation. Although it did not rule on the question of the legality of the occupation, which formally left intact the possibility of considering the states operating, or that were to operate in Iraq in support of the CPA as occupants or as aiders and abettors of the occupation, it unquestionably provided a strong normative cover for their

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253 Diario de Sesiones del Congreso de los Diputados (28 August 2003) VII Legislature, No. 8001, 25278. See text reproduced in Paz Andrés Sáenz de Santa María (n 208) 53.
presence in Iraq. States could legitimately rely on the wording employed in Resolution 1483 as a reasonable justification in the eyes of their own people for their support of the US and the UK, while seeking to avoid being labelled as ‘occupiers’.254

6.2.2. Authorities, responsibilities, and limits

Resolution 1483 constitutes a comprehensive effort on the part of the Security Council to tackle the Iraqi crisis. It articulated the functions of the main actors operating in Iraq after Saddam Hussein had been dislodged from power, with a view to ensuring their coexistence and, to an extent, cooperation. The distinct role of these actors—the CPA (with the support of the Coalition Forces); the UN; and the Iraqi people (with a substantially lesser role)—is discussed in this and in the next two sections.

Paragraph 4 of Resolution 1483 set out the functions and objectives of the CPA as follows:

[The Security Council] 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.

This passage signals the centrality of the CPA as the de facto government of Iraq, which was strengthened by the Security Council’s granting to the CPA full and exclusive control over Iraq’s main financial resources (the sale of oil), which were to be ‘disbursed at the direction of the Authority’, ‘in consultation with the Iraqi interim administration’.255 It also indicates that the CPA was expected to rule Iraq not only by maintaining the status quo as required under the Hague Regulations, but also by displaying a proactive role in the administration of Iraq so as to ensure the welfare of the Iraqi people. At the same time, the Security Council placed clear limits on the activities of the CPA. The CPA was to respect the sovereignty of Iraq, the right to self-determination of the Iraqi people, and, more generally, its obligations ‘under international law. This was to include, in particular, the

254 See Milano (n 17 Chapter 2) 196–200.
255 UNSC Res 1483 (n 19) para 13.
Geneva Convention of 1949 and the Hague Regulations of 1907.\footnote{The President of the Security Council pointed out that Resolution 1483: ... specifically upholds the principles of the United Nations Charter as they relate to Iraq. It affirms the sovereignty and territorial integrity of Iraq. It stresses the right of the Iraqi people to freely determine their own political future and to control their own natural resources. It affirms the imperative of respect for international law, especially the Geneva Conventions and the Hague Regulations. See UN Doc S/PV/4761 (n 18) para 11.} It could be argued that these normative limitations were only a ‘smokescreen’, a ‘rhetorical base’ with which to appease certain members of the Security Council without, in fact, conceding much.\footnote{Grant Harris, ‘The Era of Multilateral Occupation’ (2006) 24 BJIL 1, 61, argued that: ... the law of occupation served as the path of least resistance (or, put less delicately, a type of legal fiction) in a politically charged atmosphere, even while the Security Council made clear that this body of law would serve as nothing more than a rhetorical base and humanitarian foundation upon which to lay modern norms of human rights, nation-building, and democracy.} In my view, this argument is not persuasive. Once included in a Security Council Resolution, the importance of a given obligation cannot be underestimated, regardless of the reasons why it was introduced in the text of the resolution. In fact, if taken seriously by their addressees, those limitations, because of their comprehensive content, could have had a significant constraining effect on the conduct of the occupants in Iraq, favouring the protection of rights recognised under international law.

In addition to these general limitations, the Security Council specifically required the CPA to reach certain objectives. Because of their breadth, these objectives functioned both as a limit in the sense that the CPA had to give them priority and adjust its conduct accordingly, but also indirectly as an enabling device: the CPA was implicitly authorised to do all that it thought was necessary to achieve them. Under paragraph 4 of Resolution 1483, the CPA was to ‘promote the welfare of the Iraqi people through the effective administration of the territory’. This duty is consistent with the proactive attitude that, as discussed in Chapter 1, the Geneva Convention IV and the Additional Protocol I demand of occupying powers in their behaviour towards the civilian population of the occupied territory. It can also be interpreted as requiring the CPA to seek to improve existing social
services, such as the provision of water, gas, electricity, health care and education. The adjective ‘effective’, as used in economic sciences, may suggest that the conduct of the CPA (including its use of Iraq’s money gained from the sale of oil) was to be assessed in light of the relationship between the results obtained and the economic resources employed. This criterion is a welcome addition to the vocabulary of the law of occupation, setting a fairly exacting standard on the performance of an occupying power not previously provided for.

As paragraph 4 continues, it tasks the CPA with working towards the ‘restoration of conditions of security and stability’. The provision of security is, of course, a condicio sine qua non for ensuring the welfare of a people under occupation, and a requirement under Article 43 of the Hague Regulations, which includes the maintenance of public order and the restoration of the ‘normal life’ of the occupied population.258 Being instrumental to the maintenance of public order, this provision could be interpreted as covering the adoption by the CPA of measures and precautions to ensure the safety of the Iraqi civilian population from all those threatening it, including from the Coalition Forces and the private contractors working for them.

The term ‘stability’, which does not appear in the law of occupation, may be taken to mean something more than the maintenance of public order. It adds a political dimension to the tasks of the CPA, requiring and at the same time authorising it to take actions to render Iraq a politically stable and internally peaceful country. Arguably, such measures covered those directed towards maintaining and strengthening social cohesion within Iraq, and ensuring peaceful and constructive relationships within the various Iraqi religious and ethnic groups. There can scarcely be any stability without the cohesion, or at least the peaceful coexistence, of the major segments of a people.

Lastly, paragraph 4 provided that the CPA was to work towards the ‘creation of conditions in which the Iraqi people can freely determine their own political future’. This objective is more restrictive than those canvassed by the CPA in Regulation 1, which essentially constituted a self-authorisation of the project of installing democracy in Iraq. And yet the

Security Council came close to the occupants’ wishes. It conceded much of what they had asked for, as evidenced by the substantive similarity of paragraph 4 of Resolution 1483 to paragraph 1 of the 9 May draft Resolution.259

Furthermore, the Security Council strengthened the authority of the CPA, particularly concerning political matters, in three other respects. First, paragraph 9 of Resolution 1483 called on the Iraqi people to form an Iraqi interim administration, although this goal was to be pursued only ‘with the help of the Authority’. Second, the CPA was free to choose the measures that it considered most effective in achieving the objectives set by the Security Council. Moreover, because of the breadth of the objectives assigned to it and the essential lack of direct supervision under which it operated, the CPA could determine when those objectives had been met. Third, unlike the UN mission in Iraq, the CPA was not under a reporting obligation towards the Security Council and was thus, in a sense, immune from immediate scrutiny, giving it room to steer Iraq in the direction it deemed fit. Resolution 1483 only encouraged the UK and the US ‘to inform the Council at regular intervals of their efforts under this resolution’,260 adding that the Security Council intended to ‘review the implementation of this resolution within twelve months of adoption and to consider further steps that might be necessary’.261 While true that by expressing in the Preamble its ‘resolve that the day when Iraqis govern themselves must come quickly’, the Security Council added something to the urgency with which the CPA was to perform its tasks. It did not, however, set any temporal limitation on the CPA’s presence in Iraq, which suited the CPA, allowing it ‘to adapt to unforeseen shifts in Iraq’s legal-political landscape’.262

It is consequently possible to say that by adopting an approach unprecedented in its practice, the Security Council gave the CPA a unique function as the enabler of the Iraqi people’s right to (internal) self-determination

259 The 9 May Draft (para 1) read:

Calls upon the Authority 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 may freely determine their own political future.

260 UNSC Res 1483 (n 19) para 24.
262 See Grant (n 237) 829.
and the instigator of a new political system in Iraq. However, equating the granting of this role with an authorisation to transform Iraq into a democracy would be unwarranted. If taken literally, the objective of ‘creating the conditions for a free determination’ by the Iraqi people might have been satisfied, for example, by the CPA’s engagement in the preparation of free, fair, and safe elections of a parliament and/or of an Iraqi constitutional assembly. In principle, nothing more was necessary to empower the Iraqi people to choose their own political and economic future.

Moreover, in the Preamble to Resolution 1483, the Security Council encouraged efforts ‘by the people of Iraq to form a representative government’, yet paragraph 4 did not provide for the ‘advancing efforts to restore and establish national and local institutions for representative governance’ (emphasis added) that were offered under CPA Regulation 1. Curiously, however, that very same sentence figured among the tasks entrusted to the UN under paragraph 8(c) of Resolution 1483, which also clarified that the task of the Special Representative of the Secretary-General was to work ‘intensively with the [Coalition Provisional] Authority’ in the performance of this task. The latter provision indicates that the Security Council favoured the development of democratic institutions and also ensured that the CPA had an important role in pursuing the political objectives mentioned in paragraph 8(c), even if this was an area of governance entrusted to the UN. Though construed in a rather convoluted way, the result of these provisions was the enablement of, rather than the restraint of, the transformative ambitions of the CPA.

Whatever the truth of the matter, it appears that the CPA’s tasks were so broad as to be read in a variety of ways. Shortly after the session of the Security Council that adopted Resolution 1483, while other representatives remained silent on the point, US Ambassador Negroponte was quick to interpret the mandate as enabling the CPA to transform Iraq by establishing new institutions:

By recognising the fluidity of the political situation and that decisions will be made on the ground, the Security Council has provided

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263 Paragraph 8(c) of Resolution 1483 (n 19) reads:

… 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 an internationally recognized, representative government of Iraq.
a flexible framework under Chapter VII for the Coalition Provisional Authority, Member States, the United Nations ... to assist the Iraqi people in determining their political future, establishing new institutions and restoring economic prosperity to the country.²⁶⁴

Somewhat more cautiously, UK Ambassador Sir Jeremy Greenstock spoke only of reforming existing Iraqi institutions, while ensuring stability and security: ‘We look forward to increased international and United Nations involvement helping the people of Iraq to reform their institutions, rebuild their country, and enjoy conditions of stability and security in a stable regional environment.’²⁶⁵ When looking at these strikingly different interpretations, it appears clear that Resolution 1483 was characterised by a considerable degree of ambiguity.²⁶⁶ It does not represent a clear endorsement of the CPA’s transformative agenda,²⁶⁷ let alone an authorisation of ‘the promotion of a radical transition to democratic governance’.²⁶⁸ The CPA had less power under Resolution 1483 than under CPA Regulation 1.²⁶⁹ Yet it must be acknowledged that, because of the content of Resolution 1483, the CPA had the authority to take measures that could lead towards the creation of a democratic Iraq.²⁷⁰

Whether the granting of such a role to the CPA constituted an impermissible departure by the Security Council from the law of occupation and, eventually, a breach of a norm of jus cogens²⁷¹—that is a rule ‘from which no derogation is permitted’,²⁷² is discussed in the next section.

²⁶⁴ UN Doc S/PV/4761 (n 18) 2–3.
²⁶⁵ Ibid 5.
²⁶⁸ Brown (n 225) 62.
²⁶⁹ Ibid.
²⁷⁰ Arguing that the ‘Resolution gave the occupants what they deemed to be sufficient authorization to transform Iraq’, see Benvenisti, The International Law of Occupation (n 24) 258.
²⁷² Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) (Judgment) 3 February 2012, para 94 <http://www.icj-cij.org/docket/
(a) The CPA’s ‘political’ tasks: a derogation from the law of occupation?

According to David Scheffer, the law of occupation ‘was never designed for transforming exercises’ and is ‘ill-suited for the kind of transformation of the Iraqi legal system the occupants wanted to carry out’. In a memorandum to the Prime Minister before the adoption of Resolution 1483, speaking on the limitations on the occupying powers deriving from international law, the UK Attorney General pointed out that:

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.

Rightly, the remarks of the UK Attorney General made clear the existence of limits upon transformative reforms by the occupying powers. In fact, it is argued, the tasks set in the above-mentioned paragraph 4 of Resolution 1483 could not have been achieved within the framework of the law of occupation. It is difficult to see how the Iraqi people could begin to exercise their right to (internal) self-determination if the obstacles that had traditionally impeded its enjoyment—the power structures of Saddam Hussein’s regime—were to be left intact. Since the legal basis of the regime was to be found in the 1970 Constitution, which also recognised the existence of the Ba’ath party, the CPA needed the authority to modify, set aside, or simply ignore existing fundamental laws and constitutional norms. Although the Security Council did not clarify the relationship between the relatively broad tasks assigned to the CPA and the law of occupation, which are clearly at odds, particularly in relation to the political


273 Scheffer (n 132) 600–2. Adam Roberts (n 13) 613 observed that, ‘taken as a whole, the purposes of the occupation as outlined in Resolution 1483 went beyond the confines of the Hague Regulations and the Fourth Geneva Convention’.


275 Garraway (n 163) 272–5
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field, Resolution 1483, especially paragraph 4, may be thought of as implicitly derogating from that body of law.276

Centred on the conservationist principle encapsulated in Article 43 of the Hague Regulations, which, as discussed in Chapter 1, requires an occupying power to preserve the existing status quo (that is, the ‘laws in force in the country’) unless ‘absolutely prevented’, and operating essentially as a code for the administration of an occupied territory rather than its transformation, the timely application of the law of occupation would not have permitted the significant political and normative reforms that compliance with Resolution 1483 necessitated.277 Hence, because the creation of conditions in which the Iraqi people could exercise their right to self-determination requested in paragraph 4 of Resolution 1483 could hardly be achieved without the removal of the normative and institutional framework erected by Saddam Hussein’s regime, it does seem possible to speak of an implicit authorization of wide-ranging political measures not otherwise permitted under the law of occupation.278

However, both Gregory Fox279 and Robert Kolb caution against reading too much into the Security Council’s rather tepid and convoluted wording. Kolb, in particular, argues that the language of paragraph 4 of Resolution 1483 is too ‘vague and imprecise’ to be the basis for a clear conclusion that a departure from the law of occupation was authorised.280 From a purely textual perspective, Kolb is certainly correct in the sense that the Security Council never stated explicitly that it was derogating from the law of occupation; in fact, it called upon all parties to respect it. However, even if its directives are not couched in clear legal terminology and do not provide detailed guidance, the content of a Resolution can be broad

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276 See in this regard Roberts (n 13) 613; Benvenisti, The International Law of Occupation (n 24) 271. According to Rudiger Wolfrum ‘Resolution 1483 gave the Coalition the mandate to administer Iraq and to work towards its political and economic reorganization’. This mandate, said Wolfrum ‘goes beyond the powers assigned to a belligerent occupation under international humanitarian law, in general’. See Wolfrum (n 48) 16–17.

277 See Scheffer (n 39) 601; Wolfrum (n 48) 16; Roberts (n 13) 580.

278 See, in this regard, Wolfrum (n 48) 16; Scheffer (n 132) 601; Benvenisti, The International Law of Occupation (n 24) 271. See also Zwanenburg (n 42) 766–7; Fox (n 268) 263–72; Stefan Talmon, ‘Security Council Treaty Action’ (2009) 62 Revue Hellénique de droit international 62, 69–70.

279 Fox (n 267) 260.

280 Kolb (n 271) 29.
and clear enough—particularly when its text is examined against the rationale leading to its adoption and the political debate surrounding it—to be interpreted as having—directly or indirectly—authorised a given course of conduct. And, in fact, as noted, the US and the UK were quick to read Resolution 1483 as granting them a reformist mandate, with the goal of contributing to the establishment of Iraq as a democratic state. Even a country like Germany, which had strenuously opposed the war against Iraq, went as far as declaring, when voting in favour of Resolution 1483, that ‘A process of political and economic reconstruction will be started’ and stressed that it is ‘important now to give the Iraqi people the perspective of building a democratic and stable Government’.281

It is difficult to imagine that the occupying powers would have voted in favour of a document that merely upheld the law of occupation and forbade them to proceed as they had planned. This is especially so if we consider that the language used in Resolution 1483 was suggested in a draft prepared by the occupying powers themselves. Likewise, the Security Council could not on the one hand call for the formation of a representative government in Iraq, and on the other impede it by forbidding the necessary reforms of the Iraqi political system even if these were to be carried out by the occupying powers.282 It appears that what was expected from the CPA on political issues was not a merely conservative role—which would have accorded with the law of occupation, but would not have changed the political system in Iraq—but a reformist one that could create the conditions for the emergence of a democratic system of government in Iraq, and for the Iraqi people to realise their right to self-determination. This required a broader normative justification than that afforded by the law of occupation283—and this is precisely what Resolution 1483 provided to the occupying powers, albeit the contours were not neatly defined.

281 UN Doc S/PV/4761 (n 18) 5.
282 In the Preamble of Resolution 1483, the Security Council encouraged the Iraqi people to form ‘a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion or gender’. In paragraph 8(c), the Security Council requested the UN, together with the CPA, to ‘advance efforts to restore and establish national and local institutions for representative governance’. See Resolution 1483 (n 19) Preamble.
That said, an objection may be advanced that the Security Council acted unlawfully on the basis that it did not have the authority to derogate, albeit implicitly, from the law of occupation and in particular from Article 43 of the Hague Regulations. According to Luigi Condorelli, ‘the Council must respect international humanitarian law in its entirety’ because ‘it has essential implications for minimum guarantees that concern the individual’.284 Upon reflection, this argument is not convincing. Reminding the Security Council of the necessity of complying with its duties is certainly appropriate. But there is a danger in carrying the argument too far because it may enter the realm of formalism as if the interpretation and application of norms should not be tested against the concrete circumstances in which they are called to apply.

Not all of the norms of international humanitarian law are automatically protective of the ‘minimum guarantees that concern the individual’, and, as discussed in Chapter 1, not all of them were even created with this only purpose in mind. The derogation operated by the Security Council concerned primarily Article 43 of the Hague Regulations. This norm, which encapsulates the conservationist principle, performs the valuable function of protecting an occupied state’s existing laws and institutions and, in effect, its people, from the whims and abuses of conquerors and despots.

But it is not axiomatic that the preservation of the status quo is what best serves the welfare of an occupied people.285 Article 43 protects the existing normative (and institutional) framework of a given territory on the reasonable and historically justified belief that the dislodged sovereign is legitimate, while the conqueror is not. As discussed in Chapter 1, this protection was born out of deference towards the sovereignty of states, not the rights and interests of individuals. The preservation of the status quo, which logically forbids any reshuffling of the political and economic structure of the occupied territory and limits to a necessary minimum the changes to existing laws, may be beneficial to the local population, or it may not, depending on the kind of regime in which a people live.


285 Arai-Takahashi (n 140) 141–2.
Article 43 of the Hague Regulations is a norm of a general character that applies irrespective of the context, and protects the rights and interests of what Article 43 calls the ‘legitimate power’. In so doing, by accident rather than design, Article 43 may either benefit or harm an occupied people. It may shield a people from a despotic regime when they are threatened by such an occupying power, or it may undermine a people’s enjoyment of their rights by limiting the extent to which an occupying power may dismantle a despotic regime.

In this latter situation, a mechanical application of Article 43 may result in protecting nothing more than the architecture of a despotic regime. Keeping in place a normative system that oppresses the rights of its subjects, such as a penal code that does not recognise fundamental human rights, is hardly ‘humanitarian’. Whether Iraq’s political institutions—such as the Revolutionary Command Council, which was created under the 1970 Constitution and was the most important organ of the executive branch of the Iraqi government—should have been left in place was not a ‘humanitarian issue’, even though the law of occupation may have protected its continuance. Legal norms cannot and must not operate to the disadvantage of those whom they are expected to shield. A key question in this regard is deciding who should be authorised to make so significant a determination. Granting to each occupying power the authority to decide whether or not to adhere to Article 43 depending on that power’s motives and aspirations for the occupied territory may give rise to abuses, as the interests of the occupying powers and the occupied people may clearly diverge.

The obvious candidate for making such a determination, because of its function under the UN Charter and the role that it can effectively play in situations of crises and occupation, is the Security Council. Indeed, it implicitly did so in Resolution 1483. This derogation from Article 43 of the Hague Regulations was justifiable because it was directed to impact on the sovereignty of a despotic regime to enable a people to exercise its right to self-determination. It was not, and there is no basis to interpret otherwise, an effort to detract from the protection afforded to individual rights. Unless one argues that the right to sovereignty of the ousted sovereign dislodged during the occupation, which Article 43 protected, is in and of itself a norm of *jus cogens*, it is difficult to construe Article 43 of the Hague Regulations as a norm falling automatically into the category of *jus cogens*. It may not be so when, as in the present case, a derogation from Article 43 was meant to facilitate the protection of the fundamental rights
of a people under occupation by removing the norms and institutions oppressing them.

Thus, in the circumstances existing in Iraq, Article 43 should not be interpreted as falling automatically into the category of what Robert Kolb rightly calls ‘ordre public humanitaire’, or the broader category of jus cogens.\footnote{Dietrich Schindler, ‘Problemes des humanitären Volkerrechts und der Neutralität im Golfkonflikt 1990/91’, (1991) 1 Revue suisse de droit international at européen 12; Zwanenburg (n 42) 763; Stephen Wheathley, ‘The Security Council, Democratic Legitimacy and Regime Change in Iraq’ (2005) 17 EJIL 531, 532. See in general the analysis in Karl Zemanek, ‘How to Identify Peremptory Norms of International law’ in Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N Shaw, and Karl-Peter Sommermann (eds), Essays in Honour of Christian Tomuschat (NP Engel Verlag 2006) 1107–17. See also Alexander Orakhelashvili, Peremptory Norms of International Law (OUP 2006) 50–66, especially 61–3.} This does not exclude that in other contexts, when the protection of the rights of individuals is at stake because the occupant may introduce more restrictive, if not discriminatory, norms than the ones in force, Article 43 should be considered as not subject to derogation.

However, in contexts such as Iraq, when the rights of individuals may be hampered by existing norms and institutions, the powers of the Security Council should be construed as including that of devising norms prevailing over the part of the law of occupation that is not specifically humanitarian. This should be so, even though it may mean trumping the sovereignty of the occupied state and norms that, although formally part of humanitarian law, are not, in such a case, protecting humanitarian values. In the present case, such an objective was the creation of conditions in which the Iraqi people could freely determine their own political future, which was consistent with international law, as it was directed at enabling the Iraqi people to exercise their right to self-determination. Because it had to achieve this objective, the CPA was implicitly authorised by the Security Council to take the necessary measures, including, of course, those of normative character, to fulfil it. This does not mean that the CPA received carte blanche from the Security Council for its actions. The CPA was to work for the Iraqi people and not for the states of which it was made up.\footnote{See in this regard the comments of the representative of Cameroon (p 10) and Pakistan (p 11) in UN Doc S/PV/4761 (n 18).} It remained bound to comply with all other norms applicable to the occupation of Iraq, beginning with the norms of international humani-
tarian and human rights law protecting the rights of individuals under occupation.288

Finally in this section, it may be asked whether the Security Council’s implicit expansion of the authority of the occupying powers is in tension with, if not in violation of, the distinction between *jus ad bellum* and *jus in bello*.289 This distinction protects the fundamental principle of the equal application of the laws of war to belligerents, which mandates the application of the laws of war to any belligerents irrespective of the validity of the reasons for fighting.290

To begin with, it can be argued that the Security Council is not formally bound by the distinction between *jus ad bellum* and *jus in bello* but that this does not impede the Security Council from seeking the enforcement of norms of international humanitarian law. The Security Council is not bound to expand an occupying power’s authority under the law of occupation on the ground that the use of force that led to the occupation was lawful.291 By the same token, the Security Council is not bound to enforce the narrow legislative authority granted by the law of occupation on the basis that the use of force that preceded the occupation is believed illegal. The Security Council is entitled to shape the applicable law in a *post bellum* phase depending on its determinations as to what is needed to pursue its mandate under the UN Charter. This is what the Security Council did in Resolution 1483. While seeking to ensure respect for the rights of the belligerents and the civilian population, the Security Council requested ‘all concerned’, which included states that participated in the Operation Iraqi Freedom and those that did not, to comply with international humanitarian law. This could be taken as a confirmation of the Security Council’s *de facto* adherence to the principle of equal application of the laws of war to all the belligerents, namely that compliance with norms of *jus

288 See the comments of the representatives of France (pp 3-4); Mexico (p 7); the Russian Federation (pp 7-8) Cameroon (p 11), Angola (p 11), Pakistan (p 12) in UN Doc S/PV/4761 (n 18).


291 Fox (n 267) 255.
ad bellum and thus the validity of its casus belli is not dispositive of one’s duties under international humanitarian law. The latter continues to apply irrespective of the casus belli, even though norms such as Article 43 of the Hague Regulations could in appropriate circumstances be regarded as derogable by the Security Council as discussed above.

It is true that the granting of a certain normative leeway by the Security Council in respect of the law of occupation is—formally speaking—a departure from the principle of the equal application of the laws of war to all of the belligerents because treating them unevenly serves to increase the authority of one of the two belligerents. The question then is whether this differentiation is justifiable. I would suggest that in this case it did not diminish, let alone hamper, the protective scope that the principle of equality rightly pursues. If it is correct to maintain that Article 43 of the Hague Regulations would have served no humanitarian purpose, but essentially would have protected Saddam Hussein’s despotic regime, then its bypassing cannot be considered a reduction of the humanitarian duties of one of the belligerents. Therefore, while the approach adopted by the Security Council was uneven, it should not be censured. Not only did the Security Council not reduce the duties placed on the CPA (and Coalition Forces) to ensure the humanitarian protection to which the Iraqi people were entitled under the laws of war, but it also made sure to remind the CPA of its duties, such as restoring ‘conditions of security and stability’ and working towards the realisation of the welfare of the Iraqi people.292

(b) The administration of Iraqi oil

Resolution 1483 authorised the CPA to dispose of the economic and financial resources of Iraq and set criteria and limits for the use of such resources.293 In paragraph 10, Resolution 1483 lifted the trade embargo with Iraq established under Security Council Resolution No. 661 of 6 August 1990,

293 John B Bellinger III (US State Department legal adviser in 2003) made the following comment on the effects of Resolution 1483:

Resolution 1483 modified the legal framework contained in prior Resolutions and specified the authorities related to the sale of Iraqi oil and use of proceeds. Oil sales and use of proceeds are specifically authorised—indeed, they are facilitated by a grant of immunity by the Security Council—and subject to international mechanisms to
which followed Iraq’s invasion of Kuwait, by eliminating ‘all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq’. It authorised the CPA to sell Iraqi oil and petroleum products to UN member States, and to use the revenues for the reconstruction of Iraq. The only restriction that the Security Council kept in place was the prohibition on selling or supplying arms and arms-related material to Iraq, which nevertheless did not apply to those destined for the CPA.

There had been speculation that a motivating factor behind Operation Iraqi Freedom was attaining control over Iraqi oil resources. Resolution 1483, however, sought to ensure that the income deriving from the sale of oil would benefit only the Iraqi people. Foreign control, or at least foreign ownership, of Iraqi oil was prevented by the reference in the Preamble of Resolution 1483 to the right of Iraqis ‘to freely determine their political future and control their own natural resources’. In paragraph 16 of the Resolution, the Security Council requested that the UN Secretary-General, in coordination with the CPA, terminate within a period of six months, ‘in the most cost effective manner, the ongoing operations of the “Oil-for-Food” Programme’. This transferred responsibility for the administration of any remaining activity under the ‘Oil for Food’ Programme to the CPA, and required the CPA to undertake a number of tasks detailed in

guarantee the transparent use of proceeds for the benefit of the Iraqi people.

Thus, it seems clear that Resolution 1483 both eliminates the previously existing Council limitations on oil sales and considers how oil proceeds may be used to fund long-term economic reconstruction projects to benefit Iraq—an activity that would, at least arguably, be outside the scope of authorities provided by the Hague Regulations. See Sean Murphy, ‘State Department Legal Adviser U.S. Views on International Law: Security Council Powers under Chapter VII of the UN Charter’ (2005) 99 AJIL 891, 893. See also Dobie Langenkamp and Rex J. Zedalis, ‘What Happens to the Iraqi Oil? Thoughts on Some Significant Unexamined International Legal Questions Regarding Occupation of Oil Fields’ (2003) 14 EJIL 417, 418–21.

294 UNSC Res 661 (n 211) 2–4.
296 Zedalis (n 295) 508.
297 UNSC Res 1483 (n 19) para 16.
paragraph 16 in order for the programme to be closed effectively and efficiently.\footnote{298}{Ibid, 509.}

In order to ensure the smooth trading of oil, paragraph 22 of Resolution 1483 protected, until 31 December 2007, ‘petroleum, petroleum products, and natural gas originating in Iraq’ from legal proceedings and ‘any form of attachment, garnishment, or execution’ by international creditors with claims against the former regime.\footnote{299}{See Philippe Sands, ‘L’exploitation des resources naturelles en Irak’ in K Bannelier, O Corten, T Christakis, and P Klein (eds), \textit{L’Intervention en Irak et le droit international} (Pedone 2004) 317, 321.} The revenues from this sale were to be transferred to a ‘Development Fund for Iraq’ (DFI), held by the Central Bank of Iraq and disbursed at the direction of the CPA, in consultation with the ‘Iraqi interim administration’.\footnote{300}{UNSC Res 1483 (n 19) para 13.} The Security Council requested that UN member states freeze funds or other financial assets in their territories belonging to the previous government of Iraq, Saddam Hussein, or other senior officials, and transfer them to the DFI.\footnote{301}{Ibid, para 23(b).} After voting in favour of Resolution 1483, the French Ambassador welcomed these measures: ‘With the lifting of civilian sanctions and the forthcoming resumption of petroleum exports, Iraq should have the resources necessary to rebuild its economy and improve the humanitarian and social situation of its people.’\footnote{302}{Ibid, para 3.}

Along the same lines, the Pakistani Ambassador acknowledged that, ‘the resolution lifts the sanctions long enforced against the Iraqi people and opens the door to the provision of relief and humanitarian assistance to them, to the revival of the Iraqi economy, to Iraq’s reconstruction’.\footnote{303}{Ibid, para 11.} The Security Council stressed that the CPA was to use the DFI in a:

\begin{quote}
transparent manner, to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq’s infrastructure, for the continued disarmament of Iraq, and for the costs of the Iraqi civilian administration, and for other purposes benefiting the Iraqi people.\footnote{304}{Ibid, para 14.}
\end{quote}
The resolution also provided that the CPA’s use of Iraq’s natural resources would be audited by independent public accountants approved by the International Advisory and Monitoring Board for Iraq (IAMB). The establishment of the IAMB has been praised as a major step towards ensuring accountability, the lack of which defines most occupation administrations. Last but not least, Resolution 1483 effectively reduced the amount Iraq was to pay annually to the UN Compensation Commission in recompense for the damages inflicted on Kuwait during Iraq’s invasion of the latter. This reduction was from 25 percent of its petroleum exports to 5 percent.

### 6.3. The role of the United Nations

In the process leading to the adoption of Resolution 1483, the role of the UN in Iraq was the subject of much debate. While the US was firmly opposed to a central role for the UN, other permanent members of the Security Council favoured such a role, calling for UN supervision over the political process due to its expertise in transitional administration and the UN’s embodiment of international legitimacy. After several negotiations, a compromise was reached whereby the UN administration in Iraq would play a ‘vital role’. Of course, the problem then was to identify exactly what ‘vital’ meant and how much power was effectively vested in the UN in order that it might undertake such a role.

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305 The members of this body were to include ‘duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and the President of the World Bank’, see UN Doc S/PV/4761 (n 18) 12.


309 UNSC Res 1483 (n 19) Preamble; Stahn (n 308) 368.
The role entrusted to the UN covered the provision of humanitarian relief, reconstruction efforts and the establishment of governance institutions. Under the leadership of the Special Representative of the Secretary-General (the late Sergio Vieira de Mello), the UN was charged with coordinating ‘humanitarian and reconstruction assistance by United Nations agencies’; promoting ‘the safe, orderly, and voluntary return of refugees and displaced persons’; facilitating ‘the reconstruction of key infrastructure’; promoting ‘economic reconstruction and the conditions for sustainable development’; supporting ‘the protection of human rights’; encouraging international efforts ‘to rebuild the capacity of the Iraqi civilian police force’; and promoting ‘legal and judicial reform’.

Judging from the extent of these tasks, the mandate attributed to the UN in post-invasion Iraq appears to have been ample. Yet, in fact, the allocation of a broad number of functions did not correspond to a conferral of real power, which instead remained with the CPA, and left the exact role of the UN far from ‘vital’. On the basis of a review of the verbs used to define the function of the UN Special Representative in paragraph 8 of Resolution 1483, it becomes clear that the UN was to be an assistant to the Iraqi people; to act as a supporter, facilitator, mediator, promoter, and (in only a few instances) coordinator of some fields of activities. The bulk of the UN’s tasks had to be carried out in conjunction with the CPA, which meant that the former’s influence decreased as a result. Further, the Coalition Forces


312 According to Charles Garraway, however, Resolution 1483 had envisaged ‘a partnership between the Coalition Provisional Authority (CPA) and the United Nations’; but its nature was changed with the death of the Special Representative of the UN. As a consequence, the ‘United Nations effectively ceased to be a “player” on the ground’. See Charles H B Garraway, ‘The Duties of Occupying Power: An Overview of the Recent Developments in the Law of Occupation’ in Julia Raue and Patrick Sutter (eds), *The Faultlines of International Legitimacy* (Martinus Nijhoff Publishers 2009) 179, 187–9.

were not asked to assist the UN in its fulfilment of these tasks. In contrast with its role in Kosovo or East Timor, the UN in Iraq lacked autonomous decision-making powers, let alone enforcement powers. As observed by Stahn, the role of the UN in Iraq was ‘de facto a light footprint’.\(^{314}\) Marking the limits of this role, Resolution 1483 required the UN to work ‘intensively with the Authority’.\(^{315}\) The CPA was to be the UN’s partner in striving to ‘advance efforts to restore and establish national and local institutions for representative governance’,\(^{316}\) which could not but strengthen the political role of the CPA in Iraq rather than that of the UN.\(^{317}\)

Under the leadership of Special Representative Sergio Vieira de Mello, the UN was nonetheless able to carve out a role for itself as a gatherer of the Iraqi people’s complaints. Unlike the CPA, the UN was willing to listen to the Iraqis themselves, and took upon itself the task of relaying the comments and criticisms of the occupied people to the leadership of the CPA.\(^{318}\) These efforts, however, were to come to an abrupt end only a few months later. On 10 August 2003, UN operations received a severe setback

\(^{314}\) Stahn (n 308) 368.

\(^{315}\) Ibid.

\(^{316}\) UNSC Res 1483 (n 19) para 8(c).

\(^{317}\) Allawi (n 9) 164–7; Bremer (n 169) 86–104. Even though its effective role in the formation of the Iraqi Governing Council was limited, the UN could still play a role in the background. The role of the Special Representative consisted of meeting with all of the Iraqi groups and facilitating communications between the Iraqi people and the CPA. In the first report to the Security Council, the Secretary-General pointed out that ‘[t]he Special Representative, therefore, has strongly advocated that the Authority devolve real executive authority to a broadly representative and self-selecting Iraqi leadership’. The report was also a way in which to bring the views of Iraqis to the attention of the Security Council. It mentioned that common themes emerging from meetings of the Special Representative with Iraqis were ‘that democracy should not be imposed from the outside; it had to come from within’, and that ‘some Iraqi interlocutors strongly felt that participation in the constitutional process should be determined by elections’. The report also stressed that ‘the importance for the Iraqi people of moving quickly towards their own government cannot be overstated’. See UNSC ‘Report of the Secretary-General Pursuant to paragraph 24 of Resolution 1483’ (2003) UN Doc S/2003/715, paras 4–5. See also UNSC ‘Report of the Secretary-General Pursuant to paragraph 24 of Resolution 1483 (2003) and paragraph 12 of Resolution 1511’ (2003) UN Doc S/2003/1149, paras 4–5, 10.

\(^{318}\) Ferguson (n 130) 186, 295–6.
when the UN headquarters were the target of a terrorist attack; a car bomb claimed the lives of twenty-two people, including the Special Representative himself, and wounded some 150 more. The lack of security evidenced by this attack compelled the UN to withdraw many of its personnel from Baghdad on 19 August. Thereafter, the role of the UN during the occupation was significantly curtailed.

Providing yet further clear evidence of the limited nature of the UN contribution to the reconstruction of Iraq is the joint World Bank and United Nations Development Programme (UNDP) report prepared in the summer of 2003 and presented at a donors’ conference in Madrid on 23–24 October 2003. The report asserted that the major roles in the setting of priorities for the reconstruction of Iraq were played not by the UN, but by US companies Halliburton and Bechtel.319

6.4. The role of the Iraqi people

6.4.1. The ambit of the Iraqi people’s right to self-determination

In the Preamble to Resolution 1483, the Security Council recognised that the Iraqi people had the right to self-determination—that is, that they were entitled to ‘freely determine their own political future and control their own natural resources’.320 The right to self-determination is generally regarded as encompassing two dimensions: an external dimension, which concerns the right of a people to be independent and free from foreign interferences, such as colonialism or occupation;321 and an internal dimension, which, in essence, pertains to the right of a people to choose their rulers freely.322 Although one could argue that in the case of an occupation, it is only the external dimension of the right to self-determination that plays a role; this section argues that various determinations made in Resolution 1483 carried important consequences under both dimensions of that right.

320 Ibid.
To begin with, it should be clarified that the Security Council’s recognition that the Iraqi people had the right to self-determination is consistent with international law. Article 1 of the ICCPR confers the right to self-determination on ‘all peoples’ under international law. To hold the right to self-determination, a group of individuals inhabiting a given territory must be a ‘people’ under international law, and not, for example, a minority or an ethnic group. The notion of ‘people’ is to be understood in a broad sense. Although there is no agreed definition under international law, generally speaking, the noun ‘people’ is used in respect of groups of individuals inhabiting permanently the whole or a part of the territory of an independent state, or of a territory that may be under ‘alien subjugation, domination and exploitation’.

The existence of an Iraqi people inhabiting the Iraqi state has generally not been questioned, even though Iraq as a state came into existence only in the twentieth century. Of course, there has been a traditional division between Shiites and Sunnis on religious issues, accentuated by political inequalities—including the fact that the Sunnis held central positions within the Iraqi government—which were exacerbated in connection

326 See Reference Re Secession Quebec, Supreme Court of Canada, 20 August 1998, 37 ILM 1340, paras 123–125. For Jeremy Waldron, a distinction should be drawn between a territorial conception of the right to self-determination whereby a ‘people’ refers to ‘anyone who lives permanently within the country in question, and it is compatible with either the homogeneity or the diversity of that population in terms of ethnicity or cultural composition’ and an identity-based conception whereby a ‘people’ is a community that regards itself as ‘ethnically or culturally distinct’. See Jeremy Waldron, ‘Two Conceptions of Self-Determination’ in Samantha Besson and John Tasioulas (eds), The Philosophy of International Law (OUP 2010) 397.
327 Ibid (Waldron) 398. Furthermore, for a list of territories which qualify as ‘units of self-determination’ see James Crawford, The Creation of States in International Law (2nd ed, OUP 2007) 127–8.
328 Crawford (n 323) 12–19; Vaughan Lowe, International Law (OUP 2007) 114.
with the occupation when the balance of power shifted in favour of the Shiites. Yet this divide, strong as it may be, is essentially of a religious and political nature, rather than of an ethnic character. Neither of these groups challenged their status as Iraqis and, together, they constitute the large majority of the Iraqi people. The Kurds are a different case: a minority within Iraq, but still a distinct ethnic group, who consider themselves a people and have sought independence from the Iraqi State on this basis.\textsuperscript{329} This claim, however, has not yet succeeded and, in essence, Resolution 1483 ignored it. More difficult than asserting the existence of the right to self-determination of the Iraqi people, however, is gauging the meaning of it within the framework defined by Resolution 1483: in respect of whom and what did the Iraqi people have the right to self-determination?

6.4.2. A position of subordination

In a first approximation, the Security Council’s reference to the right to self-determination could be read as an endorsement of, and synonymous with, the right of the Iraqi people to external self-determination, namely, a right to freedom from and termination of the occupation,\textsuperscript{330} and a right not to be a passive witness to the coerced transformation of Iraq’s political and economic system.\textsuperscript{331} By expressing its resolve ‘that the day when Iraqis govern themselves must come quickly’, the Security Council showed concern for the right to self-determination of the Iraqi people, urging a speedy end to the occupation. Unquestionably, the existence of the right to self-determination both conceptually and legally limited the range and depth of the conduct in which the CPA could engage. It also paved the way for the end of the occupation on the basis that there was another entity holding a much stronger title to govern in Iraq than the CPA, which could itself administer Iraq only on a temporary basis. The more explicitly this right was recognised, the stronger the duty of both the Security Council and the CPA was to respect it by taking actions that made it meaningful, including ultimately the ending of the occupation.

\textsuperscript{329} Tripp (n 2) 44–74, 186–316.
\textsuperscript{330} See also Steven Weathley, ‘Democracy in International Law: A European Perspective’ (2002) 51 ICLQ 225, 231.
On closer inspection, however, it can be argued that other than recognising the right to self-determination, and in contrast to what the various references to the Iraqi people contained therein may suggest, Resolution 1483 did little to enhance the role of the Iraqi people. The Security Council encouraged the Iraqi people to ‘form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion or gender’.332 This encouragement is puzzling because the Iraqi people were, in essence, being told that they had the right and power to do something, when, in reality, they had not the ability to do so. Under the control of the occupying powers, there was little that the Iraqi people could do to create a representative government. In the Preamble to Resolution 1483, the Security Council spoke of the efforts of the Iraqi people towards the creation of a representative government, underscoring the pro-democracy declarations made in the 15 April 2003 Nasiriyah Statement and in the 28 April 2003 Baghdad Statement.333 In fact, no representative government was being created. Those declarations were merely the result of hasty meetings held under the auspices of the US and UK between a few hundred Iraqis.334 Nor had the Iraqis been asked whether they wanted the kind of government that they were being encouraged to form. This latter circumstance should not be overemphasised, however. While there is no strict obligation that a government be democratic, the Security Council is certainly allowed to recommend that it be so and to expect that a government comply with international human rights standards. A recommendation by the Security Council in this regard is not an undue interference, but a reminder of the values for which the UN stands.

The concern raised here is that the Security Council’s support for the formation of a representative government meant little for the Iraqi people in practice. The Security Council encouraged the people of Iraq—again with the ‘help’ of the CPA and working with the UN Special Representative—to form ‘an Iraqi interim administration’.335 By doing so, the Security Council treated the Iraqi people as an independent subject in name only. It is difficult to see how the Iraqi people could have established an interim administration by themselves and with ‘the help’ of the CPA, and whether the authorisation of the CPA to merely ‘help’ the Iraqi people in this regard

332 UNSC Res 1483 (n 19) Preamble.
333 Ibid.
335 UNSC Res 1483 (n 19) para 9.
implied that they would be permitted to establish a government without the CPA's approval. Ultimately, this provision strengthened the position of the CPA, not that of the Iraqi people. While, in principle, this ‘interim administration’ might have been placed on the same—or an even higher—legal footing as that of the CPA, the reality was very different. The Security Council had not defined the powers of such an administration against those of the CPA. By failing to do so, the Security Council left the CPA with the authority to shape the structure and functions of the Iraqi interim administration, thus limiting rather than enabling the Iraqi people’s right to external self-determination.

On a final note, it is apparent that Resolution 1483 treated the Iraqi people as a passive subject. Albeit deserving of protection and with inherent rights, the Iraqi people had no voice in the CPA’s determination of their needs or with regard to those conditions that the CPA was to create in order to enable their right to self-determination. No mechanism existed through which the Iraqi people could check on the activity of the CPA, veto unfavourable proposals, or at least oppose the CPA’s enacted reforms. It therefore seems fair to say that the Iraqi people were more spectators than actors in the political process initiated by Resolution 1483, despite some supportive language on the part of the Security Council. The Iraqi people remained a people under occupation, a reality that Resolution 1483 could perhaps attenuate, but could not alter.

6.4.3. The Security Council and the right to self-determination

Considering the position of subordination in which the Iraqi people remained even after Resolution 1483 and the fact that the Security Council did not set a date for the end of the occupation, and conferred some authority on the occupation administration by tasking it with the achievement of important goals for the future of Iraq, it may be asked whether Security Council’s Resolution 1483 is in breach of the Iraqi people’s right to self-determination. This question raises the problem of understanding whether the Security Council is bound to respect the right to self-determination of a people under occupation. I believe the answer should be in the affirmative.

First, as discussed, the Security Council itself acknowledged the existence of this right in Resolution 1483 and (see Chapter 4) it would do so again in Resolutions 1511 and 1546. It would be contradictory on the part of the Security Council and a mockery of this right if, after recognising the Iraqi people as holder of that right, the Security Council were to consider
that states are bound to respect it, but that the Council itself was not. Second-
ly, the Security Council is bound to respect this right as a peremptory
norm. The latter point requires more analysis.

As widely referred to, the Security Council has a discretion under the
UN Charter in deciding both when to act (Article 39) and how to act (Ar-
ticles 40–42).\textsuperscript{336} Once the Security Council makes a determination pursuant to Article 39, it has wide authority to decide how best to perform its
function and to choose the adequate course of conduct—that is, which
enforcement action to pursue and by what means, which may necessarily
involve deviating from both customary and treaty law.\textsuperscript{337} Article 103 of the
Charter gives the Security Council this authority by providing that states’
obligations under the Charter prevail over any other ‘obligations under
any other international agreement’. Although the powers of the Security
Council tend to be ‘open textured and discretionary’,\textsuperscript{338} the authority of
the Security Council is not unlimited. As an international actor that oper-
ates as an organ of the UN within, and because of, the legal system of in-
ternational law and the subsystem of UN Charter—it is not \textit{legibus solutus}
(unbound by law), despite the uniqueness of the function entrusted to it.\textsuperscript{339}

\textsuperscript{336} See de Wet (n 225) 133; Terry D Gill, ‘Legal and Some Political Limitations
on the Power of the UN Security Council to Exercise its Enforcement Pow-
ers under the Chapter VII of the UN Charter’ (1995) 26 Yearbook of Inter-
national Humanitarian Law 62; Benedetto Conforti and Carlo Focarelli, \textit{Le

\textsuperscript{337} De Wet (n 225) 182; Michael Wood, ‘The UN Security Council and Inter-
national Law’ (Hersch Lauterpacht Memorial Lectures) Lectures 2 and 3
<www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_lecture_2.pdf> ac-

\textsuperscript{338} Susan Lamb, ‘Legal Limits to UN Security Council Powers’ in Stefan Talmon
and Goodwin Gill (eds), \textit{The Reality of International Law: Essays in Honour of
Ian Brownlie} (OUP 1999) 361.

\textsuperscript{339} \textit{Tadić} Jurisdiction Decision (n 47) paras 28-9. See Georges Abi-Saab, ‘The
Security Council \textit{Legibus Solutus}? On the Legislative Forays of the Council’
in Laurence Boisson de Chazouvnes and Marcelo Kohen (eds), \textit{International
Law and the Quest for Its Implementation: Liber Amicorum Vera Gowlland-
Debbas} (Brill 2010) 23–5; Anne Peters, ‘Article 25’ in Bruno Simma, Daniel
Erasmus Khan, George Nolte and Andreas Paulus (eds), \textit{The Charter of the
The political character of an organ does not serve to absolve it from acting within the legal framework to which it belongs.  

First of all, as an organ of the UN, the Security Council is bound to respect the UN Charter, which entrusts the Council with the performance of a specific function, not with the authority of steamrolling the values for which the Charter stands. Moreover, it is generally accepted that there are at least two ‘substantive’ limits to the Council’s discretion in deciding which kind of measures it can adopt once a determination under Article 39 of the UN Charter is made. First, the Security Council must act in compliance with the ‘purposes and principles of the United Nations’, as required by Article 24 of the UN Charter. Second, it must respect norms of jus cogens. If this latter limitation is accepted—as it logically flows from

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340 The ICJ in the *Conditions of Admission* case stated:

> The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.


342 De Wet (n 225) 182; Peters (n 339) 811–9.

343 Abi-Saab (n 339) 24-5; Conforti and Focarelli (n 336) 225; Peters (n 339) 812-3. According to Peters, however, the ‘purposes’ enumerated in Article 1 of the UN Charter do not ‘pose stable and clear limits for Council action’ because they ‘are so sweeping and abstract that is hardly conceivable that the Council take any decision which cannot be said to further them’.

344 See in this regard De Wet (n 225) 187–91; Peters (n 339) 818. See also Benvenisti and Keinan (n 64) 275–6. In *Kadi*, the European Court of First Instance stated:

> International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.
determining that the Security Council is not *legibus solutus* and from the universally recognised importance of the values that that category aims to protect—and if the right to self-determination is considered as falling into the category of *jus cogens* as it is increasingly suggested though the matter is not immune from controversy then it could be argued that the Security Council must take this right into account when exercising its functions. Considering this status, the question that then arises is whether the right to self-determination should be construed as absolute or relative when placed against the authority of the Security Council. Robert McCorquodale has observed that self-determination is not an absolute right because its purpose is not directly to protect the personal or physical integrity of the stated individuals or groups. He stressed that the international society has a general interest in maintaining international peace and security, which limits the right of self-determination, and argued that this general interest has historically taken two forms: territorial integrity of states and the maintenance of colonial boundaries (*uti possidetis iuris*).

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Arguably, a balanced approach could then be to suggest that, while remaining bound to give effect to it at least in the long term—unless the conduct of the concerned people constitutes a threat to international peace and security as also a people has obligations under international law—the Security Council may, when required to perform its function under the UN Charter, shape the content and the modalities of the enjoyment of a people’s right to self-determination. In this way, the Security Council would be legitimately balancing the right of a people with the right of UN member states to the maintenance of international peace and security.

In this regard, it can also be noted that Common Article 1(3) of the IC-CPR and ICESCR appears to set a limit to the right to self-determination in the sense of making its protection subordinate to determinations made under the UN Charter. It provides that states have an obligation to respect the right ‘in conformity with the provisions of the Charter of the United Nations’. This may be taken as requiring consistency with, and a certain primacy of, Security Council resolutions and thus as enabling the Security Council to make determinations impacting on the right to self-determination of a people.348

Therefore, when, as in the case before us, the Security Council appears to be claiming that a given process is instrumental in promoting the right to self-determination, it is essential to determine whether the freedom of choice of the people concerned is effectively enabled, or whether it is, instead, curtailed by determinations whose primary consequence is an increase in the normative authority of an occupying power and thus in the latter’s ability to take decisions that may affect the future of an occupied territory in lieu of the people affected.

(a) **Enablement of the right to self-determination or breach?**

On a first approximation, it could be argued that, despite backing an occupation administration, the Security Council was not directly violating the right to external self-determination of the Iraqi people because it essentially acted out of necessity rather than choice. Under the circumstances as they existed in May 2003, the Security Council had little option but to tolerate the continuation of the occupation while seeking to move the conduct of the CPA towards realising the rights of the Iraqi people in accordance with international law. A Resolution calling for the immediate withdrawal of the Coalition Forces had no prospect of adoption when the occupying powers themselves were members of the Security Council. Nor was it a real option for the Security Council to do nothing—that is, not to issue a Resolution at all—as this risked a further loss of credibility and relevance that would have compounded the effect of the Council’s failure to come to a unified position on the use of force against Iraq. Moreover, the non-issuance of a Resolution may have contributed to a continuation of the occupation and could also, somewhat recklessly, have left the situation in Iraq in a state of chaos.\(^{349}\)

However, the argument that the Security Council was acting merely out of necessity rather than choice and bore no responsibility for the continuation of the occupation and for the determinations that it made in this regard is not wholly satisfactory either. It is hard to justify to those that were victims of the occupation that its continuation served no meaningful purpose and was merely an unavoidable accident that had befallen them. It also seems somewhat far-fetched to argue that a body as powerful as the Security Council was endorsing an occupation administration and allocating to it extensive tasks only because it had no alternative but to do so.

Perhaps a more convincing way of interpreting the approach pursued in Resolution 1483 is to argue that the Security Council in fact decided, in light of the circumstances as they stood at that time, to make a virtue out of a necessity by requesting the occupation administration to work towards the realisation of the rights of the Iraqi people. This determination was the starting point of a process that may have led to the democratisation of Iraq or, in other words, to the formation of ‘a representative government based on the rule of law that affords equal rights and justice ... without regard to ethnicity, religion, or gender.’\(^{350}\)

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\(^{349}\) Brown (n 226) 44–5.

\(^{350}\) UNSC Res 1483 (n 19) Preamble.
In so doing, the Security Council in part endorsed the CPA’s reformist agenda and its effort to make Iraq a democratic nation, but also limited that agenda by asking the CPA to embark on a process that enabled the Iraqis, not the CPA, to determine their own political future free from foreign interference. This can be seen as an effort to strike a balance or, perhaps more cynically, to square the circle between foreign intervention and the free choice of the Iraqi people, thereby ensuring (at least on paper) that the former could be instrumental to the achievement of the latter.

One could argue that the only way in which to fulfil the right to self-determination of an occupied people is through the withdrawal of occupation forces. This may be true in most cases, but care must be taken before jumping too quickly to such a conclusion. In this instance, a sudden withdrawal of occupation forces may have facilitated the advent, or the return to power, of forces that would overstep the internal dimension of this right by imposing a despotic regime. Almost to the point of paradox, the fulfilment of the external dimension of the right to self-determination may have hampered its internal dimension.

In the absence of a local government which had been permanently removed from power, or of any political group speaking for the majority of the Iraqi people, it was for the Security Council to evaluate whether the circumstances for the ‘creation of the conditions in which the Iraqi people can freely determine their own political future’ existed in Iraq after Operation Iraqi Freedom. Being a fundamental political question, opinions on the way the Security Council evaluated the circumstances before it may depend on one’s perspective. Assuming, however, that it is correct to say that, for a number of reasons, including the lack of an adequate and self-sustainable institutional and normative framework, and the possibility of a return to power by Saddam Hussein’s regime,351 the Iraqi people could not by themselves exercise the right to internal self-determination, the intervention of a foreign actor capable of bringing about the necessary conditions for them to be able to do just that, does not seem an outlandish idea.

Judging from a legal perspective, therefore, it could be argued that the temporary suspension of the right to self-determination that the continuation of the occupation inevitably caused may not *ipso facto* be a violation of the right to self-determination, but rather a measure that could be con-

351 Testifying before the US Senate Committee, General Garner stated, ‘Well, first of all, Mr. Chairman, I can’t imagine that we would walk away from this. If we did, and if Saddam Hussein is still alive, he’d return immediately, and our credibility worldwide would be zero’. See Garner Statement (n 147).
sidered justifiable in the circumstances, insofar as it was instrumental in achieving both dimensions of that right in the longer term. It was for the CPA, through a protracted effort, to carry out the request of the Security Council under Resolution 1483 and develop policies that could effectively enable the exercise of this right on the part of the Iraqis and thereby comply with international law. This may have allowed for the initial pursuit of the right to internal self-determination, and, as a logical consequence, the attainment of the right to external self-determination thereafter. Presumably, the occupation would have ended when the CPA had accomplished its mandate and an elected Iraqi government was in place.

In light of this reasoning, it is suggested that Resolution 1483 may be regarded as a reasonable attempt, or perhaps ‘an experiment’, to stir the direction of the occupation in a way that, on the face of it, could have helped the realisation of the Iraqi people’s right to self-determination in both of its dimensions and that, therefore, it was generally consistent with international law and not in breach of the right to self-determination.

(b) Internal self-determination and Saddam Hussein’s regime

Resolution 1483 enhanced the right to (internal) self-determination of the Iraqi people by determining, albeit indirectly rather than claris verbis, that only the Iraqi people, and thus neither Saddam Hussein’s government nor any government linked to it, had the authority to determine the political future of Iraq. Resolution 1483 prevented, or at least made very difficult, the formation of a government in exile by calling UN member states to ‘deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice’. It is not clear who was supposed to make the determination as to which individuals were alleged to be responsible for these crimes and how these allegations were to be formulated. Nevertheless, in light of this provision and, more broadly, the stigma attached to Saddam Hussein’s regime reflected in the disposition of Resolution 1483, it is hard to imagine that a UN member state would have hosted anyone involved in that regime. Moreover, the Security Council ordered UN member states to freeze, without delay, ‘funds or other financial assets or economic resources of the previous Government of Iraq … located outside Iraq’ and funds that ‘have been removed from Iraq, or acquired, by Saddam Hussein.

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352 De Wet (n 225) 336.
353 UNSC Res 1483 (n 19) Preamble.
or other senior officials of the former Iraqi regime’. As previously noted, these resources were to be transferred to the DFI.354

Second, the Security Council made clear that it was for the Iraqi people alone to determine their own political future, and thus they were encouraged to form a new Iraqi administration. This meant that even if the dislodged government of Saddam Hussein was still formally the government of Iraq, it would no longer be entitled to rule Iraq under international law, regardless of the content of Iraqi law. This is at variance with the approach traditionally followed in international law, which does not consider a government illegitimate because it has been forcibly removed from power. As discussed in Chapter 1, it is an underlying assumption of the law of occupation—and of general international law, as developed in the nineteenth century—that the existing sovereign over a territory (before the occupation) remains the legitimate sovereign of that territory.355 Under this conception, the legitimacy of the ousted government arises from its position as the ruler of a territory before the occupation started, as well as its capacity to return to power should the occupying army leave the country. The occupying power assumes effective control of the territory of the dislodged sovereign, but not legitimate title to rule over it.356 Thus if a dislodged government has the material ability in one way or another to return to power should the occupation army leave its territory, it may still claim to have title to rule over the temporarily occupied territory, regardless of whether or not the affected people legitimated its rule.

The Security Council had followed this approach during Iraq’s occupation of Kuwait. In Resolution 661, the Security Council condemned the invasion and occupation of Kuwait because, *inter alia*, Iraq had ‘usurped the authority of the legitimate Government of Kuwait’.357 Subsequently, in Security Council Resolution 687, the Security Council concluded that the

354 Ibid, para 23.
355 Article 43 of the Hague Regulations states that:

> the authority of the **legitimate power** having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. [Emphasis added]

357 UNSC Res 661 (n 211) para 1.
invasion and occupation of Kuwait were illegal, and it welcomed the ‘re-
turn of its legitimate Government’. The ‘legitimate Government’ of Ku-
wait was, in essence, the Sheik Jaber al-Ahmad al-Sabah, who had ruled
Kuwait since 31 December 1977 and who was to remain in power until 15
January 2006. Following the Iraqi invasion of Kuwait, the Sheik imme-
diately left Kuwait to form a government in exile in a hotel near Dharan
in Saudi Arabia. As a result of the successful completion of Operation
Desert Storm, which forced the Iraqi troops to withdraw from Kuwait, the
Sheik returned to his original place as sovereign of Kuwait, with the ap-
proval of the Security Council. The right to self-determination of the
people of Kuwait, let alone the fact that their government was not demo-
cratic, did not seem to have influenced the determination that the Sheik
represented the legitimate government and that, therefore, he had the
right to return to power.

By contrast, in Resolution 1483, the Security Council adopted the op-
posite approach by ignoring the question of whether there was a dislodged
government that could return to power and whether such government
(and its leader) had the right to do so. In so doing, the Security Council
overturned a pillar of the law of occupation as an instrument for protect-
ing the rights of existing sovereigns. It closed off the possibility of rein-
stalling any government linked to Saddam Hussein or the Ba’ath party,
even though Saddam Hussein had not surrendered and his whereabouts
remained unknown, and only a few of the Ba’ath party leaders had been
captured.

The innovative character of this approach can also be viewed from a
human rights perspective. From this perspective, Saddam Hussein may be
regarded as an illegitimate sovereign because many states despised him
and his tyrannical rule over the Iraqi people. Yet international law has
not embraced the principle that a dictatorship is an illegal form of gov-
ernment, even though the state in which this unfolds may be regarded as
responsible for serious human rights violations. By the logic of traditional
international law, Saddam Hussein was still the legitimate sovereign, and

359 J Miller, ‘War in the Gulf: Kuwait—Exiled Leader Appeal for Calm by Ku-
360 Ibid.
361 Coalition Forces only captured him six months after the adoption of Reso-
lution 1483. See Bremer (n 169) 244–5; Sanchez (n 53) 297–301.
thus, being alive and in a position to return to power, it could be argued that he had title to rule Iraq.

Insistence on the right of the Iraqi people and not on those of the ousted Iraqi government may be regarded as a way of preventing the return of the sovereign that had become illegitimate in the eyes of its people because of the way it had treated them. The Security Council’s emphasis on the right to self-determination is a powerful endorsement of the idea that an occupied people holds the sovereignty of that state under international law, and that it must therefore have the right to choose its own rulers free from outside interference.362 This shift constitutes a precedent of absolute relevance for comparable situations in the future.

7. Conclusion

In Resolution 1483, the Security Council legally reinforced the conditions for a definitive regime change in Iraq. Taking the right to determine the political future of Iraq away from the government of the still-alive President of Iraq, Saddam Hussein, or any of his successors, suited the purpose of regime change that underpinned Operation Iraqi Freedom. Through this process, self-determination had become a tool of regime change: it was the last nail in the coffin of Saddam Hussein’s regime, so to speak.

The approach adopted by the Security Council in Resolution 1483 is certainly innovative. Not only did it implicitly derogate from the normative powers of occupying powers under the law of occupation, but it also reversed a pillar of the nineteenth-century law of occupation as an instrument protecting the rights of existing sovereigns. In so doing, it overcame the dogma underlying the law of occupation whereby the existing ruler is presumed to be legitimate and remains so even if dislodged. It is precisely when the existing ruler is dislodged that the law of occupation comes into play, protecting *inter alia* the sovereignty of the occupied state.

At the same time, Resolution 1483 represents a return to an older perspective that echoes, in certain respects, that of the French National Assembly during the French Revolution. The National Assembly heralded the people, not their rulers, as the legitimate sovereign.363 Military campaigns and occupations fostering this ideal were encouraged, and they sought to

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363 See Chapter 1, § 3.1.
liberate people and to bring them to power in lieu of the *ancien régime*—albeit that the reality was often one of exploitation rather than liberation. Operation Iraqi Freedom and the role of the CPA present the same dilemma that emerged in those campaigns—namely, whether the ruler of the liberated country will be its own newly ‘liberated’ people, as is rhetorically claimed, or whether, regardless of what is originally claimed, the occupying powers will seize and maintain power in order to transform the occupied territory as they deem fit.

In the latter case, one problem that would (and should) concern the Security Council is the loss of authority and credibility that would necessarily ensue from claiming to protect a given right while at the same time supporting its usurpation by the entity (the CPA) to which it had entrusted its protection. Whether the practice of the CPA went as far as this, and beyond the tasks conferred to it by the Security Council under international law, will be the focus of the next chapter.
The ultimate goal is a unified and stable, democratic Iraq that: provides effective and representative government for the Iraqi people; is underpinned by new and protected freedoms for all Iraqis and a growing market economy; is able to defend itself but no longer poses a threat to its neighbours or international security.

—CPA Vision, Baghdad, July 2003

Over a period of approximately thirteen months, the CPA issued twelve Regulations, one hundred Orders, seventeen Memoranda, and twelve Public Notices. Through these instruments, the CPA governed Iraq, administered the daily life of the Iraqi people, and painstakingly sought to build a new Iraq modelled on the political and economic systems of Western liberal democracies. They introduced sweeping reforms in almost all facets of the Iraqi State’s activities, such as security, justice, government (including constitutional reforms), economy, trade, and finance, through the creation of an institutional and normative framework that replaced or amended existing Iraqi institutions and laws.

Undertaking a comprehensive review of this practice, grouped under specific areas of governance, this chapter examines how the CPA carried


2 The text of all of these documents is reproduced in Stefan Talmon, The Occupation of Iraq (Hart Publishing 2013) vol 2, 3–759. It is in this volume that, unless otherwise stated, all printed versions of the CPA and the Iraqi Governing Council’s documents cited in this chapter can be found. The CPA’s documents are also available (at the time of writing March 2013) at the website <http://www.iraqcoalition.org>. 
out the dual role of: (i) *de facto* governor of Iraq—a function entrusted to it under international law *qua* occupier and recognised by Resolution 1483; and (ii) reformer, or more correctly transformer, of Iraq’s institutions and laws—a self-attributed ‘mission’, nurtured in part by Security Council resolutions. This is accompanied by an inquiry as to whether, in so doing, the CPA complied with applicable international law rules and principles. Taking into account the Security Council’s unprecedented role in shepherding the course of the occupation, the chapter critically reappraises the Council’s practice, and reflects on whether it, in turn, validated the practice of the CPA—at least on some issues.

The chapter begins with an analysis of the first and, arguably, most dramatic steps taken by the CPA. In line with its transformative project to forge a new Iraq—as soon as Bremer arrived on the ground—the CPA took to dismantling what was left of Saddam Hussein’s regime after Operation Iraqi Freedom. The resulting measures involved (i) the adoption and implementation of the policy of ‘de-Ba’athification’, which led to the dismissal from office of tens of thousands of civil servants on account of their membership of the Ba’ath Party, the ruling party for over thirty years; and (ii) the dissolution and termination of the military, security, and political entities that supported Saddam Hussein’s reign, which affected hundreds of thousands of people.

1. **The dismantling of Saddam Hussein’s regime**

1.1. **The de-Ba’athification of Iraqi society**

Speaking before the US House of Representatives Committee on International Relations, Douglas Feith—a chief architect of the US policy in Iraq—emphasised that carrying out the de-Ba’athification of Iraqi society was a priority for the US government. For Feith, the policy of de-Ba’athification, which involved (i) the ‘disestablishment of the Ba’ath party’, (ii) ‘the elimination of its structures’, and (iii) ‘the removal of its high-ranking members from positions of authority in Iraq’, was a way of assuring the Iraqis that ‘their way forward will not be blocked by the remnants of the Ba’athist

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3 The consequences of these measures are still felt in Iraq at the time of writing. See, in this regard, Ned Parker, ‘The Iraq We Left Behind: Welcome to the World’s Next Failed State’ (March/April 2012) 91 FA 94, 95–6.
apparatus that tyrannised them for decades’.\(^4\) He also noted that ‘de-Ba’athification’ would be carried out notwithstanding that it could result in the loss of skilled professionals who could help the reconstruction and administration of Iraq.\(^5\)

Although unquestionably a chief policy of the US administration in Iraq since the very beginning of the occupation, the scope and breadth of de-Ba’athification was refined in the initial months of the occupation. In General Franks’ Freedom Message, which came early in the occupation, de-Ba’athification was limited to the dissolution of the Ba’ath Party and the requisitioning of its assets.\(^6\) Subsequently, General Garner, the head of the Office for Reconstruction and Humanitarian Assistance (ORHA), undertook to carry out what he called ‘gentle de-Ba’athification’.\(^7\) This amounted to the removal of some Ba’athists from their positions on a case-by-case basis, while making sure not to deprive Iraq’s public administration of competent and skilled professionals.\(^8\)

However, under Bremer’s leadership of the CPA, de-Ba’athification became bolder and more widespread. It affected tens of thousands of individuals in a manner comparable to the purges undertaken by the Allied Powers in occupied Germany and Japan after World War II. In its order of 16 May 2003, entitled ‘De-Ba’athification of Iraqi Society’,\(^9\) the CPA terminated the work of an estimated 30,000 to 50,000 people,\(^10\) who were grouped into two main categories. The first category of individuals tar-


\(^5\) Ibid.

\(^6\) See Chapter 3, s 2(3).

\(^7\) See the interview of Jay Garner, Director of ORHA in Charles Ferguson, No End in Sight: Iraq’s Descent into Chaos (PublicAffairs 2008) 146.

\(^8\) Ibid.


targeted by Order 1 included political leaders within the Ba’ath Party who were defined as ‘Senior Party Members’. This category comprised Ba’ath Party members that held the ranks of (i) ‘Udw Qutriyya’ (Regional Command Member); (ii) ‘Udw Far’ (Branch Member); (iii) ‘Udw Shu’bah’ (Section Member); and (iv) ‘Udw Firqah’ (Group Member). Order 1 provided for their immediate removal from office, banned them from future employment in the public sector, and mandated that they ‘be evaluated for criminal conduct or threat to the security of the Coalition’. In addition, those suspected of criminal conduct were to be ‘investigated and, if deemed a threat to security or a flight risk, detained or placed under house arrest’.

In addition to Senior Party Members, a second category of individuals targeted by Order 1 comprised the ‘top three layers of management in every national government ministry, affiliated corporations, and other government institutions (e.g. universities and hospitals)’. These individuals were to be interviewed for possible affiliations with the Ba’ath Party and subject to investigation for ‘criminal conduct and risk to security’. If they were found to have been full members of the Ba’ath Party, they were to be removed from employment even if they had risen no higher than the junior ranks of the Party, such as ‘Udw’ (Member) and ‘Udw Amil’ (Active Member). Exceptions could be granted by the CPA’s Administrator on ‘a case-by-case basis’.

Order 1 also sought to eradicate any remaining influence of the Ba’ath Party and Saddam Hussein within Iraq. It did so by forbidding ‘displays in government buildings or public spaces of the images of Saddam Hussein … or symbols of the Ba’ath party’, and providing for the confiscation and holding in trust by the CPA of all the ‘property and assets of the Ba’ath party’.

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11 Order 1 (n 9) s 1(2).
12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.
16 Ibid, s 1(6).
17 See also Order 14, which forbade the media to broadcast or publish material which ‘advocates the return to power of the Iraqi Ba’ath Party or makes statements that purport to be on behalf of the Iraqi Ba’ath Party’. See CPA, ‘Prohibited Media Activity’, CPA/ORD/10 June 2003/14, 10 June 2003.
Insisting on the responsibility of the Ba’ath Party for the commission of crimes, the CPA offered rewards ‘for information leading to the capture of senior members of the Ba’ath party and individuals complicit in the crimes of the former regime’.\(^{19}\) Nothing in Order 1 suggests the possibility that the dismissed individuals would receive any pension or termination indemnity. Shortly after issuing Order 1, the CPA established the ‘Iraqi de-Ba’athification Council\(^ {20}\) and devised a two-stage de-Ba’athification process. The first stage of this process was under the control of the CPA, while the second was to be carried out under the direction of the Iraqi de-Ba’athification Council.\(^ {21}\)

Some months later, in light of ‘the grave concern of Iraqi society regarding the threat posed by the continuation of Ba’ath Party networks and personnel in the administration of Iraq’, and given that ‘organising and expediting de-Baathification’ was ‘an urgent task’, the CPA issued Memorandum No 7, delegating authority to implement the de-Ba’athification policy to the Iraqi Governing Council (IGC) in a manner ‘consistent with Order No. 1’.\(^ {22}\) Memorandum 7 stressed that the ‘Iraqi people have suffered large scale human rights abuses and deprivations over many years at the

\(^{19}\) Order 1 (n 9) s 1, paras 4–5.

\(^{20}\) The Iraqi De-Ba’athification Council was composed only of Iraqi citizens selected by Bremer, who had final authority over it. The Council was to prepare a list by investigating and gathering information on the identity and whereabouts of members of the Ba’ath Party who had been ‘involved in human rights violations and in the exploitation of the Iraqi people’. This information was to be submitted to Bremer, as the CPA Administrator. See CPA, ‘Establishment of the Iraqi De-Baathification Council’, CPA/ORD/25 May 2003/5, 25 May 2003. At the end of the CPA, this order was rescinded. See Order 100 (n 18) s 4.

\(^{21}\) In a rather paternalistic manner, section 3(1) of Memorandum 1 provides that the ‘Council was to carry out a significant role in the de-Ba’athification process’ but that this could also happen with the assistance of the Iraqi people ‘as the Administrator [of the CPA] determined that the responsibility for identifying Ba’ath Party members effectively can be transferred to Iraqi citizens’. See CPA, ‘Implementation of De-Ba’athification Order No 1’, CPA/MEM/3 June 2003/01, 3 June 2003, s 3(1).

hands of the Ba’ath party’. Unlike Order 1, however, the Memorandum sought to circumscribe the discretion of the IGC by setting detailed ‘terms and conditions’, and to avoid generalisations by specifying that ‘under the prior regime some Iraqis may have become affiliated with the Ba’ath Party for reasons not primarily related to their ideological beliefs’. Memorandum 7 also acknowledged, and in so doing endorsed, an earlier decision of the IGC to establish the Higher National De-Ba’athification Commission as an instrument to assist in the achievement of a ‘secure, stable environment that will sustain freedom and democracy for the Iraqi people’.

Interestingly, it was not the decision of the IGC that framed the competence of the Commission, but Memorandum 7 of the CPA. According to Memorandum 7, the Higher National De-Ba’athification Commission was to ‘analyze information objectively’ and render ‘fair and judicious determinations’ regarding an ‘Iraqi citizen’s affiliation with the Ba’ath Party’ or regarding his involvement with the intelligence and security organisations of Saddam Hussein’s. Moreover, it was to evaluate exceptions for ‘application to particular professions or groups of individuals’, such as those who were held as ‘POW by Iran during the period September 4, 1980 through June 1, 2003’ and ‘honoured’ upon their return with high positions in the Ba’ath party, as well as being tasked with the examination of appeals. Importantly, and consistent with basic notions of procedural fairness, Memorandum 7 provided that ‘any Iraqi citizen who is dismissed from his or her position’ of employment received ‘advance written notification’ of the grounds for dismissal and notification of the procedures for appeal. With Memorandum 7, the CPA also authorised the IGC to seize and manage the property and assets of the Ba’ath Party. Though delegating the implementation of the policy of de-Ba’athification to the IGC, Memorandum 7 did, however, ensure the CPA retained some supervisory control, as the IGC

23 Ibid, Preamble.
24 Ibid and see also s 2 (Terms and Conditions).
26 Ibid, s 2(2).
27 Ibid, s 2(3).
28 Ibid, s 2(4).
29 Ibid.
30 Ibid, s 1(2).
was to report monthly to the CPA’s Administrator about the ‘manner in which the authority delegated herein has been exercised’.  

As a consequence of Memorandum 7, what had begun as a policy of the occupants was gradually shifting towards becoming a policy of the Iraqi people, or, more precisely, of those Iraqis that had come to power in post-Saddam Hussein Iraq. In his memoirs, Bremer called the delegation to the IGC a ‘serious mistake’, because, under ‘Chalabi’s direction’ the policy of de-Ba’athification had been broadened. Irrespective of this, however, the remit of Order 1 was already quite broad and therefore prone to abuse. Order 1 targeted not only the Senior Party Members (more precisely, the top four layers of the Ba’ath Party), but also the top three layers of management in every public administration, including non-political entities such as public corporations, universities, schools, and hospitals. These individuals were targeted even if they were not Senior Party Members but were simply ‘active members’ and thus part of the fourth level of the hierarchy of the Ba’ath Party. Although the policy of de-Ba’athification as implemented by the Commission was far-reaching and divisive, the basis for this broad purview had in fact already been set by the CPA through the various provisions of Order 1. That said, the detailed ‘terms and conditions’ set by the CPA in Memorandum 7, if punctually complied with, could have ensured a more balanced and fair implementation of that policy.

1.2. Dissolution of entities

The dismantling of Saddam Hussein’s regime continued in Order 2. Issued a few days after Order 1 (22 May 2003), this Order, entitled ‘Dissolution of Entities’, disbanded the Iraqi army and other security forces, which

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31 Ibid, s 2(10).
32 Paul L Bremer, My Year in Iraq (Schuster & Simon 2006) 297. Speaking before the General Assembly of the UN as President of the Iraqi Governing Council, Chalabi showed an intransigent rather than a conciliatory attitude towards the Ba’athists by stating: ‘We want an Iraq that will eradicate all Ba’athists once and for all, bring all their officials to justice and prevent them from assuming power again.’ See UNGA Verbatim Record (2 October 2003) UN Doc A/58/PV.22, 30. See also Stover et al (n 10) 20–22.
caused an estimated 300,000 individuals to be put out of work and dissolved numerous political and security organisations in a single stroke.\textsuperscript{34}

An Annex to Order 2 listed the entities that would be \textit{ipso facto} dissolved and whose assets the CPA were entitled to seize. These listed entities can be grouped into three main categories. The first consisted of political and intelligence agencies, including ‘The Ministry of Defence, The Ministry of Information, The Ministry of State for Military Affairs, The Iraqi Intelligence Service, The National Security Bureau, The Directorate of National Security, the Special Security Organization’ and ‘all entities affiliated with or comprising Saddam Hussein’s bodyguards’.\textsuperscript{35} The second category concerned military as well as intelligence entities: ‘the Army, Air Force, Navy, the Air Defence Force and other regular military services, the Special Republican Guard, The Directorate of Military Intelligence, The Al Quds Force, Emergency Forces (Quwat al Tawari)’; as well as the paramilitary organisations known as the ‘Saddam Fedayeen’, ‘Ba’ath party militia’, ‘Friends of Saddam’, and ‘Saddam’s Lions Clubs (Ashbal Saddam)’.\textsuperscript{36} The third category of entities to be dissolved was more heterogeneous. It comprised a series of entities that in one way or another were part of, and had lent support to, Saddam Hussein’s rule of Iraq. These were ‘the Presidential Diwan, the Presidential Secretariat, the Revolutionary Command Council, the National Assembly, the Youth Organization, [the] National Olympic Committee, [the] Revolutionary, Special and National Security Courts’,\textsuperscript{37} and, finally, ‘all organisations subordinated to the dissolved entities’.\textsuperscript{38} The Order branded all of these entities as ‘Dissolved Entities’ and any person employed by a ‘Dissolved Entity’ was dismissed with effect from 16 April 2003—the date of the formation of the CPA.\textsuperscript{39}

Unlike Order 1, the text of Order 2 sheds little light on the reasons underpinning it. The only rationale that is mentioned in the text of Order 2 is the CPA’s recognition (though more a determination than a recognition) that

\begin{itemize}
\item \textsuperscript{34} Tripp (n 10) 282. See also Ricks (n 10) 162; Sanchez (n 10) 184; Toby Dodge, ‘From Regime Change to Civil War: Violence in Post-Invasion Iraq’ in Astri Suhrke and Mats Berdal (eds), \textit{The Peace in Between: Post-War Violence and Peacebuilding} (Routledge 2011) 134–43; Ali A Allawi, \textit{The Occupation of Iraq} (Yale University Press 2007) 157.
\item \textsuperscript{35} Order 2 (n 33) Annex.
\item \textsuperscript{36} Ibid.
\item \textsuperscript{37} Order 2 (n 33) Annex.
\item \textsuperscript{38} Ibid.
\item \textsuperscript{39} Ibid, 3(3).
\end{itemize}
the ‘prior Iraqi regime used certain government entities to oppress the
Iraqi people and as instruments of torture, repression, and corruption’. 40
The same order provided that a termination payment should be paid to
people working for a Dissolved Entity, with the exception of Senior Par-
ty Members, ‘in an amount to be determined by the Administrator’ and
promised that all pensions would continue to be paid, ‘including to war
widows and disabled veterans’. 41 In speaking of a termination payment,
Order 2 made clear that the removed officials were not only suspended
from office, which would have been justifiable as a temporary security
measure, but were also permanently dismissed, thereby depriving the re-
moved officials of their source of income indefinitely. 42 This determina-
tion seems to be, more than anything else, a punitive measure. The right
to remove public officials under Article 54, paragraph 2 of the Geneva
Convention IV should not be interpreted as a licence to impoverish such
officials and, by extension, their families, as so drastic a measure does not
seem justifiable from a security perspective. Such a course of action also
ran counter to Resolution 1483, which had asked the CPA to ensure the
welfare of the Iraqi people.

The decision to disband the Iraqi army engendered great frustration. 43
On 23 June, in the face of angry demonstrations by demobilised soldiers,
some of which led to violent confrontations, the CPA announced an in-
terim plan to facilitate the return of demobilised soldiers to civilian life,

40 Ibid, Preamble.
41 Ibid, s 3(5).
42 Ibid, s 3(4).
43 Staff Brigadier General Nabeel Khaleel commented:

The Americans dissolved the army and then they decreed they would
not give us a cent, precisely in order to make us understand that we
were a vanquished army. Then they told us that only the Ba’athists
would be denied payment. By displaying such ambiguity and vague-
ness, they are trying to show that Mister Bremer is all-powerful. Since
that time, the soldiers are desperately seeking more information: how
much will they receive? Until when? Where do they need to go? Now,
we know that our future is in their hands. Then, all of a sudden, in
July, Mr. Bremer decided to be magnanimous: he paid us in advance
three months’ worth of our pay. How can one account for such a cava-
lier attitude?

which included providing salaries to those not linked to the Ba’ath Party.44 However, Order 2 was never amended to adequately reflect and implement the announced change.

1.3. **Assessment**

According to Eyal Benvenisti, the policies pursued in Orders 1 and 2 are difficult to reconcile with the law of occupation and Resolution 1483.45 However, I believe that it is not the adoption of such policies that cannot be justified from a legal perspective, as neither the law of occupation nor Resolution 1483 forbade them, but rather it is the extent of these policies which is unjustified.

Orders 1 and 2 can be regarded as part of a strategy that saw the definitive dismantling of Saddam Hussein’s regime as the necessary condition for building a new Iraq. They removed a concrete obstacle that may have impeded the Iraqis in exercising the right to self-determination, as nobody (and certainly not the majority of the Iraqi people) wished that power be given back to the Ba’ath Party after decades of dictatorship.46 If the political, constitutional, and security structure that had fostered that regime and its mechanism of government remained in place, it would have been more difficult, if not impossible, for the Iraqis to ‘freely determine their own political future’, and for the UN and the CPA to establish ‘an inter-

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46 According to Charles Garraway whilst many considered that the use of force that led to the occupation was illegal, nobody took the view that the occupation should end with the transfer of power back to the Ba’ath party or Saddam Hussein. It was recognised that it was in the interests of the Iraqi people themselves that they should be able to develop fresh institutions, free from the taint of Saddam Hussein.

nationally recognized, representative government of Iraq’ as advocated in paragraph 8(c) of Resolution 1483.\(^{47}\) In this sense, Orders 1 and 2 could be said to be consistent with and justified by the spirit, if not the letter, of Resolution 1483. Likewise, Article 54 of the Geneva Convention IV authorises the dismissal of public officials that may threaten the security of an occupant. Under the law of occupation, massive purges may be justified to strengthen the security of the occupants, though, as clarified in the UK military manual,\(^{48}\) the right of dismissal must not be exercised in an arbitrary fashion, such as for ‘reasons unrelated to the official’s work, or because of the official’s refusal to carry out an order that is contrary to international law’.\(^{49}\)

Therefore, while no objection can be made regarding their adoption from a normative perspective, the draconian character of Orders 1 and 2 remains puzzling. Let us consider the reasoning supporting these orders. Order 1 was justified by three main sets of concerns: (i) the Iraqi people’s suffering of ‘large scale human rights abuses ... at the hands of the Ba’ath Party’; (ii) ‘the threat posed by the continuation of Ba’ath Party ... and the intimidation of the people of Iraq by Ba’ath Party officials’; and (iii) ‘the need to ensure that those in positions of authority in the future are acceptable to the people of Iraq’.\(^{50}\) Moreover, Order 1 spoke of ‘the continuing threat to the security of the Coalition Forces posed by the Iraqi Ba’ath Party’. Like Order 1, it was also emphasised in Order 2 that ‘the prior Iraqi regime used certain government entities to oppress the Iraqi people and as instruments of torture, repression and corruption’.\(^{51}\) Unlike Order 1, however, Order 2 did not mention security concerns. Presumably, though, this may have been an implicit justification for its adoption, as it targeted the military structure and personnel of the Iraqi regime.

By linking Ba’ath Party members as well as members of the Iraqi Army and other security organisations to widespread human rights violations,


\(^{49}\) Arai-Takahashi (n 47) 144.

\(^{50}\) Order 1 (n 9) Preamble.

\(^{51}\) Order 2 (n 33) Preamble.
Orders 1 and 2 went far beyond issues of security and the removal of obstacles to the building of a new Iraq, in that they amounted to a kind of collective sanction, if not punishment. When looking at the reasons given in support of their enactment, these orders may be understood in terms of a *sui generis* process of accountability carried out by the occupying powers, ostensibly in the name of, and for, the Iraqi people. Orders 1 and 2 made entire categories of individuals believed to be associated with human rights violations pay for their deeds, or, rather, pay for what the CPA assumed their collective deeds to have been. The constant references to ‘the Iraqi people’ in the text of these orders made it appear as if the Iraqi people had been the jury of Saddam Hussein’s regime, pronouncing a guilty verdict and demanding retribution without either a factual inquiry or a trial. However, though segments of the Iraqi population unquestionably supported the CPA’s policies as victims of Saddam Hussein’s regime, it should not be overlooked that it was in fact the CPA itself, and not the Iraqi people, that was drawing conclusions and inferences regarding which categories to target for their association with past crimes. Without wishing to detract from the occurrence of crimes during Saddam Hussein’s regime, the dismissal of these individuals was nevertheless based merely on status rather than on facts.\(^5\)

The ‘sanctions’ imposed by the CPA upon the groups deemed responsible for human rights violations resulted in the permanent loss of employment in the public sector, along with the loss of related benefits and entitlements. Placing such blame on tens of thousands of individuals was also unjust from a human rights perspective, as it resembled an act of political discrimination rather than one of democratic development, which not only resulted in removing the categorised individuals from power for the duration of the occupation, but severely hampered the possibility of their return to work, given that Order 1 had banned the category of Senior Party Members from future employment in the public sector.

The approach adopted by the CPA of allocating responsibility for crimes was *sui generis* amounting to neither a mechanism of judicial accountability nor a truth and reconciliation process. Nor did it help in proving the commission of the crimes ascribed to the targeted individuals, which was asserted but not demonstrated, as well as being recorded in a public

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document. From the perspective of accountability, something the Security Council had called for in the Preamble of Resolution 1483, Orders 1 and 2 were simultaneously too severe and too lenient.

The excessive severity and broad scope of the two orders meant that tens of thousands of individuals were regarded as responsible for human rights violations, without any serious investigation of the individual roles, and levels of participation of each individual, if any, with respect to the commission of such violations. In this sense, the policies carried out in Orders 1 and 2 appear similar to a process of guilt by association. Orders 1 and 2 overlooked the fact that some Ba’ath Party members, if not the majority, had joined the party as an inescapable step in pursuing a career in the public sector of a totalitarian state, in much the same way as those who lived under communist rule in Eastern Europe had joined the Communist Party in a ‘purely nominal way’.

Concomitantly, the extent of the purges does not appear to be proportionate to, and justified by, the security needs of the occupants. Although ostensibly directed only against the Senior Party Members, the policy of de-Ba’athification was in fact much broader. As previously noted, Order 1 also targeted the first three layers of management in every national government ministry, affiliated corporations, and other government institutions, even if these employees or officials were active members only at the fourth level of the Ba’ath Party hierarchy. For example, this order included physicians within its scope, limiting the ability of hospitals to provide health care. Not only is it unclear what threat physicians posed to the Coalition Forces, it also contradicts Article 56 of the Geneva Convention IV, which requires

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53 According to Stover et al (n 10) 22:
De-Ba’athification procedures were unfair and opaque. Individuals were automatically dismissed without basic due process procedures, such as being notified of the information against them, the right to a hearing prior to dismissal, or the right to examine their own file. Exemptions and reinstatements were technically possible, but depended on ill-defined and often changing criteria. As a result, the HNDBC (De-Ba’athification Commission) wielded enormous power over the lives of thousands of people with little or no accountability. There was the strong perception, and sometimes the reality, that the De-Ba’athification Commission was merely another political tool in the hands of its Shia masters.

54 See the interview of Robert Hutchings, Chairman of US Intelligence National Council, in Ferguson (n 7) 154.
that ‘to the fullest extent of the means available to it’, the occupying power should ensure and protect ‘the medical and hospital establishments and services, public health and hygiene in the occupied territory’, and Article 15, which provides that ‘Civilian medical personnel shall be respected and protected’.55 Thus, unless there was a reasonable basis upon which to conclude that the physicians directly threatened the security of the occupants, which may have justified their removal under Article 54 of the Geneva Convention IV, their removal from their posts contravened the occupants’ duties under Article 56.

Similarly, under Article 50 of the Geneva Convention IV, an occupying power is also tasked with the duty of facilitating ‘the proper working of all institutions devoted to the care and education of children’. This duty can be difficult to carry out, however, if those with the ability to make those institutions work in a given context are prevented from so doing by being prejudicially dismissed. The excessive nature of Orders 1 and 2 did not aid the creation of conditions of security and stability either; on the contrary, the orders inflamed resentment against the occupation and hatred among Iraqi groups. Because the traditional ruling class of Iraq was predominantly Sunni,56 attacking the Ba’ath Party and the institutions of

55 See the texts of Art 56 of the Geneva Convention IV and Arts 14 and 15 of Additional Protocol I in Adam Roberts and Richard Guelff, _Documents on the Laws of War_ (3rd edn, OUP 2000) at 320 and 430–1, respectively. Arts 14 and 15 of Additional Protocol I may be regarded as reflecting a norm of customary international law and thus binding also on the US see in this regard Jean-Marie Henckaerts and Louise Doswald-Beck, _Customary International Humanitarian Law_ (CUP 2005) vol 1, 79–84.

56 Speaking in terms of ‘Sunni’ and ‘Shiites’, which reveals a religious, not an ethnic distinction, serves a descriptive purpose but, of course, caution is necessary to avoid too broad generalisations. Aptly Anthony Cordesman in _Iraq’s Insurgency and the Road to Civil Conflict_ (Praeger Security International 2008) Vol I at 50, observes that:

While most of Iraq’s ruling elite during Saddam Hussein’s decades of dictatorship were Sunni, the top elite came from a small portion of Sunnis, many with family backgrounds in what were originally rural military families. The top elite had strong ties not only to Saddam’s extended family, but to Tikritis in general, ... However, the vast majority of Sunnis got little special benefit from Saddam’s rule, and many Sunnis suffered from his oppression in the same way as other Iraqis.

On the same line, the International Crisis Group notes in ‘Make or Break: Iraq’s Sunnis and the State’ (Middle East Report No 144, 14 August 2013) 4:
Saddam Hussein’s regime was tantamount to attacking the Sunnis, peremptorily excluding them from the control of Iraq. This turned the tables on the perceived former Sunni oppressors, who, because of Orders 1 and 2, also saw their power, status, and jobs ebb away to the benefit of Shiites and Kurds. Not surprisingly, therefore, the frustration that this caused among Sunnis became a rationale for insurgents who vowed revenge against the occupation.

From a human rights perspective, the CPA’s orders are excessive in at least two respects. First, it could be argued that, as so often happens in processes of lustration, by not distinguishing between levels of responsibility, participation in, and contribution to the policies of Saddam Hussein’s regime, Order 1 may be seen as a form of political discrimination. This could be construed as a breach of Articles 2(1) of the International Covenant on Civil and Political Rights (ICCPR) and 2(2) of the International Convention on Economic, Social and Cultural Rights (ICESCR). Further, Orders 1 and 2 terminated, rather than merely suspended, the jobs of tens of thousands of individuals in a manner that prejudiced them without any assessment of their individual culpabilities, which is at odds with the right to work recognised in Article 6 of the ICESCR. The Human Rights Committee (HRC) interpreted this norm, which is binding on both the US and the UK as party to the ICESCR, as including the right not to be unfairly deprived of work.

After the Baath party assumed power in 1968, Sunnis Arabs retained an important – although far from exclusive – share within the power structure. Saddam Hussein, himself a Sunni Arab but above all a provincial outsider, invested in tribal and sectarian loyalties to entrench his power in the capital, especially in the sensitive security arena. That said his regime victimised people from all backgrounds, members of the Sunni community included – whether ordinary citizens, clerics, businessmen or tribesmen.

58 Ibid, 396.
59 Paragraph 4 of General Comment No 18 reads:

The right to work, as guaranteed in the ICESCR, affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regard-
Arguing for the possibility that certain human rights provisions may have been violated is not denying that the CPA could sideline Iraqi public officials during the occupation. Article 54 of the Geneva Convention IV as lex specialis trumps corresponding human rights provisions. Rather, it is to recall that, unlike human rights obligations, measures taken under Article 54 are not binding on a government that assumes office after the end of an occupation. For instance, the rather harsh provision in Order 1 permanently forbidding Senior Ba’ath Party Members from being appointed to public service should have been deemed to have expired after the end of the occupation. It is then for the new government to decide what to do with the sidelined officials. Such targeted officials could reclaim their previous posts on the ground that the termination of their work was due to the occupation, and not related to performance of their work or to human rights violations, as asserted but not demonstrated in Orders 1 and 2. Also, relying on Article 6 of the ICCPR and on relevant Iraqi laws, those officials could seek to argue that they had the right to regain their posts unless the government confirmed their dismissal and gave reasons for such a decision—reasons that in a democratic system the dismissed workers should be able to challenge in a court of law—as well as to claim any economic entitlement which would have accrued during their employment.60

Nothing of the sort occurred in Iraq, however. The de-Ba’athification Commission, and thereby the policy it was implementing, remained in place after the demise of the occupation. The recognition of the Commission’s existence in Article 49(A) of the Transitional Administrative Law of 8 March 2004 (TAL)—which, as discussed in section 4.5, below, was essentially an interim constitution—ensured that this was the case.61 In 2008


60 Order 1 (n 9) s 1(2).
61 Art 49(A) of the TAL provided that:

The establishment of national commissions such as the Commission on Public Integrity, the Iraqi Property Claims Commission, and the Higher National De-Ba’athification Commission is confirmed, as is the establishment of commissions formed after this Law has gone into effect. The members of these national commissions shall continue to serve after this Law has gone into effect, taking into account the contents of Article 51, below. See text of the TAL in Talmon (n 2) 1249–67.
the Iraqi Parliament established the Supreme National Commission for Accountability and Justice. The purposes of this Commission included to ‘prevent the ideological, administrative, political and practical return of the Baath party under any name into power or public life of Iraq’; and to ‘[c]leanse the establishments of the public and mixed sectors, the civil society organizations and the Iraqi society from the Baath party system in any form whatsoever’. At the time of writing, the policy of de-Ba’athification is still in existence.

To summarise, it is possible to justify, the policies pursued through Orders 1 and 2 in accordance with Resolution 1483 as contributing to the creation of conditions for the Iraqi people to determine their future free from the intimidating influence of those who had impeded such choice for many years by supporting a dictatorial regime. However, Orders 1 and 2 went too far in their effort to remove Saddam Hussein’s regime by not adequately distinguishing among differing roles and responsibilities. As a consequence, Orders 1 and 2 did not help to bring security and stability to Iraq; on the contrary, they counteracted principles of fairness and proportionality, affected the welfare of the Iraqi people, deprived the Iraqi State of the contribution of many skilled civilians, and military and security professionals, with the consequence of helping to create the conditions of resentment, anger, and confusion that constituted the fuel to ignite the flames of insurgency and sectarian violence and the ideal conditions for terrorists to infiltrate and prosper.

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64 On 14 January 2010, the Independent High Electoral Commission disqualified 499 Sunni candidates from participating in the forthcoming political elections after receiving a list from the Supreme National Commission for Accountability and Justice singling out those individuals for ties with the Ba’ath Party. See Anthony Shadid, ‘Iraqi Commission Bars Nearly 500 Candidates’ NYT (New York, 14 January 2010); Steven Lee Myers, ‘Iraqi Court Disqualifies Opposition Candidate’ IHT (New York, 27 April 2010).

65 See for further analysis, Toby Dodge (n 10) 36-40. A more proportionate and balanced approach may be that suggested by Larry Diamond. This scholar has advocated that only the military and political leadership be purged and that both police officials and members of the Ba’ath party be submitted to a vetting process. He suggested that all soldiers and officers up to a certain
On the other hand, Orders 1 and 2 were simultaneously too lenient, or perhaps simply incomplete, in one fundamental respect. Specifically, the orders did not contemplate a mechanism of judicial accountability that could effectively ensure that those who may have been responsible for human rights violations, for the commission of crimes more generally, or for being a threat to Iraqi society, could be put on trial. Although the Iraqi Special Tribunal did try some of the leaders of the Ba’ath Party (see section 3.2.1. below), the number of individuals put on trial was minimal in comparison to what might have been expected in light of the far-reaching claims made in Orders 1 and 2.

Last but not least, it is important to acknowledge that when an occupying power is faced with the problem of what to do with the remnants of the previous despotic regime, there are no clear-cut solutions. The possibility that the security of the occupant and of the occupied people in the case of oppressive regimes will be threatened by the officials of the dislodged regime is certainly not remote. As the law of occupation is, *inter alia*, intended to protect the security of an occupying power, the removal of officials that threaten or may threaten that security is consistent with the legal framework.66

Moreover, it is important to underline—particularly in a society as fragmented as the Iraqi one—that the policy of de-Ba’athification was not unpopular among numerous Iraqis.67 On the contrary, it had been sought by Iraqi exiles, Shi’a Islamist parties, and the Kurds.68 When Iraq regained sovereignty and the Iraqis had the ability to set it aside, they chose not to. As noted, in both 2005 and 2008 the Iraqi legislative bodies passed laws that ensured the continuation of the substance of the policy. The path chosen in Iraq suggests that the CPA’s policy of de-Ba’athification was legitimised by the Iraqi people, or at least by the majority of them. Hence, it

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68 Allawi (n 34) 150.
could be argued that, from the perspective also of the right to self-determination, the CPA should not be rebuked for adopting such a policy. But the legitimacy of a policy does not allow for overlooking the excesses and abuses caused by its adoption and formulation. A government, whether *de jure* or *de facto* is not only the guarantor of the implementation of the wishes of the majority, but it is also the protector of the rights of the minority. So, while, in retrospect, it could be argued that the CPA may have legitimately chosen to adopt the policy of de-Ba’athification, it should also have ensured its compliance with basic human rights standards of fairness, transparency, and equal treatment. This effort could have included a generalised right of appeal and the setting of clear and transparent restrictions as to the categories of individuals for which exceptions could be made, rather than leaving it to the discretion of the CPA’s Administrator. In Memorandum 7, the CPA sought to do something along these lines, but the fact that it never amended Order 1 suggests that it was not ready to concede flaws within its own policy and make a clear amendment, capable of being impugned, visible to all the Iraqis. Notably, this was a missed opportunity for the CPA to demonstrate its commitment to human rights by preventing possible discrimination.

That said, it should not be neglected that there are also problems with the content of Article 54 of the Geneva Convention IV. Apart from expounding the right of occupants to remove officials within the occupied country, paragraph 2 of Article 54 does not set parameters to govern the exercise of that right, nor do any of the other paragraphs of the Article. While the above analysis has unveiled a number of rules and principles applicable to occupations in general that are relevant to situations falling under Article 54, it is also suggested that the measures taken under paragraph 2 of Article 54 of the Geneva Convention IV must be restrained by the principles of necessity and proportionality. However, in order for the law to play any meaningful guiding role in crisis situations such as occupation, it must itself provide specific and clear guidance to avoid dependence on interpretation, which may be quite subjective. In the absence of specific limitations, the possibility of excesses is of course at its zenith. To curb excesses, a sharper definition of the occupants’ duties under Article 54, perhaps developed through an amendment to the law of occupation or on a case-by-case basis through a Security Council resolution issued in the aftermath of a conflict, appears necessary.

Another problem is the arguably inherent contradiction in the Geneva Convention IV itself. On the one hand, it requires that the civilian population be protected; on the other hand, it often allows entire families to be
left without their main or only source of income due to job purges during occupation. Providing some form of help to those families might be expected from any occupying power, and certainly the Security Council’s quest to protect the welfare of the Iraqi people could have been interpreted in this way. However, the business of law, and certainly of international humanitarian law, is not to rely on expectations of moral behaviour but to provide clear guidance to its addressees so as to induce compliance with its tenets. I would prompt, therefore, that it is necessary to update the Geneva Convention IV to ensure that those victims of purges during an occupation are not deprived of their economic entitlements, including their income, without appropriate reasons that could be subject to judicial review once the occupation ends.

2. **The duty to restore ‘conditions of security and stability’**

Consistent with Article 43 of the Hague Regulations, which places the onus on an occupying power to ensure ‘as far as possible, public order and safety’ within the occupied territory, paragraph 4 of Resolution 1483 required the CPA to ensure the welfare of the Iraqi people through ‘working towards the restoration of conditions of security and stability’. In contrast to Article 43, however, the Security Council did not state that the CPA was to perform its duty ‘as far as possible’. This omission may suggest that the obligation proclaimed in Resolution 1483 was somewhat stronger than that in Article 43. At the same time, the use of the wording ‘working towards the restoration of conditions …’ may have provided the CPA with some leeway as to the extent to which its compliance with that duty was to be assessed. The inclusion of this duty in a dispositive paragraph of Resolution 1483 is indicative of the importance the Security Council attributed to it.

Under the law of occupation and Resolution 1483, the CPA had the authority and the duty to devise an appropriate policy and normative framework to restore ‘conditions of security and stability’ in Iraq. This included providing the necessary directives to Coalition Forces, as well as to the

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69 Resolution 1483 (n 47) para 4.

70 Section 1(3) of Regulation 1 provides that ‘as the Commander of Coalition Forces, the Commander of U.S. Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq's territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally’. See CPA, ‘Co-
Iraqi people. While the latter did not have a duty of allegiance to the CPA, nor were they required to comply with any potential demands of the CPA, the Iraqi people could still be expected to comply with the CPA, as the civilian authority governing Iraq and possessing authority to legislate under both general international law and Resolution 1483 in those areas in which the CPA was entitled to take normative measures. Arguably, it would be contradictory if international law were to task an occupant with the protection of the local civilian population and, at the same time, were to jeopardise such an objective by allowing the local population to ignore the genuine efforts made in this regard; all the more so when a given conduct of an occupying power is requested or supported by a Security Council Resolution.

The Security Council did not rank the objectives it had set for the CPA on a hierarchical scale. However, taking account of the precarious security conditions in Iraq, the nature and content of the law of occupation, and the exhortation contained in Resolution 1483, working towards the restoration of conditions of security and stability in occupied Iraq should have been an absolute priority for the CPA, necessary also for the achievement by the CPA of much-needed legitimacy and support among the Iraqi people.

Because the maintenance of security and stability involved the use of force, Coalition Forces naturally had a key function to play in this respect. They enforced the CPA’s policies and also had a duty to protect the civilian population from any form of violence, including any arbitrary behaviour on the part of members of the Coalition Forces. During the course of the occupation, the CPA and Coalition Forces faced serious problems due to terrorist attacks and a growing insurgency. Initially perceived and erroneously dismissed as no more than the actions of a few terrorist groups or remnants of Saddam Hussein’s regime, the increasing series of attacks

alition Provisional Authority Regulation No 1’, CPA/REG/16 May 2003/1, 16 May 2003, s 1(3) (Regulation 1).


72 Dinstein (n 66) 94–5.

against Coalition Forces gradually escalated into a full-scale insurgency. In addition to its terrorist component, the insurgency had both a Sunni and a Shiite element. The Sunni group, or at least a part of it, opposed the occupation on the basis of perceived loss of power and pride, loss of income, suspicions regarding the motives behind the occupation, and

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74 See Chapter 3, footnote n 35. Anthony Cordesman of the Washington-based Centre for Strategic and International Studies in *Iraq's Insurgency and the Road to Civil Conflict* (Praeger Security International 2008) 68-9, describes the evolution of the insurgency thus:

A total of 37 US soldiers were killed in May 2003. The death toll for US troops in June was 30. In July the death toll reached 47, but levelled off in August and September to 35 and 30, respectively. The monthly death toll was still only 43 in October, although it suddenly rose to 82 in November, almost doubling from previous months. The total number of enemy-initiated attacks rose from 750 in September to 1,000 in October. The US death toll for December was 40. By January 31, U.S. fatalities from post-combat period numbered 381. Between December and January, insurgents shot down five U.S. military helicopters.

75 A newspaper article reported an Iraqi Sunni as saying that ‘we were on top of the system. We had dreams. Now we are the losers. We lost our positions, our status, the security of our families, stability, Curse the Americans, Curse them ... Was being a Ba'athist some sort of disease? Was serving the country some sort of crime?’ See Daniel Williams, ‘In Sunni Triangle, Loss of Privilege Breeds Bitterness Veterans of Security Apparatus Are Now Pariahs’ *Washington Post* (Washington, 13 January 2004) 1. On the same line, the International Crisis Group notes in ‘Make or Break: Iraq’s Sunnis and the State’ (Middle East Report No 144, 14 August 2013) 4:

After the Baath party assumed power in 1968, Sunnis Arabs retained an important—although far from exclusive—share within the power structure. Saddam Hussein, himself a Sunni Arab but above all a provincial outside, invested in tribal and sectarian loyalties to entrench his power in the capital, especially in the sensitive security arena. That said his regime victimised people from all backgrounds, members of the Sunni community included—whether ordinary citizens, clerics, businessmen or tribesmen.

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76 Allawi (n 34) 242.

77 Insurgents were quoted as saying that ‘we do not want to see our country occupied by forces clearly pursuing their own interests, rather than being
disgruntlement at the choices made by the CPA. Religious convictions, a quest for power, and a general resentment towards the foreign presence in Iraq also inspired the rise against the occupation among certain segments of the Shiite group. The growth of the insurgency led to major confrontations in the spring of 2004, which became violent enough to be called a ‘Second War’ or, to quote General Sanchez, ‘the Shia Rebellion’. Fighting the insurgency and its terrorist component became the principal activity of Coalition Forces, which Resolution 1511 enabled by authorising Coalition Forces to use force, that is to ‘take all necessary measures’ to ‘contribute to the maintenance of security and stability in Iraq’. While reviewing the conduct of hostilities by Coalition Forces against insurgents and terrorist groups is beyond the scope of this book, the next section discusses the poised to return Iraq to the Iraqis’. See Zaki Chehab, ‘Inside the Resistance’ Guardian (London, 13 October 2006).

78 The Sunni clerical class has always been intimately associated with power as well as with the Ministry of Religious Endowments, which traditionally took direct responsibility for the staffing, paying, and directing of the nearly 7,000 Sunni mosques under its jurisdiction. The CPA, however, abolished this ministry. See Allawi (n 34) 245.

79 By April 2003, Muqtada al-Sadr, a young Shiite cleric, and his colleagues had formed the so-called Mahdi army, and were able to drive out the Ba’ath Party and take control of an area in the eastern part of Baghdad, previously known as Saddam City and renamed it Sadr City. This was an example of an occupation of territory by a non-state actor. In August 2003, the Iraqi Central Criminal Court issued arrest warrants for Sadr for the killing of the moderate Shiite cleric Ayatollah Maji al-Khoei, but the order was never executed. Although it did not ignore the order altogether, the CPA did not stop Sadr and his militia, as the emergence of the militia was, at that time, considered a spurious phenomenon. In addition, political considerations favoured containment over direct confrontation in order to avoid making Sadr appear as a martyr. See Larry Diamond, ‘What Went Wrong in Iraq and Why’ in Francis Fukuyama (ed), Nation-Building Beyond Afghanistan and Iraq (John Hopkins University Press 2006) 178. As the warrant issued against Sadr was never executed, Sadr’s Mahdi army was able to continue to recruit and train. See Diamond, Squandered Victory (n 65) 214–7.

80 See Diamond, Squandered Victory (n 65) 211; Bensahel et al (n 73) 96.

81 Ricardo S Sanchez (n 10) 329–45.

measures taken by the CPA to fulfil its duty to restore conditions of security and stability within Iraq in concomitance with a mounting insurgency.

2.1. Control of weapons

A logical pre-condition, or rather an imperative, for the maintenance of security is the full disarmament of those who have no legitimate function in the maintenance of security within a territory. According to some estimates, there were 24 million firearms in Iraq in April 2003. Some of these weapons, such as AK-47s, had been obtained out of fear for personal security during the phase of massive looting in the immediate aftermath of Operation Iraqi Freedom. Other weapons included a vast cache of light and heavy military armaments, such as rocket-propelled grenades.

But despite the presence of this substantial amount of weaponry, the CPA seemed more inclined to control and reduce the number of weapons in Iraq rather than to carry out a fully-fledged disarmament. Its first measure in this respect was Order No 3, issued on 23 May 2003, which was tellingly enough named ‘Weapons Control’. The order drew a distinction between ‘Heavy Weapons’, the possession of which was banned for everyone except for members of the Iraqi forces supervised by the Coalition Forces, and ‘Small Weapons’, which could be held ‘in a person’s home or place of business’ but not in public places. Although this measure may have produced some positive results, it is debatable whether it was enough
to curb violence in Iraq, let alone to prevent it. ‘Small Weapons’, including ‘rifles that fire up to 7.62 mm ammunitions, shotguns, and pistols’, were by no means innocuous. Given their lethal firepower, the continued circulation of these ‘Small Weapons’ were capable of fostering a significant degree of armed violence in the territory. Furthermore, the number of places that qualified as ‘home or place of business’ in which the possible abuses or violations of Order 3 were exempt was so large that the possibility that these weapons could be used for reasons other than strict personal defence was quite high.

Six months later, the CPA blurred the distinction between heavy and small weapons. 89 It extended the ban imposed on the former to the latter and enlarged the definition of public places, in which all weapons were prohibited. 90 Even this stricter interpretation, however, fell short of requiring fully-fledged disarmament. Groups authorised by the CPA as well as those authorised by the Iraqi Ministry of the Interior could continue to possess weapons. Civilians could possess firearms for personal use. 91 This latter exception was probably born out of the desire to offer the Iraqis the ability to defend themselves in the increasingly violent context in which Coalition Forces could not always guarantee ‘minimum’, let alone full, security. 92 Limiting, but not banning, the possession of weapons could be described as a compromise between complete disarmament, which could leave some Iraqis completely unprotected, and no disarmament at all, which would have led to sustained, or even increased, violence. Yet in a situation as tense and violent as that in Iraq, which had been exacerbated by the continuation of the occupation, it may be questioned whether this middle ground was a solution or a deferment of the problem. Allowing private citizens to possess weapons may have increased insecurity rather than reduced it. The adoption of a more restrictive and clearer policy than that offered in the original Order 3 at the start of the occupation would

90 Ibid, s 1(8). The revised list of public places covered ‘state-owned property, places of worship, holy sites, hospitals, schools, gathering places such as town squares and parks, streets and such other places that may be designated by the CPA’.
91 Ibid, ss 3(2) and (3).
have been more in line with the CPA's primary obligation to provide security under the law of occupation and Resolution 1483.

2.2. **The criminalisation of specific conduct and the harshening of penalties**

In the absence of a viable police force and a fully functioning judicial system, and within the context of a situation that grew increasingly tense as the months went by, a recurrent issue confronting the CPA was how to maintain security in a country with a population of several million, some of whom seriously threatened or hampered the security of Coalition Forces, while others were engaged in the commission of a variety of crimes, such as smuggling and kidnapping of both Iraqis and foreign personnel.93 In line with the authoritarian nature of the CPA's position in Iraq as an occupation administration, but consistent with the authority vested in it to decide which measures to adopt in the performance of its functions and execution of its duties, the CPA sought to achieve a safer Iraq by: (i) forbidding or restraining a variety of conducts, such as those expressing or encouraging dissent against the occupation; (ii) introducing new crimes sanctioned with harsh penalties; and (iii) augmenting the penalties for some existing crimes under the Iraqi Penal Code of 1969.

An initial raft of measures enacted by the CPA concerned ways of curbing dissent against the CPA and/or expressions of support for the Ba'ath Party. On 5 June 2003, the CPA issued a public notice forbidding ‘prohibited pronouncements’ and ‘material’ inciting violence,94 and sanctioning violations of these prohibitions with the ‘immediate detention’ of the author as ‘a security internee under the Fourth Geneva Convention of 1949’.95 More-

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93 Some of the crimes that occurred most frequently were revenge and honour killings to settle scores against former Iraqi public officials and politicians; kidnappings of adults and children for money or political reasons; and attacks against police stations. The lack of a functioning police force made it difficult to stop what had become a cycle of violence. See the interviews of Joost Hiltermann, a senior official at the International Crisis Group, Paul Hughes, who worked for both ORHA and the CPA, Matt Sherman, who worked for the CPA, and Gerald Burke, CPA’s advisor to the Iraqi Ministry of Interior, in Ferguson (n 7) 251–65.


95 Ibid.
over, determined ‘to prevent the misuse of media to promote violence or undermine public security generally’, the CPA issued Order No 14, which banned media content that incited violence, civil disorder, or violence against the Coalition Forces, or that advocated the alteration of Iraq’s borders or the return of the Ba’ath Party.\textsuperscript{96} Transgressors could be ‘detained, arrested, prosecuted and, if convicted, sentenced by relevant authorities to up to one year in prison or a fine of up to USD 1,000.00’.\textsuperscript{97}

On 9 July 2003, concerned ‘by the exploitation of demonstrations by persons intent on inciting violence against the Iraqi people’, the CPA issued Order No 19, restricting freedom of assembly.\textsuperscript{98} Under this order, it was unlawful ‘for any person, group or organization’ to ‘conduct or participate in any march, assembly, meeting, or gathering on roadways, public thoroughfares or public places in more than one specific area’\textsuperscript{99} without obtaining the CPA’s authorisation through a Coalition Forces Commander or a Divisional or Brigade Commander twenty-four hours in advance.\textsuperscript{100} Such authorisation could, however, be denied if the event ‘unreasonably obstructed pedestrian or vehicular traffic’, if it lasted longer ‘than four hours’, and if it were held ‘within 500 meters of any CPA or Coalition Force facility’.\textsuperscript{101} Any individual violating this order was to be ‘detained, arrested, prosecuted and, if convicted, sentenced to up to one year in prison’.\textsuperscript{102}

Along the same lines, the CPA amended the Iraqi Penal Code to add the obligation to denounce to the CPA any offence that had been ‘committed with the intent to spread panic among the population or create anarchy’.\textsuperscript{103}

In tandem with these efforts, the CPA sought to tighten control over Iraq’s borders so as to prevent the infiltration of ‘terrorists’ and the fleeing of suspects of crimes. On 27 June 2003, the CPA issued Order No 16, which

\textsuperscript{96} CPA, ‘Prohibited Media Activity’, CPA/ORD/10 Jun 2003/14, 10 June 2003.


\textsuperscript{99} Ibid, s 3.

\textsuperscript{100} Ibid, s 4.

\textsuperscript{101} Ibid.

\textsuperscript{102} Ibid, s 7.

\textsuperscript{103} These offences included ‘the destruction of or serious damage to public property of significant national economic importance (including an oil pipeline), public buildings (including a mosque), and government property’. See CPA, ‘Notification of Criminal Offences’, CPA/ORD/19 September 2003/41, 19 September 2003, s 1(2).
placed a number of limitations upon the right to enter and exit Iraq.\textsuperscript{104} It provided that a person seeking entry to Iraq was to appear before ‘an authorized officer of the CPA ... for examination to determine whether the person may be granted entry to Iraq’.\textsuperscript{105} It limited the number of people that could freely exit Iraq by requiring certain categories of individuals, such as ‘Senior regime or military leadership and Senior Party Members’, to obtain ‘special clearance’ from the Minister of Interior in order to be able to exit Iraq.\textsuperscript{106} In addition, on 24 August 2003, the CPA established the Department of Border Enforcement, which was to ‘monitor and control the movement of persons and goods to, from, and across the borders of Iraq’\textsuperscript{107} under the authority of the Ministry of Interior because ‘border controls are essential to the establishment of a free and safe Iraq’\textsuperscript{108}

A third set of measures enacted by the CPA focused on restraining rampant criminality. Seeking to prevent and repress ‘attacks of looting and sabotage’ and ‘instances of kidnapping, rape, and forcible larceny’, which represented a ‘serious threat to the security and stability of the Iraqi population’,\textsuperscript{109} the CPA passed Order No 31 on 10 September 2003, which modified Article 353(1) of the 1969 Iraqi Penal Code\textsuperscript{110} to increase the maximum punishment for the offences of ‘wrecking, destroying or otherwise damaging water, electricity or oil installations or other public utilities’ from seven years to life imprisonment.\textsuperscript{111} Order 31 increased the maximum penalty to life imprisonment for theft involving aggravating factors, as list-
ed in Articles 440 to 443 of the 1969 Iraqi Penal Code.¹¹² Last but not least, Order 31 augmented the maximum penalties for both kidnapping (Articles 421, 422, and 423 of the 1969 Iraqi Penal Code)¹¹³ and rape (Article 427 of the Iraqi Penal Code) from fifteen years to life imprisonment,¹¹⁴ and increased the maximum punishment for indecent assault from seven years (or ten years if the victim was under eighteen) to fifteen years.¹¹⁵

Furthermore, on 3 October 2003, the CPA issued Order No 36 entitled ‘Regulation of Oil Distribution’.¹¹⁶ Acting on the conviction that ‘theft and smuggling of the natural resources of Iraq’ were crimes that affected ‘the well-being and future of all Iraqis’, and determined to ‘act decisively to tackle the theft and smuggling of natural resources’,¹¹⁷ the CPA devised a mini-criminal code attached to Order 36.¹¹⁸ This code regulated the transportation of fuel cargos and specified the required authorisations,¹¹⁹ as well as seeking to restrain smuggling by prohibiting drivers ‘to sell any fuel within Iraq’.¹²⁰ The penalties for failing to comply with this order consisted of ‘a term of detention not exceeding six months or a fine’, which could be doubled ‘for a second or subsequent offences’.¹²¹

2.3. The effort to restrain private militias

Not surprisingly, given the dissolution of the Iraqi army and various other security organisations brought about by Order 2 and the general lack of security and growing tension among the main Iraqi groups, the proliferation and growth of private militias was common during and after the CPA’s control over Iraq.

All of the main Iraqi political parties, including most notably the Patriotic Union of Kurdistan (PUK), the Kurdistan Democratic Party (KDP), the Iraqi National Congress (INC), and the Supreme Council for the Islamic

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¹¹² Ibid, s 5(1).
¹¹³ Ibid, s 2(1).
¹¹⁴ Ibid, s 3(1).
¹¹⁵ Ibid, s 3(2).
¹¹⁷ Ibid, Preamble.
¹¹⁸ Ibid, Annex A.
¹¹⁹ Ibid.
¹²⁰ Ibid, para 8.
¹²¹ Ibid, s 5.
Revolution in Iraq (SCIRI), had their own private militias.\(^{122}\) Although not linked to the parties represented in the IGC, the so-called ‘Mahdi army’ must be added to this list because it exercised control over certain areas of Baghdad.\(^{123}\)

The private militias were essentially standby armies at the disposal of the major political parties and factions in Iraq. They were ready to defend their parties and strike against other militias and, in some cases, against Coalition Forces, in order to foster the causes and interests of the factions to which they belonged.\(^{124}\) They were accountable to no one other than the parties to which they belonged. These militias often constituted a threat to the security of the Iraqi civilian population, not only because they carried, and at times used, weapons; but also because some of their members, in particular those belonging to the Mahdi army,\(^{125}\) were involved in the commission of crimes, including kidnapping\(^{126}\) and the killing of Iraqi public officials.\(^{127}\) In addition to being a threat to security, private militias were a possible threat to stability in Iraq. The creation of a new and stable political order had to be based on a single actor enjoying a monopoly on the legal use of force, rather than on a plurality of actors that could use force against each other. Although it came quite late in the occupation, the CPA eventually realised that the widespread presence of private militias in Iraq constituted a threat to security and stability, and it determined that this threat needed to be repelled.\(^{128}\) The key hurdle in this regard was that the majority of the militias belonged to parties represented in the IGC, which was the cornerstone of the political process led by the CPA.\(^{129}\)

Furthermore, certain militias, such as the Kurdish Pesh Merga, had fought

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123 Ibid, 222–5.
124 Ibid.
125 Ibid.
126 Ferguson (n 7) 258–61.
127 According to some estimates, 100 Iraqi public officials had been killed during the CPA’s occupation of Iraq. See Diamond, ‘What Went Wrong in Iraq and Why’ (n 81) 178.
128 Bremer, *My Year in Iraq* (n 32) 274.
129 Each of the main political parties of Iraq represented in the IGC had its own militia, including the Kurdistan Democratic Party (KDP), the Patriotic Union of Kurdistan (PUK), the Badr Organization, Da’wa, Iraqi Hezbollah, the Iraqi Communist Party, the Iraqi Islamic Party, the Iraqi National Accord, and the Iraqi National Congress. The number of militia members was approximately 100,000. See CPA Fact Sheet, ‘Armed Forces and Militia
alongside Coalition Forces to defeat Saddam Hussein. Not surprisingly, therefore, the CPA balked at the idea of taking action against the militias, even though such groups could have ignited or furthered sectarian violence. As Bremer has noted, ‘it was unrealistic to think that the Coalition was going to attack our recent Iraqi allies’. Thus, the elimination of the militias had in practice been merely a ‘nominal goal’ of the CPA for the first months of the occupation.

From February 2004, the CPA strove to implement a comprehensive plan called the ‘Transition and Reintegration Plan’ that aimed at gradually disbanding existing militias and reintegrating their members into legal activities without engaging them in a military confrontation. This plan was aimed at decommissioning any irregular force and disarming its components. In exchange for these actions, the CPA offered a variety of individual and group incentives, such as immunity from prosecution and integration into either the private sector or the new security forces. The Transition and Reintegration Plan did not, however, prove capable of eradicating the militias. For instance, despite having fought against the Mahdi army in April–May 2004, the Coalition Forces did not go so far as to disband this army, preferring to continue a strategy of containment out of apparent fear of igniting further violence. One consequence of this was that the Badr militia, which was the militia of the SCIRI party, did not disband, apparently because of fears associated with the excessive power of the Mahdi army.

The final effort in this regard came in June 2004, when the CPA’s occupation was about to end with the issuing of Order 91. In Order 91, the CPA distinguished militia members from the veterans who deserved recognition because they had fought ‘the Ba’athist regime in resistance forces’.

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130 Bremer, My Year in Iraq (n 32) 274.
131 Ibid.
132 Diamond, Squandered Victory (n 65) 222.
133 Ibid.
134 Ibid, 224.
135 Bremer, My Year in Iraq (n 32) 275.
136 CPA, ‘Regulation of Armed Forces and Militias Within Iraq’, CPA/ORD/02 June 2004/91, 2 June 2004 (Order 91).
137 Under Order 91, the ‘veterans’ were to receive the same pension they would have received had they served in the Iraqi Army and were eligible for all
Order 91 included a mechanism to ‘give individuals belonging to the militias the chance to support their families pursuing civilian lives and jobs’. Militias that met certain criteria could disband slowly without fear of reprisals ‘through a path that provided a variety of social services and benefit incentives to their members’. Militias not meeting these criteria were to be treated as illegal and their members were to be ‘subject to criminal prosecution in accordance with the laws of Iraq’.

From the point of view of the applicable law, Order 91 is irreproachable in the sense that it was directed to ensure security within Iraq. This was in line with the law of occupation and Resolution 1483, as acknowledged in its Preamble. The Order was also based on Article 27(B) of the TAL, which provided that ‘Armed forces and militias not under the command struc-

veteran benefits, such as preferences for jobs in the Ministry of Labour and Social Affairs. The approach adopted by the CPA was explained in a press conference:

while recent news has associated the term ‘militia’ with the sort of violence orchestrated by Muqtada Al Sadr, in fact most of these groups and individuals were part of the resistance against Saddam Hussein’s regime. To reward these former resistance fighters for their service, opportunities have been created for them to join state security services or lay down their arms and enter civilian life. CPA is releasing Order 91, which activates the Transitional Administrative Law’s ban on militias and other armed forces. They and other veterans of Iraq’s bloody past will be helped and treated alike. To do this, it officially designates former resistance fighters as Veterans; Creates an Iraqi inter-ministerial committee to oversee this effort.

See CPA Fact Sheet, ‘Armed Forces and Militia Transition and Reintegra-
tion’ 7 June 2004, (n 129) 2.

138 Order 91 (n 136) Preamble.

139 The criteria that the militias had to meet included registration of their members with the Iraqi veterans agency; non-recruitment of forces; non-engagement with any sort of criminal activity; and non-involvement with ‘operations or activities of any type, whether armed or unarmed without express authorization from the Ministry of Interior and the Commander of the Multinational Force’. They were also prohibited from endorsing, financing, supporting, or campaigning for candidates for political office at any level. See Order 91 (n 136) s 4(5).

140 Ibid, s 6(2).
ture of the Iraqi Transitional Government are prohibited, except as provided by federal law.\footnote{141}{See Arai-Takahashi (n 47); Gregory Fox, ‘The Occupation of Iraq’ (2005) 36 GJIL 195, 212.}

A matter of concern in respect of Order 91 is the fact that, having been issued in the final month of the CPA's tenure of Iraq, it was directed to regulate conduct after the demise of the CPA.\footnote{142}{Ibid, 212.} Whilst the subject matter covered by Order 91 falls squarely within the competences of an occupant, that the bulk of its effects took place after the end of the occupation with an indigenous government in place raises the problem of the limits ratione temporis of an occupying power's authority.

At issue is not the general question of the legality of an occupant's acts once an occupation is over, which turns on whether an occupant's directives issued during an occupation were validly enacted under international law or not, which is primarily for the incoming government to assess.\footnote{143}{Dinstein (n 66) 284; Felice Morgenstern, ‘Validity of the Acts of the Belligerent Occupant’ (1951) 28 BYIL 291, 296–9. See also Chapter 6 s 5.1.} Rather, it is the related, and yet more specific, point of the legality of measures taken by an occupant towards the end of an occupation, which, either inevitably, if not intentionally, will regulate conduct and display effects after the end of an occupation. Unless otherwise agreed between the occupant and the occupied, an occupying power does not have the authority to issue legislation directed at regulating conduct after the end of the occupation, notwithstanding that the subject matter of the legislative measure may fall within the occupant's competence.\footnote{144}{In Anastasio, the Consiglio di Stato explained it thus: However, in view of the transitory nature of the fact of occupation no rule of international law allows, and the interests of the occupying power do not require, that the acts carried out by the latter should be of a lasting nature ... generally, acts carried out by the occupying power by reference to its own requirements or as a result of necessity, especially those which are calculated to exercise a continuous effect, need not necessarily be allowed to display these effects beyond the period of occupation ... It is true that during the occupation the Allied Authorities could, within the sphere of activity accorded to them by international law, dispense with the observance of Italian law in case of absolute prevention ... But a different situation arose with its cessation and with the relaxation of the strict regime of occupation. Relying upon the same rules of international law, the Italian Government...}
The competence of the occupying power is limited *ratione temporis*, as an occupant’s authority is a functional one, and is limited to the existence of an occupation. As an occupant is only the temporary *de facto* sovereign over a territory, its jurisdiction over that territory cannot continue when it no longer holds this status. By the same token, once an occupation is over, the authorities and duties of an occupier cease and return to the ‘legitimate sovereign’. If it were otherwise, the occupant could be regarded as impermissibly breaching the sovereignty of the indigenous government, or the right to self-determination of the people concerned, as the case may be. With regard to Order 91—issued at the very end of the occupation—the entire application of its comprehensive and detailed measures was essentially left to the post-occupation phase. As the CPA was acting as a legislator on matters of extreme complexity on which the incoming Iraqi government might have opted to take a different approach, it would be appropriate to see Order 91 as an encroachment on the prerogatives of the incoming Iraq government.\(^\text{145}\) Therefore, in cases such as Order 91, where the bulk of its effects could be seen mainly after the end of an occupation, there is much force in the argument that the CPA acted *ultra vires* in so doing.

### 2.4. The attitude towards private contractors

In addition to the Iraqi militias, another distinctive feature of occupied Iraq was the widespread diffusion of private contractors\(^\text{146}\) or, as more formally referred to, private military and security companies (PMSCs).\(^\text{147}\) Pri-

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145 Fox (n 141) 282.


147 For a detailed analysis of the concept and functions of PMSCs, see Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (CUP 2011) 28–51.
Private contractors are comparable to traditional mercenaries in the sense that they are professional soldiers for hire; but in other respects, they diverge from the traditional characterisation of venture soldiers. Private contractors work as commercial enterprises, which may have the same nationality as the hiring state, and which provide services for specific assignments based on highly lucrative contracts. Members of these companies perform their services as employees of that company rather than as private individuals. Apart from contractors involved in the reconstruction of Iraq’s infrastructure, which included engineers and technicians, a significant number of the private contractors employed in Iraq were former military personnel and performed military-related tasks. Unlike mercenaries, however, private contractors in Iraq were not hired to engage directly in combat operations, even though on occasion they became involved with such operations. They were active in training Iraqi forces; in the provision of logistical services; in the gathering of intelligence; and in the protection of the CPA’s senior civilian officials (including Bremer), specific buildings and infrastructures, and non-military convoys.

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152 Ibid, Schumacher (n 151) 124–53.

153 Ibid, 93–123.


156 Ibid (Schumacher) 125.
Understandably, though not justifiably, since the private contractors performed key functions in support of the Coalition Forces and the CPA itself, the CPA never took measures to make them accountable for harm that they may have caused to the civilian population. On the contrary, the CPA protected private contractors and their freedom of action. Order 17 granted private contractors immunity from Iraqi judicial proceedings, with contractors remaining at least formally subject to the jurisdiction of their countries of origin, although jurisdiction was very difficult to exercise if only because of the level of secrecy that surrounded the work of these companies and the identities of their members. This legal shield contributed to the development of what could be termed a ‘Wild West climate’ in which the often reckless behaviour of private contractors endangered and enraged the Iraqi people. Therefore, the possibility that the CPA should be held accountable, because providing such a shield might have facilitated the commission of crimes, should not be discounted.

Issued on 26 June 2004 at the very end of the CPA’s occupation of Iraq, Memorandum 17 set a number of registration requirements for private security companies. In a detailed annex, it contains rules for the ‘use of force by contractors in Iraq’, with a second annex defining the ‘Code of Conduct for Private Security Companies Operating in Iraq’. However, this is the kind of legislation that the CPA, in order to comply with its duties, should have issued at the beginning of the occupation, not at the end. As a result, issued at the end of the occupation and essentially being a piece

157 On 26 June 2003, the CPA issued a public notice stating that ‘in accordance with international law, the CPA, Coalition Forces and the military and civilian personnel accompanying them, are not subject to local law or the jurisdiction of local courts’ but remained subject to the ‘exclusive jurisdiction of the State contributing them to the Coalition’. See Office of the Administrator of the Coalition Provisional Authority, ‘Public Notice Regarding the Status of Coalition, Foreign Liaison and Contractor Personnel’ (26 June 2003).

158 CPA, ‘Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq’, CPA/ORDER/27 June 2004/17, 27 June 2004, s 4, reprinted in Ehrenberg et al (n 73) 209–11. Even before the issuance of Order 17, the CPA had taken measures that, though not expressly mentioned, protected private contractors. Paragraph 3 of Order 7 stated that ‘no person will be prosecuted for aiding, assisting, associating with, or working for Coalition Forces or for the CPA’, see Order 7 (n 110) s 3(3).

159 Ferguson (n 7) 395–8; Hannah Tonkin (n 147) 155.

160 Tonkin (n 147) 134–5.
of legislation that was inevitably to take effect only after the demise of the CPA, Memorandum 17 constitutes, for the reasons mentioned earlier, an *ultra vires* measure. Leaving the political evaluation of its utility aside, the CPA was not the entity entitled to issue legislation regulating conduct after June 2004. What the CPA could have done, it is submitted, was to propose a draft of that memorandum for the attention of the incoming Iraqi government. Such an approach would have been consistent with Iraq’s sovereignty.

2.5. *The attitude of Coalition Forces towards the Iraqis*

A further source of concern, which eventually increased insecurity rather than eradicating it, was the attitude of the Coalition Forces, or at least of certain of its members, towards the Iraqi civilian population. Operating in the belief that the police had not been a primary instrument of dictatorial repression, the CPA did not disband it; rather, efforts were made to restructure the force.\(^{161}\) However, only a part of the police force returned to work for the CPA after the beginning of the occupation, and, according to some accounts, it was ‘incapable of providing security and order’.\(^{162}\) One factor that undermined the efficiency of the Iraqi police was the policy of de-Ba’athification. For instance, upon his arrival in Iraq, in compliance with that policy, the former New York chief of police fired 7,000 police officers, essentially leaving the majority of the force without superiors.\(^{163}\)

As a consequence, it fell on Coalition Forces to carry out the bulk of the daily police work, even though they were not specifically trained for law-enforcement tasks. Not surprisingly, therefore, in several instances Coalition Forces were a cause of pain and anguish for the Iraqi population. A mix of genuine human error, carelessness, arrogance, and a general inability to deal with a population speaking a different language caused several incidents involving the civilian population.\(^{164}\) According to a Human Rights Watch Report, in the period between 1 May and 20 September 2003, the US military killed 94 civilians in questionable circumstances due to a ‘pattern by US forces of over-aggressive tactics, indiscriminate shooting

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\(^{161}\) Dobbins et al (n 67) 71–81.


\(^{163}\) Bensahel et al (n 73) 124–6.

\(^{164}\) For further analysis see Hilary Charlesworth, ‘Law After War’ (2007) 8 Melbourne Journal of International Law 240.
in residential areas and a quick reliance on lethal force. The harsh behaviour of Coalition Forces towards the Iraqi civilian population was also denounced by the United Nations. In a report to the Security Council, the Secretary-General stated that:

intensified efforts by Coalition forces to demonstrate that they are adhering strictly to international humanitarian law and human rights instruments—even in the face of deliberate and provocative terrorist attacks, sometimes against vulnerable and defenceless civilians—would make it that much more difficult for the insurgents to rally support for their cause.

The Secretary-General went on to note that:

the use of lethal force by the Coalition forces—in the context of military responses to threats to Coalition forces, dispersal of demonstrations, raids on homes and confrontations as well as at checkpoints—should, in accordance with international humanitarian law, be proportionate and discriminating. In this connection, special care needs to be taken to avoid inflicting casualties on innocent Iraqi civilians.

According to Human Rights Watch, the causes of Iraqi civilian deaths in Baghdad could be grouped into three basic categories. First, there were deaths that occurred during US military raids on homes in search of arms or resistance fighters. Second, there were civilian deaths caused by US soldiers who responded indiscriminately after they had come under attack at checkpoints or on the road. Third, there were killings at checkpoints when Iraqi civilians failed to stop, which was sometimes due to a shortage

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167 Ibid.
169 Ibid, 4.
of translators able to facilitate communication with the Iraqis. Linked to these issues was, of course, the problem of obtaining information about the incidents, establishing the degree of individual responsibility, and thus ensuring the accountability of those involved. An obstacle in this regard was Order 17, which had rendered the soldiers ‘immune from local criminal, civil and administrative jurisdiction and from any form of arrest or detention other than by persons acting on behalf of their parent states.’

The problem of the lack of adequate investigations into the conduct of Coalition Forces was highlighted not only by Human Rights Watch, but also discussed before the ECtHR in the *Al-Skeini v United Kingdom* case.

In *Al-Skeini*, the applicants were relatives of five Iraqis who were killed by British troops in Basrah (southern Iraq), and of one Iraqi who was mistreated by British troops in a British detention facility in the province of Al-Basra in 2003, an area under the responsibility of UK forces. The applicants did not complain of any substantive breach of the right to life under Article 2 of the ECHR; instead they submitted that the UK Government had not fulfilled its procedural duty to carry out an effective investigation into the killings under Article 2. Finding that the ‘UK troops in Basra were occupying powers’, and recalling that the ‘Geneva Conventions also place an obligation on each High Contracting Party to investigate and


171 Hearts and Minds Report (n 165) 43–6.

172 *Al-Skeini and others v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011).


174 Ibid, para 155.

175 Ibid, para 143.
prosecute alleged grave breaches of the Conventions’, the ECtHR ruled in favour of the applicants. It stressed that it was ‘particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command’, and noted that the military police’s ‘Special Investigation Branch’ was not, during the relevant period, operationally independent. This resulted in an insufficient inquiry as to the circumstances surrounding the incidents and the adequacy of the investigation undertaken.

Incidents such as those described here show that Coalition Forces, at times, presented themselves more as a threat to the Iraqi people rather than as being their protector, as required by the law of occupation. Whilst the CPA did not hesitate to issue a flurry of detailed measures on a great variety of issues, it did little to guide and restrain the conduct of Coalition Forces towards the Iraqi civilian population. Irrespective of the fact that Coalition Forces were not directly subordinated to the CPA under the internal laws of the country composing them, under Resolution 1483 the CPA nonetheless had the authority under international law to take measures that were binding upon the Coalition Forces. The lack of such an effort creates the impression that goals, more lofty and ambitious than the daily protection of the Iraqi civilian population, were of most concern to the CPA.

2.6. The creation of new Iraqi security forces

Shortly after Order 2 was implemented, the CPA embarked on a long-term project aimed at building a new security system from scratch for Iraq, consisting of a new army, a fully reformed and newly trained police force, a new intelligence agency, a new Ministry of Defence, and a national security council. To begin with, the CPA set up a new Iraqi army as ‘the first step towards the creation of the national defense force of the new Iraq’.

This was to be temporarily headed by the CPA’s Administrator, Bremer. Voluntary in nature, the new Iraqi army’s task was to defend ‘the national territory ... critical installations, facilities, infrastructures, lines of com-

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176 Ibid, para 92.
177 Ibid, para 169.
179 Ibid, para 175.
180 Warren (n 52) 187–8.
munications and supply and the population’. After the CPA withdrew from Iraq, it would fall to the new Iraqi government to decide whether to maintain the army. This provision was somewhat unrealistic, as it would have been difficult for a new, and arguably weak, government to dismiss an entire army unless it already had another one at its disposal. By the time of the demise of the CPA, the new Iraqi army numbered in the thousands. To regulate the conduct of the new army, the CPA issued a long and detailed code of military discipline.

The CPA subsequently established other new entities that were assigned specific security tasks, including the Iraqi Civil Defence Corps, the Fa-

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182 Section 3(2) of Order 22 clarified that ‘the New Iraqi Army shall not have, or exercise, domestic law enforcement functions, nor intervene in the domestic political affairs of the nation’. See Order 22 (ibid) s 3(2).

183 Ibid, s 3(1).

184 By the end of the CPA’s mandate, the Iraqi army had two divisions of motorised infantry that totalled about 27,000 by March 2005 and an Iraqi National Guard that totalled about 41,088 by October 2004. It also included an Iraqi Intervention Force that totalled about 6,665 by November 2004 and an Iraqi Special Operations Forces and Iraqi Counter Terrorist Force that together totalled about 764, plus a Commando Battalion that totalled about 828 by February 2006. Furthermore, it had an Iraqi Coastal Defence Force that totalled about 405 by October 2004 and an Iraqi Air Force that totalled about 500 planes by December 2004. See CPA, ‘Coalition Provisional Authority Accomplishments’ (28 June 2004), text reprinted in Talmon (n 2) 1063–110 (CPA Accomplishments).


186 The Civil Defence Corps was a kind of military police involved in tasks such as ‘patrolling urban and rural areas’ and ‘conduct[ing] operations to search for and seize illegal weapons’. It operated under Bremer’s authority and the supervision of the Coalition Forces. See CPA, ‘Establishment of the Iraqi Civil Defence Corps’, CPA/ORD/3 September 2003/28, 3 September 2003.
ilities Protection Service,187 and the Defence Support Agency.188 Although the CPA had not disbanded the Iraqi police force as per Order 2, the CPA did not deem it as adequately qualified to provide domestic security. Thus, it decided to train thousands of Iraqi police officers in a three-week Transition and Integration Program (TIP) training course.189 In the middle of 2004, the newly reformed police force had 78,000 members,190 and by June 2004, there were some 90,000 police on its books.191 It is not clear, however, whether all of the police officers had completed the required training.192 According to some accounts, the contribution of the Iraqi police to security maintenance also remained minimal because they lacked uniforms, patrol vehicles, and protective vests.193 Moreover, insurgents attacked police stations, as they viewed the police officers as the ‘lackeys of the occupation’.194 By the end of March 2004, no fewer than 350 policemen had been killed.195

In the last months of its existence, the CPA set up a number of political and intelligence institutions. It created a new Ministry of Defence to supervise the new Iraqi army,196 with a mandate to ‘protect, and guarantee the security of Iraq’s borders and to defend Iraq’ and serve ‘all Iraqis’. As part of its task of restoring ‘conditions of security and stability’, the CPA authorised the IGC to establish the Iraqi National Intelligence Service

187 The FPS consisted of a military unit composed of ‘employees of private security firms’ licensed by the Ministry of Interior engaged through contracts to provide security for ministries and government offices and infrastructures, see CPA, ‘Establishment of the Facilities Protection Service’ CPA/ORD/4 September 2003/27, 4 September 2003.
188 The Defence Support Agency was a civilian agency charged with providing a wide range of services to the new Iraqi army, including recruitment, procurements, logistics, medical and legal affairs, and finance and accounting. It operated under the authority, direction, and control of the CPA. See CPA, ‘Creation of the Defence Support Agency’, CPA/ORD/19 September 2003/42, 19 September 2003.
189 Bremer, My Year in Iraq (n 32) 128–30. See also Bensahel et al (n 73) 126.
190 CPA Accomplishments (n 184) 13–17.
191 Bensahel et al (n 73) 129.
192 Ibid, 129.
193 Ibid, 130.
194 Ibid, 131.
195 Ibid, 132.
occupation as transformation: the practice of the CPA

(INIS), with functions that mirrored those of the American FBI and CIA, and which operated under civilian control ‘pursuant to law and in accordance with recognized principles of human rights’. Lastly, the CPA established the Ministerial Committee for National Security as responsible for facilitating and coordinating national security policy among the ministries and agencies of the Iraqi government, which was to be headed by a national security advisor.

It could be argued that these measures were justified to ensure security. In a sense, this was certainly the case, as that was the primary concern underlying their establishment. However, an occupation administration, as a temporary ruler, must operate within the timeframe of its jurisdiction. What the CPA did in a few months, in fact, was to define the architecture of the Iraqi State in matters of security for years to come. These were not temporary measures meant to solve issues emerging during the occupation, but the realisation of a long-term vision of what Iraq’s internal and external security system should look like. Not only is this transformative approach not supported by the law of occupation, but there does not appear to be any justification for it in the resolutions issued by the Security Council. Therefore, by virtue of taking decisions that belonged to the Iraqi State and its people, the conclusion that the CPA encroached upon their rights is warranted.

The order authorised the IGC to form the INIS by promulgating its statute before 3 April 2004 and also contained the ‘Charter for Iraqi National Intelligence Service’, which set out the authorities and duties of the INIS. See CPA, ‘Delegation of Authority to Establish the Iraqi National Intelligence Service’, CPA/ORD/1 April 2004/69, 1 April 2004 (Order 69). The IGC expressly approved the ‘Charter establishing the Iraqi National Intelligence Service’. See IGC, ‘Approval of the Charter Establishing the Iraqi National Intelligence Service’, Resolution Number 41, 31 March 2004.

Ibid, Art 3. The INIS had the task of collecting, analysing, and disseminating ‘information about terrorism, domestic insurgency, espionage, narcotics production and trafficking, weapons of mass destruction, serious organized crime and other issues related to the national defence or threats to Iraqi democracy’. See also Arts 7 and 14 of the same order.

2.7. **Assessment**

Several of the measures undertaken by the CPA and discussed in this section had a discernible connection with the pursuit of security for the Iraqis and for the occupation forces during the occupation.\(^{200}\) In this sense, the CPA complied with Resolution 1483, as it took steps towards the ‘restoration of conditions of security and stability’.\(^{201}\) Moreover, from the perspective of the law of occupation, even such drastic measures as the introduction of new crimes and of harsher penalties may be justifiable in a context as violent as the Iraqi one—at least insofar the new norms did not operate retroactively, which would have breached the principle of *nullum crimen sine lege* and bearing in mind that it remained for the Iraqi government to confirm their validity after the demise of the occupation, even if inserted in the Iraqi penal code.

On the other hand, it can be argued that Orders 16 and 19, which restricted freedom of assembly and freedom of movement, breached Articles 12 and 21 of the ICCPR to which the states constituting the CPA were bound to comply as occupying powers, as discussed in Chapter 2. However, the restrictions implemented through Orders 16 and 19 were temporary and based on the quest for security and maintenance of public order, which means that they could be regarded as legitimate under the law of occupation and Resolution 1483.\(^{202}\) This is also supported by the fact that the rights in question are not absolute rights but relative in the sense of being malleable to restrictions in special circumstances.\(^{203}\) Because of the

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\(^{201}\) See Arai-Takahashi (n 47) 125–6; Kelly (n 200); Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 EJIL 661, 674.


\(^{203}\) See Art 4(3) of the ICCPR stating that ‘No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made.’
existence of an occupation and the very precarious security conditions that went with it in the Iraqi context, the norms related to the law of occupation that enable an occupying power to legislate in matters of security should be interpreted as lex specialis prevailing over the human rights norms protecting freedom of assembly and movement.

Yet acknowledging the authority of an occupant to determine which measures to enact in compliance with its duty in matters of security is not, and should not be, tantamount to granting a licence for arbitrary behaviour. As the de facto government of Iraq under the law of occupation, and entrusted with the accomplishment of a number of important goals by the Security Council, the CPA had the authority and the duty to exercise a supervisory function over the various actors operating in Iraq so that conditions of security and stability could be restored and maintained in full respect of international law, and so that the welfare of the Iraqi people could be improved. Another key problem plaguing the practice of the CPA is that some of the measures it took were poorly timed to restore conditions of security and stability during the occupation. Sealing off Iraq’s borders may have happened too late to prevent terrorists who wanted to enter Iraq from doing so. 204 This conclusion regarding timing is also relevant with regard to the delays associated with the prevention of the spread of weapons, the delays in the adoption of measures to rein in militias, particularly those that were not supporting the CPA, and the delay in the timely adoption of a normative framework that could have restrained the behaviour of private contractors from the beginning of the occupation.

By contrast, the CPA seemed to have been looking well beyond the occupation on other matters. It is questionable whether the reforms employed by the CPA in order to build an entirely new Iraqi security system were necessary, and whether it was necessary for all of these reforms had to be undertaken during the occupation rather than left for an indigenous Iraqi government to subsequently decide in Iraq’s best interests. The CPA may have been better advised to focus on its chief legal duty, which was to ensure security during the occupation rather than after it. Tellingly, Bremer himself expressed doubts about the performance of the CPA and Coalition Forces relating to security. In his memoirs, he recalls a phone call with a senior White House Official where he stated, ‘so the message to most Iraqis is that the Coalition can’t provide the most basic government ser-

204 See Diamond, Squandered Victory (n 65) 303.
vice: security'; before going on to conclude, ‘we’ve become the worst of all things—an ineffective occupier’.205

3. The administration and reform of the judicial system

Upon its arrival, the CPA encountered the hurdle that, as a consequence of the war and the looting and civil unrest that followed, approximately 75 per cent of the courts in Iraq and 90 per cent of those in Baghdad had been severely damaged; files, court records, and computers having all disappeared.206 In response, the CPA consolidated all of the district courts of Baghdad into two separate courthouses, one on each side of the Tigris River. These courts, reportedly, reopened for business on 8 May 2003.207 That being done, the CPA focused on reforming the Iraqi judicial system by amending the Iraqi penal and procedural laws in line with human rights standards, creating new courts, and setting guidelines on the management of the country’s detention facilities.

3.1. Amending existing legislation: the influence of human rights law

On 9 June 2003, on the basis of the understanding that the ‘former regime’ had used ‘certain provisions of the penal code as a tool of repression in violation of internationally recognized human rights standards’ and that it was necessary for ‘the benefit of the Iraqi people’, the CPA issued Order 7.208 On the one hand, Order 7, in line with the conservationist principle, confirmed the validity of the 1969 Iraqi Penal Code, and on the other made several amendments to it.209

A first set of amendments were directed at ensuring the security of the CPA, that of Coalition Forces, and, more generally, stability within Iraq. Enhancing its monopoly as arbiter of legality within Iraq, the CPA decided that criminal charges concerning (i) ‘publication offences’; (ii) offenses against the external and ‘internal security of the State’; (iii) ‘offenses
against public authorities’; and (iv) the ‘offense of insulting a public official’ could be brought before a court ‘only with the authorisation of the Administrator of the CPA’, that is Bremer. 210 Protecting and facilitating its own ruling of Iraq, it granted immunity from criminal proceedings before the Iraqi courts to persons ‘aiding, assisting, associating with, or working for Coalition Forces, or the CPA’. 211 Next, the CPA amended the Iraqi Penal Code by suspending section 200, which criminalised a number of actions against the Ba’ath Party and the Iraqi State, such as inciting ‘the overthrow of the appointed regime in Iraq or hatred of or scorn for such regime’. 212

A second set of amendments introduced into the Iraqi legislation a set of human rights-inspired norms. Order 7 suspended capital punishment by requesting that ‘in each case where the death penalty is the only available penalty prescribed for an offense, the court may substitute the lesser penalty of life imprisonment, or such other lesser penalty as provided for in the Penal Code’. 213 Most crucially, Order 7 forbade ‘torture and cruel, degrading or inhuman treatment or punishment’. 214 Furthermore, in line with Article 2 of the ICCPR, the CPA introduced into the Penal Code an anti-discrimination norm requesting ‘all persons undertaking public duties or holding public office’ to ‘apply the law impartially’ and stressed that ‘[n]o person will be discriminated against on the basis of sex, race, color, language, religion, political opinion, national, ethnic or social origin, or birth’. 215 Along similar lines, in Order 19, the CPA suspended certain provisions of the Iraqi Penal Code because they ‘unreasonably’ restricted ‘the right to freedom of expression and the right of peaceful assembly’ and were inconsistent with ‘Iraq’s human rights obligations’. 216

Turning to the modifications to the code of criminal procedure, the CPA justified these on the basis of the desire ‘to accord the people of Iraq fun-

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210 Ibid, s 2(2).
211 Ibid, s 3(3).
213 Order 7 (n 110) s 3(1).
215 Order 7 (n 110) s 4.

Memorandum 3 kept the Criminal Code of Procedure issued in 1971 in force, but modified it in various respects. For instance, it strengthened the rights of the accused in criminal proceedings. Furthermore, in line with Article 9 of the ICCPR, it added to the Iraqi code (i) the right of the accused to remain silent, together with the caveat that ‘no adverse inference may be drawn from the accused’s decision to exercise that right’, (ii) the right for any individual ‘to be represented by an attorney’, and ‘if he or she is not able to afford representation’ to be appointed an ‘attorney at no expense of the accused’, (iii) the right to be ‘represented by an attorney’ if the accused so desires; and (iv) the guarantee that the examining magistrate ‘shall not question the accused until he or she has retained an attorney or an attorney has been appointed by the Court’. Section 4 provided that ‘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’.

One of the distinctive aspects of the human rights-oriented reforms introduced by the CPA was that they were not designed to be short-term measures to fulfil the needs of the occupation, nor were they necessarily directed at protecting the Iraqi population from the actions of the CPA and Coalition Forces. They were long-lasting measures designed to shape the future of Iraq’s penal system by instilling human rights-oriented norms therein. As such, they do not fall within the purview of occupying powers. They are at odds not only with the conservationist principle stipulated in

219 Ibid, s 2.
220 Ibid, s 3(a) and (d).
221 Ibid, s 3(b)(i).
222 Ibid, s 3(b)(ii).
223 Ibid, s 3(c).
224 Ibid, s 4.
Article 43 of the Hague Regulations, but also under paragraph 1 of Article 64 of the Geneva Convention IV, which forbids such amendments, stressing that penal legislation in force must be respected by the occupying power. This general prohibition should be upheld, as otherwise the occupying power would have the same prerogatives of a legitimate sovereign.

That said, it is submitted that the possibility that reforms of the kind introduced by the CPA could be justified should not be discarded a priori. The existence of a general norm or principle prohibiting a given conduct, either in international or in national law systems, is not necessarily synonymous with the existence of an absolute rule that admits of no exception. In some specific cases, and this is particularly so in the field of international law where a degree of auto-interpretation is inevitable in the absence of anything resembling a developed and comprehensive judiciary or of a legislator, carving out an exception to a general norm may be justifiable if appropriate reasons are tendered. Cautious adjustments may remedy the under-inclusiveness of a normative instrument, and enable a given instrument to play a constructive role in contexts different from those for which it was enacted.

While considering the nature of occupation measures as force-based, such adjustments must be anchored to some reasonably objective criteria in order to avoid the imposition of the values or interests of one state over those of another.225 A possible criterion could consist in the passing of legislative measures which reflect universally recognised human rights-standards entrenched in customary international law, such as the prohibition against torture. It is not, however, sufficient to posit that because a given reform is based on human rights law that it must be accepted,226 for within human rights law there is a sphere of norms that are not universally agreed, nor have evolved into customary norms of general application. It ought to be demonstrated by the occupant that local laws fall short of internationally recognised standards, which the proposed law would instead meet.

When looking at the content of the provisions in Order 7 and Memorandum 3, it may be argued that this is what the CPA did. It was not imposing its own set of values in Iraq, nor was it pursuing its own interests by seeking to introduce into the Iraqi normative system anything other than

universally accepted human rights standards that could be objectively assessed as based on customary international law and codified in the ICCPR. Furthermore, confirming the objective value of these reforms, it is worth recalling that Iraq itself was a party to the ICCPR.\footnote{Iraq became a party to the ICCPR on 25 January 1971. See the list of State parties to the ICCPR <http://treaties.un.org/Home.aspx?lang=en> accessed 3 April 2013.} In light of all these circumstances, it is submitted, for further reflection as a possible interpretative development of the law of occupation, that a narrowly construed exception to the conservationist principle of the kind suggested here could be justifiable, even if destined to display effects beyond the duration of the occupation. This is, of course, a far cry from endorsing human rights-based transformative occupation—which remains forbidden under the law of occupation and, more generally, contemporary international law—let alone granting a blank cheque for reforms by an occupying power.

On a further note, the CPA also sought to reform the administration of the Iraqi judicial system. With a view ‘to ensure fundamental standards of due process’ and on the understanding that ‘the Iraqi justice system has been subjected to political interference and corruption over the years of Iraqi Ba’ath Party rule’,\footnote{CPA, ‘Establishment of the Judicial Review Committee’, CPA/ORD/23 June/15, 23 June 2003, Preamble.} the CPA created a Judicial Review Committee composed of both Iraqis and CPA representatives.\footnote{See for further analysis Raid Juhi al-Saedi, ‘Regime Change and the Restoration of the Rule of Law in Iraq’ in Raul A ‘Pete’ Pedrozo (ed), \textit{The War in Iraq: A Legal Analysis}, 86 International Law Studies (Blue Book) Series (Naval War College 2010) 3–5.} Because of this order and the conduct of the committee it established, by mid-2004, more than 800 judges and prosecutors had been investigated, and approximately 170 had been removed from office for corruption, association with human rights abuses, or other serious breaches of conduct.\footnote{Williamson (n 206) 237–8.} It is difficult to rebuke the CPA for establishing a mechanism directed to ensure fair trials consistent with human rights law during the occupation, thereby enhancing the right to a fair judicial hearing as protected under Article 14 of the ICCPR.\footnote{Fox (n 141) 279.}

What is puzzling, however, is that these well-meaning reforms went hand in hand with the vetting of judges and prosecutors under the policy.
of de-Ba’athification, which, as noted earlier, tended to allocate responsibilities in a rather summary and uneven manner. In so doing, the CPA did not seem to be extending to all Iraqis the same standards of fairness and due process it purported to introduce in Iraq.

Furthermore, in order to recreate the independence that the judicial system had enjoyed prior to Saddam’s rule, the CPA re-established the so-called ‘Council of Judges’, on the ground that ‘a key to the establishment of the rule of law is a judicial system staffed by capable persons and free and independent from outside influences’.232 The Council was charged with ‘the supervision of the judicial and prosecutorial systems of Iraq’; was to ‘perform its functions independently of the Ministry of Justice’; and was vested with the authority to appoint judges and oversee the administration of the courts.233 The Council was responsible for nominating candidates, promoting and transferring existing judges, investigating allegations of misconduct or professional incompetence, and judicial discipline.234 This latter reform is another example, albeit laudable in its intentions, of a process of transformation rather than administration of the occupied territory. As this was not meant to serve any particular utility during the occupation and concerned sensitive constitutional issues, such as the relationship between the executive and the judicial power, it should have been left to be determined by a future Iraqi parliament.

3.2. The establishment of new courts

The CPA established two new ad hoc courts, namely, the Central Criminal Court of Iraq (CCCI) to prosecute suspected insurgents and terrorists, and the Iraqi Special Tribunal (IST) to prosecute the leaders of the previous Iraqi regime.235 The judges of the CCCI were Iraqis and so was the law that

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233 Ibid, ss 1-3.
234 Ibid, s 3 (i)b.
235 CPA, ‘The Central Criminal Court of Iraq’, CPA/ORD/11 July 2003/13 (Revised), 11 July 2003. Moreover, on the basis that they were necessary for the ‘proper and efficient administration of justice’ and ‘that the former regime manipulated the court system against disfavored regions and peoples of Iraq by denying them access to local justice’, the CPA established the ‘Courts of Appeal districts in Masan and Muthanna governorates’. These
this court enforced. 236 According to the CPA, the CCCI was an interim measure to address ‘the immediate need for a reliable and fair system of justice’, which was to deal with the ‘serious crimes that most directly threaten public order and safety Iraq’. 237 It had ‘discretionary jurisdiction’ through its CPA-enacted statute, which limited it to (a) ‘terrorism’; (b) ‘organized crime’; (c) ‘governmental corruption’; (d) ‘acts intended to destabilize democratic institutions or processes’; (e) ‘violence based on race, nationality, ethnicity or religion’; and (f) ‘instances in which a criminal defendant may not able to obtain a fair trial in a local court’. 238 Although formally independent 239 and capable of accepting cases on its own authority brought by a chief investigative judge, the CCCI was closely linked to the CPA. Section 2(2) of Order 13 provided that the ‘Investigative Court shall have jurisdiction over all criminal offenses assigned to it by the Administrator’. 240 By August 2004, 56 trials before the CCCI had been completed. 241

According to John Williamson, the CPA’s Senior Advisor to the Iraqi Ministry of Justice from April to June 2003, the CCCI provided a forum for the ‘most serious cases to be handled expeditiously and with a degree of professionalism that still was not a certainty in the regular criminal courts at the point’. 242 Scholars have rightly noted that this measure was justifiable and even necessary under the law of occupation. 243 Arguably, considering the selectivity of the cases it dealt with and the fact that the head of the CPA

courts, in contrast to those discussed in the text, were not, however, *ad hoc* courts with special jurisdiction framed by the occupants, but were part and parcel of the CPA’s efforts to restructure the existing Iraqi judicial system, see CPA, ‘Masan and Muthanna Courts of Appeal’, CPA/ORD/05 February 2004/58, 5 February 2004.

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236 Ibid, s 5(1) and s 4.
237 Ibid, Preamble.
238 Ibid, s 18(1) and (2).
239 Ibid, s 6.
240 Ibid, s 19(1).
241 By 2006, the CCCI had held 1,767 trials of individuals apprehended by the Coalition Forces which resulted in the conviction of 1,521 individuals with sentences ranging up to death; see Williamson (n 206) 223. See also for a critical review, Michael J Frank, ‘U.S. Military Courts and the War in Iraq’ (2006) 39 VJTL, 645–778.
242 Williamson (n 206) 239.
could defer cases to it, it would be an exaggeration to trumpet the CCCI as establishing a fair system of justice. Rather it was an example of ‘occupation justice’. Although a civilian court run by Iraqis, the CCCI fulfilled first and foremost the objectives of the occupation administration. It had jurisdiction over the Iraqis but not over occupation personnel, who were exempt from its jurisdiction pursuant to Order 7. It had jurisdiction over crimes defined—in a rather general manner—by the CPA. Those offences concerned security and stability in Iraq, and included those that could threaten the political process prompted by the CPA, such as terrorism.

Because of its *ad hoc* nature, as opposed to being of a general competence, the charge of bias, that is of discriminating among similar conduct, could reasonably be laid against such a court. From the perspective of the law of occupation and Resolution 1483, however, no reproach can be made of the CPA for instituting a court directed at ensuring security and stability during the occupation.

### 3.2.1. The Iraqi Special Tribunal

Acting on ‘the appeal by the U.N. Security Council in Resolution 1483 to Member States to deny safe haven to those ... alleged to be responsible for crimes and atrocities and to support actions to bring them to justice’, the CPA issued Order No 48, delegating to the IGC the authority to establish the IST and setting out its 38-article Statute.

The IST had jurisdiction over certain international crimes, the list of which is almost identical to the respective list contained in Articles 6 to 8 of the Statute of the International Criminal Court, as well as three additional offences drawn from Iraqi criminal law: ‘manipulation of the judiciary’; ‘squandering of public resources’; and ‘abusive pursuit of poli-

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244 Von Glahn (n 202) 112.
cies that might lead to war against an Arab country’. Although Order 48 indicates that the ‘Governing Council, reflecting the general concerns and interests of the Iraqi people’ has ‘expressed a desire to establish a Special Tribunal to try members of the Ba’athist regime accused of atrocities and war crimes’, the role of the CPA in deciding to establish the IST and shaping its structure and functioning was far from irrelevant.

The Statute of the IST was attached to Order 48, not to a decision by the IGC, and it was the CPA that was authorising its establishment. Nor was the preparation of the Statute the work of the IGC alone—as the Order stated, the ‘proposed provisions of ... [the Statute] have been discussed extensively between the Governing Council and the CPA’, and individuals linked to the CPA or the IGC worked on it between September and December 2003. Moreover, section 1(6) of Order 48 reserved to the ‘Administrator’ of the CPA (and only to him) the right to ‘alter the Statute’ or any elements of crimes or rules of procedure developed for the Tribunal if required in the interests of security. Additionally, Order 48 stated that the

247 The international crimes were: genocide (Art 11); crimes against humanity (Art 12); and war crimes (Art 13). The violations of the so-called ‘Stipulated Iraqi Laws’ (Art 14) included an ‘attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violations, inter alia, of the Iraqi interim constitution of 1970, as amended’, ‘the wastage of national resources and the squandering of public assets and funds, pursuant to, inter alia, Article 2(g) of Law Number 7 of 1958, as amended’, and the ‘abuse of position and the pursuit of policies that were about to lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958’. See the text of the Statute of the Iraqi Special Tribunal in an attachment to Order 48 (n 245).

248 See IGC, ‘Formation of a Special Tribunal for the Prosecution of Crimes against the Iraqi People and Humanity’ 15 July 2003, Resolution Number 4. See text in Talmon (n 2) 1122.


250 Order 48 (n 245) s 1(1).

251 Ibid.

252 Bassiouni and Hanna, ‘Ceding the High Ground’ (n 249) 39. See also Newton and Scharf (n 246) 50–4. See also Sarah Williams, Hybrid and International Criminal Tribunals (Hart Publishing 2012) 115–6.

253 Order 48 (n 245) 1(6).
IGC was to ensure that the tribunal ‘meets, at a minimum, international standards of justice’. 254 Order 48 also requested the President of the IGC to appoint non-Iraqi nationals ‘to provide assistance to the judges with respect to international law’ and ‘to monitor the protection by the Tribunal of general due process of law standards’. 255

The establishment of the IST mirrors in its amplitude and historical significance the precedents constituted by the establishment of the Nuremberg International Military Tribunal (IMT), the International Military Tribunal for the Far East (IMTFE), and the more recent International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY and ICTR, respectively), but the significant differences between the IST—a national court—and these international courts must not be overlooked.

Although it had jurisdiction over some international crimes, 256 the IST was an *ad hoc* Iraqi court established during an occupation. Unlike the courts mentioned, the judges of the IST were Iraqis, which is to say that they were citizens of the country where the crimes had been committed and were of the same nationality as both the victims and the accused. In addition to its Statute, the IST applied the Iraqi Criminal Procedure Law. 257 Moreover, the IST had jurisdiction not only over international crimes, like the tribunals mentioned, but also over a number of crimes under Iraqi law. Like the IMT and the IMTFE, but unlike the ICTY and the ICTR (which were established by the Security Council acting under Chapter VII of the UN Charter), the establishment of the IST had been made possible by the will of the countries that were occupying the country where the crimes had been committed. Unlike the ICTY and the ICTR, but similar to the IMT 258 and the IMTFE, the jurisdiction of the IST was both territorial and personal: the Statute of the IST restricted its jurisdiction to crimes committed ‘in connection with Iraq’s wars against the Islamic Republic of Iran

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254 Ibid, s 2(2).
255 Order 48 (n 245) Art 6(b).
257 Bassiouni and Hanna (n 249) 41.
258 Art 1 of the IMT Charter states that it was established for the ‘just and prompt trial and punishment of the major war criminals of the European Axis’, and Art 1 of the IMTFE Statute indicated that the IMTFE was established for the just and prompt trial and punishment of the major war criminals in the Far East’ (emphasis added).
and the State of Kuwait’ and by ‘any Iraqi national or resident of Iraq’. This provision left out any possible crime committed by Coalition Forces. The jurisdiction *ratione temporis* of the IST covered events from 17 July 1968 (when the Ba’ath Party came to power) to 1 May 2003 (when the US President declared the end of major hostilities).

In view of the differences between the international tribunals mentioned and the IST, to which others (such as the different historical context surrounding the establishment of the IMT and IMTFE) should be added, justifying the establishment of the IST on the basis of such precedents may be somewhat far-fetched. In fact, what should be queried in connection with the IST is not so much whether an occupation administration can establish an international or multinational *ad hoc* court, but the distinct question of whether that administration can establish a new local, and yet special, court, with the unique characteristics and jurisdiction the IST had, mixing both international and national elements.

For Danilo Zolo, the IST was an ‘occupation court’, and therefore its members could not judge independently. Along the same lines, the IST has been criticised as being at risk of becoming a tool for vengeance, and it has

259 Art 1(b) of the IST’s Statute reads:

*The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq’s wars against the Islamic Republic of Iran and the State of Kuwait. This includes jurisdiction over crimes listed in Articles 12 and 13 committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shiites and Sunnis) whether or not committed in armed conflict.*

(emphasis added)

See Order 48 (n 245) Art 1.

260 Ibid.

been suggested that its establishment was a ‘miscalculation’ that should have been postponed until Iraq had ‘a truly representative government’. Yoram Dinstein has observed that ‘whilst special courts and tribunals may also function in an occupied territory pursuant to existing legislation’ and military courts can be set up ‘to try and punish offenders against the security legislation enacted by the Occupying Powers’, it remains unclear ‘how far an occupying power can move beyond existing legislation (especially in a prolonged occupation) with respect to establishing new local courts with limited jurisdiction’. According to Cherif Bassiouni, the fulfilment of its duties as an occupying power did not require the CPA ‘transforming Iraq’s legal and judicial institutions’, because the IST was not ‘an absolute necessity within the context of the CPA’s role’. On the other hand, Michael Newton has observed that Resolution 1483 did stress the need for an accountability regime ‘for crimes and atrocities committed by the previous Iraqi regime’, and that Article 64 of the Geneva Convention IV provides a legal cover for the establishment of the IST under any of the three permissible purposes specified for the enactment of new laws therein.

In agreement with Newton, while there is no specific provision for the establishment of an *ad hoc* court within the law of occupation, which is something different from an occupation court, the creation of such a court could, in the appropriate circumstances, be justified. The authority for do-

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262 Bassiouni and Hanna (n 249) 50.
263 Dinstein (n 66) 136.
264 Ibid, para 320.
265 Ibid, para 319.
266 Bassiouni and Hanna (n 249) 49.
267 Ibid, 50.
269 Art 64 of the Geneva Convention IV reads:

> 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 administration, and likewise of the establishments and lines of communication used by them.

270 Newton, ‘The Iraqi Special Tribunal’ (n 268) 875.
ing so may be regarded as stemming from an occupant’s responsibility and duty to ensure the effective administration of a territory in a manner necessary to ensure ‘public order and safety’, as provided for under Article 43 of the Hague Regulations. In the same vein, Article 64 of the Geneva Convention IV justifies the adoption of norms necessary to ensure ‘the orderly government of territory’. Arguably, an occupant may determine that the best way to comply with this objective is by ensuring that those suspected or accused of international or national crimes of particular gravity be put on trial. As a temporary administrator of territory, an occupant is well placed to make that assessment. Allowing political and military leaders to go untried encourages their supporters to resist and fight against the occupant, claiming to have been unjustly accused rather than justly tried. It remains for the occupant, however, to ensure through the passing of adequate measures that such trials accord with international standards of fair trial rather than being an example of summary justice.

As with any ad hoc court, the IST can be criticised as representing a case of selective and thus unfair justice on the grounds that the definition of jurisdiction by the occupants may lead to the prosecution of some individuals but not of others equally deserving of prosecution. However, the unfortunate circumstance that not all of those who deserve to be tried will be tried, is not a sufficient reason to suggest that nobody should be tried. The fact that the establishment of an ad hoc court is an exercise in selective justice is not, in and of itself, an argument for not holding trials, but rather for making sure that those trials that are eventually held are indeed justified by the evidence against the accused, rather than being an instrument of political prosecution, and that they are irreproachable in terms of due process. Further, as Newton remarked, Resolution 1483 did provide additional legal cover for the establishment of the IST where it affirmed ‘the need for accountability for crimes and atrocities committed by the previous Iraqi regime’. This was flexible enough to allow the CPA to decide to take the measures it deemed fit, such as the establishment of a special tribunal, in order to pursue the goal set by the Security Council.

Recognising the authority of an occupying power to enable the establishment of a new national court with jurisdiction over international or national crimes of particular gravity, which was strengthened by Resolution 1483, is not, however, tantamount to granting the occupying power the faculty to establish whatever kind of court it deems suitable. With authority also comes responsibility. Albeit enabling, if not requesting, the prose-
Execution of international crimes, international law places stringent limits on the modalities within which such prosecution should unfold. Bringing an accused to justice is not the same as granting a licence to vengeful judges to settle scores with their former enemies or oppressors.

Under contemporary international law, it would be difficult to view an ad hoc tribunal as validly constituted if its statute does not comply with international law; for instance, by allowing the appointment of partisan judges, giving jurisdiction over crimes that were not crimes at the time of their commission (*nullum crimen sine lege*), and/or allowing the trial of an accused to be conducted under rules falling below customary international law standards of fair trial. To avoid repetition of the criticism surrounding the IMT and the IMTFE as victors’ justice, it was paramount for the IST to fulfil all of these criteria. Unfortunately, the IST was apparently not able, in whole or in part, to meet these standards. The criticism against the IST included the allegations that certain provisions of its statute breached the principle of *nullum crimen sine lege*,\(^{272}\) and did not respect international fair trial standards;\(^{273}\) and that its rules of procedure resulted in a rather artificial blend of civil and common law procedures.\(^{274}\)

Despite these criticisms, and most significantly from the point of view of its legitimacy, the Iraqi people did support the establishment of the IST. When they had the opportunity, they demonstrated it. On 9 October 2005,


the so-called Iraqi Transitional National Assembly, elected on 30 January 2005, decided to formally set aside the IST, re-enacted (with amendments) its statute into Iraqi law, and gave it a new name (the Supreme Iraqi Criminal Tribunal). Notably, almost to underline its different origin and status, the statute of the Supreme Iraqi Criminal Tribunal, which took effect upon publication in the Official Iraqi Gazette one day before the start of the trial, made scant reference to the IST. Article 37 of the Statute of the new tribunal revoked the IST statute, though Article 38 demonstrated that this new court was the successor of the IST by stating that ‘[a]ll decisions and Orders of Procedure issued under the Iraqi Special Tribunal Law No. 1 are correct and conform to the law’. Likewise, the judges, the prosecutors, and the accused all remained the same.

3.2.2. The trial of Saddam Hussein

Saddam Hussein was captured by Coalition Forces on 13 December 2003. As he had been the commander in chief of the armed forces involved in an ongoing international armed conflict, Coalition Forces correctly labelled him as a prisoner of war, which meant that he was entitled to all the legal protections provided for under the Geneva Convention III. In this respect, the showing of images televised worldwide of a dishevelled Saddam with a long black and grey beard undergoing a medical examination was a flawed move. Article 13 of the Geneva Convention III specifies that ‘prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity’. The last part of this phrase appears to be broad enough to cover broadcast of im-

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276 Newton and Scharf (n 246) 84.
277 Bassiouni and Hanna (n 249) 54.
278 Ibid, 54.
279 Dobbins et al (n 68) 161–2.
ages of prisoners. Thus, it could be argued that the telecast of the medical examination of Saddam Hussein did constitute a violation of Article 13.\textsuperscript{281}

Indicted for crimes against humanity concerning the 1986 killing of 148 individuals in the Shiite village of Dujail, Saddam Hussein was brought before the IST for arraignment on 9 July 2004. Asked to state his name for the record, he responded ‘I am Saddam Hussein, the president of Iraq’.\textsuperscript{282} While such a statement would be formally correct from the perspective of traditional international law, the swift response of the judge arraigning him that he was the ‘former’ president of Iraq is—in the case of Iraq—legally correct, being a consequence of the innovative approach adopted in Resolution 1483 as discussed in Chapter 3.

The trial of Saddam Hussein and other Iraqi leaders began on 19 October 2005.\textsuperscript{283} The first verdict was rendered on 5 November 2006. One accused was acquitted and three accused were given fifteen-year sentences. Taha Yssin Ramadan, the former Vice President of Iraq, was sentenced to life in prison. Saddam Hussein, Awad Hamed al-Bandar, the former President of the Revolutionary Court, and Barzan Ibrahim, the former head of Iraqi Intelligence, were sentenced to death by hanging.\textsuperscript{284} Acting with ‘shocking swiftness’\textsuperscript{285} on 26 December 2006, the Appeals Chamber confirmed the sentence.\textsuperscript{286} Looking more like an act of vengeance rather than one of justice, the subsequent execution was also widely criticised.\textsuperscript{287}

\textsuperscript{281} Ibid, 657.
\textsuperscript{282} Newton and Scharf (n 246) 69.
\textsuperscript{283} For a broader analysis, see Newton and Scharf (n 246) 83–96.
\textsuperscript{285} Newton and Scharf (n 246) 193.
According to several commentators, the trial of Saddam Hussein was riddled with flaws; and will probably be remembered for the ‘courtroom chaos’ and the excited exchanges between judges and accused. On the other hand, although recognising that ‘the record of the Dujail trial is one of missteps, misconceptions, and misstatements’ and that the trial has been ‘one of the messiest trials in legal history’, some scholars have suggested—perhaps somewhat too indulgently as fair trial norms and principles should not be subject to exception in contemporary international criminal law—to take a less critical stand considering the circumstances in which it unfolded.

Whilst it is beyond the purpose of this book to engage in a detailed analysis of the trial, two of the issues addressed in both the trial and appeal judgments, namely, the legitimacy of the establishment of the IST and the use of the death penalty, deserve attention.

Responding to challenges to the tribunal’s legitimacy, the Trial Chamber argued first that it was ‘a self-evident truth’ that Iraq had jurisdiction over international crimes committed within its territory. Moreover, emphasised the Chamber, the Iraqi government that ‘had taken office on 20 May 2006’ had chosen to accept the decision of the IGC to establish a tribu-

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289 See Newton and Scharf (n 246) 227, who wrote that:

during the nine-month trial, Saddam Hussein, his seven co-defendants, and their dozens lawyers regularly disparaged the judges, interrupted witness testimony with outbursts, turned cross-examination into political diatribes and staged frequent walkouts, hunger strikes, and boycotts.

290 Ibid, 107–70.
nal ‘having judicial power to judge Iraqi citizens’. The Appeals Chamber agreed with this view, and underscored that the IST was recognised as an institution in the permanent Constitution of Iraq, which was ratified by referendum on 15 October 2005. It recognised the validity of the CPA’s authorisation to establish the IST based on Resolutions 1483, 1500, and 1511.

Turning to the question of the death penalty, the Trial Chamber explained that under paragraph 2 of Article 24 of its Statute, the penalties it was authorized to impose were only those prescribed under the 1969 Iraqi Penal Code. Order 7, noted the Trial Chamber, had suspended ‘capital punishment’, not abolished it. For the Trial Chamber, the continued application of the 1969 Iraqi Penal Code was also justified because the CPA’s Regulation 1 had stated that the laws in force in Iraq until 16 April 2003, including therefore the Iraqi Penal Code, remained ‘effective and applicable’ unless ‘suspended, substituted or canceled’. The Appeals Chamber upheld the conclusion of the Trial Chamber, stressing that the principle of lex mitior applied and that therefore Order 7 was irrelevant due to the ephemeral nature of the CPA authority and because the order did not stem from the legislative authority in Iraq, nor did it include any standards of public opinion. As Order 7 was a temporary measure imposed by an interim authority, it could not be considered capable of making ‘the law of capital punishment null and void.

Perhaps, more convincingly than the Appeals Chamber, the Trial Chamber aptly noted that the suspension of the death penalty by the CPA caused its non-application during the occupation but did not prevent its application after the end of the occupation. The approach of the CPA is a textbook example of how the normative powers of an occupant may be used to undertake reforms and/or impede the application of existing laws during an

295 Ibid.
297 See generally Bhuta (n 288) 39–65.
298 Appeal Judgment (n 296) 8.
299 See text of Article 24 in Mallat and Chodosh (n 63) 945.
300 Dujail Trial Judgment (n 294) 2.
301 Dujail Appeal Judgment (n 296) 13.
302 Ibid.
occupation without trumping the sovereignty of the occupied state. The pronouncement of the CPA prevented the application of the death penalty during the occupation, but did not impede its application after the demise of the occupation with the consequence that it was left entirely to the Iraqis to choose what kind of penalties could be imposed in criminal proceedings. For those opposed to the death penalty, the approach of the CPA may be discomforting. From the perspective of the law of occupation and the right to self-determination, however, the suspension of the death penalty during the occupation constitutes a case of full compliance with these norms, while adopting a reformist approach.

3.3. The management and supervision of detention facilities

On 5 June 2003, the CPA gave ‘full authority and control’ over all Iraqi detention facilities, previously managed by the Ministry of Interior and the Ministry of Labour, to the Ministry of Justice.\(^{303}\) This order was followed by a memorandum setting out a detailed and comprehensive list of human rights-oriented standards that were to be applied in the management of detention and prison facilities under the authority of the Ministry of Justice.\(^{304}\) The Preamble of this memorandum spoke of the ‘obligation of the CPA to restore public order and safety and to maintain and ensure fundamental standards for persons detained’, and it recognised the ‘urgent necessity to ensure secure and humane prisons’.\(^{305}\) These standards were to be applied impartially, giving full respect to the ‘religious beliefs and moral precepts of the group’ to which a prisoner belonged.\(^{306}\) To ensure respect for these standards, the ‘Administrator of the CPA’ (that is, Bremer) was to ‘remain in full control of the Iraqi prison system’.\(^{307}\) These standards governed all of the aspects of the life of the detainees.\(^{308}\)

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305 Ibid, Preamble.
306 Ibid, s 2.
307 Ibid, s 2(3).
Yet, quite surprisingly, an otherwise laudable piece of legislation was tainted, and severely so, by the introduction of a disparity between the standards in the prisons under the authority of the Ministry of Justice and those in the prisons run by the Coalition Forces. The standards in Memorandum 2 did not apply to those run by the Coalition Forces. Section 1(2) of Memorandum 2 stated:

This memorandum prescribes standards to be applied in the Iraqi prison system under the authority of the Ministry of Justice. 2) All prisons within Iraq shall, to the greatest extent practicable, operate in accordance with the following standards until otherwise directed. Any and all existing Iraqi prison regulations are hereby suspended. (emphasis added)

With this provision, Memorandum 2 deviated from the standards stipulated for prisons under the authority of the Ministry of Justice in two respects. First, it made it possible that in the prisons run by Coalition Forces, the standards set out in Memorandum 2 could be applicable only ‘to the greatest extent practicable’, with the result that their application became a matter of choice and convenience rather than of obligation. Secondly, by using the expression ‘until otherwise directed’, Memorandum 2 hinted that other regulations or directives could be introduced by those officer(s) in control of a prison and that these would override the standards prescribed in Memorandum 2.

Perhaps not surprisingly, in light of the unequal approach adopted in Memorandum 2, reports of human rights abuses in Coalition Forces’ prisons had already emerged during the initial phases of the occupation. According to a UN report of July 2003, in the early months of occupation certain Iraqis had already approached the UN Special Representative and his staff to express concern about the treatment and conditions of prisoners, citing the obligation of humane treatment under IHL. This Report indicated that the UN Special Representative had urged the CPA to ensure better treatment of detainees and maintain a continuous dialogue with

309 Ibid.
the ICRC, and that he had received assurances that these concerns were being addressed through remedial action.\textsuperscript{311}

On 19 January 2004, General Sanchez, having been informed of abuses at the Abu Ghraib prison that had been reported to the army’s Criminal Investigation Unit, tasked General Taguba with carrying out an investigation into these events.\textsuperscript{312} The resulting report (Taguba Report) disclosed numerous instances of appalling treatment.\textsuperscript{313} The Taguba Report found:

\begin{quote}
[t]hat between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force ... The allegations of abuse were substantiated by detailed witness statements ... and the discovery of extremely graphic photographic evidence.\textsuperscript{314}
\end{quote}

These abuses, which included torture, cruel treatment, and beatings, gained notoriety worldwide.\textsuperscript{315} The Taguba Report concluded that ‘[s]everal US Army soldiers have committed egregious acts and grave breaches of international law.’\textsuperscript{316} Subject to the specific analysis of the relevant evidence

\textsuperscript{311} Ibid.
\textsuperscript{312} Sanchez (n 10) 279.
\textsuperscript{313} See ‘Article 15–16 investigation of the 800th Military Brigade’, March 2004 (Taguba Report). See text in Karen J Greenberg and Joshua L Dratel (eds), The Torture Papers: The Road to Abu Ghraib (CUP 2005) 415–20. It should be clarified that, although this section focuses only on the events at Abu Ghraib, mistreatment of detainees also occurred at other locations. It may be recalled in this regard, that the Taguba Report found that ‘egregious acts and grave breaches of international law’ were committed ‘at Abu Ghraib/ BCCF and Camp Bucca’ and that ‘key senior leaders in both the 800th MP Brigade and the 205th MI Brigade failed to comply with established regulations, policies, and command directives in preventing detainees abuses at Abu Ghraib (BCCF) and at Camp Bucca during the period August 2004 to February 2004.’ See Taguba Report reprinted in Greenberg and Dratel (above) at 444.
\textsuperscript{314} Ibid, 416.
\textsuperscript{315} Seymour M Hersch, ‘Torture at Abu Ghraib’ New Yorker (New York, 10 May 2004).
\textsuperscript{316} See the conclusion of the Taguba Report in Greenberg and Dratel (n 313) 444.
and the necessary findings as to the status of the victim, these abuses constitute war crimes as grave breaches of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention III), of the Geneva Convention IV, of Article 75(2) of Additional Protocol I, and serious violations of human rights norms binding on both the US and the UK.

Similarly, a subsequent investigation by Major Fay found that ‘From 25 July 2003 to 6 February 2004’, ‘certain individuals committed offenses in violation of international and US Law to include the Geneva Conventions and the UCMJ and violated Army Values’. The Fay Investigation went on to blame ‘Leaders in key positions’ because they had failed ‘to supervise the interrogation operations at Abu Ghraib’ and ‘to react appropriately to those instances where detainee abuse was reported, either by other service members, contractors, or by the International Committee of the Red Cross’. Stressing that the ICRC comprised ‘independent observers’ who had ‘identified abuses to the leadership of Abu Ghraib as well as to CJTF-7’, the Fay Investigation critically underscored that ‘Their [the ICRC observers] allegations were not believed, nor were they adequately investigated’.

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317 See Arts 13, 14, 17, 87 of the Geneva Convention III reproduced in Roberts and Guelff (n 56) 250–2 and 278.

318 See Arts 5, 27, 29, 31 and 32 of the Geneva Convention IV reproduced in Roberts and Guelff (n 55) 311–312.

319 On Article 75 of Additional Protocol I see s 4 of Chapter 1.


321 MG George R Fay (Investigating Officer), ‘AR15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade’, Executive Summary, (Fay Investigation). See text in Greenberg and Dratel (n 313) 987, 1022.

322 Ibid.

323 Ibid. In a report made public on February 2004, which detailed abuse committed between March and November 2003, the ICRC found that ‘methods of physical and psychological coercion were used by the military intelligence in a systematic way to gain confessions and extract information’ and
A concomitant investigation by Lieutenant-General Anthony Jones also placed specific blame on General Sanchez as ‘policy memoranda promulgated by the CJTF-7 Commander [i.e. Sanchez] led indirectly to some of the non-violent and non-sexual abuses’.\footnote{LTG Anthony R Jones, ‘AR15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade’. See text in Greenberg and Dratel (n 313) 991, 993 (Jones Investigation).} Additionally, General Jones stated in the report of his investigation that the ‘CJTF-7 Commander and Deputy Commander failed to ensure proper staff oversight of detention and interrogation operations’.\footnote{Ibid.}

Following court martial proceedings, five individuals have been convicted in relation to the events at Abu Ghraib under a number of counts ranging from physical and sexual abuses to mistreatment, but not—arguably erroneously—under specific charges of torture. The penalties inflicted varied from six months’ to ten years’ imprisonment and/or fines, and dishonourable discharges.\footnote{‘U.S. Abuse of Iraqi Detainees at Abu Ghrab Prison’ (2004) vol 98(3) AJIL 591, 595; ‘U.S. Military Justice Proceedings Involving Alleged Offenses against Protected Persons’ (2005) vol 99(3) AJIL 713–4; ‘Additional Military Justice Proceedings against Soldiers Accused of Abusing Protected Persons’ (2006) vol 100(2) AJIL 478. See also Sanchez (n 10) 454–5.} Six other soldiers have entered into plea agreements.\footnote{‘U.S. Military Justice Proceedings Involving Alleged Offenses against Protected Persons’ (2005) vol 99(3) AJIL 714.} In early May 2005, Brigadier General Janis Karpinsky, commander of the 800th Military Police Brigade, the unit whose ‘detention and internment operations’ had prompted the start of the investigations, was relieved of command, reprimanded, and demoted to colonel.\footnote{Ibid, 713.} In May 2005, Colonel Thomas Pappas, the highest-ranking officer at Abu Ghraib, who had admitted to ‘using unmuzzled dogs during interrogations’,\footnote{Sanchez (n 10) 456.} received non-judicial punishment via a written reprimand and was fined $8,000.\footnote{Ibid.} He opted for the non-judicial punishment instead of a court-martial on charges, amongst others, that he failed to ensure proper train-
ing and supervision in interrogation procedures. General Sanchez, the commander of Coalition Forces in Iraq, retired rather than accepting a new senior-level assignment, which would have required Senate hearings and confirmation.

In addition to the US military, the Taguba Report found that private contractors working for CACI (which provided interrogation services) and TITAN (which provided translation services) were involved in serious mistreatment of detainees. Against these companies, though not only in relation to events at Abu Ghraib, three civilian suits lodged by more than 335 Iraqi civilians have been brought in US courts under the Alien Tort Statute. To date, however, none of these cases have been adjudicated on the merits.

At the time of writing, no military or civilian leader has been put on trial for failure to prevent and/or punish the commission of crimes at Abu Ghraib, or for facilitating their commission. This is at odds with recent authoritative suggestions of a much greater level of responsibility than that which has emerged from the court-martial proceedings. A US Senate Report made public in April 2009, which was prepared by Senators Levi and McCain and was the result of an 18-month inquiry, attributed responsibility for the events at Abu Ghraib to senior US military and political officials.

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333 See in this regard, Fay Investigation in Greenberg and Dratel (n 313) 1045, 1052–6; Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities’ (n 155) 512.
also. Speaking of the involvement of General Sanchez, the commander of the Coalition Forces at the time of the events at Abu Ghraib, the Levi and McCain Report stated:

Interrogation policies approved by Lieutenant General Ricardo Sanchez, which included the use of military working dogs and stress positions, were a direct cause of detainees’ abuse in Iraq. Lieutenant General Sanchez’s decision to issue his September 14, 2003 policy with the knowledge that there were ongoing discussions as to the legality of some techniques in it was a serious error of judgment.

The same Report blamed the then-US Secretary of Defence, concluding that ‘The abuse of detainees at Abu Ghraib in late 2003 was not simply the result of a few soldiers acting on their own’. It also emphasised that the ‘Interrogation techniques such as stripping detainees of their clothes, placing them in stress positions, and using military working dogs to intimidate them’ had appeared in Iraq ‘only after they had been approved for use in Afghanistan and at GTMO’. It argued that Rumsfeld’s December 2002 authorisation of ‘aggressive interrogation techniques and subsequent interrogation policies’ had ‘conveyed the message that physical pressures and degradation were appropriate treatment for detainees in U.S. military custody’. Along the same lines, Laura Dickinson stated in the pages of the American Journal of International Law that:

[in] the months preceding the events at Abu Ghraib, Bush administration officials took a series of steps that weakened longstanding commitments within the military to the norms and values of the law of war, and in particular norms regarding the treatment of detainees.

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337 Ibid, xxix, Conclusion 17.
338 Ibid, Conclusion 19.
339 Ibid.
340 Ibid.
She further pointed out that:

> [a]dministration authorities circulated statements and memoranda suggesting that the law of war might not apply to certain categories of detainees, issued multiple, confusing directives to troops on the ground regarding permissible interrogations techniques; allowed civilian intelligence personnel, special forces, uniformed troops, and private contractors to mingle without clear lines of authority or divisions of responsibility and greatly expanded the role of private contractors. Together, these practices helped set the stage for the abuses that took place.\(^{342}\)

In addition to these opinions that rightly point to the existence of a higher level of responsibility within the military leadership and Bush administration officials than actually emerged, it should also be added that the conduct of the CPA may have contributed to the creation of conditions for the commission of crimes at Abu Ghraib.

As discussed, in Memorandum 2, the CPA did not set standards for the treatment of detainees in the prisons run by Coalition Forces.\(^{343}\) As the de facto government of Iraq and the authority specifically entrusted by the Security Council to ensure the welfare and security of the Iraqi population, international law required the CPA to adopt measures protecting the rights of detainees, irrespective of the specific authority the CPA had over Coalition Forces under the applicable municipal laws. Regrettably, only at the very end of the occupation on 27 June 2004 did the CPA recognise the Geneva Convention IV as an ‘appropriate framework’ for ‘criminal detainees’ and set standards for their treatment by the Coalition Forces.\(^{344}\) Moreover, by exempting private contractors, under Order 17,\(^ {345}\) from Iraqi jurisdiction, the CPA may have contributed to developing that sense of impunity, which is instrumental for massive and continuous violations to be perpetrated.\(^ {346}\) One should not go as far as to automatically draw the conclusion that a different normative framework would have prevented

\(^{342}\) Ibid, 12.

\(^{343}\) See s 3.3 above.


\(^{345}\) Order 7 (n 110) s 3.

\(^{346}\) Seeking to extend the privileged treatment granted in Order 17 after the end of the CPA’s occupation see CPA, ‘Status of the Coalition Provisional
abuses against the detainees; crimes occur despite the presence of good laws. Nonetheless, it may not be too far-fetched to suggest that by not exercising any form of supervisory role, the CPA may have facilitated the commission of abuses.

The dramatic incidents at Abu Ghraib constitute an upsetting and sobering reminder that an occupying power may itself engage in the commission of crimes and is also in a position to endanger the security and rights of the occupied people the most—notwithstanding its lofty aspirations to bring democracy to a country and to spread the protection of human rights. Despite the smokescreen of grand visions and ideals, it must not be forgotten that an occupation unfolds in a wartime situation, where the relationship between occupant and occupied remains one of enmity, as the former is determined to impose its will on the latter, which it perceives as a threat, either real or potential. In this climate of tension and hostility, the possibility of the commission of abuses and crimes, whatever the reason for their occurrence, is, naturally, at its zenith. Hence, the first and primary concern of an occupation administration must be to comply with its duties towards the individuals under its jurisdiction.

4. The political and constitutional process to transform Iraq into a democracy

Beyond its day-to-day administration of Iraq, the CPA also pursued a major political and constitutional process aimed at restoring Iraq's sovereignty only after transforming it into a democratic state, or, in the CPA's words, into 'a free Iraq governed by a representative government chosen through democratic elections'. In less than three years, this process led to (i) the adoption of an interim constitution on 8 March 2004; (ii) the holding of two general elections on 30 January and 15 December 2005 respectively;

347 See CPA Vision, reprinted in Hillary Synnott, Bad Days in Basra (I B Tauris 2008) 273–5. A piece in the prestigious journal Survival, co-authored by Bremer, explained it in the following manner:

Strategically, the choice was between building democracy in Iraq or replacing Saddam with another authoritarian government of more moderate cast. The issue was considered by the US government before the war. By the time the CPA was established, President George W. Bush had decided squarely in favour of building a democratic Iraq.
and (iii) the voting for a permanent constitution that embraced parliamentary democracy as a form of government and made Iraq into a federalist state through a referendum held on 15 October 2005.

Had the CPA pursued this transformative process alone, relying only on its normative authority under the law of occupation and Resolution 1483, dismissing it as illegal would have been rather straightforward. As discussed in Chapter 1, the law of occupation does not in and of itself permit an occupying power to bring about major political and constitutional reforms,348 and Resolution 1483 does not seem to have authorised as much. However, because of the significant involvement in this process of both the Security Council, a UN organ, and the IGC, an Iraqi body, gauging its legality in light of contemporary international law requires a more nuanced and holistic approach. To this end, the following sections articulate the main steps of this process, and dissect the distinct contribution made by each of the actors involved.

### 4.1. The role of the Iraqi Governing Council

In line with the rather rhetorical affirmation by the Security Council that the Iraqi people were to form an ‘Interim Iraqi Administration’ by themselves, with only the ‘help’ of the CPA and the Special-Representative of the UN Secretary-General (UN Special-Representative), the CPA never declared that it had established the IGC.349 On 13 July, the CPA issued Regulation No 6, recognising the existence of the IGC and taking note of the fact that ‘the Governing Council met and announced its formation’.350 Accordingly, when it assembled in Baghdad’s main conference centre for its first public gathering on 13 July 2003, the IGC announced its own formation without attributing its origins to the CPA.351 This statement of autonomy is not persuasive, however.

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348 Dinstein (n 66) 124.
350 Ibid, Preamble.
351 ‘Statement of the Governing Council after Its First Meeting’ 13 July 2003, reproduced in Talmon (n 2) 1231; Allawi (n 34) 166.
Apart from some auxiliary and diplomatic activity performed by the UN Special-Representative (Sergio Vieira de Mello) in the process of its formation, the establishment of the IGC can only be attributed to the CPA.\textsuperscript{352} In his memoirs, Bremer himself expounded upon the CPA’s handpicking of the twenty-five members of the IGC and the criteria followed in its selection, including that of ensuring an equal representation of all the groups in Iraqi society, including its women.\textsuperscript{353}

Although the functions of this body were generally referred to in the Preamble, Regulation 6 left their content and ambit somewhat ambiguous.\textsuperscript{354} Apart from the fact that the IGC was not the government of Iraq—a role fulfilled by the CPA—it is difficult to ascertain whether it nonetheless had some governmental functions, as a part of its name (Iraqi Governing Council) suggests, whether it merely had advisory functions, or whether perhaps it combined the two. To try to answer these questions, it is necessary to examine both the content of Regulation 6 and the practice of the IGC during the occupation.

Regulation 6 expressed the CPA’s recognition of the IGC as the ‘principal body of the Iraqi interim administration’\textsuperscript{355} and that, in accordance with Resolution 1483,\textsuperscript{356} the members of the IGC had ‘certain authorities and

\begin{quote}

353 The IGC included three women, had a slight Shiite majority, and an equal representation (five) of Kurds and Sunni Arabs, and one Assyrian Christian. A significant number of its members were ‘exiles’ who had left Iraq during Saddam Hussein’s regime and returned after his fall. Not surprisingly, several IGC members had been part of the opposition against Saddam Hussein. See Dobbins et al (n 67); Bremer, \textit{My Year in Iraq} (n 32) 86, 93, 98; Diamond (n 67) 43. For a useful background on this topic see Noah Feldman and Roman Martinez, ‘Constitutional Politics and Text in the New Iraq: An Experiment in Islam Democracy’ (2006) 75 Fordham Law Review 883, 888–90.

354 Regulation 6 (n 349) 191.

355 Ibid, s 1.

356 Ibid, the Preamble of Regulation 6 reads:

Acknowledging that, consistent with Resolution 1483, the Governing Council has certain authorities and responsibilities as representa-
responsibilities as representatives of the Iraqi people’, which included ‘ensuring that the Iraqi people’s interests are represented in both the interim administration and in determining the means of establishing an internationally recognised, representative government’. As Regulation 6 does not indicate how the IGC had determined these competences, nor does it refer to their origin, let alone their legal basis, it could be suggested that by mentioning them in one of its Regulations, the CPA was, in fact, framing the competences of the IGC rather than recognising them. The result is that the competences of the IGC were clearly more limited than one would expect from a governing authority. On the other hand, as rightly emphasised by Schmitt and Garraway, it would not be correct to compare the IGC to a puppet government, simply receiving instructions from the CPA.

Under Regulation 6, the IGC and the CPA undertook ‘to work together in a cooperative and consultative process’. Moreover, the IGC had a distinct function in the administration of Iraq ‘as representatives of the Iraqi people’, ‘defender of the Iraqi people’s interests’, and as a shaper of Iraq’s future in terms of forming a representative government. On this front, it could be argued that the IGC was not subordinate to the CPA.

Several aspects of Regulation 6, however, suggest otherwise. First, it was the CPA, rather than the IGC, that issued Regulation 6 ‘recognising’ the IGC and defining the CPA’s relationship with it. Arguably, had the IGC been in more than a subordinate position, it would have been possible to witness the opposite. Moreover, Regulation 6 did not specify the content of the ‘authorities and responsibilities’ of the IGC. This qualification would have been necessary to carve out a distinct sphere of autonomy for the

See Regulation 6 (n 351).

Informative in this regard, section 1 of Order 7 stated: ‘All judges, police and prosecutors shall perform their duties in accordance with CPA Regulation No. 1 (CPA/REG/23 May 2003/01) and in accordance with any other Regulations, Orders, Memoranda or instructions issued by the CPA’. See Order 7 (n 110) s 1.

Schmitt and Garraway (n 243) 37.

Regulation 6 (n 351) Preamble.

Ibid.

Ibid.
IGC from the more powerful CPA. Section 2 of Regulation 6 stipulated that ‘in accordance with Resolution 1483, 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’. Under this provision, because of the use of the verb ‘shall’, it would have been very difficult, if not impossible, for the IGC to take decisions independently of the CPA’s authority or advice.

Although the CPA was also required to consult and coordinate with the IGC, this may be regarded as an obligation in name only. Under the law of occupation the CPA, unlike the IGC, was an expression of the states that were in occupation of Iraq, and therefore had an autonomous and exclusive normative authority, which Resolution 1483 had served to amplify.

In accordance with Article 43 of the Hague Regulations, which stipulates that the authority of the dislodged government has ‘in fact passed into the hands of the occupant’ once an occupation is established, the defeated indigenous government loses its capacity to legislate for the territory it once ruled. As the CPA—more correctly the states behind the CPA—had replaced the Iraqi government in the ruling of Iraq, it was the CPA

362 Ibid, s 2.
363 For more on this topic, see Gregory Fox’s analysis in ‘The Occupation of Iraq’ (n 141) 252. According to Feldman:

The 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.

Noah Feldman, What We Owe Iraq (Princeton University Press 2004) 110. According to Larry Diamond, a constitutional law adviser to the CPA:

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 ministries (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.

364 Fox (n 141) 252.
and not the IGC which had normative authority as defined under the law of occupation within Iraq. For the duration of the occupation, this normative authority remained with the CPA, unless it opted to delegate it, or give post facto authorisation to measures taken by the IGC.\textsuperscript{365} The CPA delegated authority to the IGC with regard to the establishment and functioning of the ‘Iraqi Property Claims Commission’,\textsuperscript{366} the ‘Iraqi Special Tribunal’,\textsuperscript{367} the ‘Iraqi Commission on Public Integrity’,\textsuperscript{368} and the ‘Iraqi National Intelligence Service’.\textsuperscript{369} Most importantly, as noted earlier, the CPA delegated to the IGC, which had already established the Higher National De-Ba'athification Commission, the implementation of the policy of de-Ba'athification subject to its remaining consistent with Order 1 and the ‘terms and conditions’ outlined in Memorandum 7.\textsuperscript{370}

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\textsuperscript{365} According to Ali Allawi, a member of the IGC:

It was clear, even in those early days that the Governing Council was not a government-in-waiting. Rather, it was a hybrid, which fitted awkwardly into the governing structures of an occupied country. All the data and information of the Iraqi State were under the control of the CPA, and what was released to the Governing Council was only what was thought necessary or convenient ... The budget for the rest of the year, which was in the process of being finalised had been created without any serious involvement by the Governing Council.

Allawi (n 34) 234.


\textsuperscript{370} Memorandum 7 ‘Delegation of Authority under De-Ba'athification Order No.1’ (n 22). To have a sense of the IGC’s activity with regard to the policy of de-Ba'athification see: IGC, ‘Formation of De-Ba'athification Committees and Instructions to Facilitate and Organize the Work of the Ministries’, Resolution Number 58, 20 September 2003; IGC, ‘Reinstatement of Those Dismissed for Political Reasons’ Resolution Number 51, 29 September 2003; IGC, ‘Central Ministerial De-Ba'athification Committees’ Resolution Number 52, 29 September 2003; IGC, ‘Retirement of Employees of Dissolved Entities and Employees Covered by the De-Ba'athification Order’, Resolution Number 54, 29 September 2003; IGC ‘Confiscation of Movable
On other hand, these delegations did not constitute *carte blanche*. Each of the delegation orders contained a list of ‘terms and conditions’ sections and a detailed statute of the entity that was being created. This practice suggests a stronger role for the CPA than the term ‘delegation’ may otherwise denote. Further, the CPA did not hesitate to assert its normative prerogatives. Writing to the ‘Iraqi Cabinet’—composed by the Iraqi ministries that the IGC had appointed—Bremer stated that he had been informed that ‘the Governing Council has been advising you [the Ministries] of the decisions that they issue and requesting that you implement them’, which resulted in ‘ministers implementing actions that do not yet have the force of law’. Bremer stressed that:

as you are aware, no decision by the Governing Council has the effect of law unless it has been made pursuant to a specific delegation of authority from the CPA, or until it is ratified by a CPA Order which I sign. Particularly with respect to issues that concern changes in law or policy and any financial matters, please consult with your CPA Senior Advisory before implementing any decisions by the Governing Council.

Finally, what Regulation 6 presented as a partnership was, in reality, an unequal relationship. The CPA was backed by a victorious army, and had been given a set of tasks of fundamental importance for the future of Iraq by no less than the Security Council. The IGC, by contrast, was weak: having been appointed by the CPA, it did not wield political, let alone military,

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372 Ibid.
strength of its own, nor did it have significant support from the Iraqi people, even though some of its members were leaders of political parties.\footnote{The UN Secretary-General welcomed the establishment of the IGC and stated that the IGC ‘will have the right to set policies and take decisions in coordination with the Authority [CPA]’. On one hand, however, this was an overstatement, as there is no documentation issued by the IGC suggesting that it actually developed any specific policy. On the other hand, by using the word ‘coordination’, it was confirmed that the IGC was subordinate to the CPA. Had it been otherwise, it would have no need to coordinate with the CPA. See UN 17 July 2003 Report (n 310) para 24. See also Bensahel et al (n 73) 167. In one of its periodic reports, the International Crisis Group put it thus: While it can accurately be described as the most broadly representative body in Iraq’s modern history, selected as it was by the CPA in consultation with pre-chosen political parties and personalities, the Interim Governing Council simply lacks credibility in the eyes of many Iraqis and much of the outside world. On paper, it enjoys broad powers; in reality, few doubt the deciding vote will be cast by the U.S. A gathering of political leaders with weak popular followings, very little in common between them, no bureaucratic apparatus and a clumsy nine-person rotating presidency at its helm, it is doubtful that it can become an effective decision-making body. See International Crisis Group, ‘Governing Iraq’ (ICG Middle East Report No 17, 25 August 2003) ii.}

Turning to the practice of the IGC, it should be observed that this body came into existence only in mid-July 2003, when the authority of the CPA had already been defined and it had carried out some key reforms such as those in Orders 1 and 2, leaving the IGC incapable of displaying any influence in the early phases of the occupation. During the period of the CPA’s tenure of Iraq, the IGC issued 235 resolutions, touching on a wide variety of subjects.\footnote{The texts of all of these resolutions are reprinted in Talmon (n 2) 1121–1229.} Yet despite this copious number, the content and style of the IGC’s resolutions differ considerably from the normative measures taken by the CPA. More than legislative acts setting general requirements on a given issue according to a particular policy, these decisions—which on average are no longer than a half page of written text and are very scantly reasoned—can be compared, for the most part, to administrative decisions and decrees directed at tackling contingent governance issues rather than formulating comprehensive policies. In some cases, the decisions of the IGC, though not necessarily unimportant, had essentially no impact on
the occupation as they concerned administrative matters, the modalities of the IGC's functioning, or the appointment of committees to study or work on specific issues, without going as far as defining any specific policy. By contrast, in other cases, decisions of the IGC had a more dynamic

375 See, amongst others, IGC, ‘National day of Iraq and Official Holidays’, Resolution Number 1, 13 July 2003; IGC, Designation of Iraq's Women's Day', Resolution Number 19, 13 August 2003; IGC, 'Retirement of the Director-General of the Ministry of Transport', Resolution Number 56, 30 September 2003; IGC, 'Appointment of the Presidents of the Sunni and Shiite Awqaf', Resolution Number 68, 22 October 2003; IGC, 'Arabian Gulf Academy for Maritime Studies', Resolution Number 85, 4 November 2003; IGC, 'Amending the Name of the Committee of Education and Culture', Resolution Number 139, 30 December 2003; IGC, Monthly Pension for the Former President of Iraq Abdul Rahmn Muhammad Arif', Resolution Number 22, 10 February 2004; IGC, 'Commissioning KPMG to Investigate the Oil-for-Food Programme', Resolution Number 61, 20 April 2004; IGC, 'Appointment of an Adviser at the State Consultative Council', Resolution Number 75, 8 May 2004.


377 See, among others, IGC, 'Formation of a Committee to Draw up the Work Programme of the Governing Council', Resolution Number 2, 14 July 2003; IGC, 'Formation of a Committee to Draft the Rules of Procedures of the Governing Council', Resolution Number 3, 14 July 2003; IGC, 'Right to Vote of Deputies of Members of the Governing Council', Resolution Number 5,
and incisive role. In addition to its already mentioned position in respect of the policy of de-Ba'athification, the following examples can be proffered here. The IGC continued the work of the CPA to dismantle Saddam Hussein's regime. It established and defined the competence of the Iraqi ministries, appointed the members of the ministries during the occupation.


IGC, 'Appointment of Ministers' Resolution Number 28, 31 August 2003. CPA's Memorandum 6 contained the 'List of Approved Interim Selected by the Governing Council of Iraq' to be 'responsible for the detail operations of the Iraqi Ministers'. Annex A to Memorandum 6 listed the name and the functions of 25 Ministers. See CPA, 'Implementation of Regulation on the Governing Council Number 6' (CPA/REG/13 Jul 2003/06), CPA/MEM/2 Sep 2003/06, 2 September 2003 (Memorandum 6). See also IGC, 'Establishment of New Ministries', Resolution Number 13, 7 August 2003. This latter resolution established five new ministries (Transport and Communications, Human Rights, Environment, Immigration, Electricity). Subsequently, and rather confusingly, or perhaps indicative of the CPA's attitude towards the IGC, the CPA—through a series of orders—also established three of the five ministries established by the IGC: the Ministries of Human Rights,
and acted as a liaison between the ministries and the CPA,\textsuperscript{380} while also determining their salaries.\textsuperscript{381} Immediately after its formation, the IGC agreed to form a ‘Special Tribunal for the Prosecution of Crimes against the Iraqi People and Humanity’\textsuperscript{382} even though this tribunal became a reality only following subsequent decisions of the IGC and CPA’s Order 48.\textsuperscript{383} The IGC fixed income tax at 15 percent—a decision repeated in the CPA’s Order 37.\textsuperscript{384} It also approved a ‘customs duty of 5% for imported goods with exemp-

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\textsuperscript{381} IGC, ‘Salaries of Ministries’, Resolution Number 95, 10 November 2003.

\textsuperscript{382} Deciding to ‘form a special tribunal’ to prosecute ‘those from the ousted dictatorial regime that are accused of crimes against the Iraqi people and against humanity’ and identifying a list of individuals that had expertise on the subject matter, see IGC, ‘Formation of a Special Tribunal for the Prosecution of Crimes against the Iraqi People and Humanity’, Resolution Number 4, 15 July 2003.

\textsuperscript{383} Order 48 (n 245). See also IGC, ‘Adoption of the Law on the Iraqi Special Criminal Tribunal for Crimes Against Humanity in Iraq’, Resolution Number 127, 9 December 2003.

\textsuperscript{384} Capping the level of the income tax at 15%, see IGC, ‘Approval of the Level of Income Tax’ Resolution Number 42, 16 September 2003. This resolution took the same view as CPA’s Order 37, which was issued shortly after on 19 September (See below n 599). The IGC’s Resolution was accompanied by
tions for food, medicine, books and clothing’. On 16 September 2003, in what appears to be, though is not framed as, an endorsement of CPA’s Order 39, which was issued only three days later, the IGC issued Resolution 44 approving the ‘principle of unconditional investment of foreign and Iraqi capital alike’. Notably, in what could be seen as a criticism of the excessively foreign-friendly strategy pursued by the CPA, the IGC in the same resolution also recommended (presumably to the CPA) to ‘provide support for national investment through the issuance of long-term loans, modest interest rates and regulation of the investment process’. Furthermore, the IGC established the ‘National Authority for Media Affairs’ and approved the ‘Company Law presented by the Coalition Provisional Authority’. On 4 November 2003, the IGC decided to ‘halt all plans for or activities aimed at privatizing State-owned enterprises’, which was one of the CPA’s goals. Although the decision does not specify as much, its significance lies in the

a Note stating ‘The CPA has approved this resolution and notice [of the approval] will be forthcoming’.

387 Ibid.
390 The IGC justified the ‘halt’ by the need to ‘carefully examine the state of these enterprises and institutions, then weigh the socio-economic and political repercussions of their privatization’. See IGC, ‘Halting of All Plans or Activities for the Privatization of State-Owned Enterprises and Institutions’, Resolution Number 90, 4 November 2003. In relation to the CPA’s attitude towards state-owned enterprises see Allawi (n 34) 264; Bremer, My Year in Iraq (n 32) 62, 64, 200. On 22 March, the CPA issued Order 76, which on the basis of ‘having worked closely with the Governing Council to ensure that economic change occurs in a manner acceptable to the people of Iraq’ provided for the ‘consolidation and reorganization of certain state-owned enterprises into government ministries or agencies’. See CPA, ‘Consolidations of State-Owned Enterprises’, CPA/ORD/20 May 2004/76, 20 May 2004, Preamble.
fact that the IGC took an independent stand in the debate of what was to be done in respect of the costly and bureaucratic state-owned enterprises.

On 29 December 2003 the IGC approved Decision 137, which repealed the ‘Iraqi Law of Personal Status of 1959’ and replaced it with a law that would have governed matters of marriage, divorce, and inheritance according to Sharia law. However, when this decision came before Bremer for signature he exercised his veto powers by refusing to sign it. Therefore, as only the CPA had normative authority, Decision 137 never became an Iraqi law and, tellingly, the IGC subsequently repealed it. Furthermore, it can be recalled that the IGC voiced its concern with regard to the events at the Abu Ghraib prison (see section 3.3 above) by deciding to denounce ‘all violations of human rights within the wall of the prison and to publicise that fact in available media’ and establish a ‘committee by Iraqi judges and public prosecutors to investigate the anti-humanitarian violations committed by those in charge of Abu Ghraib prison’.

At times, the IGC denounced Coalition Forces for the cruelty and violence used during their searches of Iraqi homes and, towards the end of the CPA’s occupation, it voiced vehement opposition to Coalition Forces’ military operations in Fallujah by threatening to put an end to the political process if those military operations continued.

On a final note, the role of the IGC at the international level deserves mention. On 14 August 2003, the Security Council passed Resolution 1500 welcoming the establishment of the ‘broadly representative Governing Council of Iraq’. The Security Council described the IGC as an ‘important step towards the formation by the people of Iraq of an internationally recognised, representative government that will exercise the sovereignty of Iraq’. Supporting this conclusion, the American Ambassador to the UN called the IGC a ‘partner with which the United Nations and the in-

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391 IGC, ‘Introduction of Shari’ah Law in Personal Status’, Resolution Number 137, 29 December 2003. See also Feldman, What We Owe Iraq (n 363) 108–11.
392 Ibid (Feldman) 110.
395 Allawi (n 34) 167.
396 Ibid.
398 Ibid.
ternational community can engage so as to support it in its endeavours to build a better Iraq. This international recognition was followed by invitations to members of the IGC to sit as representatives of the Iraqi State on certain international bodies.

399 Other members of the Security Council took a more critical position. The Russian Ambassador, though accepting the idea that the IGC could be a first step towards creating an Iraqi government, did not consider it bold enough. He stressed the need to ‘give the Iraqi people the right to independently manage the resources of their country’, stressing that ‘conditions should be created to ensure that the Iraqi people are able to choose a legitimate and internationally recognised Government that can help resolve the crisis in the country.’ He further stated that:

the success of the political and economic reconstruction of Iraq and, hence, its stability, require the United Nations to play a dynamic role in the post-conflict management of the country. The resolution that we have just adopted does not ... we would like a timetable to be established with regard to the sequence of the political transition ... which should facilitate the stabilisation of Iraq ...

UNSC Verbatim Record (14 August 2003) UN Doc S/PV.4808, 2. See also in the same document the declarations of Pakistan (p 3), Germany (p 4), Mexico (p 5), China (p 6), and Syria (p 7).

400 A UN Secretary-General report to the Security Council described the international dimension of the IGC and how its role was contested by other Iraqi groups. It stated:

On 9 September the interim Iraqi Minister for Foreign Affairs, Hoshyar Zebari, assumed Iraq’s seat at the League of Arab States meeting of Foreign Ministers in Cairo. Although the League of Arab States granted the interim Foreign Minister one-year provisional recognition, it also received at its headquarters in Cairo a delegation of Iraqis challenging the legitimacy of the Governing Council to represent Iraq. Similarly, during the summit of the Organisation of the Islamic Conference in Malaysia, the Malaysian President received the then acting President of the Governing Council, as well as Iraqis representing groups outside the Governing Council. On the other hand, on 2 October, on behalf of the Governing Council, its acting President addressed the United Nations General Assembly, no objection having been raised by any other Member State. (emphasis added)

See UN 5 December 2003 Report (n 167). See also IGC, ‘Participation of the Republic of Iraq in the Meetings of IMF and World Bank’, Resolution Number 40, 10 September 2003; IGC, ‘Participation in Paris Club Meeting’ Reso-
The international recognition did not, however, increase the authority of the IGC within Iraq, which remained rather limited throughout the occupation.\footnote{According to Allawi, the IGC had negotiated a number of powers for itself, including the right to nominate twenty-five cabinet ministers; however, the CPA did not leave the IGC with primary control of financial resources, security, and military matters. He observed that over a period of months the relationship between the IGC and the CPA had become one ‘compounded of distaste’. See Allawi (n 34) 60.} Likewise, the IGC’s public perception remained tainted by its closeness to the CPA: having been chosen by the occupiers and cooperating with them during the occupation, the IGC was seen, in essence, as a ‘collaborationist body’.\footnote{For descriptions of the IGC’s shortcomings and its lack of legitimacy, see Isam al-Khafaji, ‘I Did Not Want to be a Collaborator’ The Observer (London, 27 July 2003); E A Khammas, ‘A Closed Circle of Collaborators’ Occupation Watch Center (28 July 2003); Steven Komarov, ‘US-Appointed Body Has Little Power, Its Influence Is Fading, and Hostility toward It Is Rising’ USA Today (New York, 4 December 2003). The UN 5 December 2003 Report (n 166) para 58, stated that: On 20 September Akila al-Hashimi, one of three women on the Governing Council, was assassinated, illustrating the severe risks facing Iraqis cooperating with the Coalition Provisional Authority-led process. Since then, serious threats and attempts against the lives of members of the Governing Council, interim ministers and officials at the governorate and municipal levels have continued. For example, Faris Al-Assam, Deputy Mayor of Baghdad, was assassinated on 26 October.} Probably, the most tangible sign of the limited ascendancy of the IGC among the Iraqis, or at least of its inability to create consensus towards the political process it was supporting, is provided by the gradual but steady rise of the insurgency against the occupation,\footnote{On the rise of the insurgency, see s 2 above.} in which many Iraqis participated or supported and which arose despite the IGC, if not against it as an auxiliary to the occupation administration.

In view of the foregoing, it seems fair to say that the IGC was neither a governor of Iraq nor a servant of the CPA. Its status and function lay somewhere between these two poles. It did not shape the CPA’s policies but contributed to them at both the domestic and international levels. It took

\footnote{Resolution Number 74, 27 October 2003; IGC, ‘Appointment of Iraqi Representative to UNESCO’, Resolution Number 77, 9 May 2004; IGC ‘Appointment of Iraqi Representative to FAO’, Resolution Number 78, 9 May 2004.}
decisions on areas not regulated by the CPA or in support of the CPA’s policies, performed functions for which it was better suited as an Iraqi body, and, at times, distanced itself from the CPA’s plan and choices. However, looking at the nature of this work, the topics dealt with, and the content of its resolutions, the impression remains that the role of the IGC during the occupation was of limited influence. The fact that resolutions of the IGC were very brief and scantly reasoned confirms the view that it was not the IGC who was setting policies or patterns of conduct as an alternative to those set by the CPA. More likely, as the references in the text of the CPA’s Orders discussed in this chapter also suggest, the IGC remained an auxiliary body to the CPA rather than an independent unsupervised governor/administrator of Iraq.

One area, however, where the IGC was perceived—by no less than the Security Council—as a partner of the CPA was the political and constitutional process pursued by the CPA. Whether the IGC was a subordinate ally or a partner of the CPA representing and working for the Iraqi people and capable of conferring legitimacy to the transformative project pursued by the CPA, is for the next sections to expand upon.

4.2. Sistani’s fatwa against the drafting of a constitution by a non-elected body

Shortly after the appointment of the IGC, the CPA moved to ensure the preparation of a constitution. Although Iraq already had a constitution, Bremer thought that it was necessary to draft a new constitution because ‘electing a government without a permanent constitution defining and limiting government powers invites confusion and eventual abuse’. It is not clear what the CPA thought of the 1970 Constitution, but looking at its content—essentially a socialist-inspired constitution adopted by the Ba’ath Party after taking power through the 1968 revolution—it may not

404 Toone (n 352) 470.
407 Tripp (n 10) 184–7.
be surprising if the CPA found it unsuitable for the new Iraq it wished to forge. The 1970 Constitution did contain several important provisions ensuring protection of human rights, stressed the principles of equality before the law and equal opportunities, and spoke of the duty of ‘society’ to ensure ‘to the citizen his full rights and freedom’. It was inspired by the model of the Socialist State. Article 1 defined Iraq as a country striving ‘to fulfill the united Arab State and to establish the Socialist system’, and Art 10 indicated that ‘social solidarity is the first basis for the society’. Further, Art 10 spoke of the ‘social function’ of ownership and of the role of the state in ‘planning, directing and guiding the national economy’. See text of the 1970 Constitution (n 405) Arts 19–36.

Bremer pledged that the new constitution was to be written by Iraqis, but he did not appear to be concerned that it would be written by Iraqis chosen by the CPA and under the CPA’s advice and influence over the course of an occupation, rather than by representatives chosen by the Iraqi people in a free and sovereign country. Unsurprisingly, in July 2003, the rumours (which turned out to be correct) that the CPA was going to task the drafting of an Iraqi constitution to a committee selected by the IGC prompted harsh protests.

The Grand Ayatollah al-Sayyid Ali al-Husayni al-Sistani (Sistani), a prominent cleric belonging to the Shiite group, criticised this move by the CPA. Apparently concerned that the constitution was to be written by a non-elected body and that the CPA would force a constitution upon the Iraqi people, in a similar manner to General MacArthur during the

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408 The 1970 Constitution did contain several important provisions ensuring protection of human rights, stressed the principles of equality before the law and equal opportunities, and spoke of the duty of ‘society’ to ensure ‘to the citizen his full rights and freedom’. It was inspired by the model of the Socialist State. Article 1 defined Iraq as a country striving ‘to fulfill the united Arab State and to establish the Socialist system’, and Art 10 indicated that ‘social solidarity is the first basis for the society’. Further, Art 10 spoke of the ‘social function’ of ownership and of the role of the state in ‘planning, directing and guiding the national economy’. See text of the 1970 Constitution (n 405) Arts 19–36.

409 He put it thus: ‘The coalition has no intention of changing the constitution (...) The constitution will be written by the Iraqi people, not by the coalition. We don’t intend to change it, we don’t intend to unchange it. It’s going to be done by the Iraqi people. It will be written by Iraqis for Iraqis, and it will then be put to the Iraqi people for their approval.’ See the quoted passage in CPA, Coalition Provisional Authority Update Briefing from Baghdad, Iraq (2 September 2003) <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3111> last accessed 15 March 2014.

410 See in this regard Andrew Arato, Constitution-Making Under Occupation (Columbia University Press 2009) 100–4; Feldman, What We Owe Iraq (n 363) 40–1.

411 Feldman, What We Owe Iraq (n 363) 40.

412 Ibid.

occupation of Japan in the aftermath of World War II. Sistani responded to a question from a group of followers, by issuing a fatwa on 26 June 2003. According to the fatwa—a religious and legal pronouncement by an authority in Islamic law (mufti) that becomes incumbent on all believers—the plan for an appointed rather than elected assembly to draft a new Iraqi constitution was ‘fundamentally unacceptable’. This was because ‘those forces [i.e., occupation forces—a circumlocution used in the fatwa to avoid giving them either recognition or offense] had no authority to write a constitution’. For Sistani, the only way to eventually adopt a constitution was for general elections to be held so that every eligible Iraqi could choose someone who would represent them at a constitutional convention to write it. Curiously enough, it was an Ayatollah and not the occupiers, despite their ambition to bring democracy to Iraq, who was lecturing the Iraqis as well as the occupiers about issues of legitimacy, representativeness, and democracy.

On 11 August 2003, at the request of the CPA, which hoped that the IGC could endorse a number of experts to write a constitution, the IGC appointed a twenty-five member ‘Preparatory Committee to find the mechanism and means for selecting and electing members for the constitutional convention’. This committee was to prepare a draft of the constitution. On the same day, the IGC appointed a ‘Coordinating Committee’ to ‘Find Mechanisms and Means for the Selection and Election of Members of the Constitutional Convention to work with the Preparatory Committee’.

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414 Bremer, My Year in Iraq (n 32) 94.
415 Feldman and Martinez (n 353) 891–2.
416 See Diamond, Squandered Victory (n 65) 44. See also the entry ‘fatwa’ in William R Tumble, Angus Stevenson (eds), Shorter Oxford English Dictionary (5th edn, OUP 2002) vol 1, 931.
417 Ibid.
418 See text of the fatwa in Talmon (n 2) 1421. See also Feldman, What We Owe Iraq (n 363) 40.
420 Ibid, see also Dobbins et al (n 67) 267.
422 Ibid.
According to a UN Report, on 30 September 2003, the preparatory committee submitted a report to the IGC recommending, in accordance with Sistani’s fatwa, that the new Iraqi constitution be drafted by a directly elected body (constitutional convention) and that, thereafter, the draft constitution be voted on by the population as a whole through a general referendum. Nonetheless, the CPA did not abandon the project that a constitutional document could be written during the occupation. Against this backdrop, it had to find support outside Iraq and did so in the guise of Resolution 1511.

4.3. Security Council Resolution 1511: moving democratisation forward

Resolution 1511 was issued under Chapter VII of the UN Charter upon a finding that the situation in Iraq, although improved, continued to constitute ‘a threat to international peace and security’. Like Resolution 1483, Resolution 1511 emphasised that Iraq was a sovereign country, and that its people enjoyed the right of self-determination, including both free determination of their political future and control over their natural resources. It reiterated the temporary nature of the CPA as well as ‘its authorities, responsibilities and obligations under international law’.

Unlike Resolution 1483, however, Resolution 1511 called for the (gradual) end of the occupation, making clear that the CPA was to end when ‘an internationally recognized, representative government’ is ‘sworn in and assumes the responsibilities of the Authority’, and expressed ‘its resolve that the day when Iraqis govern themselves must come quickly’. Although it did not set a date for the end of the occupation, the Security Council called upon the CPA ‘to return governing responsibilities and authorities to the
people of Iraq’, that is, to end the occupation, though it downplayed this call by stating that the CPA was to do so ‘as soon as practicable’. The significance of these determinations cannot be underestimated: the Security Council had unequivocally called for the end of the occupation, though probably the most important choice made in Resolution 1511 was the embracing of the CPA’s political and constitutional project. Unlike Resolution 1483, which had set general tasks without detailing how they were to be achieved and speaking generally of an Iraqi administration, Resolution 1511 set a course of action, which was significantly more specific and bolder than Resolution 1483. It called for the adoption of a new constitution and for the holding of elections under that constitution. This endorsement began with the qualification, or perhaps ‘boosting’, of the status of the IGC. Notwithstanding the presence of an occupation administration, the Security Council went as far as holding that the IGC ‘and its ministers are the principal bodies of the Iraqi interim administration’ and that the IGC ‘embodies the sovereignty of the State of Iraq during the transitional period’. Treating it as an essentially independent, if not sovereign, body, the Security Council welcomed ‘the decision’ of the IGC, though without providing any reference to identify it, to ‘form a preparatory constitutional committee to prepare for a constitutional conference that will draft a constitution to embody the aspirations of the Iraqi people’, and urged the IGC to ‘complete this process quickly’.

431 Ibid, para 6.
432 The views of the CPA were set out in an op-ed published in the Washington Post shortly before Resolution 1511, in which Bremer acknowledged that, ‘[e]lections are the obvious solution to restoring sovereignty to the Iraqi people’, but pointed out that ‘at the present elections are simply not possible’. According to Bremer it was necessary to draft a constitution because ‘[e]lecting a government without a permanent constitution defining and limiting government powers invites confusion and eventual abuse’. See Paul L Bremer, ‘Iraq’s Path to Sovereignty’ Washington Post (Washington, 8 September 2003) A21.
433 See Wolfrum (n 256) 27.
434 Resolution 1511 (n 82) para 4.
435 Bremer made clear that the suggestion to appoint a constitutional preparatory committee, with which the IGC agreed, had come from the CPA. See Bremer (n 31) 163. For the UK Ambassador the ‘Council’ was ‘our partner in many decisions concerning the administration of Iraq’ and remarked that ‘The Governing Council has set up a constitutional preparatory committee, which is now meeting to organize countrywide consultations on a fu-
The Security Council also allocated specific tasks to the IGC and the CPA: it asked the IGC (even though Resolution 1511 uses the less forceful term ‘invites’) to provide for its review—by no later than 15 December 2003—a ‘timetable and a program’ for (i) ‘the drafting of a new constitution for Iraq’, and (ii) ‘for the holding of democratic elections under that constitution’ (emphasis added). In the pursuit of these tasks, the IGC was to work ‘in cooperation with the Authority [CPA] and, as circumstances permit, the Special Representative of the Secretary-General’. The Security Council took note of the ‘intention’ of the IGC—without detailing where and when this intention had been made explicit—to hold a constitutional conference and stated that ‘the convening of the conference would be a milestone in the movement to the full exercise of sovereignty’.

Last but not least, the Security Council gave support to the political and constitutional process prompted by the CPA with the cooperation of the IGC in another fundamental respect. Namely, it empowered the renamed Multinational Force (previously Coalition Forces) to take all necessary measures to contribute to the maintenance of security and stability in Iraq. This authorisation to use force was of a general character. It did not distinguish between threats posed by terrorists and threats posed by Iraqis fighting against the occupation. Instead, it was an alignment with, and endorsement of, the occupation against all of its enemies. In particular, the authorisation to use force given to the Multinational Force was

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Resolution 1511 (n 82) para 7.

Ibid.

Ibid.

Paragraph 14 of Resolution 1511 (n 82) reads:

Determines that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and authorizes a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure.
justified by the fact that the provision of security and stability was ‘essential to the successful completion of the political process as outlined in paragraph 7 above’, to ensure ‘the necessary conditions for the implementation of the timetable and program’, and to contribute to the ‘security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration’. Much more than in Resolution 1483, it seems evident when reading the content of Resolution 1511 that its enactment signalled that the Security Council had become an ally of the occupiers, a partner in the realisation of a process leading to Iraq becoming a democratic state. True, the Security Council had also called for the end of the occupation, but this end remained subordinate to the achievement of the goals set by the Security Council and was not subject to any meaningful deadline.

4.3.1. The 15 November Agreement between the IGC and the CPA

In compliance with the request of the Security Council, on 15 November 2003, the IGC and the CPA signed an agreement detailing the process through which Iraq could move from an occupation administration to an elected government and adopt a new constitution in the subsequent two years. It affirmed that the occupation was to end by 30 June 2004, with the dissolution of the CPA and the so-called ‘transfer of sovereignty’ to a transitional administration. Under the agreement, a temporary parliament, which it termed ‘Transitional National Assembly’, was to be selected through a ‘transparent, participatory, democratic process of caucuses in each of Iraq’s 18 governorates’, which would occur under the supervision of the CPA no later than 31 May 2004. Once elected, this assembly would choose the head of the government and appoint its ministers. Quite strikingly, the 15 November Agreement was determining not only what was going to happen during the occupation, but also the modalities of the election and formation of the new Iraqi government, even though Resolution 1511 had requested the CPA and the IGC to do nothing of the kind.

440 Resolution 1511 (n 82) para 13.
441 ‘Agreement on Political Process between the Coalition Provisional Authority and the Governing Council of Iraq’ 15 November 2003 (15 November Agreement). See text in Talmon (n 2) ss 3-5, 998.
442 Ibid.
443 Ibid, s 3.
The mechanism engineered under the 15 November Agreement for the adoption of a new and democratic constitution comprised two steps. The first was the preparation of what the 15 November Agreement calls ‘Fundamental Law’, later called TAL.444 The ‘Fundamental Law’ was to be written by the IGC in ‘close consultation’ with the CPA and approved by both entities by 28 of February 2004.445 This ‘Fundamental Law’ was to be an interim constitution. Although never officially defined as such—ostensibly because it would have run against ‘Sistani’s dictate against unelected authorship of a constitution’,446 the name used for it, that is ‘Fundamental Law’, and the anticipated content of its provisions suggests that no less than the drafting of an interim constitution was being agreed upon. Evidently influenced by American constitutional principles, the 15 November Agreement determined that the topics to be included in the ‘Fundamental Law’ were: (i) a ‘Bill of rights, to include freedom of speech, legislature, religion; statement of equal rights of all Iraqis, regardless of gender, sect, and ethnicity; and guarantees of due process’; (ii) a ‘Federal arrangement for Iraq, to include governorates and the separation and specification of powers to be exercised by central and local entities’; (iii) a ‘Statement of the independence of the judiciary, and a mechanism for judicial review’; (iv) a ‘Statement of civilian political control over Iraqi armed and security forces’; (v) a ‘Statement that Fundamental Law cannot be amended’; (vi) ‘An expiration date for Fundamental Law’; and (vii) a ‘Timetable for drafting of Iraq’s permanent constitution by a body directly elected by the Iraqi people; for ratifying the permanent constitution; and for holding elections under the new constitution’.447 The second step consisted of the Iraqi people electing by 15 March 2005 a ‘Constitutional Convention’ that was to draft the new Iraqi constitution by 15 August 2005. The resulting draft was to be approved (or rejected) by the Iraqi people in a general referendum to be held no later than 15 October 2005. Elections for a new Iraqi government were to be held by 31 December 2005.

Under Resolution 1511, the CPA was to cooperate with the IGC in preparing a timetable and a programme for drafting the constitution. In the 15 November Agreement, this cooperation translated into the CPA’s becoming the partner of the IGC in the preparation of the interim constitution, and in determining the selection of the topics that the ‘Fundamental Law’

444 See text of the TAL in Talmon (n 2) 1249-67.  
445 15 November Agreement (n 441) s 1.  
446 Dobbins et al (n 67) 290.  
447 15 November Agreement (n 441) s 5.
was to cover. Moreover, the IGC and the CPA went as far as setting a deadline for the still-to-be-elected Constitutional Convention that was to adopt the new constitution. The propounding of this deadline is puzzling, however. As an occupation administration that was soon to end, neither the CPA nor the IGC had the power to bind an elected Iraqi assembly, nor dictate to it how many months it had to prepare the most important law of Iraq for the years to come. From a legal perspective, the newly elected parliament could subsequently have rejected the time limit set by the 15 November Agreement. The Security Council’s backing in Resolution 1546 of the bulk of the timetable set in the 15 November Agreement made reversing that limit all the more difficult, however.

Neither a resolution nor a statement by the President of the Security Council endorsing the 15 November Agreement was issued by the Security Council. Yet the Security Council discussed the 15 November Agreement during a meeting held on 21 November 2003, which revealed rather wide support for the Agreement. In that session, the US Ambassador informed the members of the Security Council of the content of the 15 November Agreement, explaining how it was part of the American efforts in Iraq, and praising it as ‘an important step toward realising the vision of Iraq as a democratic, pluralistic country at peace with its neighbours’. More soberly, but still supportive, the French delegate expressed support for the 15 November Agreement because it was part of the process of ending the occupation. The Russian representative expressed disappointment with the absence of any UN involvement, while commending the 15 November Agreement for ‘speeding up the process of the restoration of Iraq’s sovereignty’. These and other supportive statements, which emanated

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448 Ibid, s 1.
449 See UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546, para 4. See also the analysis conducted in Chapter 5 ss 1–5.
450 UNSC Verbatim Record (21 November 2003) UN Doc S/PV/4869.
452 Ibid, 2.
453 Ibid, 8.
454 Along the same lines, the German representative stressed the need for a strong UN role in the political process to ‘provide the necessary legitimacy’, and for ‘broadening the basis of the political process in order to include all political and societal forces in Iraq that are willing to cooperate in a peaceful manner’. The German representative also spoke of the ‘suitability of holding an international conference about Iraq on the model of that held in Afghanistan’. See UNSC Verbatim Record (n 450) 10.
from various members of the Security Council, such as Angola, Bulgaria, China, Guinea, Mexico, Pakistan, and Spain, demonstrated that several members of the Security Council approved of and lent support to the substance of the 15 November Agreement, with only Syria speaking against it. No member of the Security Council expressed concern regarding the fact that the 15 November Agreement had gone far beyond Resolution 1511 by detailing the modalities of the formation of future Iraqi governments, by determining that Iraq needed both an interim and a final constitution, and by defining the topics to be dealt with in the interim constitution that were also likely to have an influence over the content of the final constitution.

As the proceedings of the meeting discussing the 15 November Agreement were public, it seems likely that not only the CPA (which must have known about it because the countries behind it sat in the Security Council), but also the members of the IGC must have known that the Security Council, or more correctly several of its members, supported what the IGC and the CPA had agreed upon. Although this support certainly cannot be equated to a statement of the President of the Security Council, let alone to a Security Council Resolution, it is not an insignificant detail amidst the existing tensions and the situation of conflict in Iraq at the time, where on one side there was an occupation administration eager to transform Iraq into a democracy, and on the other a growing number of Iraqis involved in fighting that very same occupation. The signal that the CPA and the IGC had implicitly received from some key members of the Security Council was to proceed with the implementation of the 15 November Agreement, which, in turn, meant that they could continue, unimpeded, to shape the political future of Iraq by preparing and adopting no less than an interim constitution whilst Iraq remained under occupation.

4.3.2. A breach of the right to self-determination?

Summarising the major decisions made in Resolution 1511 and in the 15 November Agreement, the following points can be highlighted. The Security Council acceded to the idea, originally put forward by the CPA, that Iraq needed a constitution before general elections, and entrusted the IGC

455 UNSC Verbatim Record (n 450) 11 (China), 14 (Spain), 15 (Bulgaria), 17 (Mexico), 18 (Pakistan), 19 (Guinea), 19 (Angola).
and the CPA with devising a process leading to such a constitution, which was outlined in the 15 November Agreement. In this agreement, the CPA and the IGC decided that Iraq needed both an interim constitution and a permanent constitution. The former was to be written by the IGC, in close consultation with the CPA, and both were to approve the final text. The Security Council did not formally endorse the 15 November Agreement but, indirectly, several of its members gave it an informal ‘green light’. These determinations alone carry significant legal consequences, and even more so when examined jointly.

From the perspective of the law of occupation, tasking the CPA and the IGC with drafting a constitution seems untenable given the limited powers of an occupying power. But, as discussed earlier, the Security Council could be regarded as authorised to carve out an exception to the normative authority of an occupant insofar as it does not involve any limitation of its humanitarian duties and responsibilities. As regards the right to self-determination, it should be noted that unlike in Resolution 1483, in which the Security Council appeared only to be concerned with facilitating a process leading the Iraqis to exercise their right to self-determination, in Resolution 1511 the Security Council may have crossed the line between facilitating a process and shaping its content. This possibility requires examination.

A first matter of concern is the Security Council’s exaggeration of the status of the IGC as representative of the Iraqi people. For the Security Council, the IGC was no less than ‘the principal body of the Iraqi interim administration’ and ‘embodied the sovereignty of the State of Iraq during the interim period’. Had the IGC been the true representative of the majority of the Iraqi people, as opposed to being the representative of some limited segments of it, the Security Council’s support for the transformation of Iraq via the IGC would have been irreproachable from the perspective of the right to self-determination. However, Iraq did not have an ‘interim Iraqi administration’ but rather an occupation administration, in respect of which the IGC performed an auxiliary role. The IGC was not a

sovereign body because it did not control Iraq’s territory, and it had not been legitimised by any form of popular support.\footnote{The Sunni group, which was at the centre of the insurgency against Coalition Forces, held the IGC in low regard because it was composed of former exiles who had opposed Saddam Hussein’s regime. See Steven R Weisman, ‘A Region Inflamed: New Analysis; Iraq Exit Plan: New Obstacles’ \textit{NYT} (New York, 29 November 2003) 9.}

Against this background, it could be argued that the IGC—some of whose members were heads of political parties—incorporated the Iraqi ‘political elites’ and was thus legitimate enough and capable of creating a ‘locally produced’ constitution.\footnote{Noah Feldman, ‘Imposed Constitutionalism’ (2004–2005) 37 Connecticut Law Review 857, 859, 886.} A locally produced constitution could be said to be preferable to a foreign-drafted and imposed constitution, such as occurred in Japan after World War II.\footnote{Ibid, 886–7. For a critique of Feldman’s view, see Simon Chesterman, ‘Imposed Constitutions, Imposed Constitutionalism, and Ownership’ (2004–2005) 37 Connecticut Law Review 947, 948–55.} According to this argument, political elites such as those represented in the IGC, ‘unrepresentative though they may be’, would be able ‘to negotiate constitutional outcomes without external imposition’ and achieve a ‘lasting and stable constitutional deal’ because those elites would retain power even after the occupation had come to an end.\footnote{Feldman, 'Imposed Constitutionalism’ (n 460) 888–9.}

It is not disputed that in a post-conflict scenario, there could be certain local elites in a position to achieve a ‘constitutional deal’ due to their power within a territory. What is perplexing, apart from the fact that it is still for those elites to take the appropriate steps to take charge of their future rather than being instructed do so by foreign actors, is the transplanting of theoretically attractive formulas to differing situations as if such formulas could automatically work in all contexts. Even if, \textit{ex arguendo}, it were possible to speak of the existence of such elites in post-Saddam Iraq, the IGC—a body ‘disproportionately tilted towards the diaspora [of the exiles]’\footnote{International Crisis Group, ‘Governing Iraq’ (n 373) 25 August 2003, 14.}—did not represent all of them.\footnote{In a statement dated 28 November 2003, Ayatollah Sistani appears to point out the lack of legitimacy on the part of the IGC expressing his ‘reservations’ against the plan of preparing ‘the law of the Iraqi state, for the transitional period, through the Governing Council in conjunction with the occupying power – thus not providing it with legitimacy’. See Statement of}
revolt against the occupation and who could not simply be labelled as ‘terrorists’.\textsuperscript{465} Vesting an occupant with the right to choose who the elites of a given territory are, as opposed to merely recognising their existence when such elites are organised enough to act as a legitimate and reasonably common front, is fundamentally at odds with the right to self-determination.

A second matter of concern is that such a fundamental decision concerning the future of Iraq as the adoption of a new constitution had been prompted by the CPA and endorsed by the Security Council in Resolution 1511, rather than by the IGC, let alone by the Iraqi people.\textsuperscript{466} Resolution 1511 referred to the decision of the IGC to hold a constitutional conference, but did not provide any reference to understand when such a decision was taken, whether it was in writing, and how it was communicated to the Security Council.

On a final note, by requesting the IGC and the CPA to prepare a timetable for drafting a constitution and for elections to be held under that constitution, the Security Council paved the way for the CPA to shape the content of the interim constitution. In fact, as noted, in the 15 November Agreement, the IGC and the CPA had determined the topics that the interim constitution should deal with and decided that it would need to be approved by both.\textsuperscript{467} Such an outcome was a golden opportunity for the CPA to consolidate its transformative project by enshrining its vision of what Iraq should become in the forthcoming interim constitution.\textsuperscript{468}

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\textsuperscript{465} According to Professor Andrew Arato, the legitimacy of the IGC and thus of the process in which it was involved was tainted because of excluding ‘not only remnants of the Ba’ath party (perhaps justified, as far as top echelons are concerned) but also all Arab nationalist parties and Sunni and Shi’ite radicals from the IGC’, see Arato (n 410) 122.

\textsuperscript{466} From the pages of the New York Times, Noah Feldman had approved a suggestion by Bremer to extend the occupation until the end of 2004, thereby delaying elections in Iraq, by stating: ‘Historical experience also suggests that quick elections under post-war conditions elect people not dedicated to democratization. Simply put, if you move too fast the wrong people could get elected’. See Noah Feldman, ‘A Region Inflamed: News Analysis, Iraq Exit Plan: New Obstacles’ NYT (New York, 29 November 2003).

\textsuperscript{467} 15 November Agreement (n 441) s 1.

\textsuperscript{468} Bremer, in My Year in Iraq (n 32) 213, stated that:

To meet President Bush’s vision for the New Iraq, the interim constitution would have to establish guarantees of fundamental individu-
under the 15 November Agreement, the permanent Iraqi constitution had
to be approved by a referendum to be held on 15 October 2005. Assuming
that an Iraqi assembly could be formed shortly after the scheduled 30 January elections, the freshly elected Iraqi parliament would have had at best only five months to produce the final Iraqi constitution. Almost making a mockery of the rights to sovereignty and self-determination, an occupation administration was dictating the agenda of a to-be elected parliament by deciding no less than how and within what temporal framework Iraq should have a new constitution.

In view of the foregoing, it is suggested that the political and constitutional process developed under Resolution 1511 and the 15 November Agreement resembles more a process of foreign rather than self-determination. In these circumstances, it is possible to argue that Resolution 1511 did breach the Iraqi people’s right to self-determination: fundamental decisions for the future of Iraq—which concerned whether, when, and how Iraq should have a new constitution—were primarily taken by foreign actors rather than by the people concerned, benefiting from the existence of an occupation. Constrained by the occupation, a genuine and majoritarian Iraqi will had not yet emerged. What had emerged was the uneasiness of many Iraqis with the continuation of the occupation.

4.4. The UN involvement in determining date and modalities of the elections

On 23 February 2004, the UN Secretary-General issued a report to the Security Council prepared by Ambassador Lakhdar Brahimi concerning the political situation in Iraq and in particular the issues of whether, when, and how the Iraqi people should vote for an Iraqi national assembly in di-

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469 15 November Agreement (n 441) s 5.
The report was the result of a UN fact-finding mission led by Brahimi that operated in Iraq between 6 and 13 February 2004. The mission accorded with Resolution 1511, in which the Security Council had asked the UN to lend its expertise to the political transition in Iraq. It was prompted by an initiative of the UN Secretary-General, who decided to send a fact-finding mission to Iraq after meeting on 19 January with the CPA, the IGC, ‘and in response to requests from both parties, as well as many Iraqi organisations and personalities, including Ayatollah Ali Sistani’. One of the key issues the Fact-Finding Mission Report dealt with was the deadlock concerning modalities of the elections of the so-called ‘Transitional National Assembly’. Sistani issued a statement critical of the fact that the 15 November Agreement provided that the members of the Transitional National Assembly would be chosen through the system of caucuses rather than general elections.

During his mission, Brahimi listened to the views of key Iraqis, including many members of the IGC and representatives of political and religious groups. He also took note of Sistani’s demands for direct general elections. In light of these viewpoints, the Fact-Finding Mission Report overcame the above-mentioned deadlock by calling for direct elections because the ‘caucus-style system to elect the national assembly was not...

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470 See The Political Transition in Iraq: Report of the Fact-Finding Mission annexed to UNSC ‘Letter dated 23 February 2004 from the Secretary-General to the President of the Security Council’ (23 February 2004) UN Doc S/2004/140 (Fact-Finding Mission Report). The report was undertaken pursuant to paragraph 10 of Resolution 1511 which reads (in part): ‘requests the Special Representative of the Secretary-General, at the time of the convening of the conference, or, as circumstances permit, to lend the unique expertise of the United Nations to the Iraqi people in this process of political transition, including the establishment of electoral processes.’

471 Ibid, para 1.

472 UNSC Res 1511 (n 82) para 10.


474 Ibid, para 21. In relevant part, the statement of Sistani (11 January 2004), reprinted in Talmon (n 2) 1422, reads: The mechanism delineated in the 15 November Agreement on the formation of a provisional national council did not ensure at all the Iraqi people’s fair representation in the council. He[Sistani] explained that elections were the ideal means to achieve that representation and many experts had affirmed that elections could be held in the coming months with an acceptable degree of credibility and transparency.
practical in Iraq and was no substitute for elections’.\textsuperscript{475} In addition to replacing the method by which the members of the Transitional National Assembly were to be chosen, an important conclusion of the Fact-Finding Mission Report was that the preparation of ‘credible elections’ would take at least eight months.\textsuperscript{476}

According to the 15 November Agreement, a transitional assembly was to be elected by 31 April 2004. But under the Fact-Finding Mission Report, the deadline was postponed to 31 January 2005. This meant that before transitioning to an elected government, Iraq had to go through not only an occupation administration but also an interim government that would be composed of (though not chosen by) Iraqis. The Fact-Finding Mission Report, however, proffered a number of reasons to explain this delay. These included: the need to undertake ‘substantial preparations’;\textsuperscript{477} the importance of holding ‘credible and unifying elections’;\textsuperscript{478} the need to construct an ‘appropriate legal and institutional framework’;\textsuperscript{479} reasons of security;\textsuperscript{480} and ‘finding adequate financial resources for elections’.\textsuperscript{481} The absence of a credible and current electoral roll that would determine who was entitled to vote was also a factor in postponing the elections.\textsuperscript{482}

The principal determinations and recommendations of the Fact-Finding Mission Report were followed through. Article 30(d) of the TAL provided that the members of the Transitional National Assembly should be selected through general and direct elections, rather than through the system

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{475} Ibid, para 14. For a detailed analysis and assessment of the problems concerning the caucuses system, see Annex 2 of the Fact-Finding Mission Report (n 470) paras 7–19.
\item \textsuperscript{476} Ibid, para 45.
\item \textsuperscript{477} Ibid.
\item \textsuperscript{478} Ibid, para 70.
\item \textsuperscript{479} Ibid, para 40.
\item \textsuperscript{480} Ibid, paras 67–8.
\item \textsuperscript{481} Ibid, para 62.
\item \textsuperscript{482} The Fact-Finding Mission Report discussed whether the electoral roll could be based on a population census, a dedicated voter registration exercise, or on the ‘public distribution’ (or ration card) database managed by the Ministry of Trade and the World Food Programme (WFP) and used for the Oil-for-Food Programme. In the end, this latter criterion, though initially not considered credible because it had been abused by the Saddam Hussein regime, was the one used for elections after having been thoroughly verified. Ibid, para 35.
\end{enumerate}
\end{footnotesize}
of caucuses. Secondly, the CPA established the ‘Independent Electoral Commission of Iraq’, which was given the responsibility of organising, overseeing, conducting, and implementing all of the elections to be held under the TAL, adopting an electoral law, and enacting the ‘political parties and entities law’. Eight months later, on 30 January 2005, consistent with the timetable indicated in the Fact-Finding Mission Report, the Iraqis went to vote to elect the 275 members of the Transitional National Assembly.

In a sense, because of the limited authority it had wielded thus far, it was somewhat unexpected that the UN would intervene on crucial issues affecting the exercise of the right to self-determination of the Iraqi people at the request of the Security Council. These crucial issues included setting the date of the elections, and the conditions under which such elections were to be held. Despite the fact that the date for elections was set for a later time, thereby delaying the moment when the Iraqis could begin to take charge of their own destiny, it does not seem possible to view this delay as a violation of the Iraqi people’s right to self-determination. From this perspective, the reasons given in the Fact-Finding Mission Report (outlined above) appear to be convincing, even though, of course, it cannot be excluded that the fear associated with the possible election of undemocratic forces may have been an additional factor in deferring the elections. Although not a choice of the Iraqi people, the Fact-Finding Mission Report seems to have reached a reasonable compromise between having elections too early, too late, or not at all. Direct nationwide elections were to be held in Iraq in less than a year, and the rather complicated system of regional caucuses, which would have frustrated the possibility of each Iraqi voting for his/her future, was definitively set aside. From the

483 See Arts 24–9, 30–4, 35–42 of the TAL (n 61). Article 30(D) of the TAL stated that elections for the National Assembly were to take place by 31 December 2004 if possible, and in any case, no later than 31 January 2005.
485 The Electoral Law provided, inter alia, that the election for the National Assembly was to be direct, universal, and held in secret ballot, and that the age limit for having the right to vote was to be 18. See CPA, ‘The Electoral Law’, CPA/ORD/7 June 04/96, 7 June 2004.
487 On this topic, see Diamond, Squandered Victory (n 65) 48.
perspective of self-determination, no reproach can be reasonably made to
the UN for the conclusions reached in the Fact-Finding Mission Report.

4.5. **The Law of Administration for the State of Iraq for the
Transitional Period**

4.5.1. **Content**

Shortly after the signing of the 15 November Agreement, the IGC appoint-
ed a drafting committee chaired by Adnan Pachachi, a former Iraqi for-
eign minister before Saddam Hussein's era, to prepare the draft of what
would become the TAL.488

The initial work of the drafting committee resulted in the production
of two drafts, one inspired by Adnan Pachachi and the other proposed by
some Kurdish members of the committee.489 Neither of these drafts, how-
ever, obtained general approval, with a compromise still required between
the rather divergent positions expressed therein.490 Bremer began a series
of side discussions with the Kurds to prepare a draft text on federalism in
order to address the Kurdish quest for maximum autonomy.491 At the same
time, a pair of US-educated Iraqi lawyers and several CPA officials worked
on preparing a new draft.492 This latter draft, which comprised 64 articles
and included a section on federalism sought by the Kurdish group, was
circulated to all members of the IGC as a so-called ‘Chairman’s draft’ on
25 February 2003.493 It prompted intense debate and negotiations involv-
ing members of the IGC and CPA, though lasting only a few days as the
deadline for the TAL’s completion was looming.494 As amply detailed in

488 See Feldman and Martinez (n 353) 895; Allawi (n 34) 221.
489 Feldman and Martinez (n 353) 895.
490 Ibid.
491 Ibid. See also International Crisis Group, ‘Iraq's Kurds: Toward an Historic
Compromise?’ (Middle East Report No 26, 8 April 2004). Andrew Arato put
it thus: ‘the Americans, in other words, accepted the most fundamental
premise: Kurdistan was one and Iraq was one, and the two were negotiat-
ing their federation.’ See Arato (n 410) 135–85, 143.
492 Diamond, *Squandered Victory* (n 65) 140–2. For detailed accounts on the
drafting process (though not always uniform in content) see also Arato
(n 410) 135–85; Peter Galbraith, *The End of Iraq* (Simon and Schuster 2006)
139–64.
493 Ibid.
494 Feldman and Martinez (n 353) 895–6.
Bremer’s memoirs, the CPA exerted pressure to ensure adherence to the deadline set in the 15 November Agreement, while also playing the role of power broker among the groups represented in the IGC and influencing the content of some of the TAL’s provisions. The TAL was signed in

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495 Feldman and Martinez (n 353) 894–6. Rather candidly, Bremer recounted the night of 28 February 2004, which was the last day before the deadline for the approval of the TAL, as follows:

> it was clear that a number of sensitive issues remained, Dick Jones and I agreed to ‘divide and conquer’. He and Barzani took some GC [IGC] members into the large Council room to go through the latest TAL draft, article by article. I rounded up a representative working group of thirteen other members, and we repaired to a conference room on the second floor to try to agree on the most difficult subjects ... The biggest battles included whether governorates would be allowed to combine as the Shia wanted and over the constitutional role of women, where the Islamist Shia tentatively agree to a target of 25 percent female representation in the Transitional National Assembly. But as before, the major issue was the role of Islam.

Bremer, *My Year in Iraq* (n 32) 295.

496 Bremer, *My Year in Iraq* (n 32) 294–5. See also Feldman pointing out Bremer’s role concerning the introduction of federalism in the TAL, indicating that Bremer began a series of side discussions with the Kurds to prepare draft language on federalism, Feldman and Martinez (n 353) 895. Bremer described the CPA’s role in the negotiations of the TAL as follows:

> drafting the interim constitution involved three months of intense negotiations among Iraqi experts and politicians, with the CPA playing an indispensable broker role. It was painful for everyone. The Shi’ites had to understand that majority rule could not be majoritarian rule; minority rights must be respected. The Kurds had to relinquish a measure of autonomy they had achieved between the First Gulf War and the liberation of Iraq. And the Sunnis had to accept that their days of domination were over. The process did show, however, that it was possible to arrive at complex and enduring agreements with Iraqis from all backgrounds and sects. The document was also useful in achieving a mutually satisfactory accommodation between the Kurds and the central government.

Bremer, Dobbins, and Gompert (n 347) 40.

497 Bremer, *My Year in Iraq* (n 32) 288–301.
the early hours of 1 March 2004\textsuperscript{498} and adopted by vote on 8 March 2004, after some postponements.\textsuperscript{499} The TAL was a complex and lengthy document comprising some 62 articles, each of which had several subsections, some key provisions of which will be recalled here. In rather emphatic terms, the Preamble of the TAL defined the Iraqi people as ‘a free people governed under the rule of law’, respectful of international law ‘having been amongst the founders of the United Nations’ and ‘striving to reclaim their freedom, which had been usurped by the previous tyrannical regime’.\textsuperscript{500} Yet, apart from the tyrannical regime of Saddam Hussein, no mention is made in the Preamble of Iraq’s millennial history.

Although the title of ‘Law of Administration for the State of Iraq for the Transitional Period’ belies the document’s constitutional character, there is little doubt that the TAL was the new constitution of Iraq, albeit provisional in character.\textsuperscript{501} In a language reminiscent of the American

\textsuperscript{498} Dobbins et al (n 67) 291.

\textsuperscript{499} See IGC, ‘Statement on the Postponement of the Signing of the Law of Administration for the State of Iraq for the Transitional Period’, 6 March 2004. See text reproduced in Talmon (n 2) 1249. See also Feldman and Martinez (n 355) 896. The delays from 1–8 March were mainly due to an increase in violence during the religious festivities of Ashura, which prompted the IGC’s president to declare a three-day mourning period until 5 March. Moreover, a letter sent on 4 March by Ayatollah Sistani to his followers, which proposed a number of changes to the TAL, had delayed some of the Shiites from signing the TAL. See Bremer, \textit{My Year in Iraq} (n 32) 302–10.

\textsuperscript{500} See Preamble in Talmon (n 2) 1249–50.

\textsuperscript{501} Interestingly, the chapter of Bremer’s memoirs dedicated to the TAL is titled ‘Writing the Constitution’, see Bremer, \textit{My Year in Iraq} (n 32) 286. According to Zouhair Al Hassani ‘The most distinctive feature of this law [TAL] is that it serves as a provisional constitution for the administration of Iraq under occupation and replaces the Iraqi constitution of 1970. It reflected a change in the Iraq constitutional system by making the state federal rather than unitary’. See Zouhair Al Hassani, ‘International Humanitarian Law and Its Implementation in Iraq’ (2008) 90(869) IRRC 51, 55. Feisal Amin al-Istrabadi (who was involved in the drafting of the TAL) stated that ‘No Iraqi wanted the American Civil Administrator to sign a Document Called an Iraqi constitution. Thus the rather cumbersome title for what in fact is Iraq’s interim constitution.’ See Feisal Amin al-Istrabadi ‘Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law’ (2005-2006) 50 New York Law School Law Review 270.
Constitution, Article 3(b) states that ‘this Law [the TAL] is the supreme Law of the land and shall be binding in all parts of Iraq;’ it also referenced its status, as is often the case with any constitution worthy of that title, as law ‘supreme’ to all other Iraqi law by declaring that ‘any provision that conflicts with this Law is null and void.’ This meant that the TAL replaced the still-in-force 1970 Constitution because the latter’s provisions were clearly in conflict with it, touching on the same subjects of the TAL but differing profoundly in content and tenor. Like most constitutional laws, the TAL required a very large majority in order to be amended: only ‘a three-fourths majority of the members of the National Assembly’ and ‘the unanimous approval of the Presidency Council’ could amend it. Confirming its status as the new, albeit temporary, constitution of Iraq, Article 3(C) of the TAL provided that: ‘This Law shall cease to have effect upon the formation of an elected government pursuant to a permanent constitution.’ And Article 62 reaffirmed this determination by stating that: ‘This law shall remain in effect until the permanent constitution is issued and the new Iraqi government is formed in accordance with it.’

Crystallising the agreements and timetable outlined in the 15 November Agreement, Article 2 of the TAL defined the political and constitutional process to be implemented after the demise of the CPA in a phase called the ‘Interim Period’, which was to last until the election of a new government under a new constitution. This process consisted of two phases. In the first phase, sovereignty was to be exercised by an Iraqi provisional government without any form of parliamentary assembly. The interim government was not to be elected, but rather formed, through a ‘process of extensive deliberations and consultations with cross-sections of the Iraqi people’, which was to be ‘conducted by the Governing Council and the Coalition Provisional Authority and possibly in consultation with the United States’.

502 Article 6 para 2 of the Constitution of the United States reads that ‘this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land’. See the text of the US Constitution at <http://constitutions.com> accessed 10 February 2013.
503 See text in Talmon (n 2) 1251.
504 Ibid, Art 3(A).
505 Ibid.
Nations.’ 507 Although the occupation was supposed to end by 30 June 2004, this provision allowed the occupation administration to expand its sphere of influence to the selection of a new government. In the second phase, a Transitional National Assembly was to be elected by 30 January 2005. 508 This reflected the conclusion reached in the Fact-Finding Mission Report that the holding of direct and general elections was a better mechanism for the selection of the Transitional National Assembly than the system of caucuses, and that, in order to hold direct elections, several months of preparation were necessary. 509 The Transitional National Assembly was to select and appoint a government and to draft a ‘permanent constitution’ 510 by no later than 15 August 2005 to be approved by referendum by no later than 15 October. 511 In accordance with the 15 November Agreement, the TAL was dictating not only the modalities of the incoming Iraqi government’s formation, but also its substantive agenda by insisting on no less than the adoption of a constitution.

Article 4 prescribed that the system of government in Iraq was to be ‘republican, federal, democratic, and pluralistic’, 512 and that powers would be shared between ‘the federal government and the regional governments, governorates, municipalities, and local administrations’. 513 Article 24(B) introduced the principle of separation of powers, stating that the ‘three authorities, legislative, executive, and judicial, shall be separate and independent of one another’. 514

After several drafts and intense negotiations, Article 7(A) determined that Islam was to be ‘the official religion of the state’, though pointing out that Islam was to be only ‘a source of legislation’ and not ‘the’ source of

507 Ibid.
508 Ibid, Art 2(B)(2).
510 See text in Talmon (n 2) 1267.
511 Article 61 of the TAL provided: ‘The National Assembly shall write a draft of the permanent constitution of Iraq’; and specified that: ‘(A) The National Assembly shall write the draft of the permanent constitution by no later than 15 August 2005 and that (B) The draft permanent constitution shall be presented to the Iraqi people for approval in a general referendum to be held no later than 15 October 2005.’ See text in Talmon (n 2) 1267.
512 Ibid, Art 4.
513 Ibid.
514 Ibid, Art 24(B).
legislation, as proposed during the negotiations of Article 7.\textsuperscript{515} On the other hand, Article 7 strengthened the authority of Islam, as it forbade any laws contradicting the ‘universally agreed tenets of Islam’.\textsuperscript{516} In addition, and quite significantly for the future of Iraq, Article 7 crystallised ‘democracy’ as the form of government of the new Iraq, stating that no law that contradicts ‘the principles of democracy and the fundamental human rights set out in the TAL could be adopted’.\textsuperscript{517} It is difficult to know with any precision which principles of democracy the drafters of the TAL had in mind, but the word ‘democracy’ is there, signalling in rather unequivocal terms the path on which Iraq was embarking.

Articles 11 to 23 set out a detailed and comprehensive list of human rights. Article 12 proclaimed the equality of all Iraqis before the law ‘without regard to gender, sect, opinion, belief, nationality, religion, or origin’, and forbade ‘discrimination against an Iraqi citizen on the basis of his gender, nationality, religion, or origin’.\textsuperscript{518} Article 13 protected the rights of the individual against the interferences of public authorities, such as the right of free expression, assembly, free movement, association, thought, peaceful demonstration and strike, and privacy,\textsuperscript{519} while Article 14 affirmed the right of any Iraqi citizen to ‘security, education, health care, and social security’.\textsuperscript{520} Torture was prohibited in any circumstance and a detailed and comprehensive list of fair trial guarantees, in line with international standards, was set out in Article 15.\textsuperscript{521} Article 23 contained a general clause indicating that the list of human rights enumerated in the TAL did not exclude the protection of other rights the Iraqis may have.\textsuperscript{522}

Article 25(E) addressed the complex issue—amplified in the context of a nascent federal state—of how to divide the income originating from the sale of natural resources, particularly oil, between the central government

\textsuperscript{515} Ibid, Art 7. For a detailed analysis of the negotiations and compromises on the role of Islam, see al-Istrabadi (n 501) 270–302.
\textsuperscript{516} See text in Talmön (n 2) 1251.
\textsuperscript{517} Ibid.
\textsuperscript{518} Ibid, Art 12.
\textsuperscript{519} Ibid, Arts 11–23.
\textsuperscript{520} Ibid, Art 14.
\textsuperscript{521} Ibid, Art 15. See also al-Istrabadi (n 501) 282–8.
\textsuperscript{522} See text in Talmön (n 2) 1255. The text reads that ‘all the rights that befit a free people possessed of their human dignity, including the rights stipulated in international treaties and agreements, other instruments of international law that Iraq has signed and to which it has acceded.’
and the local entities. Evidently, the Kurds and the Shiites were reluctant
to share oil revenues with the Sunnis, who were viewed by the Kurds and
the Shiites as their former oppressors and lived in areas where there was
little or no oil.\footnote{al-Istrabadi (n 401) 291–2.} Article 25(E) tasked the central government with the
management of ‘the natural resources of Iraq’ and, though not really solv-
ing the issue, fixed some rather general criteria for the sharing of revenues
from Iraq’s natural resources.\footnote{According to Art 25, the division of the natural resources revenues was to be
done ‘in consultation with the governments of the regions and the admin-
istrations of the governorates’ in ‘an equitable manner’ and ‘with due
regard for areas that were unjustly deprived of these revenues by the previ-
ous regime.’ See text in Talmon (n 2) 1255.}

In Article 26, with one stroke of the pen, the TAL prescribed that the
‘laws, regulations, orders, and directives’ issued by the CPA would re-
main in force after the demise of the CPA unless rescinded or amended by
the incoming so-called ‘Iraqi Transitional Government’.\footnote{Ibid, Art 26. The text reads that ‘except as otherwise provided in this Law,
the laws in force in Iraq on 30 June 2004 shall remain in effect unless and
until rescinded or amended by the Iraqi Transitional Government in accor-
dance with this Law.’} As only a few of these laws may be said to have been necessary to tackle the potential
problems that Iraq was to face after the demise of the CPA, this article can
be understood as the avenue through which the CPA sought to crystallise
the reforms it had undertaken within the Iraqi legal system.

Article 31 set the number of members of the to be elected National As-
sembly at 275, requiring, by a rather innovative, if not revolutionary, man-
date that no less than one-quarter of the National Assembly be composed
of women.\footnote{Ibid, Art 31.}

The TAL gave the Kurds significant autonomy from the central Iraqi
government. Article 53 recognised the existence of the so-called Kurdis-
tan Regional Government, which was to ‘retain regional control over po-
lice forces and internal security’,\footnote{Ibid, Art 53.} and had the right to impose taxes and
fees ‘within the Kurdistan region’.\footnote{Diamond, \textit{Squandered Victory} (n 65) 177.} In addition to these concessions to
the Kurdish quest for autonomy, a key Kurdish demand was slipped into
Article 61(c) of the TAL in the very last round of negotiations. This article provided that the future permanent constitution of Iraq could be rejected by the Iraqi people through a referendum if two-thirds of the voters of three Iraqi provinces so decided. As the Kurds dominated the three provinces that composed the Kurdistan Regional Government, the inclusion of this provision was tantamount to conferring on the Kurds a sort of veto power, as well as bargaining power in discussions concerning the content of the permanent Iraqi constitution, even though they represented a minority within Iraq.

After the signing of the TAL on 8 March, Adnan Pachachi stated that the TAL was ‘inspirational in character’ and was meant to be ‘a beacon of light and hope for future generations’. Sometime later, more soberly, an international law scholar observed that ‘for the Americans, the TAL represented a vindication of their policy of regime change and democratic transformation’. Difficulties surrounding the content of the TAL emerged shortly after its signature. Ibrahim Jaafari, a member of the IGC who would become the Prime Minister of Iraq in 2005, read a statement on behalf of twelve members of the IGC, declaring their intention to amend certain provisions of the TAL that they regarded as ‘undemocratic’ and stating that they had signed the TAL only to preserve the unity of the country. Moreover, Sistani criticised the TAL on the ground that:


530 Ibid, 941–2.

531 See Diamond, Squandered Victory (n 65) 177; Arato (n 410) 186.


533 Peter G Danchin, ‘International Law, Human Rights and the Transformative Occupation of Iraq’ in Hilary Charlesworth, Brett Bowden, and Jeremy Farrall (eds), Great Expectations: The Role of International Law in Restructuring Societies after Conflict (CUP 2009) 84.

534 Dobbins et al report that ‘handbills started appearing in mosques and bazaars decrying the TAL as a document that was ‘made behind the doors under the pressure of the occupiers ... so as to finish before the election campaign of Bush’, see Dobbins et al (n 67) 292.

535 Diamond, Squandered Victory (n 65) 177.
[a]ny law drafted for the transitional period will not gain legitimacy unless approved by the elected national assembly. In addition, this law places obstacles in reaching a permanent constitution for the country that preserves its unity and the rights of its people from all ethnicities and sects.536

Later on, in a letter addressed to President of the UN Security Council, Sistani threatened to withhold cooperation with the UN if the TAL were to be endorsed by the Security Council.537 According to Sistani, the TAL was ‘drawn up by an unelected council under occupation’ and ‘through its direct influence’ it would ‘restrict the national assembly’, which is ‘against the laws and rejected by most Iraqi people’.538 For Sistani, ‘any attempt to make this ‘law’ appear legitimate by including it in the international resolution is considered as contrary to the desire of the Iraqi people and a forewarning to dangerous consequences’.539 In a session of the Security Council held on 27 April 2004, Ambassador Brahimi downplayed the TAL’s significance, essentially equating it to a law issued by an occupying power and arguing that it was neither a constitution nor a document binding any Iraqi sovereign government. He put it thus:

The fact is that the Transitional Administrative Law is exactly what it says it is: a transitional administrative law for the transition period. It is not a permanent constitution. Indeed, it is not a constitution at all. The Transitional Law—or any other law adopted in the present circumstances—cannot, in our opinion, tie the hands of the national assembly, which will be elected in January 2005 and will have the

538 Sistani Letter (n 537) 1423.
539 Ibid.
sovereign responsibility of freely drafting Iraq’s permanent constitution.\textsuperscript{540}

Perhaps also because of Sistani’s threat, Resolution 1546 neither endorsed nor made reference to the TAL. As will be clarified in Chapter 5, this silence did not impede the Security Council from validating some of the key provisions of the TAL.

Moving to the substantive aspects of the TAL, the level of foreign influence on its content is unquestionably high. Several of its provisions, including the Preamble, which, rather unusually, begins with affirming the respect of the Iraqi people ‘for international law’ on the ground that they were among ‘the founders of the United Nations’, are telling in this regard. Concepts such as ‘republican’ state, ‘democracy,’ ‘pluralism,’ ‘free people’, ‘rule of law’, ‘checks and balances’, ‘independent judiciary’, and ‘federalism’, are the hallmarks of American constitutionalism and can also be traced in the constitution of several Western countries, rather than in previous Iraqi constitutions.\textsuperscript{541}

\textsuperscript{540} UNSC Verbatim Record (27 April 2004) UN Doc S/PV.4952, 6.

\textsuperscript{541} Allawi criticised the TAL on the grounds of being ‘utterly alien in construction and phraseology from the Arabic language and the Iraqi experience’. He noted that the initial sentence of ‘the people of Iraq, striving to reclaim their freedom’ and the references to pluralism, gender rights, separation of powers and civilian control over the armed forces were not familiar in Iraq. He also stressed that the TAL embodied Western, specifically American notions, and had been carefully supervised by the CPA, as each significant point was pre-cleared with the National Security Council in Washington. See Allawi (n 34) 222. According to this author, neither the CPA nor its drafters envisaged it as anything less than the basic model for Iraq’s permanent constitution. Bremer supported the TAL stating that:

\begin{quote}
this agreement gave Iraq the opportunity to remain a united country while becoming a democratic one. It took the landmark step of establishing a framework for Iraqi federalism, key to balancing national unity with local self-government. The federal structure reversed the millennia-long domination of Mesopotamia by Baghdad. It recognised the Kurdistan Regional Government, thereby respecting the autonomy which the Kurds established following the First Gulf War. It also left the door open for the creation of new federal regions in Sunni and Shia areas.
\end{quote}

See Bremer, Dobbins, and Gompert (n 347) 39.
The foreign influence is also evident with respect to human rights. The TAL contains a very detailed and long list of ‘fundamental rights’, which has few equals in the constitutions of other countries.\textsuperscript{542} In certain respects, this list was commendable as a way of shielding the Iraqi population from the abuses of public authorities and signalling the idea that, unlike Saddam Hussein’s regime, the protection of human rights was to be a pillar of the new Iraqi State that was being moulded. Nonetheless, it reflected a somewhat liberal\textsuperscript{543} and individualistic conception of society, concerned with shielding the individual from the interferences of public authorities, which is reminiscent of the US tradition rather than the Iraqi one.\textsuperscript{544} Unlike the 1970 Constitution,\textsuperscript{545} the TAL made little reference to the positive duties of the state towards the individual, let alone to the rights of groups and categories of peoples within Iraq and not just those of single individuals. Moreover, no reference is made in the TAL to the function of family and motherhood, the protection of children and the elderly, or to the right to a free education, all of which would be inserted later into the permanent constitution.

4.5.2. Assessment

Despite its name, the TAL was an interim constitution, the adoption of which was indirectly justified under the framework defined by Security Council Resolution 1511 and not only under the 15 November Agreement, which had specifically called for its adoption. This was brought about by the CPA’s desire to make ‘the most of its remaining months by helping to put in place an institutional structure that would last after the formal end of the occupation’.\textsuperscript{546} While sanctioning the end of the CPA’s occupation of Iraq, the TAL constituted the apex of the transformative project undertaken by the CPA and the basis on which this project could continue to

\textsuperscript{542} See generally Arato (n 410) 176.  
\textsuperscript{543} Danchin (n 533) 83.  
\textsuperscript{544} See in this regard Feisal Amin Rasoul Al-Istrabadi, ‘Islam and the State in Iraq’ in Raitner Grote and Tilmann J Röder (eds), Constitutionalism in Islamic Countries: Between Upheaval and Continuity (OUP 2012).  
\textsuperscript{545} See, in particular, Arts 11, 14, 27–8 of the 1970 Constitution (n 405) 627–31.  
\textsuperscript{546} Dobbins et al (n 67) 289–90.
have effect in Iraq even after its demise.\textsuperscript{547} In a marked departure from Iraq’s past, as Iraq had a ‘tradition of strong central control’,\textsuperscript{548} the TAL proclaimed that Iraq was to be a federal state, a parliamentary republic, and a democracy based on the rule of law and governed by the principles of separation of powers and respect for human rights. And, equally (if not more) important, the TAL included the procedure by which Iraq would have a democratic constitution by 2005.

The introduction in the occupied territory of a new constitution, even if only a temporary one, is illegal under the law of occupation by virtue of Article 43 of the Hague Regulations and under the right to self-determination, because the occupant is exercising a right, that of shaping the political and economic future of a state, which is not its own. Rightly, Andrew Arato considers the TAL illegal because it made changes to the structure of Iraq which ‘would be difficult to reverse and made sure through the rules of amendment and ratification that they could not be reversed even when the occupation ended’.\textsuperscript{549} Arato noted that ‘while it could not provide a serious constitution for the interim period, it did provide a framework for negotiating a supposedly permanent constitution. Its rules of change, … remained a highly constraining blueprint for Iraq’s subsequent constitutional process’.\textsuperscript{550}

In the present case, however, the question arises whether the drafting of an interim constitution during the occupation could nonetheless be justified either because of Resolution 1511 and/or by consent of the Iraqi people.

\textsuperscript{547} Bremer, Dobbins, and Gompert (n 347) 39 put it thus:

[T]his interim constitution, or Transitional Administrative Law, was the CPA’s most important contribution to Iraq’s political future, as even some of the CPA’s strongest critics have conceded. The law established the principles of democracy, individual rights and federalism on which Iraq’s permanent constitution came to be based and thus laid a foundation for open, representative and legitimate government. It established basic rights for all Iraqis, irrespective of gender, sect, religion or ethnicity. It committed Iraq to the rule of law and established such principles as the rights of the accused to be assumed innocent until proven guilty, to confront his accused and to have legal counsel.

\textsuperscript{548} Zaid Al-Ali, ‘Constitutional Legitimacy in Iraq’ in Raitner Grote and Tilmann J Röder (eds), \textit{Constitutionalism in Islamic Countries: Between Upheaval and Continuity} (OUP 2011) 652–3.

\textsuperscript{549} Arato (n 410) 200.

\textsuperscript{550} Ibid, 204.
Under the UN Charter, it is generally in the hands of the Security Council itself to determine which actions it is entitled to take to defuse threats to international peace and security. The argument could therefore be made that the Security Council, in the appropriate circumstances and contexts, should—in the performance of its functions under Chapter VII of the UN Charter—be accorded the right to shepherd a process which leads a country towards the adoption of a democratic constitution, even if such a process is backed by military force rather than consent, as in the case of an occupation. Interestingly, however, in the present case, the Security Council did not make such a claim, or at least not openly. It did not ground the adoption of a democratic constitution in Iraq as a remedy against the ongoing threat to international peace and security. Nor did the Security Council echo its previous practice of supporting emerging democratic governments, albeit in contexts different from transformative occupation.

What the Security Council did was to support what it perceived as an Iraqi political and constitutional process on the understanding that this process accorded with the will of the IGC, an Iraqi body, and that this Iraqi body, in coordination with the CPA, was going to carry out such a process. If it is correct to consider this as the rationale of the Security Council’s determination, then the issue is not whether in general the Security Council can impose processes of democratisation, but whether it can authorise them once such processes are requested by some local entities during an occupation, despite the strong opposition of other components of that people against the very presence of the occupation. Much will depend, of course, on the evaluation of the circumstances of each case.

In the present case, it is submitted that the Security Council may have abused its power by allocating sovereign tasks to a non-sovereign entity such as the IGC. While the Security Council is entitled to steer a given course of action in the pursuit of its function under the UN Charter and to have the necessary powers to do just that, it does not fall within its prerogative to characterise a situation in a manner different from what it is, or at least different from what can reasonably be surmised upon a non-superficial reading of the events. The Security Council embarked on such a mischaracterisation by supporting a political and constitutional process of extraordinary importance for the future of Iraq as if it were something the Iraqi people had asked for, or actively sought. Albeit an Iraqi body, the

552 Ibid, 548.
IGC was not the representative of the majority of the Iraqi people. If it were otherwise, the security situation in Iraq would probably have been different and an insurgency capable of challenging the Coalition Forces may have not emerged on the vast scale it did. Moreover, contrary to what appears to have been assumed in Resolution 1511, the Iraqi people—far from acting as a unified body—never stated that they wanted a new constitution, that they wanted it by 2005, nor that they wanted both an interim and a permanent constitution. Actually, some members of the IGC had ‘become increasingly strident in demanding an early restoration of Iraqi sovereignty’ and a CPA memo identified several people who were ‘agitating for immediate sovereignty’ calling for elections.553

From a self-determination perspective this degree of foreign influence is difficult to justify. Despite advocating the contrary, the practice of the Security Council—together with that of the CPA—ended up limiting the possibility for the majority of the Iraqis to decide whether and when to adopt a new constitution. Reliance on the IGC and the CPA made matters worse by hindering efforts to adopt more inclusive policies that could have expanded dialogue and negotiations to larger sectors of Iraqi society than those reflected in the IGC since the very beginning of the occupation. Arguably, the Security Council ought and probably should have openly stated that it was pursuing a process reputedly essential to the improvement of the situation in Iraq, rather than hiding behind an Iraqi presumed consent that was tenuous at best. In light of all of the foregoing, I would suggest that the argument that the Security Council and a fortiori the CPA, whose political and constitutional project relied on and was justified by the Security Council’s resolutions, may have violated the law of occupation, Iraq’s sovereignty, and the Iraqi people’s right to self-determination is strong.

On a final note, it should be emphasised that the TAL does not seem to have contributed to stability within Iraq. The process of adopting the TAL contributed to the generation, or rather perpetuation, of a climate of antagonism and tension among the various Iraqi groups accentuated by the partisanship of the CPA.554 Although some components of the IGC certainly thought and worked as one entity that transcended the divisions among the Iraqis, the TAL’s development was nevertheless heavily influenced by sectarian politics555 in which the Kurds enjoyed a ‘special rela-

553 Dobbins et al (n 67) 269.
554 International Crisis Group, ‘Governing Iraq’ (n 373) 15.
555 For a detailed account see Arato (n 410) 135–76.
tionship’ with the US. The choice of federalism as the form of state for the new Iraq and the formation of the Kurdistan Regional Government seems to owe more to the Kurdish quest for independence and their good relationship with the US, than to widely shared or genuine aspirations and convictions regarding the benefits of a federal Iraq. The drawback of this approach was that the more the CPA supported one group, the more it alienated the other, thus undermining social cohesion, and hence the stability of Iraq.

5. The transformation of the Iraqi economy

As in other instances discussed in this chapter, in the field of the economy the CPA’s abundant normative production also reveals both short- and long-term concerns and aspirations. On the one hand, the CPA appeared genuinely—though, perhaps because of the prevalence of its long-term transformative ambitions, not primarily—concerned with restarting the Iraqi economy and providing concrete help to the Iraqis. The CPA sought to reconstruct Iraq’s economy—a task made daunting by the combined effects of Operation Iraqi Freedom, the ensuing looting, and the ‘downward spiral’ into which Iraq had fallen after the war with Iran—by carrying out a sort of Marshall Plan. In addition, in coordination with the US Agency for International Development (USAID), the CPA worked to rebuild infrastructures, to restore basic public services, to ensure access to schools as quickly as possible, and to guarantee constant oil production by carrying out pipeline maintenance and protecting the oil wells. These important and costly efforts—although riddled with a va-

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556 Bremer, *My Year in Iraq* (n 32) 114; Arato (n 410) 135.
557 Tripp (n 10) 286. See also Diamond, *Squandered Victory* (n 65) 161–71.
558 See Arato (n 410) 160–76; Diamond, *Squandered Victory* (n 65) 164–5, 171.
559 Paragraph 84 of the UN 17 July 2003 Report put it thus: ‘As a result of successive wars, strict international sanctions and debilitating economic controls and distortions, Iraq’s economic infrastructure and civic institutions have deteriorated significantly.’ See UN 17 July 2003 Report (n 310) para 84.
560 Allawi (n 34) 249–52.
563 Dobbins et al (n 67) 130–7.
564 Allawi (n 34) 254–57.
riety of shortcomings—on the part of the CPA, despite the deteriorating security situation, are certainly laudable. They are consistent with the law of occupation, which, as discussed, requires the occupier to take no less than a proactive role in managing the occupied territory to the benefit of its people.

What is less convincing from a normative perspective is the CPA’s quest for transforming Iraq’s economic system—a socialist-inspired, or at least strongly state-centred economy—a market economy. The CPA opened Iraq to foreign investments, created financial institutions, and introduced economic and financial regulations that mirrored those of the most advanced Western economies but were

565 For a detailed analysis, see International Crisis Group, ‘Reconstructing Iraq’ (Middle East Report No 30, 2 September 2004). For an eyewitness recollection of these events with reference to the CPA’s role and its shortcomings as well as the impact of security on the reconstruction efforts, see Allawi (n 34) 248–65; Dobbins et al (n 67) 145–7. See further Herring and Rangwala (n 562) 218–22, 236–52; Ferguson (n 7) 296–311.

566 An idea of the previous Iraqi economic system can be obtained by considering Art 16 of the 1990 Iraqi Constitution. Article 16 provided that ‘(a) Ownership is a social function, to be exercised within the objectives of the Society and the plans of the State, according to stipulations of the law’; and ‘(b) Private ownership and economic individual liberty are guaranteed according to the law, and on the basis of not exercising them in a manner incompatible with the economic and general planning.’ See text of the 1990 Iraqi Constitution at <http://confinder.richmond.edu/admin/docs/local_iraq1990.pdf> accessed 20 January 2013.

567 According to the CPA Accomplishments, the CPA helped the Iraqi government to:

- build market-based economy by: modernizing the Central Bank, strengthening the commercial banking sector and re-establishing the Stock Exchange and securities market; developing transparent budgeting and accounting arrangements, and a framework for sound public sector finances and resource allocation laying the foundation for an open economy by drafting company, labor and intellectual property laws and streamlining existing commercial codes and regulations; promoting private business and SMEs through building up the domestic banking sector and credit arrangements and establishing the structure of the oil industry.

CPA Accomplishments (n 184) 3.
foreign to Iraqi history and tradition. Whether by doing so the CPA exceeded its authority will be discussed after reviewing the relevant practice.

5.1. Opening Iraq to foreign investments

Motivated by the belief in the centrality of the role of international trade ‘in Iraq’s recovery and its development of a free market economy’ and acting ‘on behalf, and for the benefit, of the Iraqi people’, on 7 June 2003 the CPA issued the ‘Trade Liberalization Policy’. This Order suspended all trade restrictions and tariffs, customs duties, import taxes, licensing fees, and similar surcharges for goods entering or leaving Iraq. Shortly thereafter, the CPA established the ‘Trade Bank of Iraq’ to ‘provide financial and related services facilitating the import and export of goods and services to and from Iraq’.

On 19 September, the CPA introduced a new regulation for foreign investment in Iraq, replacing all existing Iraqi foreign investment law. As noted by Rüdiger Wolfrum, Order 39 deviated radically ‘from pre-existing law, in particular the Iraqi Civil Code and the Iraqi Commercial Code’, which ‘prohibited investment in, and establishment of, companies in Iraq by foreigners’ who were not ‘resident citizens of Arabic countries’. As stated in its Preamble, the main reasons for adopting Order 39 were: ‘the obligation to provide for the effective administration of Iraq’; to ‘enable the social functions and normal transactions of everyday life’; and the desire of the IGC to ‘bring about significant change to the Iraqi economic system’.

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570 Ibid, s 1.
573 Wolfrum (n 256) 22.
574 Order 39 (n 572), Preamble.
Order 39 opened the door to foreign firms by permitting complete foreign ownership of businesses in all sectors of the Iraqi economy except for natural resources, which included oil. Had Order 39 not made this exception, it would have been inconsistent with the right to self-determination, as this right also includes indigenous control over natural resources, as articulated in the Preambles of Resolutions 1483 and 1511. To make matters easier for foreign investors, Order 39 granted them the same fiscal treatment as Iraqi investors. The CPA was authorised to grant licences to foreign companies to use Iraqi property for no longer than forty years; with these licences subject to the review of an ‘internationally recognised representative government upon its assumption of the responsibilities of the CPA’. The period of forty years is surely excessive: there was no legal basis for the CPA to decide the future of something, such as Iraqi property, which was not its own, and to do so for a period much longer than that of the CPA’s own existence. Finally, to encourage foreign investments, Order 39 permitted the unrestricted, tax-free transfer of all profits to foreign states. In its subsequent Order 40, the CPA intervened to allow foreign ownership of the Iraqi banks—a possibility previously only open to Arab-owned banks—though limiting the number of banks that could be wholly foreign-owned to six until 2008. It dropped this restriction, however, on the eve of its dissolution.

Furthermore, the CPA undertook numerous modifications of existing Iraqi law on intellectual property, making it consistent with international standards. This was due to both ‘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 fact that several provisions of the Iraqi trademark legislation did ‘not meet current internationally-recognized standards of protection’.

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576 Ibid, s 7(2)(d).
577 Ibid, s 4(2).
578 Ibid, s 8(2).
579 Ibid, s 7(2)d. See also McCarthy (n 572) 52–3; Wolfrum (n 256) 22.
5.2. **Financial, fiscal, and labor reforms**

An Iraqi scholar recalls that after the invasion of Iraq, ‘the purchase of the most basic groceries required a purchaser to carry out large, brick-like stacks of bills on his person’.\(^{583}\) Seeking to obviate this kind of inconvenience and, most importantly, to keep inflation under reasonable control, the CPA tasked the Central Bank of Iraq with converting the existing currency into the ‘New Iraqi dinar’, which became the new official coin of Iraq.\(^{584}\) With a view to also preventing inflation, and because the ‘previous regime interfered with the banking system for its purposes’,\(^{585}\) as well as to be in line with the model of Western central banks, the CPA quickly took measures to strengthen the independence of the Iraqi Central Bank. On the understanding that ‘credit and monetary policy must be free from political or other governmental interference’,\(^{586}\) and to prevent ‘extreme inflation’, Order 18 gave the Central Bank of Iraq the authority to determine and implement monetary and credit policy without the approval of the Ministry of Finance.\(^{587}\)

On 18 September, the CPA issued the ‘Bank Law’, establishing rules for a ‘modern banking sector’, ‘setting capital requirements’, and providing a ‘mechanism for dealing with troubled domestic banks’.\(^{588}\) It also allowed non-Iraqi banks to operate in Iraq as either a subsidiary with up to 100 per cent ownership or as a branch, receiving the same treatment as domestic banks.\(^{589}\) Subsequently, with a view to achieving and maintaining ‘domestic price stability’ and ‘maintaining a stable and competitive market-based financial system’, the CPA devised a code of 74 articles annexed to Order 56 and detailing the Central Bank’s tasks and rules of functioning.\(^{590}\)

Finally, on 6 June 2004, that is just before its winding up, the CPA—averting the ‘need to revise the Bank Law promulgated by CPA Order No. 40’—

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\(^{583}\) Hamoudi (n 380) 524.


\(^{585}\) Garraway ‘Occupation Responsibilities and Constraints’ (n 46) 52.

\(^{586}\) CPA ‘Measures to Ensure the Independence of the Central Bank of Iraq’, CPA/ORD/7 July 2003/18, 7 July 2003 (Order 18), Preamble.

\(^{587}\) Ibid, s 2.

\(^{588}\) Order 40 (n 580) s 1.

\(^{589}\) Dobbins et al (n 67) 210.

adopted a 108-article law which substantially revised the Bank Law. The new order included detailed regulations ‘to maintain confidence in the banking system’ and helped ‘to reduce financial crime, including fraud, money-laundering and terrorist financing’. The CPA’s financial legislation was completed by a law regarding bankruptcy; an ‘Interim Law on Securities Markets’, and an ‘Anti-Money Laundering Act’. In the midst of all these reforms, the CPA sought to reopen and revitalise the Baghdad stock market. Before moving to its permanent quarters a year later, the stock market was opened ‘in a converted restaurant inside a hotel’ in February 2004. Considering the volatility of the situation in Iraq, this was probably a most premature move.

The CPA also sought to reform, or rectius transform, the Iraqi fiscal system. On 19 September 2003, it issued its ‘Tax Strategy for 2003’, which suspended the collection of existing taxes from 16 April 2003 (the date of the Freedom Message) to the end of 2003, but kept in place the ‘excellent and first class hotel and restaurant tax’; the ‘tax upon the transfer of real property’; ‘car sale fee’; and the ‘petrol excise duties’. It created a new ‘Reconstruction Levy’ amounting to 5 per cent of the value of ‘all goods imported into Iraq from all countries beginning 1 January 2004’ and determined that ‘the highest individual and corporate income tax rates for 2004 and subsequent years shall not exceed 15 percent.’ This latter provision is particularly troubling: it clearly exceeds the temporal jurisdiction of the authority of an occupying power and also its jurisdiction ratione materiae.

591 Order 94 (n 581).
592 Ibid.
596 Allawi (n 34) 381–2.
597 Ibid, 382.
598 Dobbins et al (n 67).
601 See Order 37 (n 599) s 4.
It is for the government in office once the occupation is over to decide the amount of taxes its citizens should pay. From the perspective of both the law of occupation and of the right to self-determination, this provision appears to be invalid.

In addition, the CPA adopted several measures to develop and protect the private sector and private initiative. It privatised several Iraqi companies, some of which were eventually taken over by foreign companies.602 It substantially amended the Iraqi Company Law No 21 of 1997, setting out a lengthy and detailed criteria for companies to operate in the Baghdad stock exchange.603 It adopted the ‘Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law’,604 which introduced patent protection for pharmaceutical products, and up-to-date protection for industrial designs, trade secrets, test data, integrated circuits, and new plant varieties.605 It also, a move that seems unnecessary during an occupation, modified the existing copyright law to protect literary and artistic works, including those in digital form, and the performers and producers of phonograms and broadcasters.606

Last but not least, in Order 89, the CPA amended the Iraqi Labor Code of 1987607 by affirming the prohibition on companies from hiring employees younger than eighteen years of age, establishing penalties for violations, and adopting a register of workers to avoid any illegality.608 The CPA justified these measures on the basis of the ‘the Governing Council's desire to

602 Dobbins et al (n 67) 239. On 20 May 2004, the CPA issued an order with the title ‘Consolidation of State-Owned Enterprises’ providing for the ‘consolidation and reorganisation of certain state-owned enterprises into government ministries or agencies. This order also clarified the operation of existing procedures with respect to the merger of state-owned enterprises’. See CPA, ‘Consolidation of State-Owned Enterprises’ CPA/ORD/20 May 2004/76, 20 May 2004.


605 Ibid.


bring about significant change to the Iraqi labor law as necessary to improve the conditions of the people of Iraq; its determination ‘to improve the conditions of work, life, technical skills, and opportunities for all Iraqis;’ the fact that ‘labor by young persons is endemic in Iraq and is deleterious to the health, safety and morals of children’ and, most importantly, the recognition of the ‘CPA’s obligation to provide for the effective administration of Iraq, to ensure the well-being of the children and workers of Iraq and to enable the social and economic functions of everyday life.’

In my view, it is difficult to disagree with the CPA’s claim that legislating to protect children from exploitation accorded with its duty to ensure the effective administration of Iraq and the welfare of its people as set out in Resolution 1483. On this score, one may wonder why the CPA’s order came so late in the occupation. The CPA also justified the adoption of its Order 89 on the basis that ‘Iraq has ratified International Labour Convention 182 and 138, which requires signatory nations to take affirmative steps towards eliminating child labor’. Sylvain Vité supports Order 89 on the ground that this measure meets the obligation contained in the ILO Conventions to take affirmative steps towards eliminating child labour, by setting, in particular, a ‘minimum age for employment and by regulating the conditions of work for people under the age of 18’.

Adducing as part of the reasons supporting a given piece of human rights-oriented legislation, its adherence to the obligations of the occupied state as the CPA did in Order 89, stands to reason and principle. But this approach should not be taken as far as arguing that an occupying power should legislate to implement the human rights obligations of the occupied state unless, perhaps, the obligation in question is clearly recognised as a norm of customary international law. As an element of its sovereignty, the occupied state should maintain the exclusive right, once an occupation is over, to determine when and how to implement its international obligations. Moreover, authorising an occupying power to enact legislation giving effect to the international obligations of the occupied state would be tantamount to granting an additional legislative authority, which could be extended to many areas of governance. As a general rule, it is the occupied state that is best placed to decide how a given international obliga-

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609 Order 89 (ibid) Preamble.

610 Ibid.

tion should be implemented. On the other hand, it should be recalled that nothing prevented the CPA, in compliance with the human rights obligations of the states composing it, from suspending (particularly at the beginning of the occupation) any Iraqi norm that allowed or facilitated child labour for the duration of the occupation so as to prevent any human rights violations during its tenure of Iraq.

5.3. Auditing and best financial practices

As with any project dedicated to breaking with the past and aspiring to build a new and better future, the CPA's transformative agenda also had a form of 'moralising mission'. It sought to spread its own reference values in the public life of Iraq in the hope of establishing a sound environment for public and private transactions. The CPA established mechanisms directed to ensure transparency, and accountability in the Iraqi governmental institutions' handling of public money and financial resources. It was also an attempt to improve the efficient use of public resources so that such resources could be best used for Iraq.612

Noting that the 'Board of Supreme Audit' had been established in 1990 as 'the supreme audit institution of Iraq', the CPA decided to re-establish it as 'an independent public institution' to ensure that the 'Iraqi government remains honest, transparent and accountable to the people of Iraq'. The Board of Supreme Audit was tasked with carrying out a broad range of financial and performance audits and with scheduling evaluations of public activities.613 The CPA also authorised the IGC to establish the Iraq Commission on Public Integrity.614 This was to be 'an independent body' tasked with 'enforcing anti-corruption laws and public service standards', proposing additional legislation, and heightening the 'Iraqi people's demand for honest, transparent accountable leadership through public awareness and education initiatives'.615

Lastly, on 2 June 2004, the CPA introduced the 'Financial Management Law and Public Debt Law', which established a 'comprehensive framework for the conduct of fiscal and budgetary policy in line with international

612 Dobbins et al (n 67).
615 Ibid, s 1.
best practices’. This law set out a structured process for the formulation of the national budget and a number of reporting requirements aimed at increasing the accountability and transparency of the budgeting process. This reform has been heralded as a ‘profound and far-sighted piece of legislation’ that ‘set the framework for writing balanced budgets, with public accountability for all government expenditures’. As desirable as these reforms may have been, from a purely legal perspective, however, there is still the problem of an occupying power exceeding its authority by passing far-reaching legislation destined to have effect after its demise: the CPA was not adopting measures regulating its own conduct but that of the incoming Iraqi government, thus encroaching upon sovereignty of the latter.

5.4. Evaluation

To justify its reforms, the CPA proffered numerous arguments in the text of its various orders. With some approximation, these justifications may be grouped into four kinds of categories. A first set of arguments underscored the existence of Iraqi consent to the CPA’s reform, or, as described by Benvenisti and Keinan, ‘indigenous endorsement’. Some of the CPA’s orders referred to the IGC’s desire to ‘bring about significant change to the Iraqi economic system’, and to the fact 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’.

A second justification was based on the CPA’s orders being ‘consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003)’, and the fact that Resolution 1483 had ‘called upon the CPA to promote economic reconstruction and the conditions for sustainable

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617 Ibid.
618 Allawi (n 34) 264–5.
620 See the Preambles of Orders 39, 40, 56, 64, 74, 78, 81, 83, 89, 93, 95.
621 Ibid.
622 See the Preambles of Orders 18, 20, 38, 39, 40, 56, 64, 74, 78, 81, 83, 89, 93, 95.
development'. The CPA also spoke of the ‘need to ensure the effective administration of Iraq’, and to ensure the welfare of the Iraqi people. Albeit at first sight, these may be seen as policy arguments, they are, in fact, specific references to the text of Resolution 1483 and hence also have a normative dimension.

Third, the CPA relied on the 17 July UN Report, which had called for:

[the] need for the development of Iraq in its 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, and the need to enact institutional and legal reform to give it effect.

Fourth, there are other reasons that, as can be gauged from the Preamble of the CPA’s orders, were essentially of a policy nature and included ‘the creation of a sustainable development’, the creation of ‘a stable and competitive market economy’, to enable ‘the social functions and normal transactions of everyday life’, to improve ‘the conditions of life, techni-

623 See the Preambles of Orders 40, 56.
624 See the Preambles of Orders 38, 39, 40, 56, 64, 74, 78, 95.
625 See the preambles of Orders 39, 40, 56, 74, 78, 81, 83, 95. The full text of UN 17 July 2003 Report (n 310), para 90 provides that:

A comprehensive policy enacting institutional and legal reforms will be necessary to establish a market-oriented environment that promotes integration with the global marketplace. Sustainable economic growth in Iraq will be feasible only through the establishment of a dynamic private sector, real challenge for an economy dominated by the public sector and State-owned enterprises. Such a profound transformation of the economy will have far-reaching social implications for the transition process to be successful, its goals and methods must be inclusive and command broad-based Iraqi political support. Because of the degree to which Iraq had deteriorated, exacerbated by the recent war and the attendant breakdown of social services, that the development of Iraq and the transition from a centrally planned economy to a market economy needs to be undertaken. (emphasis added)

626 See the Preamble of Orders 20, 40, 64.
627 See the Preamble of Orders 38, 39, 56, 78.
628 See the Preamble of Orders 56, 74, 78, 83, 93.
cal skills, and opportunities for all Iraqis,\footnote{629} and to fight ‘unemployment with its associated deleterious effect on public security.’\footnote{630}

While unquestionably the IGC may have wanted to see some improvement in the Iraqi economy, the CPA did not explain how and when such desire was manifested. Nor is there a clear indication that all of the measures the CPA sought to adopt were regarded by the IGC as necessary and adequate to solve Iraq’s problems. For example, in a very succinct manner (5 line decision), the IGC in Resolution 44 approved ‘the principle of unconditional investment of Capital’, which may be taken as lending support to Order 39, yet it then went on to recommend the provision of support for national investments. The IGC, however, did not work as a parliament. It did not have a legal right to dissent in the sense of being legally entitled, unlike national legislative bodies in respect of measures taken by the executive power, to obstruct or block policies the CPA had chosen to adopt.

Arguably, had the IGC the right to halt any of the CPA’s legislation it disagreed with and approve only the ones it supported, or at least had the IGC expressed clear support by citing in its resolutions the name and number of the CPA’s measures it had contributed to, then one could speak of instances of shared or joint governance between the two entities. However, on the basis of the information available and judging from the content of the resolutions of the IGC, this does not seem to be the case. For instance, Ali Allawi, a member of the IGC and a minister of finance in 2005, observes in his book concerning the occupation of Iraq that Order 39 was drafted with little discussion with the IGC and ‘emerged fully formed from the warrants of the CPA offices dealing with the economy’.\footnote{631} Furthermore, the same author has suggested, plausibly, that Iraqi businessmen were not interested in an order that increased competition, while certain Iraqi newspapers had also contended that the order was helping to place the control of Iraqi assets into the hands of foreign companies.\footnote{632} The Financial Times reported that:

\[t\]he reforms [Order 39] announced on Sunday by Mr. Gailani [minister of finance, IGC member] in Dubai are near universally unpopular in Iraq. Businesspersons and unions alike criticized the order, claim-
ing it would make Iraqi entrepreneurs uncompetitive in privatization
tenders and cause high unemployment.\footnote{Charles Clover and David Turner, ‘Governing Council Hits at Minister Over Business Reform’ \textit{Financial Times} (London, 25 September 2003) 6. Schmitt and Garraway also record that opening Iraq to foreign investment, on terms no less favourable than those applicable to an Iraqi investment, caused ‘some Iraqis to express concern regarding foreign control of their economy’. See Schmitt and Garraway (n 243) 54. For a description of Iraqi reactions, see Dobbins et al (n 67) 215–16.}

As to the legitimising effect of Security Council resolutions, opinions of scholars are mixed. After a review of the reforms undertaken by the CPA, Rüdiger Wolfrum has suggested that, by adopting the economic reforms it did, ‘the CPA had gone beyond its duty of re-establishing public order and civil life as provided for under article 43 of the Hague Regulations’, that the CPA’s reforms were not provided for by Security Council Resolutions, and that, as such, they should have been left to Iraqi institutions.\footnote{Wolfrum (n 256) 23.}

On the other hand, Grant Harris has suggested that Resolutions 1483 and 1511 provided the CPA with authority for activities well beyond the mere preservation of existing economic structures and conditions.\footnote{Grant T Harris, ‘The Era of Multilateral Occupation’ (2006) 24 Berkeley Journal of International Law 1.}

Schmitt and Garraway further remarked that Resolution 1483 recognised the pressing need to rebuild Iraq’s economy and called for ‘reconstruction and development of the economy’, stressing that Resolution 1511 had re-emphasised the economic development imperative.\footnote{Schmitt and Garraway (n 243) 55.} According to these scholars, the role of the CPA in the field of the economy was enhanced by the fact that Resolution 1483 had entrusted the UN Special Representative with ‘promoting economic reconstruction and the conditions for sustainable development’ and that it was to do so ‘in coordination with the Authority’.\footnote{Ibid.} In response, however, it may be noted that the Security Council had entrusted economic matters to the UN, not to the CPA, even though the former had to coordinate with the latter.\footnote{UNSC 1483 (n 47) para 8(e).}

And, while the CPA was to act in coordination with the UN Special Representative, none of its orders mention the cooperation between the UN and the CPA envisaged.
in Resolution 1483, which suggests that the CPA may have decided the content of its policies rather independently from the UN.

While true that neither Resolutions 1483 nor 1511 required the CPA to abstain from any intervention in the economic life of Iraq, neither did they enable the CPA to pursue such far-reaching legislation as that examined in the previous sections. In contrast to the Security Council’s endorsement of the CPA’s political and constitutional process aimed at drafting an Iraqi constitution during the occupation, nowhere did the Resolutions support the transformative project the CPA sought to undertake in the economic field. In fact, references to the right to self-determination of the Iraqi people, which also consists of the right to choose their economic system, suggest the contrary.639 As noted by James Thuo Gathii, justifying a broad mandate on the premise that it is consistent with the welfare of the Iraqi people is very reminiscent of the ‘sacred trust of civilization under which European countries justified their mission of colonial rule and administration’.640

Yet, the welfare of the Iraqi people and the effective administration of Iraq could not be achieved without some kind of reform. The problem, then, is where to draw the line between inaction and transformation. Resolution 1483’s obligation to administer Iraq effectively could not have been accomplished in the absence of economic and financial reform. The adoption of a new currency is a clear example in this regard. Moreover, the reference to an ‘effective administration’ is general enough to justify the CPA’s decision to take economic measures to achieve such a goal. So it was for the CPA—mindful of its own jurisdictional limits—to explain why it was necessary, in order to ensure an effective administration of territory, to adopt a given economic reform during the occupation and why it could not be left to an incoming Iraqi government.

As a result, the CPA’s legislation directed at having effect after the occupation of Iraq cannot be justified by the formulation used in Resolution 1483. The expansive powers of radically transforming the economy of the occupied territory are inconsistent with the temporary nature of occupation governance and the right to self-determination. In fact, it is interest-

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639 Arguing that self-determination was a limit to economic reforms, see Arai-Takahashi (n 47) 171.

ing to note that several of the orders issued by the CPA were issued in the very last months of the occupation, when it was clear that the occupation was to wind up by June 2004. Albeit desirable from a policy perspective, this legislation remained *ultra vires* insofar as the CPA was legislating to shape the economic and financial future of Iraq after its demise, rather than insisting on the restoration and provision of basic services to the Iraqis under the occupation.

As for the UN 17 July 2003 Report, it is difficult to see it as a basis for the CPA’s transformative project. Formally, a UN Report is not a source of legislation and as such it could not authorise what the Security Council, by remaining silent, had not. And, most importantly, from a substantive perspective, the analysis developed in the UN report is not to be taken out of context. The UN 17 July Report also pointed out that for its transformative project to be successful it needed to be pursued through ‘goals and methods’ that ‘must be inclusive and command broad-based Iraqi political support’; however, the CPA was not able to gain such a broad support. While the UN 17 July 2003 Report did give general support to the transformation of the Iraqi economy into a market economy, this does not automatically mean that the report justified everything the CPA had done before it or was to do after it. Absent any specific references to the measures the CPA had already taken at the time of issuing the Report, caution is necessary before treating it as an endorsement of the CPA’s reforms.

As to the policy reasons adduced by the CPA in its order, it should not be forgotten that, in certain instances, its assessment of what laws Iraq needed was not flawed and was likely to be as good as any assessment made by an indigenous government. The question, however, is why an occupation administration should be entitled to make calls of such importance for the economic future of a country *in lieu* of an indigenous government or of the people directly concerned. Wolfrum rightly observed:

> The political and economic desirability of such reforms is a separate question from the more limited issue of the necessity of reform for the purpose of re-establishing public order and civil life. All that is desirable but not strictly necessary and goes beyond the aim of re-establishing public order and civil life has to be left to institutions of Iraq based upon democratic elections. Otherwise, the underlying

641 UN 17 July 2003 Report (n 310) para 90.
assumption that sovereignty remains with the occupied state would become quite meaningless.\textsuperscript{642}

There was no system of checks and balances during the occupation to assess the quality and suitability of the legislation the CPA enacted; neither was there a process of parliamentary screening, nor negotiations with a political opposition, nor a system of judicial review.\textsuperscript{643} Had the CPA focused only on the pressing issues of reconstruction and restoration of services which emerged during the occupation, instead of focusing so much—as the content and number of CPA’s orders suggest—on shaping the economic and financial structure of Iraq after the occupation, its role in Iraq would have been closer to the text of the Security Council’s resolutions and to what a contemporary occupying power is allowed to do.

That being said, it is also important to recognise the complexity of the task faced by the CPA and the fact that in the field of economics the applicable international law provides general standards of conduct rather than indications of what kind of measures should be taken in the administration of an occupied territory. This lack of clarity is most unhelpful in the context of contemporary economies where the state is called on by necessity to exercise a very profound role. In this regard, the occupation of Iraq constituted an exceptionally difficult case, because in recent times no occupier had ever had to deal with the administration of a country as big and complex as Iraq. Albeit the applicable normative framework does provide important limitations on the authorities of an occupant, there is no model to suggest what is a correct economic administration in the case of a country emerging from a dictatorship in the twenty-first century, when the state is expected to take a most active role in tackling economic issues and where the economies of countries are so closely intertwined. The law of occupation—which resulted from a period in history when the state was expected to play a minimal role in the economic affairs of a territory and economies were not globalised—provides very little guidance on economic and financial issues. Clearly, many of the economic and financial issues the CPA faced were not contemplated at the time these rules were drafted. For instance, there is no indication in the law of occupation as to whether an occupying power should open up a country to foreign invest-

\textsuperscript{642} Wolfrum (n 256) 23.

ment. Intuitively, it seems that some opening to foreign investment could benefit the life of the occupied people, but where to draw the line is difficult to determine and the Security Council's resolutions did not provide sufficient guidance.

6. Conclusion

The analysis conducted in this chapter demonstrates how, during its tenure of Iraq, the CPA acted both as an administrator and a reformer of Iraq’s institutions and laws. From a contemporary perspective, where the functions of the state have significantly grown, this role can be fully justified as having been necessary to ensure the effective management of the territory and the welfare of its people. In the context of an occupation, formal adherence to the *status quo* may lead to the worsening of the situation and thus an occupying power would be expected to provide humanitarian help, and security of the occupied people and to remove the obstacles impeding the welfare of that people. Indeed, a proactive and reformist role was already in part envisaged under the Geneva Convention IV as discussed in Chapter 1 and, in the case of Iraq, Resolution 1483 confirmed and clarified this further, by speaking of an effective administration of territory and calling expressly upon the occupation administration to work for the welfare of the Iraqi people. Against this background, the conservationist principle enshrined in the law of occupation should not be read dogmatically as a ban on all reforms. Rather, it constitutes a viable reminder of the limits of an occupant’s authority by virtue of the fact that an occupant is in a relation of enmity towards the occupied state, it is not the legitimate sovereign of a territory, and its *de facto* sovereignty is temporary in nature.

That clarified, however, the practice examined in this chapter presents the difficulty that the CPA did much more than merely administering and reforming certain aspects of the Iraq state. It sought no less than the founding of a new Iraq based on the model of Western democracies. Far from being contingent solutions to incidental problems that emerged during the occupation, the often very detailed and lengthy measures adopted by the CPA were directed to display the bulk of their effects well beyond the demise of the occupation. It is almost as if the CPA envisaged that it could draft progressive and detailed laws and through those progressive laws Iraq could, *ipso facto*, emerge as a better country after the occupation.

The transformative project of the CPA encompassed the essential areas of governance of a modern state, ranging from the political and constitutional, to the economy in its various branches, to the provision of security
and the administration of justice. In each of these areas, the CPA established new institutions and defined their role and tasks. However, due to the breadth and number of the legislative instruments issued within a short period of time, one is left with the impression that the patient was over-medicated, so to speak, and that some of the medicines were wrongly prescribed, with the consequence of contributing to further debilitating a country which was already assailed by the violence and contradictions of its recent and past history. Aside from the political evaluation of this project, what seems fair to conclude in light of the analysis conducted in this chapter is that the very legitimacy of the transformative project pursued by the CPA remains limited because a significant proportion of the measures undertaken in the pursuit of it were illegal.

Several of the CPA's measures were illegal as they went beyond its normative competence both *ratione materiae* and *ratione temporis*, concerned as they were with regulating the future of Iraq rather than its present. Other measures were illegal by virtue of being disproportionate. Both Orders 1 and 2, for instance, went too far by, *inter alia*, attributing a generic responsibility for what had gone wrong in Iraq during Saddam Hussein's regime without distinguishing individual roles and functions, and not being proportionate to the security needs of the occupants, or to the threat posed to the Iraqis themselves. The dissolution of the Iraqi army appears to have been motivated more by ideological bias, whereby all that was associated with Saddam Hussein had to be dismantled, rather than the fact that the Iraqi army constituted a threat to Coalition Forces or to the Iraqi citizens.

Moreover, the involvement of the IGC did not grant legitimacy to the CPA's legislative process. The IGC was *de facto* part and parcel of the occupation administration and cooperated with it. Though its role in the governance of occupied Iraq is far from negligible, the IGC remained in a position of subordination throughout the occupation. Instead, it was the CPA that was firmly in the driving seat of the occupation and not the IGC, who did not have the normative authority to oppose the CPA's policies and determinations.

On the other hand, some of the normative measures adopted by the CPA in the field of security and the administration of justice were justified by the law of occupation and Resolution 1483 as precisely directed to the attainment of these goals during the occupation. Some of the measures adopted by the CPA were also rightly concerned with the protection of human rights and sought to amend existing Iraqi laws. The analysis conducted in this chapter has suggested that pro-human rights reforms such as those contained in Order 7, while certainly problematic from the per-
spective of the law of occupation, require further attention to determine whether such measures can set a legally justifiable precedent for similar contexts.

One field of activity where the activity of the CPA appears to have gone beyond its legitimate purview is the administration of the economy. The CPA was authorised, or more appropriately, was required to rule the Iraqi economy in an effective manner so as to ensure the welfare of the Iraqi people and contribute to the economic revival of Iraq. However, the performance of these duties was not synonymous with transforming the Iraqi economic system, which is not permitted by either the law of occupation or the right to self-determination. The latter mandates that fundamental choices related to the future of the economic system of a country are taken solely by the people concerned themselves. Unlike the political and constitutional process, there was no specific reference in the text of Security Council resolution to justify the adoption of measures which would impact upon Iraq’s economic and financial sector for years thereafter, such as the complete opening of Iraq to foreign investment, or the establishment of a fixed income tax rate. On the other hand, in fairness to the CPA, it should also be made clear that neither the law of occupation, nor the Security Council Resolution offered precise guidance as to what the CPA should have done in the Iraqi context—a task which was all the more difficult to gauge in a country of the dimensions of Iraq operating within the context of a globalised economy.

One of the major shortcomings of the CPA was that it did not adequately fulfil its duty to restore conditions of security and stability. Indeed, during its tenure the security situation got significantly worse. This was due not only to terrorist attacks or to crimes committed by certain segments of the Iraqi population, but also to the lack of legislation, directives, and measures necessary to ensure adequate protection for the civilian population from the conduct of the Coalition Forces, private contractors, militias and terrorist groups. Concerned with lofty issues such as the democratisation of Iraq, and distracted by relatively unnecessary issues such as the re-opening of the stock market, government whistleblowers, trademarks, copyrights, patents, industrial design, plant variety, the functioning of the securities market, and others, the CPA did not prioritise the pursuit of security and the protection of the welfare of the Iraqis, as it was required to do by the applicable normative framework.

Alongside these shortcomings, the CPA relentlessly pursued its process of transforming Iraq into a democracy, with the Security Council providing a normative cover for the political and constitutional process pushed
forward by the CPA. On this note, it could be argued that the CPA's project was legal, at least in part, having had support from the Security Council. The Security Council went as far as agreeing with the analysis of the CPA and the IGC that Iraq needed a new constitution and that new elections should be held under that constitution, requesting the CPA and the IGC to prepare a timetable, or plan of action, to achieve this objective.

Nevertheless, in my view, the support given in Resolution 1511 to the CPA and the IGC's political and constitutional process is legally flawed and is therefore not capable of providing a justification of the steps taken because of Resolution 1511 such as the adoption of the TAL. This support was not grounded on a finding that the democratisation of Iraq was a way to defuse the threat to international peace and security constituted by the situation of Iraq, which could ex hypothesi have been justified as an innovative approach taken under Chapter VII of the UN Charter. It was based on the flawed presumption that such a process was being sought by the Iraq people, as represented by the IGC, which, according to the Security Council, embodied the sovereignty of Iraq. Though certainly representative of certain powerful groups in Iraq, the IGC did not speak for the majority of the Iraqi people. Indeed, at that time, because of the occupation, as well as the traditional divisions among Iraqi groups, the Iraqi people did not, and could not, speak as one.

Proceeding on the basis of a consent and a unity that was limited at best, the political and constitutional process was not—and probably could not be otherwise, given that such process was pursued in the midst of an unpopular occupation—a moment of unification of Iraq. The more the process continued, the more the violence and the insurrection against the occupation increased. During the occupation a part of the Iraqis fought against it, with a part supporting it, and within the latter were sectarian quarrels such as the Kurdish quest for independence and the quest for power between Shiites and Sunnis, which unfolded and influenced the negotiations concerning the adoption of the TAL and the fundamental decisions taken therein. Moreover, divisiveness marked the CPA's attitude during the preparation of the TAL, which appeared to favour one group over the other and to think of the future of Iraq in terms not of a single people, as the right to self-determination requires, but in terms of a bargaining process among distinct groups with differing demands.

It will be for historians, and, for the Iraqis themselves, to mull these events over. It would be excessive to consider the CPA as a sort of modern Eris that had thrown the apple of discord into an otherwise united country. Before the occupation, Iraq was already a country riddled with prob-
lems and contradictions, which, as discussed in Chapter 1, are also part of its historical heritage. However, the thought that the coercive-based policies of the CPA and the rather divisive approach it pursued served to contribute, contrary to what had been sought by the Security Council, to the increase of already-existing conditions of insecurity and instability, paving the way for the beginning of the ‘age of discord’ that has plagued Iraq for many years, and still does, can hardly be set aside.
Chapter 5 The Democratisation of Iraq after the Demise of the CPA

The adoption of the resolution on Iraq [Res 1546] constitutes an historic moment for the proud Iraqi people, who ... will, inshallah, recover, by 30 June, their independence, their sovereignty and their dignity.

—Abdullah Baali, Ambassador of Algeria, 8 June 2004

The unanimous adoption of the resolution [1637] is a vivid demonstration of broad international support for a federal, democratic, pluralist and unified Iraq.

—John R Bolton, US Ambassador, 8 November 2005

The Secretary-General’s report before the Security Council provides a sober and urgent warning that Iraq stands on the brink of civil war and chaos

—Ashraf J Qazi, UN Special Representative, 11 December 2006

Pursuant to the 15 November Agreement and Article 2(B)(i) of the TAL, the CPA’s rule over Iraq ended on 28 June 2004 when an Iraqi Interim Government (Interim Government) took office. Marking the end of the direct foreign rule of Iraq, the demise of the CPA was unquestionably a major step in the process of returning sovereignty to the Iraqis. However, this transfer of power did not bring about an effective end of the occupation. This chapter illustrates the reasons for this claim, and determines the time from which

1 UNSC Verbatim Record (8 June 2004) UN Doc S/PV4987, 4.
2 UNSC Verbatim Record (8 November 2005) UN Doc S/PV/5300, 3.
3 UNSC Verbatim Record (11 December 2006) UN Doc S/PV/5583, 2.
it is more plausible to argue that Iraq regained sovereignty. To this end, the formation and practice of the three Iraqi governments succeeding the CPA between 2004 and 2006 are discussed. In a similar vein, the demise of the CPA did not halt the political and constitutional process directed towards the democratisation of Iraq, which had begun during the occupation. This process continued until its conclusion during—and because of—the ‘Interim Period’. Under Article 2 of the TAL, which refers to it as the ‘transitional period’, and Articles 1 to 4 of Security Council No. 1546, the Interim Period ran from the demise of the CPA (June 2004) to the election and formation of an Iraqi government (May 2006) under a new constitution ratified by referendum on 15 October 2005 (2005 Constitution).

This chapter seeks to connect the dots between the political developments that unfolded during the Interim Period and the decisions made during the occupation. If the (successful) completion of the political and constitutional process engineered during the occupation could be deemed to flow from the will of the Iraqi people, then the occupation may be assessed in a different light. Rather than being seen as the spoiler of the Iraqi people’s right to self-determination, the occupation would be seen as its enabler. In such a scenario, Iraq could then be viewed as a ‘clear-cut case’ of an effort ‘to provide for peace through the establishment of a constitution based on democracy’.

If, on the other hand, such a process can be said to be—at least in part—a foreign imposition rather than an exercise of free choice, then the appraisal must be more cautious: both the CPA and the Security Council may in such circumstances be regarded as responsible for pushing forward a process that ultimately breached rather than enabled, the Iraqi people’s self-determination by imposing upon them a process they did not ask for. Of course, the latter conclusion may be difficult to defend if it is demonstrated that the Iraqis acquiesced in such a process or consented to it during its unfolding.

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1. The legal effects of the CPA's legislation after its demise

The last order issued by the CPA was Order No. 100. In accordance with Article 26(C) of the TAL, which had affirmed the continued validity of ‘the laws in force in Iraq on 30 June 2004’, Order 100 affirmed the principle that, although some of the CPA’s laws were rescinded, the bulk remained in force. Order 100 stated that ‘regulations, orders, memoranda, instructions and directives of the CPA remain in force unless and until rescinded or amended by legislation duly enacted and having the force of law’. It recognised the ‘responsibility of the Government of Iraq’ for ‘interpreting and implementing’ the norms set down by the CPA, but did not affirm the right of the Iraqi Government to disregard such laws, nor clarify the reasons why the incoming Iraqi Government had the responsibility of implementing the CPA’s legislation. As a general rule, normative instruments validly issued under the applicable legal framework will remain in force, while illegal norms are to be ipso facto invalid, with the new government left to decide whether nonetheless to make them their own, and local courts left to determine their validity. According to Arbitrator Georges Schwenk, ‘Legislative Power of the Military Occupant Under Article 43 of the Hague Regulations’ (1945) 54 Yale Law Journal 393, 411–14; Yoram Dinstein, The International Law of Belligerent Occupation (CUP 2009) 285; Eyal Benvenisti, The International Law of Occupation (OUP 2012) 314–5. As the Correctional Tribunal of Heraklion noted:

The legislative measures enacted by the ‘Governments’ set up by the Occupant—measures which are essentially no more than laws promulgated by the Occupant himself—will not be respected by the State when its authority is restored after the occupation unless they fall
Sauser-Hall, in the 1953 Award in the *Albanian Gold* case, the rule of *post-liminium* entails the invalidation of all acts committed by an occupying power in breach of international law.\(^\text{13}\) In following this rationale, a government may adopt a balanced approach,\(^\text{14}\) consisting in not rejecting the acts of an occupying power solely on the ground that the norms emanated from an uninvited ruler.\(^\text{15}\)

Those measures that are illegal under international law—and in the case of the CPA there were quite a few, as discussed in Chapter 4—should be considered *ipso facto* invalid. Order 100 may be interpreted as an effort on the part of the CPA to ensure the continuation of its transformative project after its demise. However, this Order is *ultra vires* in so far as it sought to extend the reach of CPA’s legislation beyond the occupation. It is for the incoming government to determine the fate of legislation enacted during an occupation in its entirety, not for the occupation administration within the limits of the activities permitted by international law to the Occupant … the restored Greek State … is obliged to enquire into the legal validity of these legislative measures and into the possibility of recognizing and ratifying [those] actually enacted in the true interests of this country.

Correctional Tribunal of Heraklion (Crete), Judgment No 107 of 1945, AD (1943–5) vol 12, Case No 151.


15 Ibid. In the *Namibia* Advisory Opinion, the ICJ, having found that the South African administration was illegal, stated:

> In general, the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

This does not necessarily mean that an occupation administration cannot take ‘last minute’ emergency measures to ensure, for instance, the protection of the civilian population. For instance, the CPA could have issued directives to the Multinational Force regarding their conduct towards the Iraqi civilian population to ensure its protection during the transition to a new government. Such a move would have been a legitimate exercise of its responsibilities.

That said, a different conclusion can be reached if it is correct to argue, as this chapter does, that the occupation of Iraq did not end in June 2004. If it is considered that the occupation continued—albeit with different modalities—it could be argued that Order 100 represents a confirmation of the continuation of the occupation. The Order could be taken as evidence that the occupants, notwithstanding that they could no longer administer Iraq directly, still sought to exercise control and influence over Iraq, not only through the continued presence of their troops, but also through the continuation of the occupation legislation.

2. The formation of the Interim Government

Before its scheduled dismantling on 30 June 2004, the CPA worked on the selection of a ‘fully sovereign’ Iraqi interim government (Interim Government) and organised the transfer of power to the Interim Government by 30 June. Unlike the CPA, the Interim Government was to be composed of Iraqis. The Interim Government was, as the CPA had been, temporary in nature. However, unlike the CPA, its lifespan was already set at the time of its establishment. In fact, under Article 2(B)(2) of the TAL, the Interim Government was to remain in office for less than a year, until replaced by a government that was to be elected by 31 January 2005. The CPA searched for and selected candidates suitable for the position of ministers, and, in

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16 See text of the TAL in Talm (n 8) 1249, Art 2.
18 See text of Art 2(B)(2) in Talm (n 8) 1250.
close cooperation with Brahimi, the UN Special Representative for Iraq, interviewed candidates for the position of Prime Minister.\textsuperscript{19} Although the IGC had a limited role in the Interim Government's formation, it was the IGC who announced that the new Prime Minister of Iraq was to be Dr Ayad Allawi, a neurologist and a former member of the Ba'ath party, who had left Iraq in the 1970s after turning against Saddam Hussein, and who had subsequently collaborated with US and British intelligence.\textsuperscript{20} The Presidency of Iraq went to a Sunni named Sheikh Ghazi al-Yawar.\textsuperscript{21} On 1 June, the Interim Government announced its formation.\textsuperscript{22} Shortly after, the IGC dissolved itself,\textsuperscript{23} and the Security Council, noting its dissolution, welcomed ‘the progress made in implementing the arrangements for Iraq’s political transition’.\textsuperscript{24} On 28 June 2004, in a brief ceremony—announced only two days before the event, to prevent attacks from the insurgency\textsuperscript{25}—the CPA handed its power over to the recently constituted Interim Government and dissolved itself.

\textsuperscript{19} Bremer recalls telling Brahimi, the UN Special Representative, that ‘our main interest was the top seven positions: the prime minister and the ministers of defense, interior, finance, foreign affairs, oil and trade’. Paul L Bremer, \textit{My Year in Iraq: The Struggle to Build a Future of Hope} (Simon & Schuster 2006) 87, 345–73.

\textsuperscript{20} Allawi (n 17) 284–5.

\textsuperscript{21} Dobbins et al (n 17) 323.

\textsuperscript{22} Ibid. In Regulation 10, the CPA recognised that ‘the members of the designated Iraqi Interim Government were announced on June 1, 2004’ and in what seems an effort to exercise its prerogatives until the very last moment, made clear that the ‘CPA and the members of the designated Iraqi Interim Government will consult and coordinate on matters involving the temporary governance of Iraq until such time as the Iraqi Interim Government assumes full governance authority for Iraq’. See CPA, ‘Members of the Designated Iraqi Interim Government’, CPA/REG/9 June 204/10, 9 June 2004, s 1 (Regulation 10). The complete list of the members of the Iraqi Interim Government is contained in Appendix A to Regulation 10.

\textsuperscript{23} IGC, Press Release, 5 June 2004 reproduced in Talmon (n 8) 1274. In Regulation 9, the CPA stated that the ‘Governing Council has completed its work on behalf of the Iraqi people’ and ‘acknowledges the actions by the Governing Council to dissolve itself on June 1, 2004 as part of the ongoing evolution in the structures of the interim Iraqi administration, as contemplated by Resolutions 1483 and 1511’. See Regulation 9 in Talmon (n 8) 29.

\textsuperscript{24} Res 1546 (n 4) Preamble.

\textsuperscript{25} Bremer (n 19) 384.
3. The content and effects of Resolution 1546

On 3 July 2004, speaking before the Security Council, the newly appointed Iraqi Foreign Minister Hoshyar Zebari stated:

We seek a new and unambiguous draft resolution that underlines the transfer of full sovereignty in the people of Iraq and their representatives. The draft resolution must mark a clear departure from Security Council resolutions (1483) and 1511(2003), which legitimized the occupation of our country. By removing the label of occupation we will deprive the terrorists and anti-democratic forces of a rallying point to foment violence in our country.26

He further emphasised that Iraq ‘need[s] and request[s] the assistance of the multinational force’ through arrangements that ‘compromise neither the sovereignty of the Interim Government nor the right of the multinational force to defend itself’, and that ‘any premature departure of international troops would lead to chaos and the real possibility of a civil war in Iraq’.27 The representative of Germany enumerated the goals of what became Security Council Resolution 1546 as follows:

first it has to send a clear signal which marks a genuine break with occupation ... secondly, it will have to define the respective role and responsibilities of the Interim Government, the multinational force and the former occupying powers, and the United Nations in a manner consistent with the signal of a transfer of full sovereignty.28

On 5 June 2004, in a letter to the President of the Security Council, the newly appointed Prime Minister Allawi of Iraq stressed that until Iraq was able to provide security for itself, it would need the support of the Security Council and the international community, and asked for a Security Council resolution extending the mandate of the Multinational Force to contribute to the maintenance of security in Iraq, working in coordination and consultation with Iraqi forces (Invitation).29 On the same day, the US Secretary of State Colin Powell responded in the affirmative to this

26 UNSC Verbatim Record (3 June 2004) UN Doc S/PV/4982, 3.
27 Ibid.
28 UN Doc S/PV/4982 (n 26) 6.
29 Res 1546 (n 4) Annex at 8.
request, declaring the readiness of the US and that of the Multinational Force to continue to contribute to the maintenance of security in Iraq, working in partnership with the Iraqi government (Powell Response).30

Acting under Chapter VII of the UN Charter on a finding that the situation in Iraq ‘continues to constitute a threat to international peace and security’, the Security Council issued Resolution 1546 with an Annex attached containing the exchange of letters between Allawi and Powell.

Resolution 1546 is a complex and lengthy document that sought to tackle the power vacuum left by the demise of the CPA. It defined the status and functions of the Interim Government, the role of the Multinational Force and that of the UN, and the relationships between them. In brief, Resolution 1546: (i) welcomed the plan 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’; (ii) endorsed the ‘formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004’; (iii) authorised, on the basis of the Invitation by Prime Minister Allawi, the continued presence in Iraq of the Multinational Force; and (iv) endorsed the plan leading to the adoption of a democratic constitution by 2005 and the election of a new government under that constitution.31

Further, Resolution 1546 sought to boost the role of the UN by requesting, inter alia, that the UN Special Representative and United Nations Assistance Mission for Iraq (UNAMI) play a ‘leading role’ to ‘advise and support’ the ‘process for holding elections’; and to ‘promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq’.32

3.1. Upholding the timetable of transition to a democratic constitution

Resolution 1546 does not mention the TAL. This lack of reference suggests that Resolution 1546 is neither an endorsement nor an acknowledgement of the TAL as the interim constitution of Iraq. In the absence of either an endorsement or recognition, it could be suggested that the TAL’s legal standing is on a level footing with any other laws issued during the occupation by the CPA. However, while this remark may be an accurate gen-

31 Res 1546 (n 4) para 4.
32 Ibid, para 7.
eral description of the legal standing of the TAL as a whole, it should also be acknowledged that the Security Council expressly endorsed as its own some of the political determinations made in the TAL, thereby making them binding upon, or at least difficult to overturn for future Iraqi governments.\footnote{See generally Philipp Dann and Zaid Al-Ali, ‘The Internationalized Pouvoir Constituant—Constitution-Making Under External Influence in Iraq, Sudan and East Timor’ (2006) 10 Max Planck UNYB 423, 437.}

In paragraph 4 of Resolution 1546, the Security Council endorsed ‘the proposed timetable for Iraq’s political transition to democratic government’, which meant that in less than two years, Iraq was to have two rounds of general elections, and to adopt a new democratic constitution.\footnote{UNSC ‘Report of the Secretary-General Pursuant to Paragraph 24 of Resolution 1483(2003) and Paragraph 12 of Resolution 1511(2003)’ UN Doc S/2004/625, para 35.}

In fact, the political transition to democratic government included the following agenda:

\begin{itemize}
\item[(c)] holding of direct democratic elections by 31 December 2004 if possible, and in no case later than 31 January 2005, to a Transitional National Assembly, which will, inter alia, have responsibility for forming a Transitional Government of Iraq and drafting a permanent constitution for Iraq leading to a constitutionally elected government by 31 December 2005;
\end{itemize}

This agenda originates from Article 2(B) of the TAL and accords with the 15 November Agreement.\footnote{Res 1546 (n 4) para 4.} By incorporating those aspects of the TAL in Resolution 1546, the Security Council embraced and, at the same time, validated and advanced the process of democratisation of Iraq. Furthermore, various references in the Preamble of Resolution 1546 support the choices made in the TAL, contributing to their progressive consolidation, rather than leaving them at the level of ‘transitional’ determinations. In particular, and most significant in signalling its support for the effort to democratises Iraq, the Security Council welcomed the ‘commitment of the Interim Government of Iraq to work towards a federal, democratic, pluralist, and unified Iraq’, and affirmed the ‘importance of the rule of law, national reconciliation, respect for human rights including the rights of women, fundamental freedoms, and democracy including free and fair
elections’. However, this commitment came from a government that had not yet taken office at that time. While only referring to the text of the Invitation, the Security Council was unquestionably taking a stand in favour of a democratic Iraq. Although these references are not necessarily binding, the fact that the Security Council included them in a key resolution made it more difficult for the Iraqis to take a different approach, should they have wished so.

For the UK’s representative, Sir Emir Jones-Parry, Resolution 1546 marked ‘a defining moment for Iraq’ in which the Security Council had ‘powerfully endorsed the formation of a sovereign interim government’, adding emphatically:

The promise is great: a stable, federal, democratic, pluralistic and unified Iraq in which there is full respect for human rights, a stark contrast to the past.\(^{37}\)

In a similar vein, China’s representative spoke of Iraq’s yearning for ‘democracy, peace, and a new life, under restored sovereignty’ and expressed the conviction that ‘the great Iraqi people’ will make ‘unremitting efforts to overcome all obstacles in their way, [and] return as soon as possible to their path to peace, democracy and development’.\(^{38}\)

However, in contrast to these somewhat paternalistic remarks that speak to the aspirations of a people that—insurgency apart—could not make its voice heard at that time, Resolution 1546 appears to maintain the equilibrist approach of the Security Council, juggling conflicting demands and aspirations. On the one hand, in accordance with the transformative ambitions of the occupants, the Security Council had validated certain critical aspects of the TAL and the 15 November Agreement. On the other hand, in apparent compliance with the right to self-determination of the Iraqi people, which it recalled in the Preamble of Resolution 1546, the Security Council sanctioned the end of the occupation and welcomed the formation of the new ‘sovereign’ Interim Government. Rather than an act enabling self-determination in the purest sense of allowing the Iraqi people to choose freely the political regime—democratic or not—they wished to live under, Resolution 1546 may be interpreted more as a step in the process of pushing forward the democratisation of Iraq and thus in

\(^{36}\) Ibid, Preamble.

\(^{37}\) UN Doc S/PV4987 (n 1) 3.

\(^{38}\) Ibid, 6.
also determining the content of the right to self-determination of the Iraqi people and not only the process through which it could be achieved.

Unlike in Resolution 1483, where the goals of the occupants did not necessarily coincide with those of a Security Council which had maintained a reasonably cautious approach, in Resolution 1546, like Resolution 1511 before it, the respective goals tended to coincide, encapsulated in a push for the transformation of Iraq into a democratic and federalist country grounded on a new constitution. From a legal perspective, this raises the problem not only of whether the occupying powers were in breach of the Iraqi people’s right to self-determination by appointing Iraq’s new government, but also whether the Security Council, in one way or another, was encroaching upon the sovereignty of Iraq and its people. A first step in this analysis is to establish whether the occupation ended in June 2004, as claimed by the countries behind the CPA and recognised by the Security Council, notwithstanding the continued presence in Iraq of the Multinational Force.

3.2 The Invitation to the Multinational Force

As had been the case with Resolution 1511 in respect of the Coalition Forces, the Security Council authorised the Multinational Force to ‘take all necessary measures’ to contribute to the maintenance of security and stability in Iraq so that the Iraqi people could ‘implement freely and without intimidation the timetable and programme for the political process’.39 The Security Council endorsed the ‘Security Partnership’ between the Multinational Force and the Interim Government, as detailed in the exchange of letters between Allawi and Powell. It decided that the mandate of the Multinational Force could be reviewed at the request of the Government of Iraq or after 12 months from the date of Resolution 1546, and that it should nonetheless expire upon completion of the political process, or earlier, if requested by the Government of Iraq. Paragraph 9 of Resolution 1546 reads:

the presence of the multinational force is at the request of the incoming Interim Government of Iraq and therefore [the Security Council] reaffirms the authorisation of the multinational force under unified command established under resolution 1511(2003), having regard to

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39 Res 1546 (n 4) para 10.
the letter [from prime minister Allawi and Powell] annexed to this resolution.\footnote{Ibid, para 9.}

Furthermore, in the Preamble of Resolution 1546, the Security Council emphasised:

\[\text{[t]he importance of the consent of the sovereign Government of Iraq for the presence of the multinational force and of close coordination between the multinational force and that government.\footnote{Ibid, Preamble.}}\]

In light of these passages, Resolution 1546 seemed to justify the continued presence of the Multinational Force in Iraq on the basis of the Invitation and consent by the Interim Government, on the understanding that this government was sovereign and hence had title to issue the Invitation to the Multinational Force. As a result of the consent of the ‘legitimate government’ of Iraq, the Security Council could then record the change in the status of the Multinational Force from ‘foe’ to ‘friend’ of the Iraqi Government. Yet, as a consequence of characterising the Multinational Force as an invited force, it was no longer possible to regard it as a ‘hostile army’ and thus as an occupation force.\footnote{Article 42 (paragraph 1) of the Hague Regulations reads: ‘ Territory is considered occupied when it is actually placed under the authority of the hostile army.’ See text in Adam Roberts and Richard Guelff, \textit{Documents on the Laws of War} (3rd edn, OUP 2000) 80.} This conclusion is not, however, immune from challenge. Taking into account the way in which the Interim Government was formed, established during the occupation and under the influence of the CPA, the question that arises is whether the Interim Government was legally entitled to issue the Invitation to the Multinational Force on behalf of the sovereign State of Iraq. In addition, given that the Security Council clearly believed this to be the case, it should be asked whether the recognition of the Interim Government by the Security Council should be deemed dispositive as to the status of that government under contemporary international law. To these questions, for the reasons detailed below, I believe that the answer should be in the negative.
4. The scholarly debate

Based on the demise of the CPA and Resolution 1546, one group of scholars has argued that the occupation of Iraq ended in June 2004. Among these, however, Adam Roberts has cautioned that the factual situation in Iraq had not ‘changed completely overnight’ and thus international humanitarian law (IHL), which Roberts identified, rather generally, as being the ‘1949 Geneva Conventions’, continued to apply to the forces in Iraq, as highlighted in Resolution 1546. Noting that ‘it is reality that counts, not labels’, Roberts suggests that there could be circumstances constituting ‘a general exercise of authority in Iraq’, which would justify the application of the law of occupation. This approach is not convincing, however, as it is tantamount to a reversal of the burden of proof. The issue after June 2004 was not to find out in what circumstances IHL, or more specifically the law of occupation, was applicable because of instances of a general exercise of authority. Rather, it was to understand why the factual circumstances which, before that date, had warranted defining the Multinational Force as an occupation force, particularly as it exercised de facto control over the territory of Iraq, were no longer in place after June 2004, even though the Multinational Force was still stationed in Iraq and was fighting against the insurgency. Other scholars have emphasised the existence of a sovereign government in Iraq, as a consequence of which ‘the foreign army should not be considered as hostile and can be seen as remaining in Iraq at the invitation of a fully sovereign government’.

From the opposing perspective, Marco Sassòli suggests that the Interim Government did not have democratic legitimacy and did not have ‘greater

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43 Adam Roberts, ‘The End of Occupation: Iraq 2004’ (2005) 54 ICLQ 27, 47. See also Knut Dörmann and Laurent Colassis, ‘International Humanitarian Law in the Iraqi Conflict’ (2004) 47 GYIL 292. This view is also shared by the ECtHR. In the Al Saadoon case, it stated ‘On 28 June 2004 the occupation came to an end when full authority was transferred from the CPA to the Interim Government and the CPA ceased to exist. Subsequently the MNF, including the British forces forming part of it, remained in Iraq pursuant to requests by the Iraqi Government and authorisations from the UNSC’. Al-Saadoon and Mufdhi v UK, App no 61498/08 (ECtHR 2 March 2010) para 22.
44 Ibid (Roberts) 48.
45 Ibid, 47.
46 Dörmann and Colassis (n 43) 311.
control over the reality in Iraq than the US and its coalition partners’.\(^{47}\) However, he still considered the occupation as having ended in June 2004 because Resolution 1546 is a ‘decision overriding the rules of IHL on the subject’, and such a decision would be valid ‘under Article 103 of the UN Charter’, even though he considers it a ‘dangerous precedent’ to end an occupation in this way.\(^{48}\) So argues Yoram Dinstein, according to whom the norms of the law of occupation are overridden by Resolution 1546 under the aegis of Chapter VII of the UN Charter, which is binding upon UN Member States because of the combined effect of Articles 25 and 103 of the UN Charter.\(^{49}\)

In response to these two latter authors, it could be observed that the issue at hand is not one of derogation from, let alone the overriding of, norms of IHL by the Security Council. In the view of the Security Council, the occupation had ended of its own accord in line with the political process stipulated in the 15 November Agreement and in the TAL, and as a result of the demise of the CPA and its replacement with an Iraqi government. Moreover, it was on the basis of a belief as to the legitimacy and sovereignty of the Interim Government that the Security Council welcomed the end of the occupation. Thus, I believe that the Security Council was not derogating either explicitly or implicitly from norms of IHL—contrary to what it had done, for instance, in Resolution 1483, as discussed in Chapter 3—but was merely acting in accordance with general principles of international law, where an occupation can be considered over when sovereignty is gained (or regained) by an indigenous government. If the Interim Government were the legitimate sovereign government of Iraq, there could be no disagreement with the finding of the Security Council: namely, that the occupation had ended and so too had the application of the law of occupation, and hence there would be no question of derogation.

Therefore, the issue at hand is not whether the Security Council had the authority under Chapter VII of the UN Charter to derogate from the law of occupation, but whether the Security Council was correct in treating the Interim Government as sovereign. One reason why this question arises is the fact that the only government that could, in principle, have been re-


\(^{48}\) Ibid.

garded as legitimate by virtue of emanating from the Iraqi people was that of Saddam Hussein. However, not only was that government no longer in existence, but it could also no longer be defined as ‘legitimate’, because of the determinations made in Resolution 1483 insisting on the right to self-determination of the Iraqi people, as opposed to the right of return of the ‘legitimate sovereign’ of Iraq, as discussed in Chapter 3.

At the same time, based on the principle of effectiveness, some scholars have taken the view that the occupation of Iraq by the Multinational Force may have continued after June 2004. Daniel Thürer, for instance, has suggested that, while the Security Council’s determinations have ‘considerable political importance’, they ‘need not be accorded decisive legal importance’. Quite correctly, Thürer recommends that determinations as to the end of an occupation ‘should be governed by reality’, and thus if the Multinational Force exercised ‘authority in an operational area’, it should be bound by the Geneva Convention IV. Convincingly, Ugo Villani has argued that the occupation of Iraq was not over because the Interim Government appointed by the occupying powers was ineffective, and due to the fact that the recognition of a government by the Security Council has a declarative and not a constitutive value, while also raising concerns as to the Security Council playing on the side of the occupying powers.

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52 Ibid, 21.

53 Ibid, 23.


55 Ibid (Villani), 201.
In the ICRC Expert Report on Occupation, some experts have opined that the ‘Security Council could not twist the reality by stating that an occupation had ended when the facts on the ground said otherwise, insofar as IHL applicability was always based on the factual situation prevailing at the time of the legal classification’. Another expert supported this view, adding that insofar as the law of occupation consisted incontrovertibly of *jus cogens* norms, ‘the rule defining the concept of occupation and resulting in the application of those peremptory norms should be vested with the same legal status’.

In my view, there is no need to revert to the concept of *jus cogens*, as it is not the status of applicable norms, but the correct legal qualification of the facts that lies at the heart of the matter. Whether the Security Council was correct in determining that the Interim Government was sovereign is what needs to be ascertained in order to understand whether the occupation of Iraq ended in June 2004.

**4.1. Whether the Interim Government was sovereign**

According to Christopher Le Mon, the invitation to the Multinational Force to remain in Iraq was formally invalid as it originated from a government which at the time of issuance was not, as yet, in office. The Invitation is dated 7 June and not 28 June, the date on which Allawi officially became Prime Minister of Iraq. This fact, however, becomes less important than it would otherwise be in the context of the complexity of the Iraqi situation. The Security Council, while knowing that the Interim Government was not yet in office on 7 June, did consider its request valid, and thus the possible initial defect of the Invitation can be said to have been cured by the subsequent conduct of the interested parties.

The validity of the Invitation is reinforced by the international recognition that the Interim Government had acquired. Not only did the Security Council authoritatively endorse the Interim Government through Resolu-


57 Ibid.

tion 1546, but several states also followed suit. On 12 July 2004, Iraq and France issued a joint statement resuming full diplomatic relations which had been severed in 1990 due to Iraq's invasion of Kuwait.\(^{59}\) On 13 September, Allawi spoke at the UN during the inaugural session of the General Assembly, together with other heads of state and governments and ministers of foreign affairs.\(^{60}\) Between June 2004 and January 2005, several ambassadors presented their credentials to the President of Iraq, Sheikh Ghazi Ajil Al-Yawar. These were the ambassadors of the US and Denmark on 29 June; of Italy, the Netherlands, the United Kingdom, and Romania on 7 July; of the Czech Republic, Portugal, and Japan on 13 October; of Australia, France, and China on 27 October; and of the Republic of Korea and Turkey on 2 January 2005.\(^{61}\)

Notwithstanding that the Interim Government was recognised by numerous states (although no recognition was forthcoming from several key Arab states),\(^{62}\) it is submitted that the validity of the Invitation to the Multinational Force can still be challenged. The Invitation was issued by a government which, neither at the time of its issuance, nor at a later stage, could be said to have been sovereign.\(^{63}\) It did not have effective control over the territory of Iraq, nor had it received any form of legitimisation from the Iraqi people. Therefore, if, contrary to what was asserted by the Security Council, the Interim Government lacked sovereignty, it seems questionable that it had the authority to issue the Invitation. While it is

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59 This information was available on the website of the Ministry of Foreign Affairs of Iraq at <http://www.iramofa.net/english>. At present, however, this information is no longer available but the related material is on file with the author.

60 Notably, the opening statements at the 59th General Assembly of Brazil, Canada, China, France, Germany, India, Israel, Italy, Romania, Russian Federation, Spain, United Arab Emirates, and United Kingdom do not make any reference to the new government of Iraq. On the other hand, the statements of the US and Australia do. The latter, for instance, stated 'we cannot allow terrorists to disrupt the democratic process in Iraq. Prime Minister Allawi has emphasized his Government's determination to hold elections in January 2005'. The speeches are available at <http://www.un.org/ga/59/plenary/index.html> accessed 20 February 2013.

61 See (n 59).

62 Allawi (n 17) 294–315.

true that there may be instances in which external legitimacy emanating from the Security Council could be deemed legally sufficient to confer such authority, for reasons to be illustrated, it is difficult to conceive that such a possibility could be the case in Iraq.

Under traditional international law, a government is sovereign if it is independently able to carry out its will outside and inside its own territory. This definition means that for a government to be sovereign, two criteria need to be satisfied: the government must have a legal authority ‘which is not in law dependent on any other earthly authority’ so as to enjoy independence from foreign intervention; and the government must have effective control over its territory. As to the requirement of independence, it seems that the establishment of the Interim Government, notwithstanding some consultations with segments of the Iraqi population, was largely the result of the combined work of the CPA and the UN. The UN was initially involved in the process of the formation of the government, but had a limited role in its appointment. The chief UN spokesman, commenting on the nomination of Allawi as head of the Interim Government, said ‘It’s not how we expected it to happen’; while Ahmat Fawzi, spokesman for Special Representative Brahimi, adamanty declared ‘we were not invited to appoint the government’. The other body involved in the formation of the Interim Government was the CPA, which is clearly foreign to Iraq. Overall, it consequently appears reasonable to suggest that the formation of the Interim Government was largely the result of foreign intervention. Speaking before the Security Council, Brahimi put it thus:

the fact remains, however, that neither the Interim Government nor the National Council that we expect to be chosen by the National Conference will be elected bodies. And only an elected Government and an elected legislature can legitimately claim to represent Iraq.

While the legitimacy of a government may depend not only on whether it is elected, but also on other forms of tangible support from the local

64 Sir Robert Jennings and Sir Arthur Watts, Oppenheim’s International Law (9th edn, Longmans 1992) vol 1, 122.
65 Ibid.
67 See UNSC Verbatim Record (7 June 2004) UN Doc S/PV4984, 9.
population, the involvement of the Iraqi population in the formation of the Interim Government was so minor that it is difficult to regard the Interim Government as legitimate, particularly when looked at from the perspective of the Iraqi people. As for the requirement of effective control, it appears that the Interim Government had limited control over ‘its territory’. While it is true that the Multinational Force acknowledged the sovereignty of the Interim Government, in light of the legal constraints placed upon it by Resolution 1546, the obstacles to the Interim Government’s exercise of sovereignty over its territory were so conspicuous as to lead one to doubt whether it ever really attained such control.

Let us consider, then, what Resolution 1546 says in this regard. As mentioned earlier, according to paragraph 9 of Resolution 1546, the presence of the Multinational Force in Iraq was not only at the Invitation of the incoming Interim Government, but was also authorised by the Security Council. In the comments after the voting on Resolution 1546, the UK Ambassador stated that ‘on the basis of the Iraqi Government’s request for the multinational force to remain in Iraq the resolution authorizes its continued presence’. This comment begs the question as to why the presence of the Multinational Force needed to be authorised by the Security Council if the Interim Government was sovereign and was the institution that had requested the presence of the Multinational Force. The authorisation contained in Resolution 1546 appears similar to that contained in Resolution 1511, but the latter was not prompted by an invitation from a local government.

Furthermore, it was the Security Council, and not the Interim Government, that decided the extent to which the Multinational Force could have recourse to force, as if it were a military force working for the Council rather than for the Interim Government. Resolution 1546 made clear that while the Iraqi security forces were under the command of the Interim Government, the Multinational Force was not. The Multinational Force was not operating under the supervision of the Interim Government; it was only requested to act in coordination and in consultation with the Interim Government.

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68 Ibid, 2.
69 Paragraph 13 of Resolution 1511, in relevant part, reads:

Determines that the provision of security and stability is to the successful completion of the political process ... and authorizes a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.

terim Government, and was not accountable to the Interim Government. In fact, paragraph 31 of Resolution 1546 directed the US (not the Interim Government), on behalf of the Multinational Force, to report to the Security Council on the ‘efforts and progress’ of the Multinational Force within three months from the date of the resolution and on a quarterly basis thereafter. Further, concerning the length of the Multinational Force’s mandate, paragraph 12 of Resolution 1546 reads as follows:

the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four above, and declares that it will terminate this mandate earlier if requested by the Government of Iraq.

This paragraph, while declaring that, if requested, the Security Council would terminate the mandate of the Multinational Force, made the termination of the mandate conditional on the adoption of a new resolution. Such a resolution could be adopted in two instances: either when the Security Council determined that the political process defined in Resolution 1546 was over, which means no earlier than December 2005; or earlier, if requested by an Iraqi government. There was no real guarantee, however, that the Security Council would withdraw the Multinational Force if requested, as the adoption of a new resolution is not a particularly straightforward process. For instance, a draft resolution withdrawing the Multinational Force might not have been passed on the grounds that the Security Council, or at least one of its permanent members, determined that the situation in Iraq still constituted a threat to international peace and security, or was likely to generate one should the Multinational Force leave Iraq. Alternatively, a new draft resolution could have been vetoed. The US, for instance, might have preferred to veto it rather than leaving Iraq to an unfriendly government. Last but not least, it seems somewhat unrealistic, given its weakness from a military perspective, that the Interim Government (or a subsequent government) could simply have asked the Security Council to withdraw the Multinational Force—something which, indeed, never happened—unless it wanted to take a strong stand against the US and the other countries supporting the Multinational Force, with all the

70 Res 1546 (n 4) para 31.
71 Ibid, para 12.
negative consequences stemming from such an attitude. For such a request to be successful, implicit US approval was needed before submitting it to the Security Council. Yet this approval would have been difficult to obtain because of the commitment expressed in Resolution 1546, and because of the political necessity for the Bush administration to ‘complete the job’ in Iraq.

The scant ‘sovereignty’ of the Interim Government can also be evinced by looking at the other provisions contained in Resolution 1546. First, the Security Council insisted that the Interim Government was provisional and that it would be replaced by an elected government in 2005. This determination was not in accordance with popular will, let alone a choice of the Interim Government, but was the result of the 15 November Agreement and the TAL, both of which were documents devised during the occupation. Second, while the Security Council stated that the Interim Government would assume full responsibility and authority by 30 June 2004, at the same time it circumscribed its authority by stating that the Interim Government was to refrain ‘from taking any actions affecting Iraq’s destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes offices’. These limitations make the Interim Government resemble something of a ‘caretaker administration’, appearing to be more an occupation administration than a sovereign government. The only exception in this regard is the issuing of the Invitation, which bore so many consequences for Iraq and its people that clearly affected Iraq’s destiny beyond the limited interim period. Yet, apart from this, the powers of the Interim Government were temporary. Unlike those of a sovereign government and similar to those of an occupation administration, they were expressly confined to solve the contingent problems of Iraq (such as the insurgency) without, however, dealing with the numerous long-term issues affecting Iraq. In certain respects, the Interim Government had less effective authority than the CPA, as well as having to rule Iraq in accordance with the TAL. Lastly, the establishment of the

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72 Ibid, para 1.

73 According to Section 1 of an Annex to the TAL:

The Interim Government will administer Iraq’s affairs, in particular, by providing for the welfare and security of the Iraqi people, promoting reconstruction and economic development, and preparing for and holding national elections by 31 December 2004 ... The Government, as an interim government, will refrain from taking any actions affecting Iraq’s destiny beyond the limited interim period. Such actions
Interim Government had not been accompanied by the creation of a parliament with full legislative powers.\textsuperscript{74} 

should be reserved to future governments democratically elected by the Iraqi people ... The Interim Government will dissolve upon the formation of the Iraqi Transitional Government following national elections.

Furthermore, Section 2 of that Annex made clear that ‘The Interim Government’ was ‘to operate under the Law of Administration for the State for Iraq for the Transitional Period’ and that it was to respect at ‘all times’ the ‘obligations related to the transitional period and the fundamental principles and rights of the Iraqi people set forth in this Law [TAL]’. See the texts of Sections 1–2 in ‘Annex to the Law for the Administration of Iraq in the Transitional Period’(1 June 2004) available in Talmon (n 8) 1272–3.

The institution that resembled a parliament, without, however, having the same powers, was the Interim National Council. A UN Report described the role and functions of the Interim National Council thus:

Following its formation by the National Conference in August 2004, the Interim National Council held its inaugural meeting on 1 September 2004 and has met periodically since then. Its powers and functions are laid down in the annex to the Transitional Administrative Law. According to the Law, the main functions of the Interim National Council are to promote constructive dialogue, create national consensus, and advise the Presidency Council and the Council of Ministers. The Interim National Council has the authority to monitor the implementation of laws, follow up the work of the executive bodies, appoint replacements to the Presidency Council in cases of resignation and death, interpellate the Prime Minister and the Council of Ministers, and veto executive orders by a two-thirds majority vote of its members within 10 days of being informed of such orders approved by the Presidency Council. The Interim National Council also has the right to approve the national budget for 2005, to be proposed by the Council of Ministers, and to set its internal regulations.


The Interim National Council has established 13 committees to consider a wide range of issues. These include, among other things, out-of-country voting, Government policy regarding Iraqi debt, the planned census and elections. The Council has also considered security matters and invited the Minister of the Interior to inform the Council on related developments. In addition, the Council has discussed initia-
In view of the foregoing, it is difficult to view the Interim Government as sovereign. It lacked both independence and effective control over Iraq. The authorities of the Interim Government were those of an interim administration rather than a sovereign government. Its principle and main task was to carry forward the democratisation process endorsed by the Security Council, administering Iraq until the holding of national elections, and seeking to ensure the necessary security conditions.

4.2. Whether the recognition by the Security Council may override the lack of internal sovereignty

In light of the conclusion reached in the preceding section, the next issue to be determined is whether the external legitimacy conferred upon the Interim Government by virtue of being recognised not only by states, but also, most importantly, by the Security Council, was nonetheless sufficient to view the Interim Government as sovereign so that it could be regarded as having the authority to issue the Invitation. This begs the question of whether recognition of the Interim Government by the Security Council should be given a constitutive rather than a declarative effect.

Legal recognition is the result of an act of *constatation*, through which it is established that a given entity has the status it claims to have according to general international law. In the case of a government, it certifies that a government represents the state concerned in its international relations and that its acts may be regarded as valid on the international plane, thus being capable of creating obligations for that state under international law. Although recognition may have different meanings and scope, it implies, at a minimum, that the recognised government is deemed sovereign such that it can enter into legal relations with the recognising entity. While it is true that the withholding of recognition may mean that a given government is not regarded as sovereign, it is equally true, however, that...
there have been cases of non-recognised governments that were still sovereign under international law.77

Further, it is not a generally agreed rule in international law that recognition can replace sovereignty, in the sense that every time a government is recognised, it follows that it is *ipso facto* sovereign, because the factual basis underlying such recognition may be thin. The latter consideration, I would argue, also applies to cases of recognition of a government by the Security Council. There is little doubt that the Security Council does have the power to recognise and support local governments as a plausible means of achieving its tasks under Chapter VII of the Charter if it so claims; nor is it disputed that recognition by the Security Council can be useful in the context of a civil war in which two bodies claim sovereignty over the same country. What is unconvincing is the power of the Security Council to grant sovereignty to a government that, upon a review of the relevant facts, is not sovereign. Accepting such an approach in general would make it too easy for states represented in the Security Council to free themselves from peremptory international obligations concerning the protection of the civilian population during occupation as set out in the Geneva Convention IV.

Moreover, the *ipso facto* recognition of the Interim Government, albeit an improvement when compared to the occupation, is unfair to the Iraqi people as a whole, because it imposed a government upon them which they did not choose, nor were they involved in its formation. It is true that the purpose of the establishment of the Interim Government was precisely to favour a process of self-determination and achieve democracy to the benefit of the Iraqis. But this aspiration is contradicted by the factual situation in Iraq and, in particular, by the way the Interim Government was formed, which was a process of hetero-determination rather than self-determination. In fact, it is inherently contradictory to impose a government on a population and justify it as part of a process of self-determination. In the context of Iraq, which was not a failed state, the support for a non-sovereign government seems to be more an act delaying self-determination rather than favouring its achievement. This can be gauged by reflecting on the fact that a key objective of the Security Council had become the democratisation of Iraq and not solely the enablement of a process of self-determination by the Iraqis. As a consequence, lacking internal legitimacy as an entity selected by outsiders and favouring certain Iraqi groups over others, the Interim Government could scarcely facilitate the process of

77 Ibid.
reconciliation among Iraqis, and in effect gave the groups excluded from power an additional reason to fight against the forces protecting it.

Lastly, while the Security Council is vested with the power to qualify a given factual situation in one way or another and hence treat it differently from a legal perspective, any such qualification must be regarded as legally challengeable on the ground that even the Security Council can reach erroneous conclusions based on a misreading—intentional or otherwise—of the relevant facts. As pointed out in Chapter 4, the qualification of a factual (or legal) situation in a manner other than as it is, or other than what can reasonably be surmised from a non-superficial reading of the events, does not fall within the competence of the Security Council, notwithstanding how useful it may be for achieving the Council’s objectives. If the Security Council were to do so, it would be exceeding its authority, engaging in what could be described as an *abuse de pouvoir*, particularly if committed intentionally. In the present case, the Security Council attributed the qualification of ‘sovereign’ to a body that, given the Iraqi context and extent of its powers, could not be so defined. Arguably, in accordance with the right to self-determination and with a view to driving forward the process of the democratisation of Iraq, the Security Council ought to have simply stated that it was pursuing a process leading Iraq out of the occupation and towards democracy, rather than hiding behind the will and consent of a government that, in June 2004, could not be regarded as sovereign.

### 4.3. The International practice

Mindful of the foregoing, in order to explain why recognition by the Security Council of the Allawi government may not have been sufficient to justify its designation as ‘sovereign’, it is nonetheless useful and methodologically correct to review cases that concern the issues debated in this chapter, so as to gauge whether international practice lends support, or at least does not contradict, the considerations developed thus far.

Leaving aside World War II cases of instalment by occupying powers of collaborationist governments, such as the Republic of Vichy or the government of Manchukuo, which received widespread condemnation, I shall focus on some of the most recent cases. These include the Soviet intervention in Hungary, the Vietnam intervention in Kampuchea, the American intervention in Panama, and the Soviet intervention in Afghanistan. As for cases in which the UN played a stronger role, I will refer to recent events in Afghanistan and Libya.
In 1956, Soviet forces entered Hungary and replaced the liberal government of President Nagi, which had planned to leave the Warsaw Pact, installing a new government more amenable to Moscow’s rule. This intervention was widely condemned internationally within the Security Council and the General Assembly. As a consequence of the way in which it was brought to power, for several years the Credentials Committee of the General Assembly rejected the credentials of the new Hungarian government, even though this government had gone on to effectively control Hungary.

On 25 December 1978, Vietnam invaded Kampuchea (Cambodia) and brought to power a group of exiles led by Heng Samrin as head of state of the new People’s Republic of Kampuchea. Addressing the Security Council, Vietnam justified its intervention in Kampuchea principally on grounds of self-defence and also on humanitarian grounds. On 18 February 1979, Vietnam and the People’s Republic of Kampuchea signed a treaty of peace, friendship, and cooperation. Vietnam succeeded in ousting the Khmer regime, despite strong resistance from a liberation movement guided by the former Prime Minister Son Sann and Prince Sihanouk. The latter, invited to speak before the Security Council, rigorously criticised the Vietnamese intervention as a war of aggression. The occupation of Kampuchea lasted for eleven years. There is no doubt that one of the positive results of this occupation was the ousting of the Khmer Rouge regime, and it seems that the new government, albeit established through the use of force, enjoyed the support of a large majority of the Cambodians that were grateful for their liberation from the regime. Yet the UN Member States, including the US, strongly criticised the Vietnamese intervention as breaching the sovereignty of Kampuchea, and the General Assembly continued to recognise the Khmer Rouge’s regime until 1988 on the basis that it was the ‘legitimate government’, even though it had lost control of the country much earlier. The case of Vietnam is, however, sui generis because, as has been rightly pointed out, the foreign intervention, having dislodged the murderous Khmer Rouge’s regime, should have been welcomed

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80 Franck (n 78) 146.
81 Ibid, 147.
82 Ibid, 146.
84 Franck (n 78) 150.
rather than condemned.\textsuperscript{85} In any event, it does not represent authority for recognising a government installed as a result of a military intervention and occupation.

On 27 December 1979, Soviet forces invaded Afghanistan with the pretext of defending it from ‘the imperialist enemies of the Afghan people’.\textsuperscript{86} The Soviets claimed that the intervention was at the invitation of the Afghan government in the person of Bavrak Kemal. At that time, however, Kemal did not occupy any position in the Afghan government and was in the Soviet Union. The pre-recorded invitation by him had been transmitted by a radio frequency in Central Asia. On 28 December, Kemal was unanimously elected General Secretary of the Central Committee of the Afghan Communist party and Prime Minister of the new government. The first act of the new government was to issue a statement that asked the ‘USSR for urgent political, moral and economic assistance including military assistance’.\textsuperscript{87} The international community never recognised such a request as valid and widely condemned it. An emergency session of the General Assembly declared the right of the Afghan people to freely determine its own form of government, which was clearly being denied by the Soviet effort to enable a minority within Afghanistan to speak on behalf of the majority of the Afghans.\textsuperscript{88}

On 20 December 1989, US forces invaded Panama to overthrow General Noriega, who had ousted Guillermo Endara, the legitimate winner of the presidential elections held in May 1989. Just before the start of the US invasion, Endara was sworn into office as President of Panama by a Panamanian Judge in a US military base. The US immediately recognised the government of President Endara. Once placed in office, President Endara strongly supported the American intervention. On the basis of this support, the US claimed that it could not be regarded as an occupant. In the General Assembly, the US intervention was condemned but with a limited margin of approval, 75:20 with 40 abstentions.\textsuperscript{89} Arguably, this was due to the fact that Endara was the elected president of Panama.

What all these cases demonstrate is that a government installed through military intervention or occupation tends to be ostracised, unless, as in

\textsuperscript{85} Ibid, 107.
\textsuperscript{86} Ibid.
\textsuperscript{87} Higgins (n 79) 162.
\textsuperscript{89} Higgins (n 79) 93.
the case of President Endara, it is the elected president who is (re)installed by foreign intervention.

Turning to the UN, its practice is rich with cases of involvement in support of contested governments during civil wars,90 of democratically elected governments,91 and of governments that had gained effective control over a territory,92 although there seem to be no cases of offering support to governments installed as a result of an occupation. The cases of Afghanistan and Libya are worth recalling in this context, however.93

In December 2001, as a result of the successful ousting of the Taliban regime by a US-led coalition, Afghan leaders, including those who had been outside Afghanistan during the so-called Diaspora, met in Bonn at the invitation of the UN and in particular of Brahimi, then UN Special Representative in Afghanistan. On 22 December, the Bonn conference elected Hamid Karzai as Chairman of the Afghan Interim Authority (AIA) for a period of six months. In June 2002, the AIA held a nationwide Loya Jirga (Grand Assembly), as a result of which Karzai was elected president of the Islamic Transitional State of Afghanistan. In December 2003, a second Loya Jirga prepared a Constitution which was ultimately adopted in January 2004. On 9 October, presidential elections were held and Karzai was elected president of Afghanistan. The various appointments of Karzai seem to reveal, in contrast to that of Iraq, a progressive process of legitimation, which resulted in the fact that when Afghans had the opportunity to vote, they voted for Karzai. This proves that even a government that is appointed with the aid of foreign intervention, and clearly not elected, can come to be regarded as legitimate if the factual situation supports it. In fact, in Afghanistan, when choosing Karzai, there was neither a formal phase of occupation, nor a very strong foreign control in comparison with that of the US in Iraq. Nor could the Taliban, who did not participate in the Bonn meeting, be said to reflect a sufficiently significant portion of the Afghan population as to impact on the legitimacy of the Bonn agreement by their absence. Because of these important factual differences, which point to significantly less foreign influence on the selection of the Afghan gov-

91 UNSC Res 940 (31 July 1994) S/RES/940 (Haiti—President Aristide); UNSC Res 1132 (8 October 1997) S/RES/1132 (Sierra Leone—President Kabbah).
ernment than occurred in Iraq, it is submitted that the Afghan situation cannot be used as a precedent to legitimise the formation of the Interim Government.

More recently, in Resolution No 2009, the Security Council recognised the Transitional Council of Libya—which was the entity supported by the rebels against Gaddafi’s regime—as the temporary government of Libya (until the holding of elections).\(^94\) This recognition occurred before the death of Gaddafi, but the principle of effectiveness justifies the recognition, as it appears to have correctly reflected the fact that the insurgents—an indigenous force—had been able to successfully take control of the bulk of the territory of the country and were in a position to exercise such control. In Resolution 2009, the Security Council took note ‘of the letter of 14 September 2011’ from the ‘Prime Minister of the National Transitional Council of Libya’, which stressed that ‘the United Nations should lead the effort of the international community in supporting the Libyan-led transition and rebuilding process aimed at establishing a democratic, independent and united Libya’.\(^95\) Acting under Chapter VII of the UN Charter, and taking measures under Article 41, the Security Council expressed its expectation of the establishment of an inclusive, representative, ‘transitional Government of Libya’, and stressed the need for the transitional period to be guided by a ‘commitment to democracy, good governance, rule of law and respect for human rights’.\(^96\) The Security Council welcomed the ‘statements of the National Transitional Council appealing for unity, national reconciliation and justice’.\(^97\) In addition, it encouraged, inter alia, the National Transitional Council to ‘protect Libya’s population, restore government services’ and ‘prevent further abuses and violations of human rights and international humanitarian law’, as well as to ‘ensure a consultative, inclusive political process’.\(^98\)

As in the case of Iraq, the Security Council encouraged the newly recognised Transitional Government to develop and protect the establishment of democracy in Libya. However, the Security Council was not supporting an entity that was relatively unknown to the Libyan people, nor was it supporting—unlike in the Iraqi case—an externally appointed government; it was recognising an entity that had come into being through the

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\(^95\) Ibid, Preamble.
\(^96\) Ibid, para 2.
\(^97\) Ibid, para 4.
\(^98\) Ibid, para 5(b).
free choice of a significant portion of the Libyan people to revolt against Gaddafi’s regime.

4.4. The status of the Multinational Force

To summarise, it can be suggested that, while the Interim Government was treated by some states as sovereign outside Iraq, it was not sovereign within Iraq. If one looks at the powers of the Interim Government, as defined by Resolution 1546, and its relationship with the Multinational Force, the Interim Government appears more akin to a local administration supported by the Security Council and the Multinational Force, tasked with carrying Iraq to the next phase of the political and constitutional process endorsed by the Security Council, rather than an independent and sovereign government free to set its own agenda. Nor is it possible to say that recognition by the Security Council is sufficient to make up for the lack of internal sovereignty; there are no cases in international practice that justify the recognition by the Security Council of a government that has not already acquired some degree of sovereignty over a territory. In these circumstances, it would perhaps have been more fair and respectful towards the Iraqi people and their right to self-determination, as affirmed in Resolution 1546, to avoid calling the Allawi administration a sovereign government. Because of this, I believe that the Invitation, having been issued by an entity that did not genuinely represent the Iraqi State, should be considered invalid and thus incapable of altering the status of the Multinational Force as an occupation force.

In fact, an occupation can exist even in cases where there is no specific administrative entity running it, provided that the occupant is capable of having its directions enforced everywhere within the territory under occupation. Although it could be argued that the Multinational Force was helping the Interim Government to fight an internal war against rebels, it is submitted that because the status of the Multinational Force had not changed, the original international armed conflict that pitted the countries behind the Multinational Force against Iraq, as now represented by the insurgents against the occupation, continued. The continuation and growth of the fighting between the insurgents and the Multinational Force...
Force, which they sought to dislodge from Iraq, confirms this. With this noted, it must be emphasised that the Multinational Force remained a *sui generis* occupation force, not only bound to respect IHL and human rights law by virtue of being an occupying force, but, also, as illustrated in the next two sections, operating under, and in pursuit of, a framework defined by the Security Council.


United Kingdom military records show that, as at 30 June 2004, there had been approximately 178 demonstrations and 1,050 violent attacks against Coalition forces in Multinational Division (South East) since 1 May 2003. The violent attacks consisted of five anti-aircraft attacks, 12 grenade attacks, 101 attacks using improvised explosive devices, 52 attempted attacks using improvised explosive devices, 145 mortar attacks, 147 rocket propelled grenade attacks, 535 shootings and 53 others. The same records show that, between May 2003 and March 2004, 49 Iraqis were known to have been killed in incidents in which British troops used force.

And Anthony Cordesman in *Iraq’s Insurgency and the Road to Civil Conflict* (Praeger Security International 2008) vol I at 105 notes:

The reality [in 2004] was a growing insurgency. The Battle of Fallujah in November 2004 turned out to be a particularly striking example of a tactical victory that yielded little strategic results. The U.S. and Iraqi government offensive killed some 1,200 insurgents and led to the capture of nearly 2,000, at the cost of 54 American and 8 Iraqi lives. The offensive did clear a major insurgent safe haven, but vast numbers of Sunnis fled to other towns and the Coalition ‘hold’ on the city was tenuous at best. It would be two years before security in Fallujah would reach the point where even minimal rebuilding could start ... The Sunny triangle, the area along the Tigris River, and the ‘Triangle of Death’ south of Baghdad were all areas of intensive Sunni insurgent activity, and the stability of Shi’ite and Kurdish areas remained uncertain. It was clear that insurgents would increase attacks leading up to the January 30, 2005, election.
4.4.1. The Multinational Force’s relationship with the Interim Government and the Iraqi people

According to paragraph 11 of Resolution 1546, the relationship between the Multinational Force and the Iraqi Government can aptly be characterised as a ‘security partnership’ based on consultation and coordination. More critically, but probably closer to the truth, Rüdiger Wolfrum called the ‘security partnership’ a euphemism, which was ‘meant to camouflage the fact that the Iraqi Interim Government’ was not ‘in a position to influence directly concrete military decisions of the Multinational Force’. Whilst the Interim Government was in control of the Iraqi security forces and had the authority to commit them to battle, it did not control the Multinational Force, which could conduct military operations independently. The Multinational Force was under the control of the governments to which its forces belonged, and under the overall supervision of the Security Council that had authorised its presence in Iraq and defined its mandate. The independence of the Multinational Force in respect of the Interim Government was accentuated by the fact that the Iraqi courts did not have jurisdiction over the personnel of the Multinational Force. This issue was tackled in the Powell Response to the Security Council, the relevant portion of which reads as follows:

the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes.

The ‘existing framework’ mentioned in this passage can be found in CPA’s Order 17. As discussed in Chapter 4, Order 17 provided the Coalition Forces and all foreign personnel in the CPA with immunity from ‘local criminal, civil and administrative jurisdiction and from any form of arrest or detention other than by persons acting on behalf of their parent

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102 Wolfrum (n 6) 38.
103 Res 1546 (n 4) Annex at 10.
Following an amendment in the last days of the CPA (June 27), the term ‘Coalition Forces’ was replaced with that of ‘Multinational Force’, which was to ‘respect the Iraqi law’ but continued to remain immune from the ‘Iraqi legal process’ and ‘subject to the exclusive jurisdiction of their sending states’.

Section 20 stated that the revised Order 17 ‘shall remain in force for the duration of the mandate authorising the MFN under U.N. Security Council Resolutions 1511 and 1546 and any relevant subsequent resolution’. With regard to the duties of the Multinational Force, it can be recalled that the Preamble of Resolution 1564 stressed the commitment of ‘all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law’. It is not clear, though, how the Multinational Force expressed this commitment, as the Powell Response only speaks of the intent to respect the ‘law of armed conflict, including the Geneva Conventions’. The remarks of the Security Council in the Preamble indicate the expectation of the Multinational Force’s compliance with international law, including IHL and applicable human rights instruments. The UN Secretary-General also highlighted the duties of the Multinational Force when stating:

The humanitarian situation is characterized by a marked disregard for international humanitarian and human rights law. Attacks on Iraqi civilians, residential areas and the nascent police forces, and UNAMI are widespread. Hospital facilities have been occupied and in some cases severely damaged by both militia and elements of the multinational force: safe access to people in need has been denied. I have repeatedly reminded all parties of their responsibilities under international humanitarian law including their obligation to ensure free and unhindered access of medical personnel and humanitarian aid to all areas in need. (emphasis added)

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106 Revised Order 17 (n 104) s 2.
107 Ibid, s 20.
108 Res 1546 (n 4) Preamble.
Along the same lines, on 16 November 2004, Louise Arbour, the United Nations High Commissioner for Human Rights, publicly expressed concern about the battle of Fallujah and its consequences for the civilian population. She warned that all breaches of IHL and human rights law—including deliberate targeting of civilians, the killing of injured persons, and the use of human shields—had to be investigated and those responsible for breaches brought to justice. Moreover, in a report to the Security Council, the Secretary-General described the extent to which indefinite security internment was being used by the Multinational Force as a pressing human rights concern.

In contradiction with these concerns and findings, the UK government challenged, unsuccessfully, the view that the Multinational Force was bound to respect human rights law, in its pleadings before the ECtHR in the *Al-Jedda* case. According to the UK Government, the British forces in Iraq from 2004 onwards were not only justified, but also required to detain an Iraqi citizen suspected of recruiting for the conduct of terrorist activities in Iraq from 2004 to 2007. The UK stressed that paragraph 10 of Resolution 1546 had determined that the restoration of security and stability was ‘essential’ to the well-being of the people of Iraq and that the authorisation to ‘take all the necessary measures to contribute to the maintenance of security and stability in Iraq’ included ‘preventive detention’ when necessary ‘for imperative reasons of security’. According to the UK, the duty to comply with the objective set by the Security Council prevailed over any other ‘conflicting treaty obligations’, including Article 5 of the ECHR pursuant to Article 103 of the UN Charter.

The ECtHR was not persuaded by these submissions and declined to accept that ‘Resolution 1546 places the United Kingdom under an obligation to hold the applicant in internment’. The ECtHR emphasised that in interpreting resolutions of the Security Council, ‘there must be a presump-

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112 *Al-Jedda v United Kingdom* App no 27021/08 (ECtHR, 7 July 2011), paras 130-142.
113 Ibid, para 87.
114 Ibid, para 88.
115 Ibid, paras 89–90.
tion that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights’ because of the ‘United Nations’ important role in promoting and encouraging respect for human rights’.\textsuperscript{117} The ECtHR concluded that the language used in Resolution 1546 did not unambiguously indicate that the Security Council intended to justify measures of ‘indefinite internment without charge and without judicial guarantees’.\textsuperscript{118} In the absence of a clear provision to the contrary, the presumption must be, as the ECtHR rightly said, that the Security Council intended the states that are represented in the Multinational Force to ‘contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law’.\textsuperscript{119}

Responding to a submission by the UK that the Multinational Force continued to exercise the ‘specific authorities, responsibilities and obligations’ that the US and the UK had as occupying powers, the ECtHR correctly clarified that even if IHL were to be fully applicable, it did not place an obligation on an ‘Occupying Power to use indefinite internment without trial’.\textsuperscript{120} Instead, relying on the case law of the ICJ, the ECtHR stressed that Article 43 of the Hague Regulations requires an occupying power to protect the inhabitants of the occupied territory, which included ensuring respect for human rights norms.\textsuperscript{121} The ECtHR concluded that ‘neither Resolution 1546 nor any other United Nations Security Council Resolution explicitly or implicitly’ required ‘indefinite detention without charge’, and thus there could be no conflict between the UK’s ‘obligations under the Charter of the United Nations and its obligations under Article 5§1 of the European convention’.\textsuperscript{122}

\subsection*{4.4.2. The Multinational Force’s relationship with UNAMI}

The relationship between the Multinational Force and UNAMI, as framed by Resolution 1546, can be defined as one of mutual aid within each other’s field of expertise. In a nutshell, the Multinational Force was to provide security to UNAMI, while UNAMI was to help the Multinational Force by encouraging UN Member States to increase their support for it. In a report

\begin{itemize}
  \item \textsuperscript{117} Ibid, para 102.
  \item \textsuperscript{118} Ibid, para 105.
  \item \textsuperscript{119} Ibid, para 105.
  \item \textsuperscript{120} Ibid, para 107.
  \item \textsuperscript{121} Ibid.
  \item \textsuperscript{122} Ibid, para 109.
\end{itemize}
to the Security Council, the UN Secretary-General pointed out that the UN was a ‘high-value’ and ‘high-impact’ target for attacks in Iraq and that, therefore, it needed to rely on the Interim Government and the Multinational Force to accomplish its mission.\footnote{UN Doc S/2004/625 (n 34) paras 5–7.} He also indicated that outside of UN premises, the Multinational Force would have to be the ‘effective guarantor of the overall security of the United Nations personnel in Iraq’.\footnote{Ibid.} The Security Council took these concerns seriously. Resolution 1546 welcomed the commitment of the Multinational Force, as expressed in Powell’s Response, to provide security for the UN, and stressed that the Multinational Force was to provide security in Iraq so that, \textit{inter alia}, the UN could fulfil its role in assisting the Iraqi people. It endorsed the proposal made in the Response to create a distinct unit under the command of the Multinational Force with ‘a dedicated mission to provide security for the UN presence in Iraq’.\footnote{Ibid, paras 10–13.} Reporting to the Security Council, the UN Secretary-General explained that the Multinational Force provided broad area security, escorted UNAMI personnel, and controlled access to and protection within the perimeter of the UNAMI facilities,\footnote{UN Doc S/2004/710 (n 109) para 25.} but that movements outside the international zone in Baghdad remained ‘extremely hazardous’. He added that a security agreement between UNAMI and the Multinational Force concerning the establishment of a specific unit within the Multinational Force to protect UNAMI was being negotiated.\footnote{UNSC ‘Report of the Secretary-General pursuant to Paragraph 30 of Resolution 1546(2004)’ (2004) UN Doc S/2004/959, para 21.} At the same time, the Secretary-General explained that the UN was training a UN guard unit composed of Iraqi forces which could replace the protection provided by the Multinational Force.\footnote{Ibid, para 24.} As for the role of UNAMI towards the Multinational Force, paragraph 13 of Resolution 1546 requested international organisations, which arguably include UNAMI, to ‘contribute assistance’ to the Multinational Force. A report by the UN Secretary-General noted, \textit{inter alia}, that UNAMI, at the request of the Multinational Force, encouraged a number of Member States to provide troops or make financial contribu-
tions, and pledged to continue its support. The second report pursuant to Resolution 1546 indicated that these efforts continued.

The relationship with UNAMI confirms the *sui generis* nature and functions of the Multinational Force: an occupation and stabilisation force in respect of Iraq; and an instrument, if not a partner, of the Security Council and UNAMI in the pursuit of the democratisation of Iraq and in the provision of security not only for the Iraqis but also for the UN. Unusual as it may be, this duality of functions is a logical consequence of the uniqueness of the Iraqi situation, whereby the Security Council had embraced the democratisation process initially pursued only by the states behind the CPA, and the Multinational Force was necessary to achieve that objective, notwithstanding the growing insurgency which opposed any form of foreign influence.


If, in light of the above, it is correct to suggest that the occupation of Iraq did not end in June 2004 with the demise of the CPA but continued *via* the Multinational Force, albeit with innovative modalities, the length of its duration consequently needs to be examined. A first hypothesis is to argue that the Interim Government, albeit not sovereign, was, through its conduct, subsequently capable of becoming so by virtue of obtaining the loyalty of the Iraqi people and the necessarily wide consensus it lacked at the beginning. This inquiry requires an analysis of the practice of the Interim Government.

During the brief period of its tenure, the conduct of the Interim Government was mainly directed at tackling the growing insecurity and escalation of armed violence. The security situation remained ‘volatile’; the insurgents continued ‘to challenge the presence of the multinational force’; the ‘armed militias remained active’ and ‘attacks on Iraqi civilians, residential areas and the nascent police forces’ were ‘widespread’.

As one of his first acts, Prime Minister Allawi adopted a ‘national security

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129 Ibid, para 25.
130 Ibid, para 22.
131 Ibid, para 10.
132 UN Doc S/2004/710 (n 109) para 3.
133 Ibid, para 5.
134 Ibid.
135 Ibid, para 7.
law’ under which he was ‘to exercise broad powers of martial rule to combat a persistent insurgency’ and temporarily banned the Al-Jazeera television network. The initial strategy of the Interim Government was to try to reach out to the insurgents. Allawi offered an amnesty to any ‘resistance fighters’ who handed in their weapons. He also made a deal with Muqtada al-Sadr (Sadr), the Shiite clergyman leader of the Mahdi army, who had fought strenuously against the Coalition Forces, and allowed him to publish his party’s previously banned newspaper Al-Hawza and to keep his militias on the streets, as well as cancelling a warrant for his arrest, the execution of which had been insisted upon by the Multinational Force.

Subsequently, however, in mid-July 2004, the militias of Sadr took control of the city of Najaf, which was accompanied by ‘an escalation of fighting’ between Sadr’s militia and the Multinational Force. Allawi acted as mediator between the Multinational Force and Sadr, and called on the latter and his soldiers to turn in their weapons in exchange for an amnesty. These calls were rejected, however. On 19 August, Allawi issued ‘a final call’ threatening military intervention by the Multinational Force. Before such intervention was due to occur, a five-point agreement with the Sadr militia was negotiated and finalised by Ayatollah Sistani on 27 August 2004. This agreement provided for the handing in of weapons by Sadr’s militias and the withdrawal of the Multinational Force from Najaf and Kufa, and called upon ‘all parties as well as political, social and other movements, to join in a process leading to general elections and full sovereignty.’ Ultimately the Mahdi Army turned over to the Multinational Force about 700 rocket-propelled grenades and about 400 mortar shells for the price

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138 The Economist, ‘Who are the Insurgents and how can they be Defeated’ (London, 10 July 2004) 53.
143 Ibid, para 9.
of $1.2 million. On 10 October, the Interim Government announced that those who had fought in Najaf but were not involved in crimes were to be released.

In connection with these events, and following a request from the Interim Government, the UN organised a National Conference to promote ‘national dialogue and consensus-building on the country’s future, which was attended by 1,100 delegates in Baghdad from 15 to 18 August 2004. This did not, however, include ‘a number of political actors’, who argued that ‘there could be no genuine national dialogue under the circumstances’.

The second major crisis faced by the Interim Government unfolded in the city of Fallujah. In April 2004, the Multinational Force had left Fallujah under the control of the indigenous Fallujah Brigade. However, the insurgents were able to co-opt the components of the Fallujah Brigade and gain control of the city, which, for several months, became the centre of Iraqi resistance. By September 2004, the Multinational Force planned to recapture Fallujah, but the Iraqi Interim President Ghazi Ajil Al-Yawar asked Allawi to delay the intervention of the Multinational Force in order to gain time to attempt (unsuccessfully as it turned out) to solve the situation through contacts with the insurgents. On 31 October, Allawi declared that efforts to resolve the conflict in Fallujah peacefully had entered their final phase and signalled the possibility of a major military offensive. On 3 November, the Interim Government authorised the Iraqi Security Forces and the Multinational Force to regain control of Fallujah through military action.

\[\text{146} \] UN Doc S/2004/710 (n 109) paras 13–15.
\[\text{147} \] Ibid, para 20.
tions’, the Interim Government, under the National Safety Law, declared a 60-day state of emergency in all parts of Iraq, which specifically included a 24-hour curfew in Fallujah. On 8 November, the Multinational Force and the Iraqi security forces captured Fallujah. The following day, the Sunni members of the Interim Government, in protest at the conduct of the Multinational Force, withdrew from the Government, and Sunni clerics called on Iraqis to boycott the general elections. On 3 March 2005, the Interim Government announced that it would extend the emergency measures a further 30 days from 8 February.

Looking at the practice of the Interim Government as a whole, I believe that it would be simplistic to regard the Allawi Government as a ‘puppet’ in the hands of the countries behind the Multinational Force. There are instances in which Prime Minister Allawi sought, and was able to take, an independent stand and delay the offensives of the Multinational Force. He also tried to adopt his own independent strategy of negotiations with the insurgents. Nor can it be said that Allawi was powerless, given the various initiatives he took to maintain order and seek reconciliation, as well as granting amnesties and releasing prisoners.

On the other hand, the Interim Government remained ‘a caretaker government’ whose main scope was to carry forward the democratisation process designed during the occupation in a profoundly insecure environment. There is no indication that the Interim Government engaged in a review of the CPA’s legislation so as to take an autonomous stand from the instruments enacted by the CPA. The impact of the Interim Government in terms of authority and legitimacy over the Iraqi population remained somewhat limited: on the basis of its practice, it would probably be an exaggeration to argue that the Interim Government had subsequently achieved the sovereignty which it lacked in June 2004. This appears evident when the authority of Allawi is compared with that enjoyed, for instance, by Sistani, who was the one able to persuade Sadr to desist from fighting. Perhaps the result of the 30 January elections (see below), which gave Allawi’s party a far from negligible, yet simultaneously limited 14.5 per cent of the vote, can be taken as an indication of the degree of support

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152 Ibid, para 4.
154 Ibid.
enjoyed by Allawi and his government. Consequently, it would be incongruous to hold that during its tenure the Interim Government had gained real sovereignty.

5. **Towards full sovereignty: the practice of the elected Iraqi governments**


On 30 January 2005, a significant proportion of the Iraqi people (8.5 million out of more than 14 million\textsuperscript{155}) went to the polls to elect the 275 members of the Transitional National Assembly from the 7,785 candidates running,\textsuperscript{156} with 31 per cent of seats designated to be filled by female candidates.\textsuperscript{157} According to the UN Secretary-General, the elections held on 30 January marked ‘an important milestone’ in Iraq’s transition.\textsuperscript{158} But it was not, or perhaps only in part, a moment of national unification, due to the fact that the large majority of the Sunni population had boycotted the vote.\textsuperscript{159}

Convening for the first time on 16 March 2005, the elected Transitional National Assembly nominated Jalal Talabani, a Kurd, President of Iraq on 7 April.\textsuperscript{160} On 28 April it passed a vote approving a government led by Prime Minister Ibrahim al-Jaafari which included thirty-two ministerial and four deputy ministerial posts.\textsuperscript{161} Unlike the Interim Government, the Jaafari Government was the result of general elections and of elaborate negotiations between elected representatives. Similar to the Interim Government, the mandate of the Jaafari Government was temporally limited; its span was to be approximately a year, at which point it was to be replaced by a new government to be elected under the new constitution. It was also weak because its own security, if not its whole existence, depended on the Multinational Force.

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\textsuperscript{156} Ibid, para 27.

\textsuperscript{157} Ibid.

\textsuperscript{158} Ibid, para 82.

\textsuperscript{159} Adeed Dawisha, *Iraq—A Political History from Independence to Occupation* (Princeton University Press 2009) 249.


\textsuperscript{161} Ibid, para 8.
On the other hand, the material and temporal competence of the Jaafari Government, unlike the Interim Government, was not limited to the Interim Period. The Jaafari Government could pass legislation that would have effect after its demise. For instance, on 15 September 2005 the Council of Representatives adopted a new electoral law, repealing the CPA's Order 96. Most importantly, it was under the aegis of the Jaafari Government that the drafting of the Iraqi constitution by the Iraqi Transitional Assembly would occur. At times, the Jaafari Government also distinguished itself from the Interim Government by being more closely associated with Iran than with the US. In the same way as for the Interim Government, the maintenance of security was the key issue confronting the Jaafari Government. During this period, Iraqi civilians, police forces, politicians, and active members of Iraqi civil society were targeted and killed. On 22 February 2006, the holy Shiite shrines of the Imams Ali al-Hadi and Al-Hasan al-Askari in Samarra were bombed, causing hundreds of deaths. At the same time, units under the control of the Ministry of Interior were accused of engaging in human rights violations, including execution-style killings and torture.

On 4 August 2005, the Security Council adopted Resolution 1618 (2005), finding that ‘any act of terrorism’ is ‘a threat to peace and security’ and strongly condemning the terrorist attacks that had taken place in Iraq. It

166 Ibid.
169 In paragraph 2, the Security Council took note of:

the shameless and horrific attacks in recent weeks which have resulted in over one hundred deaths, including thirty-two children, employees of the Independent Electoral Commission of Iraq, and a member and an expert adviser of the Commission charged with drafting a permanent constitution for a new, democratic Iraq, Mijbil Sheikh Isa and Dhamin Hussin Ubaidi.
stressed that ‘acts of terrorism must not be allowed to disrupt Iraq’s political and economic transition currently taking place, including the constitutional drafting process and its referendum’.\textsuperscript{170} Adopting a similar approach, in Resolution 1637, the Security Council welcomed, rather emphatically, ‘the beginning of a new phase in Iraq’s transition’ and expressed its desire ‘for the completion of the political transition process’.\textsuperscript{171} In addition to reiterating the right of the Iraqis to self-determination, the Security Council expressed support for a democratic Iraq by welcoming the ‘commitment of the Transitional Government of Iraq’ to work towards a ‘federal, democratic, pluralistic, and unified Iraq, in which there is full respect for political and human rights’.\textsuperscript{172} This welcome was a little premature, however. In the letter attached to Resolution 1637 seeking the renewal of the mandate of the Multinational Force, the Iraqi Prime Minister had only spoken of the efforts of his government towards establishing a ‘stable and democratic Iraq’.\textsuperscript{173}

Moreover, noting the establishment of the Jaafari Government, Resolution 1637 affirmed that this government was to ‘play a critical role in continuing to promote national dialogue and reconciliation’ and, tellingly, in ‘shaping the democratic future of Iraq’.\textsuperscript{174} Revealing its support for the whole process, the Security Council welcomed:

\begin{quote}
the assumption of full governmental authority by the Interim Government of Iraq on 28 June 2004, the direct democratic elections of the Transitional National Assembly on 30 January 2005, the drafting of a new constitution for Iraq and the recent approval of the draft constitution by the people of Iraq on 15 October 2005.\textsuperscript{175}
\end{quote}

Simultaneously seeking to influence its conduct, the Security Council encouraged the Jaafari Government to negotiate with the insurgents who were willing to ‘renounce violence’, and requested it ‘to promote a political atmosphere conducive to national reconciliation and political competi-

\textsuperscript{170} Ibid, para 5.
\textsuperscript{171} UNSC Res 1637 (11 November 2005) UN Doc S/RES/1637, Preamble.
\textsuperscript{172} Ibid.
\textsuperscript{173} Ibid, Annex A.
\textsuperscript{174} Ibid, Preamble.
\textsuperscript{175} Ibid.
tion through peaceful democratic means’. Further, confirming the international supervision which Iraq was under, the Security Council determined that the ‘Iraqi Development Fund was to remain under the control of the IAMB [International Advisory and Monitoring Board for Iraq]’ as it had been during the occupation of Iraq, despite the fact that the daily administration of the Fund had been transferred to the Iraqi government.

In light of these facts and circumstances, it would be wide of the mark to label the Jaaafari Government as a fully sovereign and independent government. Sitting in the heavily fortified Green Zone and thereby detached from ordinary Iraqis, the government was essentially subordinate to the Security Council that had shaped its role and functions and to the Multinational Force that protected its existence. In addition, it is certainly plausible to see the Jaaafari Government as possessing only limited sovereignty by virtue of the external supervision its conduct was under and its limited material ability to exercise its own will.

On the other hand, it would be equally unwarranted to speak of the continuation of the occupation. Albeit endowed with limited powers, the Jaaafari Government cannot be equated to an occupation administration, as it resulted from the free choice of the Iraqi people. Moreover, its representatives had powers legitimately extending beyond those of an occupation administration, and behaved in a manner that sought to assert the government’s authority and independence, notwithstanding foreign influence. It must be noted, however, that under the TAL and Resolution 1546, the Jaaafari Government remained a temporally limited government. Similar to the Interim Government, the main function assigned to it by the Security Council was to carry forward the political and constitutional process until its replacement by another government elected under the forthcoming new constitution.

5.2. The adoption of a permanent constitution (October 2005)

5.2.1. Content

The most important event that unfolded under the Jaaafari Government was the preparation of a new permanent Iraqi constitution. Whether this constitution constitutes an exercise in self-determination by the Iraqi people, or a hetero-determination by foreign actors such as the Security Coun-

176 Ibid.
177 Ibid, para 3.
cil, or perhaps a mix of both, is for this section to determine by reviewing the relevant norms.

On 10 May 2005, in accordance with the TAL and Resolution 1546, the Iraqi Transitional Assembly appointed a 55-member Constitution Drafting Committee (CDC). No Sunnis sat on the CDC, as they had boycotted the 30 January elections and as a result had won only 16 of the 275 seats in the Iraqi parliament. Their exclusion from the constitution-drafting process clearly did not help to engender stability in Iraq, even though formally it was a faultless decision, as it reflected the electoral outcome. Consequently, on 16 June 2005, under intense US pressure, the Iraqi Transitional Assembly agreed to add 15 members belonging to the Sunni group to the CDC, and further agreed that decisions within the CDC were to be made by consensus, even though these additional members could not vote because, unlike the original 55, they were not members of parliament. In July 2005, just six weeks before the deadline set by the TAL for the completion of the Constitution, the CDC began its work. Under the TAL, the deadline for drafting the permanent constitution could have been extended for six months, but this did not happen. On 1 August, as the Iraqi National Assembly was leaning toward voting for a time extension, it was reported that President Bush himself intervened, telephoning the Shiite leader Abdul Aziz Hakim and strongly insisting that the deadline for the

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178 UN Doc S/2005/373 (n 160) para 11.

the flawed negotiations of recent weeks, driven at breakneck pace by American pressure to meet an unnecessary deadline, failed to produce an agreement satisfactory to the Sunni politicians in the talks. It appears that the draft will be put before the people with their strong disapproval. The paradoxical result is a looming disaster: a well-conceived constitution that, even if ratified, may well fail to move Iraq toward constitutional government.

181 See Art 61(A) of the TAL. See text of the TAL in Talmon (n 8) 1267.
182 Feldman and Martinez (n 179) 899–901.
approval of the constitution had to be respected.\textsuperscript{183} This decision to insist on adhering to the deadline has been called ‘one of America’s most serious blunders in post-war Iraq’.\textsuperscript{184} One of the most serious ramifications of this decision was to leave the Sunnis with little time to discuss the draft constitution and to negotiate changes to the document that could have opened the way for their substantive inclusion in the political process that was unfolding in Iraq.\textsuperscript{185}

To make matters worse for those who believed that the constitutional process could be a unifying moment for the Iraqi people, a week before the 15 August deadline, the negotiations concerning the content of the constitution moved from the CDC to a ‘series of \textit{ad hoc} meetings’ under the so-called Leadership Council, which was composed of representatives of the main parties,\textsuperscript{186} and from which the Sunni delegates were excluded.\textsuperscript{187} The CDC ended its work in September 2005, but amendments to the constitutional text were made up to the last minute. On 15 October 2005, in accordance with the timetable set in the TAL\textsuperscript{188} and incorporated in Resolution 1546,\textsuperscript{189} the new constitution was put forward for referendum.\textsuperscript{190} One of the last-minute compromises, which gave the Sunnis the chance, or perhaps the hope, of being able to modify unfavourable stipulations within the constitution, was the agreement to establish a Constitutional

\begin{thebibliography}{190}
\bibitem{185} Ibid. The drafting process was exceptionally short. Following the 30 January 2005 elections, it took a full three months before a government was formed and another month before the TNA established a committee to write the constitution.
\bibitem{187} Diamond (n 180) 346; see also Feldman and Martinez (n 179) 899.
\bibitem{188} See art 61 of the TAL in Talmon (n 8) 1267.
\bibitem{189} Res 1546 (n 4) para 4(c).
\bibitem{190} Feldman and Martinez (n 179) 899.
\end{thebibliography}
Review Commission with the task of preparing proposals for constitu-
tional amendments which could be adopted under a simplified procedure.\textsuperscript{191}

In a ceremony held on 13 October 2005, which was declared National
Constitution Day, the amended draft constitution was endorsed by the
Transitional Government of Iraq.\textsuperscript{192} The constitutional referendum held
on 15 October was approved by large majorities in the Shiite and Kurdish
provinces.\textsuperscript{193} However, most Sunnis voted against it.\textsuperscript{194} In the Sunni-dom-
inated provinces of Anbar and Salah ad-Din, the constitution was over-
whelmingly rejected by more than 96 per cent and 81 per cent of voters,
respectively,\textsuperscript{195} and in the province of Ninewa, it was rejected by 45 per cent
of those voting.\textsuperscript{196}

In contrast to the TAL, which included a Preamble mentioning interna-
tional law but not making reference to God, the Preamble of the 2005 Con-
stitution opens with the expression, ‘in the name of God, the most merci-
ful, the most compassionate’,\textsuperscript{197} before recognising ‘God’s right over us’.\textsuperscript{198}
Unlike the TAL, the Preamble refers to ‘the ancient and glorious history
of Iraq’, which places Iraq as the ‘homeland of the apostles and prophets’
where ‘the first law made by man was passed’ and ‘the oldest pact of just
governance was inscribed’.\textsuperscript{199} The document makes reference to the suffer-
ing and massacres under Saddam Hussein’s regime (i.e., Al-Dujail, Halal-
cha, Barzan, and Anfal) and, like the TAL, heralds the date of 30 January
2005, which was the date of the first general elections of the post-Saddam
era, as an historical moment of national unification.\textsuperscript{200}

In accordance with decisions already made in the TAL, Article 1 of the
2005 Constitution proclaims that ‘the Republic of Iraq is a single, indepen-
dent federal state with full sovereignty,’ and ‘its system of government is

\textsuperscript{191} Ibid, 900. For a more detailed account, see UNSC ‘Report of the Secretary-
General pursuant to paragraph 30 of Resolution 1546 (2004)’ (2005) UN Doc

\textsuperscript{192} Ibid, para 8.

\textsuperscript{193} Ibid, para 9.

\textsuperscript{194} Diamond (n 180) 350.

\textsuperscript{195} UN Doc S/2005/766 (n 191) para 10.

\textsuperscript{196} See Feldman and Martinez (n 179) 900.

\textsuperscript{197} Beyond the Preamble, 14 of the 2005 Constitution’s 139 articles make direct
or indirect reference to Islam or religious values. These include arts 2, 3, 7,
10, 12, 14, 29, 35, 39, 40, 41, 43, 48, and 89.

\textsuperscript{198} See Preamble of the 2005 Constitution in Mallat (n 5) 36-7.

\textsuperscript{199} Ibid.

\textsuperscript{200} Ibid.
represen
tative par
liamentary and democratic’. This article is emblematic of the radical change that Iraq had recently undergone. In less than three years, Iraq had moved, at least on paper, from being a despot
cic state to formally embracing democracy, federalism, and representative parliamentar
ism, and consolidating all this in a new Constitution.

Article 2(B) follows in the footsteps of the TAL by stating that ‘no law can be passed that contradicts the principles of democracy’. This provi
sion leaves no doubt that democracy had become the form of government of the new Iraq and that no legislation could derogate from its principles, though nowhere is it indicated what these principles of democracy were and who was supposed to enforce them. Nonetheless, these same principles constituted a bulwark against the establishment of an Islamic theo
cracy. In line with Western constitutionalism, Article 5 emphasises that the ‘law is sovereign’ and that ‘the people are the source of authorities and its legitimacy’; and in line with the TAL, Article 45 proclaims the ‘prin

ciple of separation of powers’ and Article 83 applies it by stressing that ‘judges are independent and there is no authority over them except that of the law’.

201 Article 1 of the 1970 Iraqi Constitution provides, *inter alia*, that the basic objective of the Iraqi republic was ‘to fulfill the United Arab State and to establish the Socialist System’. See also Art 12 [Economy, Arab Unity] of the 1970 Interim Iraqi Constitution which provided: ‘The State shall undertake the planning, directing and guiding the national economy for the aim: (a) To establish the socialist system on scientific and revolutionary basis. (b) To achieve the Arab economic unity’; Art 13 entitled ‘Public Property and Planning’, provided that national resources and basic means of produc

tion are the property of the nation. The central authority of the Republic of Iraq shall invest them directly in accordance with the requirements of the general planning for the national economy. See text of the 1970 Constitu


202 See Art 2(B) of the 2005 Constitution (n 5) 39–40.

203 Zaid Al-Ali (n 186) 639.

204 See Art 5 of the 2005 Constitution in Mallat (n 5) 3.

205 Ibid, Art 45.

206 Ibid, Art 85.
As with the TAL and the 1970 Constitution previously, the 2005 Constitution declares Islam to be the official religion of the Iraqi state.\textsuperscript{207} In a slight departure from the TAL, which defined Islam only as ‘a source of legislation,’ Article 2 provides that Islam is ‘a fundamental source of legislation,’\textsuperscript{208} though in line with the TAL and under US influence,\textsuperscript{209} the article does not state that Islam is ‘the’ source of legislation, and the use of the adjective ‘fundamental’ allows the possibility that other equally fundamental sources of legislation may play a role.\textsuperscript{210} On the other hand, Article 2 stipulates that no laws can be passed that contradict ‘established provisions of Islam’,\textsuperscript{211} even though Article 92 excludes experts of ‘Islamic jurisprudence’ from appointment to the Federal Supreme Court.\textsuperscript{212}

Article 4 moves away from the idea of Iraq as an Arab state as enshrined in the 1970 Constitution by proclaiming that ‘Iraq is a country of many nationalities, religions and sects and is a founding and active member of the Arab League,’\textsuperscript{213} and echoes the idea expressly mentioned in Article 5(b) of the 1970 Constitution that the Kurds have ‘national rights’. Like Article 7 of the 1970 Constitution, Article 4 of the 2005 Constitution recognises Kurdish as an official Iraqi language and the Kurds as a people of Iraq.

Like the TAL, the 2005 Constitution places much emphasis on the protection of human rights, though a significantly less individualistic sentiment permeates the new constitution. The individual is protected not only on the basis of their individualism, but also, and somewhat more importantly, as a member belonging to one or more of the groups and categories of individuals comprising Iraqi society. In fact, allowance is made for individual personal freedoms to be restricted in favour of community interests and aspirations. In a manner reminiscent of the 1970 Constitution, the
state is mandated to intervene directly in order to remove any obstacles to
the enjoyment of one’s rights.\footnote{For an example of the tenor of the 1970 Constitution, the following provisions can be noted: Art 26 [Expression, Association], stated that ‘The Constitution guarantees freedom of opinion, publication, meeting, demonstrations and formation of political parties, syndicates, and societies in accordance with the objectives of the Constitution and within the limits of the law. The State ensures the considerations necessary to exercise these liberties, which comply with the revolutionary, national, and progressive trend’. See text of the 1970 Constitution (n 201) above.} Article 14 of the 2005 Constitution, in line with the TAL\footnote{Art 12 of the TAL reads, ‘All Iraqis are equal in their rights without regard to gender, sect, opinion, belief, nationality, religion, or origin, and they are equal before the law’. See text of Art 12 in Talmon (n 8) 1253.} and the 1970 Constitution,\footnote{Ibid, Art 19 [Equality] reads, ‘(a) Citizens are equal before the law, without discrimination because of sex, blood, language, social origin, or religion; (b) Equal opportunities are guaranteed to all citizens, according to the law’. See text of the 1970 Constitution (n 201).} protects the rights of women by stating that ‘Iraqis are equal before the law without discrimination based on gender, race, ethnicity’;\footnote{This provision differs from the TAL. See Art 14, which (in relevant part) reads: ‘the Iraqi State and its governmental units, including the federal government, the regions, governorates, municipalities, and local administrations, within the limits of their resources and with due regard to other vital needs, shall strive to provide prosperity and employment opportunities to the people’. See text of Art 14 in Talmon (n 8) 1253.} and, like the 1970 Constitution, Article 16 provides that ‘equal opportunities are guaranteed for all Iraqis’, while further specifying that ‘the state guarantees the taking of the necessary measures to achieve such equal opportunities’.\footnote{Similarly, the new constitution did not contain the omnibus provision of the TAL, which states that those rights enshrined in the constitution were} Article 17 provides that ‘every individual shall have the right to personal privacy’ even though, unlike in the TAL, this right can be exercised only ‘so long as it does not contradict the rights of others and public morals’. Article 36 recognises the rights of ‘freedom of expression, through all means’, ‘freedom of press, printing, advertisement, media and publication’, and ‘freedom of assembly and peaceful demonstration’, but unlike the TAL, it makes clear that the enjoyment of these rights must be in accordance ‘with public order and morality’.\footnote{For an example of the tenor of the 1970 Constitution, the following provisions can be noted: Art 26 [Expression, Association], stated that ‘The Constitution guarantees freedom of opinion, publication, meeting, demonstrations and formation of political parties, syndicates, and societies in accordance with the objectives of the Constitution and within the limits of the law. The State ensures the considerations necessary to exercise these liberties, which comply with the revolutionary, national, and progressive trend’. See text of the 1970 Constitution (n 201) above.}
Congruent with the 1970 Constitution but unlike the TAL, Article 22 of the 2005 Constitution maintains that working is ‘a right for all Iraqis’ and that the ‘relationship between employees and employers’ is to be governed on an ‘economic basis’ and with regard ‘to the foundations of social justice’.

In a deviation from the TAL, but reflecting the 1970 Constitution, Article 29 describes the family as the ‘foundation of society’ and requires that the state be the guarantor of ‘motherhood, childhood and old age’, and that it ‘shall care for children and youth’ by providing ‘them with the appropriate conditions to further their talents and abilities’. Similarly, but more comprehensively than in the 1970 Constitution, much attention is given to health and education. Consistent with the TAL, Article 31 defines the right to health as the right of every citizen, but unlike in the TAL, this recognition takes concrete form in the 2005 Constitution. Under Article 30(2), the state is required to ensure ‘social and health security to Iraqis in cases of old age, sickness, employment disability, homelessness, orphanage or unemployment’, and is to work to ‘protect them from ignorance, fear and not the only rights the Iraqi people enjoyed, as they were also entitled to all of the rights ‘stipulated in international treaties and agreements.’ See text of Art 23 of the TAL in Talmon (n 8) 1255.

220 Art 32 [Right, Honor, and Duty to Work] of the 1970 Constitution reads: 
(a) Work is a right, which is ensured to be available for every able citizen. (b) Work is an honor and a sacred duty for every able citizen, and is indispensable by the necessity to participate in building the society, protecting it, and realizing its evolution and prosperity. (c) The State undertakes to improve the conditions of work, and raise the standard of living, experience, and culture for all working citizens. (d) The State undertakes to provide the largest scale of social securities for all citizens, in cases of sickness, disability, unemployment, or aging. (e) The State undertakes to elaborate the plan to secure the means necessary, to enable the working citizens to pass their vacations in an atmosphere, which enables them to improve their health standard, and to promote their cultural and artistic talents.

See text of the 1970 Constitution (n 201).

221 See Art 29(b) of the 2005 Constitution in Mallat (n 5) 53.

222 Art 33 [Health] of the 1970 Constitution reads: ‘The State assumes the responsibility to safeguard the public health by continually expanding free medical services, in protection, treatment, and medicine, within the scope of cities and rural areas’. See text of the 1970 Constitution (n 201).
Article 32 clarifies that ‘the State cares for the handicapped and those with special needs and ensures their rehabilitation in order to reintegrate them into society’. Distinct from the 1970 Constitution and the TAL, the 2005 Constitution adopts an approach of social solidarity, with Article 34 proclaiming that ‘free education is a right for all Iraqis in all its stages’. Meanwhile, Article 31 prescribes that ‘children have rights over their parents in regard to upbringing, care and education’ and ‘parents shall have rights over their children in regard to respect and care especially in times of need, disability and old age’.

In line with the state-centred approach prevailing in most of its norms and thus limiting its embrace of market economy, Article 25 confers a strong role on the state in the management of the economy, though not as strong as was the case in the 1970 Constitution. It is for the state to guarantee ‘the reform of the Iraqi economy in accordance with modern economic principles to ensure the full investment of its resources, diversification of its sources and the development of the private sector’. Likewise, it is the state, through law, that ‘guarantees the encouragement of investments in the various sectors’.

Consistent with the choice of federalism contained in Article 1, Articles 112 to 117 set out the authorities and competences of the central and local entities. Article 112 states that ‘the federal system in the Republic of

223  See Art 30 of the 2005 Constitution in Mallat (n 5) para 2 at 53.
224  Ibid, Art 32(d).
225  Art 27 [Education] of the 1970 Constitution reads:

(a) The State undertakes the struggle against illiteracy and guarantees the right of education, free of charge, in its primary, secondary, and university stages, for all citizens. (b) The State strives to make the primary education compulsory, to expand vocational and technical education in cities and rural areas, and to encourage particularly night education which enables the popular masses to combine science and work. (c) The State guarantees the freedom of scientific research and encourages and rewards excellence and initiative in all mental, scientific, and artistic activities and all aspects of popular excellence.

See text of the 1970 Constitution (n 201).
226  See text of art 34 of the 2005 Constitution in Mallat (n 5) 54.
227  Ibid, art 29(B), para 2.
228  Ibid, art 25.
Iraq is made up of a decentralised capital, regions and governorates, and local administrations.\(^{230}\) Like the TAL, the 2005 Constitution created, or rather confirmed the creation of, only one Iraqi region, namely, the Kurdistan Regional Government,\(^{231}\) while maintaining the possibility of the establishment of new macro-regions which could each have their own constitution,\(^{232}\) without requiring the permission of the federal government.\(^{233}\) The powers of the Kurdistan Regional Government sanctioned in the 2005 Constitution are quite broad. It was given executive, legislative, and judicial powers, ‘except for those powers stipulated in the exclusive powers of the federal government’.\(^{234}\) As an indication of the amount of power conferred to it, the Kurdistan Regional Government could even amend the application of national legislation within Kurdistan in any case of ‘a contradiction between regional and national legislation’, unless it concerned matters within the ‘exclusive powers of the federal government’.\(^{235}\)

In a centralised state (as Iraq used to be), control over natural resources such as oil was the purview of the central government;\(^{236}\) in a federal state, the issue is evidently more problematic, particularly if natural resources, as in the case of Iraq, are not distributed uniformly within a territory but only in certain areas. Not surprisingly, therefore, Article 109 is essentially an interlocutory norm. Rather vaguely, it provides that the identification of the criteria for the allocation of oil revenues is to be made by means of

\(^{230}\) Ibid, art 112.

\(^{231}\) Ibid, art 113 reads: ‘This Constitution shall approbate the region of Kurdistan and its existing regional and federal authorities, at the time this constitution comes into force.’

\(^{232}\) Ibid, Art 120.

\(^{233}\) According to Art 115, a mega-region could be formed by one or more governorates through a referendum in the provinces wishing to merge. Such a merger would have to be approved by ‘one-third of the council members of each governorate intending to form a region’ or by ‘one-tenth of the voters in each of the governorates intending to form a region’. Remarkably, the formation of a mega-region could occur without the permission of the federal government. See generally Andrew Arato, Constitution-Making Under Occupation (Columbia University Press 2009) 226–37.

\(^{234}\) Ibid, Art 117, para. 1.

\(^{235}\) Ibid.

\(^{236}\) Ibid, see Art 13 [Public Property and Planning] which states that national resources and basic means of production are owned by the Iraqi people, and are directly invested by the Central Authority in the Iraqi Republic according to the exigencies of the general planning of the national economy.
federal legislation in ‘fair manner in proportion to the population distribution in all parts of the country’. 237

Article 102 maintains the independent entities and commissions established by the CPA, 238 and, undoubtedly making matters worse for reconciliation between the Shiites and the Sunnis, 239 Article 131 keeps in place the de-Ba’athification Commission under the control of the Iraqi parliament. 240

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237 Ibid, Art 109 provided that

First: The federal government with the producing governorates and regional governments shall undertake the management of oil and gas extracted from current fields provided that it distributes oil and gas revenues in a fair manner in proportion to the population distribution in all parts of the country with a set allotment for a set time for the damaged regions that were unjustly deprived by the former regime and the regions that were damaged later on, and in a way that assures balanced development in different areas of the country, and this will be regulated by law.

238 These are: the High Commission for Human Rights, the Independent Electoral High Commission and the Commission on Public Integrity. See text of Article 102 of the 2005 Constitution in Mallat (n 5) 79.

239 Bremer, My Year in Iraq (n 19) 297. The process of De-Ba’athification was not carried out through judicial trials determining any criminal responsibility but through summary dismissal on account of membership in the Ba’ath party. It was not unusual, however, for De-Ba’athification to be used to justify acts of violence and revenge by the Shiites against the Sunnis, who responded in kind. The Sunday Times described this situation as follows: ‘the Shi’ites, who endured decades of oppression, are threatening to purge members of Saddam’s former Ba’ath party from the army and the intelligence services, a move that would provoke fierce retaliation from the Sunnis. Since the execution-style killings of 34 men whose bound and blindfolded bodies were found in three predominantly Shiite areas of Baghdad in May, other tit-for-tat murders have followed, with clerics among the targets. What occurred was a real revenge campaign against took very violent forms’. Hala Jaber, ‘Allawi: This is the Start of Civil War’ Sunday Times (London, 10 July 2005)

240 Art 131 reads: ‘the High Commission for De-Ba’athification shall continue its functions as an independent commission, and in coordination with the Judicial Authority and the Executive institutions within the framework of the laws regulating its functions. The Commission shall be attached to the Council of Representatives.’
5.2.2. A foreign-imposed constitution?

Establishing Iraq as a state that is democratic, federalist, pluralistic, respectful of human rights, and based on the rule of law was among the goals of the CPA and the Security Council. On paper, these goals were consolidated in the 2005 Constitution. In Resolution 1770, the Security Council acknowledged this result, remarking that ‘a democratically elected and constitutionally based Government of Iraq is now in place’. It is doubtful that Iraq would have become, at least on paper, a democratic and federalist state in less than three years from the start of Operation Iraqi Freedom without the force-based influence exercised by the CPA and the initiative and endorsement of the Security Council. Fundamental choices for the future of Iraq, such as federalism, were already made in the TAL during, and as a result of, the occupation. It is difficult to argue that, without the TAL, the Iraqis would have chosen to have a federal and democratic state; but the fact that these choices were made during the occupation by a limited group of Iraqis acting in coordination with the CPA demonstrates that there was considerable foreign influence.

However, labelling the 2005 Constitution as a foreign-imposed constitution is excessive. The 2005 Constitution is an Iraqi Constitution written by Iraqis who were elected by Iraqis at a time when the occupation had ended. As our review has shown, the 2005 Constitution is—apart from the choices made with regard to the new form of state and government—an utterly different document from the strongly foreign-influenced TAL. It reflects a conception of the functions of the state and the rights of the individual that is much less individualistic than that enshrined in the TAL, and it is closer to Iraqi and Arab history, culture, and traditions, as reflected in the 1970 Constitution. Unlike the TAL, several provisions of the 2005 Constitution mirror those of the 1970 Constitution, evidencing a social conception of society as a combination of categories and groups, with a significant role played by the state in ensuring the welfare of the people. In several

244 Zaid Al-Ali (n 186) 638.
respects, the 2005 Constitution is a return to Iraq’s past as defined in the 1970 Constitution, which came just after the Ba’ath revolution of 1968 and shortly before Saddam Hussein became President of Iraq in 1974. On the other hand, it is also an embracing of the present, with Iraqis committing themselves to a system of state and government they did not experience before. Judging from the content of its provisions, it may not be accurate to conclude that the 2005 Constitution was in and of itself imposed, in the sense that its content was dictated by foreign actors, even though there certainly was such an influence via the TAL on a number of issues. The Iraqis could have tried to rebut this influence if they had so wished; however, they did not do so. On the contrary, some key choices, such as federalism, were also backed by those Iraqi groups most active in the preparation of the Constitution and had the necessary ability and strength to advance their preferred view. On this point, Zaid Al-Ali has suggested that the 2005 Constitution’s embracing of a federal system of government was the product of a particular political alliance between the Kurds and the Shiites and that it resulted in the 2005 Constitution being ‘far removed from the type of state that the majority of the population would like to live in’.246

Because of these reasons, and considering that it was drafted by elected Iraqis, I would hesitate to refer to the 2005 Constitution in terms of an imposed constitution, but it is worth remembering that the 2005 Constitution did achieve what the CPA had envisaged for Iraq. In this sense, the 2005 Constitution is the apex of the transformative project initiated by

245 According to the International Crisis Group:

no single issue proved more polarising in post-war Iraq than the 2005 drafting of the country’s permanent constitution. Kurds, who had let known their intention to stay in Iraq while expressing their preference to secede, were joined by SCIRI in a bid to impose a federal structure that would allow, aside from a Kurdish region that is accepted by most Iraqis, the establishment of a southern nine-governorate Shiite-dominated super region that would control most of the country’s oil. This would leave Sunny Arabs landlocked, deprived of natural resources and uncertain of any wealth flowing their way through a revenue-sharing mechanism controlled in name by the federal state but in effect by the right, powerful and potentially vengeful regional government in the south.


246 Zaid Al-Ali (n 186) 652.
the CPA, particularly given its more permanent character in comparison with the TAL. The fact that by this time it was no longer a CPA project but a shared enterprise of the Security Council and the Iraqi people attenuates the responsibility of the CPA for its realisation.

Mindful of the foregoing, I would instead suggest that the process leading to the enactment of the 2005 Constitution was an instance of ‘imposed constitutionalism’. Through the use of this term, I wish to highlight the fact that the process leading to the adoption of the 2005 Constitution, including, in particular, the timeframe within which it was supposed to be enacted, was imposed upon the Iraqi people and moved forward at a level above them with little chance of alteration. Until 2005—when they voted for an Iraqi parliament that was supposed to draft the constitution—the Iraqi people were essentially spectators of the political and constitutional process that was unfolding in Iraq because of the strict, and ultimately binding (made so by the Security Council) timetable devised during the occupation. As noted by Zaid Al-Ali, the fact that the Iraqi people approved the Constitution in a referendum is not sufficient to legitimise the process, as the Iraqis ‘approved a text that they had not seen, let alone read’—the Iraqis had no time to review the final draft by virtue of the fact that a ‘number of changes were introduced two days before the referendum date’.247 Certainly, the fact that the Iraqi assembly tasked with drafting the constitution did not challenge its planned adoption may be taken as a sign of consent by the Iraqi people to the proposed timetable.

Yet speaking of a genuine consent in the violent and uncertain context in which the preparation of the constitution unfolded would be likely to be an overstatement. The Iraqi Transitional Assembly, because of its weakness, had little alternative, even if it had so desired, to stand against those countries that had permitted its election and defended its existence from the insurgents. Thus, from a procedural perspective at least, it seems inevitable to speak of the foreign imposition of a process that led to the adoption of the 2005 Constitution. Such a perspective may explain why the major drawback of the political and constitutional process was that it was not a moment of national unification.248 Sadly, but tellingly, the security situa-

247 Zaid Al-Ali (n 186) 641.
248 In his 7 September 2005 Report to the Security Council, the Secretary-General wrote that ‘the security situation in Iraq inevitably affected the constitution-making process. Among other incidents, representatives of the Sunni Conference were threatened repeatedly because of their participation in the constitutional proceedings. On 19 July 2005, Mijbil Sheikh al-Issa, a
tion worsened further in the wake of approval of the 2005 Constitution on 15 October 2005. After this date, Iraq fell into a cycle of extreme sectarian violence that has been regarded as a civil war.\footnote{An International Crisis Group Report stated that...}{249}

In the session of the Security Council debating Resolution 1770, the Argentinean delegate observed bitterly that ‘the political and constitutional process, unfortunately, has not had the positive effect we would have liked to see and has not contributed to creating a climate of reconciliation and harmony among all Iraqi communities, as has been predicated.’\footnote{Ibid 8.}{250} In seeming confirmation that the Constitution had not been a moment of unification, two days prior to the referendum date, the drafters incorporated

\begin{quote}
Sunni Arab representative on the Committee, Dahmen al-Jabouri, an adviser to the Committee, and their driver were assassinated in Baghdad. In response to this assassination the representatives of the Sunni Conference temporarily suspended their participation and imposed a set of demands for their return, including an investigation into the incident, and that they be accorded the same protection arrangements as the other members of the Committee. Through efforts of the Transitional Government and the Assembly, assisted by representatives of the international community, including the United Nations, the representatives of the Sunni Conference returned to the Committee.’ UNSC ‘Report of the Secretary-General pursuant to paragraph 30 of Resolution 1546 (2004)’ (7 June 2005) UN Doc S/2005/373, para 7.
\end{quote}
Article 142 into the Constitution, which set out a procedure for possible amendments to the Constitution.\textsuperscript{251} According to Article 142, as soon as the new parliament was to enter into session, the Council of Representatives was to establish a constitutional review committee with a view to proposing to the Council—in a period of no more than four months—amendments to the Constitution.\textsuperscript{252} This being so, serious consideration needs to be given to the argument that imposing the drafting of a constitution in a wartime situation and when a part of a people is engaged in an insurgency, even if fuelled and participated in by terrorist groups, may constitute a violation of the right to self-determination of the Iraqi people, and it should be questioned whether such a form of democratisation is either viable or sensible.

Responsibility for this lies not only with the CPA and the countries behind it, which planted the seeds for the transformation of Iraq, but also, with the Security Council who, so to speak, gave water to the plant. To be clear, it is not argued that the process of democratisation of an occupied country is illegal when supported by the Security Council as a necessary measure under Chapter VII of the Charter. What the Security Council may not do, however, from the perspective of the right to self-determination, is to alter the reality by attributing to a people a will that it has not expressed. The Security Council should not claim to be acting through the consent of a people when consent is limited, or difficult to assess, as it must be in a country that is highly fragmented, partly involved in an insurgency, and partly involved in sectarian struggles. In such volatile situations, it is for the Security Council to articulate convincing reasons on the basis of which it claims that a given constitutional process should go forward notwithstanding the divisions within the people concerned and the facts on the ground that cast doubt on its feasibility.

\textsuperscript{251} Section of 1 of Article 142 reads:

The Council of Representatives shall form at the beginning of its work a committee from its members representing the principal components of the Iraqi society with the mission of presenting to the Council of Representatives, within a period not to exceed four months, a report that contains recommendations of the necessary amendments that could be made to the Constitution, and the committee shall be dissolved after a decision is made regarding its proposals.

\textsuperscript{252} Zaid Al-Ali (n 186) 641.
5.3. The Maliki Government (May 2006–re-elected in 2010)

On 15 December 2005 new general elections were held in Iraq in order to elect the 275 members of the Council of Representatives. Unlike in the previous elections, more than 75 per cent of the Iraqi population cast their votes, including the Sunni group. Following months of debate, on 23 April 2006 the Council of Representatives confirmed Jalal Talabani as President of Iraq, and on 20 May approved the appointment of the new Government of Iraq led by Prime Minister Jawad al-Maliki and thirty-seven ministers. As had been the case for the previous elected representatives, internal security constituted the key hurdle for the government of Maliki. Between 2006 and 2007, the level of violence in Iraq reached its zenith. On one side, there was the international armed conflict between the Multinational Force and the insurgents; on the other, the internecine conflict between Sunni and Shiite groups, which escalated to the point of civil war. According to a Report by the UN Secretary-General, ‘the number of civilians killed has increased considerably and stands at an average of 100 people per day, while more than 14,000 were reportedly wounded per month’.

The Maliki Government focused on promoting national reconciliation and dialogue while intervening militarily against the militias. On 25 June 2006, Maliki unveiled a 24-point National Reconciliation Plan which called, inter alia, for a qualified amnesty for the insurgents, the release of...
detainees, the reform of the legal and judicial systems, the facilitation of dialogue on constitutional and related matters, and the resolution of the problem of militias. In an effort to foster reconciliation, on 6 April 2007 the government announced its decision to provide pension payments for senior officers of Saddam Hussein’s armed forces.

In August 2006, more than 3,700 Multinational Force troops and their armoured fighting vehicles were deployed in Baghdad. Measures taken jointly by the Multinational Force and the Iraqi government included ‘control of access to and from Baghdad, curfew extensions and house-to-house cordon and search operations’. Despite close cooperation with the Multinational Force, the Maliki Government was eager to develop its own policies, a stance which caused friction with the US.

As part of the so-called ‘Surge’, the US sent 28,000 extra troops to Iraq in February 2007 to implement a new security plan for Baghdad. By the middle of 2008, the situation in Iraq had improved. On 24 March 2008, the Maliki Government announced that the Iraqi security forces had launched a massive assault on the Mahdi Army in Basra and in Baghdad. This led to six days of intense fighting until an agreement was reached to stop the violence. Two months later, 10,000 Iraqi governmental troops entered Sadr city and quickly deployed throughout its neighbourhoods, ushering in a period of calm in the troubled area not experienced since 2003.

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262 Ibid, para 7.
263 Ibid, para 11.
264 Ibid, para 47.
268 Dawisha (n 159) 273; Emma Sky, ‘Iraq, From Surge to Sovereignty’ (2011) 90(2) Foreign Affairs 117, 120.
270 Dawisha (n 159) 273.
Because of the gravity of the security situation and the ensuing divisions within the government itself, the ability of the Maliki Government to supplement its security initiatives with the implementation of projects to improve the delivery of essential services, provide jobs, and rebuild socio-economic infrastructure remained limited. One important economic initiative of the government, however, was the International Compact, co-chaired with the UN, to frame a new partnership with the international community on economic issues.

At the same time, the Council of Representatives considered several pieces of legislation. These included an Iraq Hydrocarbon draft law; a law on national investment; a law on the formation of macro-regions; a law on ‘de-Ba'athification'; a law on the treatment of minorities in the city of Kirkuk; possible changes to the Iraqi constitution; defining the status of foreign private contractors; and the possibility of an amnesty for the insurgents detained in Iraqi prisons. Following a proposal from the government to the Council of Representatives, the Council approved the ‘Law of Supreme National Commission of Accountability and Justice' which modified some of the restrictions contained in the CPA's Order 1 by granting certain members of the Ba'ath party their pensions and the possibility of returning to work in the public sector.

The Maliki Government made a significant effort to reduce foreign influence over Iraq. On 25 November 2007, Iraq and the US signed a ‘Dec-
According to this document, the State of Iraq was to ask the Multinational Force to remain in Iraq ‘for a final time’, and that ‘as a condition for this request’ the designation of the situation in Iraq as a threat to international peace and security under Chapter VII of the UN Charter was to end. This request was subsequently contained in a letter from Maliki to the President of the Security Council dated 7 December 2007.

In view of the foregoing, I would argue that the modalities of formation and practice of the Maliki Government confirmed the end of the occupation of Iraq. It sought to exercise sovereignty, develop its own policies, and work independently from the US. Yet Iraq remained in a situation of limited sovereignty. This was the case because the Maliki Government, weakened by sectarian divisions and by the growing armed conflicts within Iraq, had to rely on the Multinational Force for its existence and remained under the influence of the Security Council as long as the situation in Iraq constituted a threat to international peace and security. Importantly, however, the Maliki Government was generally able to affirm its will when necessary and exercised its sovereignty independently from the influence of the former occupants. Confiming his status within Iraq, Maliki was re-


284 Ibid.

285 Letter dated 7 December 2007 from the Prime Minister of Iraq addressed to the President of the Security Council, See UNSC Res 1790 (18 December 2007) UN Doc S/RES/1790, Annex I, 5–6 (Resolution 1790). Speaking before the Security Council at the session adopting Resolution 1790, the Iraqi Ambassador stated:

The Government of Iraq considers this to be its final request to the Security Council for the extension of the mandate of MNF-I and expects, in future, that the Security Council will be able to deal with the situation in Iraq without the need for action under Chapter VII of the Charter of the United Nations ... The Government of Iraq requests that the resolution to be adopted by the Security Council should reaffirm respect for the independence, sovereignty, unity and territorial integrity of Iraq and also reaffirm the commitment of Member States to the principle of non-intervention in its internal affairs.

UNSC Verbatim Record (18 December 2007) UN Doc S/PV/5808, 5–6.
elected in 2010 and nominated Prime Minister again in April 2011, a position he holds at the time of writing (2013).

6. The Withdrawal of the Multinational Force

On 17 November 2008, the US and Iraq signed the ‘Strategic Framework Agreement’, and the agreement ‘on the Withdrawal of the United States Forces from Iraq and the Organization of their Activities during their Temporary Presence in Iraq’. These two agreements pursued a common aim: establishing ‘une coopération sur le long terme entre les deux États’. As a result of these agreements, the situation in Iraq was no longer considered a threat to international peace and security and the issue of the role of the Multinational Force in Iraq was to be addressed bilaterally.

Recognising that ‘major and positive developments in Iraq’ had ‘taken place subsequent to April 9, 2003’, the Strategic Framework determined that the ‘threat to international peace and security posed by the Government of Iraq no longer exists’. Demonstrating that Iraq’s sovereignty was to be taken seriously, Section II of this document committed the US ‘to work with and through the democratically elected Government of Iraq’ to support and strengthen ‘Iraq’s democracy and its democratic institutions’.

In the ‘Withdrawal Agreement’, it was determined that ‘All the United States Forces’ were to ‘withdraw from all Iraqi territory’ by no later than 31 December 2011. According to this agreement, the purpose of the US forces in Iraq was to provide ‘temporary assistance’ to support ‘Iraq in its efforts to maintain security and stability’, and cooperate ‘in the conduct of

286 ‘Strategic Framework Agreement for a Relationship of Friendship and Cooperation Between the United States of America and the Republic of Iraq’ 17 November 2008, reproduced in Mallat (n 5) 411–17 (Strategic Framework).
289 Ibid, 63.
290 Ibid (n 286) Preamble.
291 Ibid, Section II.
292 Withdrawal Agreement (n 286) Art 24, para 1.
operations against al Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime’. Unlike the resolutions of the Security Council, the Withdrawal Agreement recognised the right of the State of Iraq to express ‘double consent’. Not only did the Iraqi Government have the right to consent to the presence of the Multinational Force in Iraq, but also to approve the military operations of the Multinational Force, which were to be carried out ‘with the agreement of the government of Iraq’ and in coordination ‘with Iraqi authorities’. Furthermore, Article 4 stressed the US’s obligation to ‘respect the laws, customs, and traditions of Iraq and applicable international law’. Importantly, Article 12 of the ‘Withdrawal Agreement’ sought to solve the problem of jurisdiction over the conduct of private contractors by attributing to Iraq ‘the primary right to exercise jurisdiction over United States contractors and United States contractor employees’, while the US was to have the ‘primary right to exercise jurisdiction over members of the United States Forces’.

On 1 September 2010, President Obama declared the US combat mission in Iraq over. Two weeks earlier, the last combat brigade had crossed the border into Kuwait, leaving behind just under 50,000 US troops, whose primary mission was to ‘advise and assist’ Iraqi security forces until their withdrawal at the end of 2011.

7. Conclusion

Though difficult to pinpoint an exact moment at which it ended, due to the complex factual situation existing in Iraq, it is submitted that the occupation of Iraq did not end in June 2004, but continued for at least the duration of the Interim Government. It is probably only with the Jaafari and Maliki governments, both of which were selected by assemblies chosen by the Iraqi people, that it is possible to speak of a formal end to the occupation, even though the fact that both these governments were temporary (and not so by choice of the Iraqis) reveals that their sovereignty was very limited indeed. Iraq did not become a fully sovereign and independent country overnight. Quite to the contrary, the process from occupation to full

293 Ibid, Art 4(1).
294 Ibid, Art 3.
295 Ibid, Art 4(3).
296 Ibid, Art 12.
sovereignty was tortuous and complex, and lasted at least for the entire duration of the Interim Period.

The inquiry conducted in this chapter as to the length of the occupation is not only relevant from the perspective of general international law and the question of knowing whether the law of occupation continued to apply, but also draws attention to the link between the period in which Iraq was under the CPA’s occupation and the Interim Period. The connecting bridge between these two periods was the political and constitutional process that sought to achieve the democratisation of Iraq. The linking agents were the Multinational Force, which ensured control over Iraqi territory, and the Security Council, which prodded the political and constitutional process along until its completion. What had begun as a unilateralist effort occurring in defiance of the Security Council continued as an international project to democratise Iraq, which was—formally—accomplished through the participation of the Iraqi people, with their approval of a democratic constitution. The establishment of the Interim Government was one of the steps of such process. A government less favourable to the process the Security Council was supporting might not have deemed itself bound to accomplish the agenda set during the occupation. Along similar lines, it could be observed that the temporary duration of the Jaafari Government, notwithstanding its being a ‘sovereign government’, can be justified by the need to advance the political and constitutional process aimed at the democratisation of Iraq.

This being so, it is submitted that what happened in the Interim Period at the political and constitutional level is a consequence of choices made by the CPA and the Security Council during the occupation. Hence, the assessment of the conduct of these bodies for possible breaches of international law has to be undertaken by looking at the whole period, while distinguishing between the different roles that were played at the various stages. If it is correct to say that the states behind the CPA breached the law of occupation and the right to self-determination by pushing for the adoption of the TAL and shaping its content, then, a fortiori, they bear some degree of responsibility for the denial of the right to self-determination that the imposed political and constitutional process resulting from the TAL and the 15 November Agreement brought about.

The same conclusion can be reached regarding the practice of the Security Council, which supported and brought to completion a political and constitutional process that the Iraqis had not chosen and which, as a result, can be seen as an instance of hetero-determination rather than self-determination. Of course, those who do not concur with the conclu-
sion that this process was imposed on the Iraqis may instead herald the role exercised by the CPA and the Security Council during the occupation phase as instrumental in leading Iraq towards democracy. Of particular note when considering this latter scenario is the fact that the security situation significantly worsened after the approval of the new constitution, reaching civil war levels, which demands serious reflection as to both the results achieved by the political and constitutional process described herein, and the means adopted to push it forward.
Iraq today is a democratic State that respects freedoms and is governed by a Constitution.

—Al Bayati, Iraqi Ambassador to the UN 2009

To be sure, the cost was high in the blood and treasure of the United States and also of the Iraqi people. But those lives have not been lost in vain. They gave birth to an independent, free, and sovereign Iraq. And because of the sacrifices made, these years of war have now yielded to a new era of opportunity. Together with the Iraqi people, the United States welcomes the next stage in U.S.-Iraq relations, one that will be rooted in mutual interest and mutual respect.

—Leon Panetta, US Secretary of Defence, 2011

In light of the analysis conducted in previous chapters, the occupation of Iraq can be divided into two phases—each with its own distinctive traits. The first and most significant of these phases, by virtue of the profound transformation of Iraqi society that it sought to bring about, involved the direct ruling of Iraq by the occupying powers through an occupation administration: the Coalition Provisional Authority (CPA). This phase lasted from mid-April 2003 until the end of June 2004. The second phase of the occupation of Iraq was a form of *sui generis* indirect occupation. Coalition Forces maintained control over Iraq due to the presence of a non-sover-

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1 UNSC Verbatim Record (18 June 2009) UN Doc S/PV.6145, 7.
eign indigenous government. By and large, this latter phase could be said to have ended when a government chosen by an elected Iraqi assembly took office at the beginning of 2005. However, even though it was not suspended as it occurs in a case of occupation, such sovereignty remained ‘limited’, as discussed in Chapter 5, until at least the end of the Interim Period due the continuing influence of foreign actors.3

The phase of direct occupation of Iraq can be described as a case of a relatively short transformative military occupation affecting the political, economic, and social structure of Iraq. It was a model of hybrid occupation, which comprised both unilateral and multilateral elements, predominantly the former. It was essentially unilateral in the determination of the policies to be pursued, as well as in the structure and the style of governance of Iraq. It had a multilateral trait in the Security Council’s support for the political and constitutional project prompted by the CPA. Despite the close involvement of the Security Council, the CPA was not a UN administration and did not act under the supervision of the Security Council, to whom it did not report. Notwithstanding the supportive stance of the Security Council and the participation of the IGC, an Iraqi body, in certain aspects of the governance of Iraq, the CPA was not a consent-driven occupation. It remained a substantially force-based enterprise throughout, which failed to gain legitimacy through the policies it enacted, as evidenced by the emergence of a gradual but steady insurgency.

By contrast, the period in which Iraq was under the administration of the Interim Government might be regarded as a form of indirect occupation. Far from being ‘sovereign’, the Interim Government was an indigenous administration operating under a framework defined by the Security Council to implement an agenda set during the formal phase of the occupation. There was no a formally established mechanism through which the indirect occupants could give daily instructions to the Iraqi govern-

3 While it is beyond the purpose of this book to undertake an analysis of the events after the Interim Period, it may be noted that Emma Sky’s argument that Iraq remained in a situation of limited sovereignty even after the Interim Period is a strong one. In her view, the turning point in relations between the US and Iraq occurred only after the 2009 signing of the Withdrawal Agreement and the Strategic Framework Agreement which, says Sky, ‘solidified the coming shift in the United States’ relationship with Iraq from one of patronship to one of partnership’. See Emma Sky, ‘Iraq, From Surge to Sovereignty’ (2011) 90(2) FA 122.
ment. Yet it was to the Multinational Force that the Interim Government, in the wartime situation which existed at the time, owed its existence.

Having briefly outlined the key characteristics of the CPA’s occupation of Iraq and the subsequent phase of the Interim Government, it is now possible to undertake a brief comparison between the occupation of Iraq and some of the cases of transformative occupation discussed in Chapter 1. This comparison does not aim to be comprehensive, which would require a much longer study. Adding to the analysis conducted in Chapter 1, it seeks to draw attention to some key similarities and differences that can help our reflection on the kind of response international law should give to transformative occupations that may be attempted in future.

The first question to be addressed is whether the occupation of Iraq constitutes a repetition of previous cases or, rather, is a departure from such examples, with its own new and distinctive traits, or, perhaps, something in between. This chapter suggests that the occupation of Iraq may share with its predecessors a sort of hegemonic approach, a sense of entitlement to shape another country’s future due essentially to the unflinching conviction in its own system of values and governance, even though the reaction of the people affected may be different from one country to another and from one historical context to another. It cautions against justifying the effort to democratise Iraq on the basis of the rather successful precedents set by the Allied Powers’ occupation of Germany and Japan because of the profound historical, political, and normative differences. This comparative effort will be followed by a more specific analysis of how the precedent set by the occupation of Iraq may influence future developments within the field of international law.

1. Break from or continuum with the past?

1.1. A comparison with the occupation of Mesopotamia and the subsequent Mandate

At the outset, it should be noted that, strictly speaking, the occupation of Iraq should be compared only with the occupation of Mesopotamia (1914–1919) and not also with the ensuing Mandate (1920–1932), as the two, albeit both being forms of foreign administration of territory, are formally different models. It suffices to recall here that the system of mandates was a form of administration of territory that resulted from a decision made by the League of Nations, an assembly of sovereign states, and unfolded
on the basis of the instructions contained in the text of the Mandate.\textsuperscript{4} By contrast, an occupation is a form of control of territory that results from an international armed conflict governed by the law of occupation. However, both a mandate and a transformative occupation constitute examples of foreign administration and control of territory, which may share a common intention of establishing a new political order within the controlled territory. For the purposes of our comparison, these shared characteristics may be viewed as sufficient, while bearing in mind the aspects that differentiate them.

1.1.1. Some similarities and differences

Both the occupation of Mesopotamia and that of Iraq were the consequences of international armed conflicts. The occupation of Iraq was the result of a ‘war of choice’, supported by a coalition of states, and fought against a state which was considered to be an enemy and a threat.\textsuperscript{5} By contrast, the British occupation of Mesopotamia was part of a much broader conflict, namely World War I, and can be justified as part of the ‘logic’ of that conflict. In both occupations, the occupants drew a distinction between the local populations and their former rulers, presenting themselves as liberators, and expressing their commitment to improving the life of the civilian population with whom, ostensibly, they had no quarrels. Both occupants pursued broad military, geo-political, and economic interests, which Iraq, due to its location, dimensions, and natural resources, could serve well.

Both the occupation of Mesopotamia and that of Iraq were carried out through the support of ‘local elites’. The British relied, in particular, on the local tribes (Sunnis and Shiites),\textsuperscript{6} though the first Iraqi government formed

\textsuperscript{4} Detailing how the mandate for Iraq was given effect through a series of treaties, see the discussion in Chapter 1, § 3.2.2. On the mandate for Iraq, see also Norman Bentwich, ‘Mandated Territories: Palestine and Mesopotamia (Iraq)’ (1921–1922) 2 BYIL 48–56; and, for a thorough analysis from the perspective of international law, see Ralph Wilde, \textit{International Territorial Administration: How the Civilizing Mission Never Went Away} (OUP 2008) 161–89 and 306–63.


\textsuperscript{6} Charles Tripp, \textit{A History of Iraq} (3rd edn, CUP 2007) 38.
after the occupation was dominated by the Sunni group. According to Kristian Coates Ulrichsen, the ‘British rewarded the Sunni notables for their loyalty with positions of dominance and institutionalized the inter-communal settlement that dominated Iraqi political life until the US-led overthrow of Saddam Hussein in 2003’. Kristian Coates Ulrichsen, ‘The British Occupation of Mesopotamia, 1914–1922’ (2007) 30(2) Journal of Strategic Studies 352.
themselves had been instrumental in forming, which enabled them to continue exerting some degree of influence.

When comparing the occupation of Iraq with the occupation of Mesopotamia and the ensuing Mandate, a useful place to start is the different historical and normative context. The occupation of Mesopotamia and the transformation of the existing political order which was undertaken served the purposes of an empire at war with another empire during World War I. The occupation of Iraq was, by contrast, the result of a use of force which had, as its principal justification, the belief that Iraq had weapons of mass destruction and could use them. The latter unfolded in the age of the formal equality of states, human rights, and self-determination in which the Security Council is the main arbiter of the legality of the use of force, not states. Consequently, there is a conspicuous difference in the content of the applicable normative framework. At the time of the occupation of Mesopotamia, self-determination had not been consolidated into a normative principle; the Geneva Conventions had not been adopted; and human rights norms had yet to emerge.

In summary, the international law framework applicable to the occupation of Iraq in 2003 was significantly more restrictive than that applicable to the occupation of Mesopotamia and the ensuing Mandate. What was permissible at that time, by virtue of the greater freedom states enjoyed in the context of a rather primitive international law, cannot be considered legal in the twenty-first century, given the remarkable developments within the field of international law. In the occupations of both Mesopotamia and Iraq, the Hague Regulations were formally applicable, but in the case of Mesopotamia they were considered irrelevant, and no objection was raised to this approach, apart from the US protest against the UK’s attempts to control Iraq’s oil. By contrast, in the case of the occupation of Iraq, the Security Council insisted on the respect of international humanitarian law by the occupying powers.

While the occupation of Mesopotamia and the ensuing Mandate lasted for more than fifteen years, the CPA’s occupation of Iraq was much shorter: it continued for only fourteen months. The subsequent phase that we have described as indirect occupation lasted for eleven months, even though Iraq remained under a form of international scrutiny, as the Security Council considered the situation in Iraq to be a threat to international

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peace and security until Resolution 1958 was issued in 2010.9 The end of the occupation of Mesopotamia appears to have been determined by the UK's desire to control Iraq indirectly once opposition to its direct rule began to emerge.10 Irrespective of the will of the Iraqis and the Iraqi government, the Mandate over Iraq lasted until the UK determined that Iraq had met the necessary conditions to become an independent nation.11 By contrast, the demise of the CPA was not linked to some tangible specific achievements but to the decision to return sovereignty back to the Iraqis. Once the Security Council had declared and reiterated that Iraq was a sovereign country and that the Iraqi people had the right to self-determination, the occupation could not (logically and legally) drag on indefinitely. Sovereignty had to be returned to its legitimate holder, namely, the Iraqi people.

According to Peter Sluglett, one of the ‘most enduring economic consequences of Britain’s intervention in Iraqi affairs’ was that ‘Iraq’s oil resources were controlled by a British dominated company until the company was nationalised in 1972’.12 Quite apart from the question of whether one of the motives behind Operation Iraqi Freedom was acquiring control over the Iraqi oil fields, the occupants could not have gained control over Iraq's oil resources as a result of the occupation. Each of the Security Council's resolutions enacted during the occupation emphasised the right of the Iraqi people to freely ‘control their natural resources', meaning that the occupying powers could use the income originating from the sale of Iraqi oil only for the reconstruction of Iraq through the internationally monitored Iraqi Development Fund.13 Consistent with the right to self-determination, the political and constitutional process devised during the CPA’s occupation was premised on the return of full sovereignty to the Iraqis through a series of elections, as well as their direct participation in the crafting of the country’s constitution. By contrast, as long as the Mandate lasted, Iraq did not go through a comparable process of gradually, but effectively, regaining sovereignty as being subject to the shepherding of the Mandatory Power. Until the end of the Mandate, the UK could substantially influence the political and economic future of Iraq through a series of treaties that,

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10  Tripp (n 6) 39–44.
11  See Chapter 1, s 3.2.2(b) at 53–5.
12  Sluglett (n 7) 75.
13  See in this regard Chapter 3, s 6.2.2(b).
albeit an expression of formal equality between Iraq and the UK, were, in fact, the means through which British interests in Iraq could be pursued.\footnote{14}{See Chapter 1, s 3.2.2 (b) at 50–5.}

In the space of a few years, Mesopotamia had moved from being a conglomeration of different tribes to being a state and a constitutional monarchy. This occurred mainly at the instigation of the UK, acting as a sort of ‘glue’ to unify and maintain a highly fragmented population.\footnote{15}{Sluglett (n 7) 211.} In reflecting on the British experience during the Mandate, Cecil Edmonds, a British diplomat who had worked as an advisor to the Iraqi Ministry of Interior, observed:

> The general impression left on the mind is that the bases of the Iraqi state are still not as broad as one would wish: it dangerously resembles a pyramid balanced on its point. The Government is—I suppose inevitably—in the hands of a limited oligarchy composed essentially of Sunni Arab townsmen really representing a very small minority of the country.\footnote{16}{See text quoted in Sluglett (n 7) 211–12.}

The fragility of the foundations on which Iraq and its institutions had been built during the period of British influence soon became evident. As early as 1936, a military coup d’état—one of several that would plague Iraq’s history in the twentieth century\footnote{17}{For a chronology of the political history of Iraq in the twentieth century, see Tripp (n 6) xii–xix.}—brought about a change of government.\footnote{18}{Ibid, 86–91.}

1.1.2. Self-determination as a limit to constitutional processes

Unlike the process that unfolded during the Mandate, the events that followed the end of the formal phase of the occupation by the CPA under the supervision of the Security Council were characterised by the effort to restore full sovereignty to the Iraqi people in accordance with the right to self-determination. As discussed in Chapter 5, these included the end of the occupation, with Coalition Forces only remaining in Iraq to provide security; the holding of elections; the formation of a formally sovereign government; the preparation of a constitution by an Iraqi parliament; and the submission of the text of the newly approved constitution for referendum.
And yet it is difficult to consider this process as fully successful (if at all). Certainly, the 2005 Constitution was not sufficient to prevent an increase in the divisions among the Iraqis, which intensified to the brink of civil war. Considering that the Security Council insisted on respecting both the Iraqi sovereignty and the right of the Iraqi people to self-determination, it would seem unwarranted to speak of a return to the colonial area.

However, while there has been a clear change of means and approach, it can be observed that neither the Mandate nor the constitutional process supported by the Security Council brought about a unified and harmonious country. Both were followed by violent events that suggest a high level of fragmentation within a society. Therefore, it may be possible to detect a common thread that unites the occupation of Mesopotamia, the ensuing Mandate, and the occupation of Iraq. This lies in the assumption that foreign actors can dictate the course of conduct that a nation should follow, namely when and whether to have a new constitution. Of course, in the case of the occupation of Iraq, this conclusion can be refuted by those that disagree with the argument developed in this book, that the IGC was not sufficiently representative to have the authority to decide that Iraq should have a new constitution. But, if it is agreed that the IGC did not have such an authority, then it could be said that the constitutional process that unfolded in Iraq was mainly the result of the will of the occupying powers as expressed by the CPA and supported by the Security Council. In the unflinching pursuit of this project, one can see the assumption that foreign actors are entitled to take such decisions and that a constitutional process could compensate for a lack of cohesion within a people.19 This assumption, however, may be flawed, or at least it requires to be closely scrutinised.

19 Aptly Hilary Charlesworth, in ‘Law after War’ (2007) 9 Melbourne Journal of International Law 246, observes that:

In the West, we have a tendency to believe that democracy and justice are inherently virtuous concepts; that they have a fixed content and that they will inevitably be accepted. If only people truly understood what democracy meant, they would welcome it with open arms. We assume that intervention in post-conflict societies can act as a decisive break between a problematic traditional order and the clean and shiny new world of modern democracy. However, no evidence supports this assumption: indeed, the best cases of democracy-building have achieved only ambivalent success.
When a particular foreign-supported constitutional process operates as a complete rupture with local practices, as opposed to merely restoring a previous system, it is difficult for such a process to be implemented successfully without some degree of acceptance, whether explicit or tacit, by the affected population. Ultimately, at the basis of any constitutional agreement, whether reached for the first time or replacing a previously established constitution, as in the case of Iraq in 2005, there should be a community of individuals that genuinely decide to live and cooperate together on the basis of some shared aspirations and principles of justice, and who decide to do so through a constitutional document—whether prepared by them or by a foreign entity—which would then encapsulate what that community agreed on and decides to be bound by.

If acceptance by the people concerned or by those in a position of authority within that society is lacking, or is tenuous, the prospect of achieving lasting constitutional agreements is proportionally undermined. In using the term ‘acceptance’, I refer not only to the necessity for a particular constitutional document to be formally approved by parliamentary vote or by a referendum, as occurred in Iraq, but also at a more fundamental level, for the general population, or at least for wide segments of it, to acquiesce in the terms of that document and adjust their conduct accordingly. Acceptance in a substantive sense can be seen through the willingness and ability of a given people to work together under the new constitutional framework by complying with the aspirations it embodies and bringing its provisions into effect. Lacking genuine consent in the sense above indicated over the constitutional text, the risk of division and conflict may be higher and disputes over the allocation of powers, responsibilities, and duties between the various components of a state established by the constitution may arise.

Hence, in light of the Iraqi case, it is suggested that it may be appropriate to reflect on whether the right to self-determination should be construed as requiring not only the circumstance that the local population ought to participate in the drafting of its constitution, as the Iraqis did in 2005, but also that the fundamental decisions on why, whether, and when to adopt a new constitutional document or replace an existing one should be made only by the affected people through an open and transparent process, facilitated (or enabled) but not dictated by international actors. From this perspective, it can be proposed that, before embarking on a process of democratisation, regardless of any Security Council support for such a process, compliance with the right to self-determination should be interpreted as requiring an occupation administration to devise forms of genuine
consultation on whether a new constitution is indeed needed. In a sense, this could represent a break with that sort of ‘doctor knows best’ attitude, which permeated the colonial epoch and, to an extent, despite the useful parameters set by contemporary international law, also influenced the occupation of Iraq and its aftermath.

1.2. A comparison with the Allied Powers’ occupation of Germany and Japan

Arguably, the principal common trait between the Allied occupations of Germany and Japan and the CPA’s occupation of Iraq is to be found in the aspiration to reform the existing political order by eliminating any remnants of the previous despotic regime and building a new political, economic (and social) order grounded in a democratic constitution. In this sense, these three occupations may be regarded as constituting a sub-category of transformative occupation, namely pro-democratic transformative occupation. Each of the three occupations not only saw a vast effort to reshuffle existing societies, but were also characterised by the taking of tangible steps towards building lasting democratic systems. Legislation was passed to dismantle the political parties and the military elites that had formed part of, or lent support to, the previous regime, as well as to ensure the de-militarisation of the occupied countries (albeit in Iraq the effort was also made to build a new Iraqi army), and measures were taken to support the adoption of democratic constitutions in lieu of existing ones.

In each of these occupations, the occupants sought to involve local actors in the process of devising a new constitution. In the case of Iraq, the new permanent constitution was adopted after the end of the occupation by an Iraqi Parliament, even though it was based on a ‘template’ prepared by the CPA and the IGC during the occupation: the TAL. The ‘Basic Law’ was written by Germans without a ‘template’, albeit with some foreign influence, and the constitution of Japan was discussed and approved by

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20 According to Donald Kommers, the German experience is relevant to Iraq in that it shows that ‘establishing constitutional government can only begin when the occupying power is fully in control and only when law and order have been fully restored’. Donald P Kommers, ‘Prepared Statement of Donald P. Kommers’ in Senate Judiciary Committee Hearing ‘Constitutionalism, Human Rights, and the Rule of Law in Iraq’ (25 June 2003) 67.
21 For the process of adoption of the TAL and its content, see Chapter 4, s 4.5.
22 See the analysis in Chapter 1, s 3.3.1.
the Japanese Diet. Arguably, the fact that Germans had a primary role in drafting their own constitution contributed to its acceptance and consolidation. In the case of Japan, the circumstance that SCAP was heavily involved in the preparation of the constitution\textsuperscript{23} did not prevent the constitution from being, over time, accepted by the majority of the Japanese people, helped by the contribution of the Emperor,\textsuperscript{24} although calls for the revision of Article 9 of the Constitution (renunciation of war) persists in contemporary Japan.\textsuperscript{25} By comparison, in the case of Iraq, the constitution

\begin{footnotesize}
\begin{enumerate}
\item For a detailed analysis of the whole process, see John W Dower, \textit{Embracing Defeat: Japan in the Wake of World War II} (WW Norton & Company 1999) 346–404.
\item According to Eiji Takemae in \textit{Inside GHQ: The Allied Occupation of Japan and its Legacy} (Continuum 2002) 519, SCAP’s decision to retain the Imperial Institution in the form of a ‘symbolic emperor’, with exclusively representation and ceremonial duties, and to exempt Hiroito from war-crimes prosecution had lasting consequences for Japan’s fledging postwar democracy. In light of recent research, there is no longer any doubt that Hiroito was involved intimately in planning and directing Japan’s war effort. MacArthur spared the monarch because he feared that, without him the public would not cooperate as willingly with his reform agenda, necessitating perhaps, direct military government and a difficult and protracted occupation.
\item Article 9 of the Japanese Constitution reads:
\begin{quote}
Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.
\end{quote}
Eiji Takemae in \textit{Inside GHQ: The Allied Occupation of Japan and its Legacy} at 519, recalls that ‘After 1952, ultra-conservative politicians attempted to reverse key occupation reforms, openly advocating a military force independent of US control and an emperor who was not merely a symbol of national unity but also political head of state.’ According to Takemae, for the ‘Liberal Democratic Party’ which had ruled ‘Japan virtually unchallenged until the early 1990s [and remains in office at the time of writing]’ the objectives of ‘Constitutional revision, rearmament and a politically revitalised emperor system remain at the top of the conservative agenda’. Takemae justifies the
\end{enumerate}
\end{footnotesize}
was formally accepted by the Iraqi people through a parliamentarian vote and a referendum, but the fact that it was far from being an example of national unification lends a somewhat artificial character to the whole process.26

Last but not least, the three occupations also served the long-term geopolitical interests of the occupants based on shifting the occupied countries from enemies to allies. The occupations of Germany and Japan aimed at co-opting these countries in the struggle against Communism;27 and the occupation of Iraq sought to democratise it as a part of a broader process of spreading democracy to the Middle East.28

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26 According to Donald Kommers, the German experience demonstrates that ‘rebuilding democracy must be the first responsibility of the Iraqis’, that a ‘spirit of trust and cooperation must define the relationship between the occupiers and the occupied’ and that ‘the educated classes and a critical mass of democratically inclined citizens must be willing and able to cooperation with the Occupation’: Kommers (n 20) 67.


28 In ‘Remarks by the President at the 20th Anniversary of the National Endowment for Democracy United States Chamber of Commerce’ 6 November 2003, George W Bush declared:

Iraqi democracy will succeed and that success will send forth the news, from Damascus to Teheran—that freedom can be the future of every nation. The establishment of a free Iraq at the heart of the Middle East will be a watershed event in the global democratic revolution ...

As long as the Middle East remains a place where freedom does not flourish, it will remain a place of stagnation, resentment, and violence ready for export. And with the spread of weapons that can bring catastrophic harm to our country and to our friends, it would be reckless to accept the status quo. Therefore, the United States has adopted a new policy, a forward strategy of freedom in the Middle East. This strategy requires the same persistence and energy and idealism we have shown before. And it will yield the same results.

Turning to the analysis of the differences, the profound historical differences, as can be gauged by the analysis conducted in Chapter 1, the connection with the reasons that had brought the occupation about, the applicable normative framework, which, as noted in Chapter 1 was based on valid *ad hoc* normative instruments, and the reaction of the people concerned, all deserve to be highlighted from our perspective.

Unlike the occupation of Iraq, the occupations of Germany and Japan by the Allied Powers had a direct and clear linkage with and a justification in, the international armed conflict that had caused the occupation. They had a logical and moral justification in that they served to eradicate what were considered the principle causes (Nazism and Japanese militarism) of World War II.29 In the cases of Germany and Japan, democratisation was instrumental in the eradication of the threat posed by a possible re-birth of the Nazi party or of Japanese militarism. In the case of Iraq, the occupation could not be based on, or justified, as a response to an aggressor. It was justified on the promise that it could deliver democracy, which was treated as a sort of panacea that, if introduced in Iraq, could solve Iraq’s problems and lead to beneficial change.30

Although, of course, this remains a matter of debate on issues of extreme complexity, it can be suggested that, unlike the occupation of Iraq, the occupations of Germany and Japan appear to have succeeded in convincing the local populations that they were unavoidable and thus of the need to make the best of the existing situation.31 This is not to say that the Allied occupations were pursued through the consent of the occupied people, which would be a step too far. But it is to underscore the circumstance that, unlike in Iraq, there was no insurrection against the Allied occupations, which suggests that, in some way, the occupied people had come to terms with the inevitability and necessity of the occupations in the dire conditions in which they found themselves after World War II.32 According to John Dower, for instance, the occupation of Japan, which he describes available at <http://www.theguardian.com/world/2003/feb/27/usa.iraq2> accessed 20 May 2013.

31 Edelstein (n 27) 59.
as an example of ‘neocolonial revolution’, was characterised by the ‘virtually uncontested moral legitimacy of the United States’.

Of course, this ‘moral legitimacy’ was only one of a number of relevant factors. The relative success of the occupation of Japan was assisted by its being a system of indirect occupation involved in ‘co-opting, rather than destroying, wartime institutions; by the circumstance that the ‘governing structures remained intact and administrators and technocrats remained at their jobs top to bottom’; and by the fact that ‘the social cohesion that held Japan together’ was ‘impressive’. In turn, this was possible because of a ‘resilient civil society that had emerged prior to the rise of the militarists in the 1930s’ and ‘who had experienced a healthy democracy in the 1920s’.

In a comparable way, in the case of the occupation of Germany, historians have suggested that the democratisation of that country did not have to start from scratch, as the seeds had already been sown before the Nazi party’s rise to power, and the occupants built upon something that had already existed, namely, the local political and economic elites. Accord-

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35 Edelstein (n 28) 60. John Dower recalls the ‘incommensurable words’ pronounced by Emperor Hiroito on accepting the instrument of surrender (15 August 1945), when he exhorted his subjects to follow his lead in ‘enduring the unendurable and bearing the unbearable, to pave the way for a grand peace for all generations to come’. Dower, *Cultures of War* (n 34) 319. See also Chapter 1, s 3.3.2. at 64.
36 Dower, *Cultures of War* (n 34) 320.
37 Ibid, 321.
38 Ibid.

In order to penetrate German society, this process of building democracy had to go well beyond the establishment of formal democratic institutions: The foundation of democracy lies rather in the broad acceptance of democratic *Umgangsformen*, or modes of political interaction, in all spheres of public life. The critical difference between the Weimar and Bonn republics was not the technical perfection of formal democratic institutions, but the breadth of acceptance of democ-
ing to Diethelm Prowe, when ‘local communities began to dig out from under the rubble of Hitler’s war in the spring and summer of 1945, old local elites began to reemerge too’\textsuperscript{40} because of the ‘need for the kind of expertise that could identify and mobilize the local resources necessary for reconstruction’.\textsuperscript{41}

As in the case of the occupation of Iraq, some of the measures passed by the Allied Powers were very harsh indeed. Article 3 of Control Council Law no. 34 abolished veterans’ organisations and all legislation that concerned the ‘legal status and privileges of military and ex-military personnel and members of quasi-military organizations and their families’.\textsuperscript{42} This measure remained unchanged for the duration of the occupation, even though many German soldiers felt discriminated against, strongly protested, and sought to change these laws.\textsuperscript{43} Notably, however, when the government of West Germany took office in 1949, it began to outline policies directed at appeasing the legitimate demands of veterans and ‘restored much that had been taken away during the occupation’, which worked to ‘engender loyalty to the new political order’.\textsuperscript{44} These efforts of democratisation through restoration were based on Germany’s experience of democracy prior to the advent of the Nazi party and empowered the elites that had authority before the Nazi regime who had the skills necessary to re-build Germany.

The German model could hardly work, even if attempted, in a country such as Iraq, which had been under a despotic regime for over thirty-five years, had no experience of democratic governance at any stage of its history, and seemed exclusively concerned with ensuring a total break with its past, regardless of individual responsibilities and competences. The

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See also in the same volume the study of Rebecca Boheling on the (re-) emergence and function of political parties, Rebecca Boheling, ‘U.S. Military Occupation, Grass Roots Democracy, and Local German Government’ in ibid, 281–306.
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\textsuperscript{40} Prowe (ibid) 310–11. Diethelm Prowe argues that ‘Konrad Adenauer’s well known return to the mayor’s office in Cologne was perhaps the most striking restoration of the old city elite’; ibid, 311.

\textsuperscript{41} See Boheling in Diefendorf, Frohn, and Rupieper (n 39) 286–7.

\textsuperscript{42} James M Diehl, ‘U.S. Policy Toward German Veterans’ in Diefendorf, Frohn, and Rupieper (n 39) 353–73.

\textsuperscript{43} Ibid, 365–7.

\textsuperscript{44} Ibid, 373.
policies of de-Ba'athification and demilitarisation remained substantially in place even after the end of the occupation. What could have been a temporary sidelining—and only a partial one if re-directed to focus only on those directly responsible for human rights violations—of the former ruling class became a permanent removal, with the accompanying consequences that the loss of skills and the tension between those claiming to represent the new Iraq and those who had managed the country for over thirty-five years could generate. A government returning to, or assuming its legitimate place at the end of an occupation, has full authority to rectify any policy enacted by the occupying power and, I would argue, even has a duty to do so from a human rights perspective if certain policies are discriminatory or disproportionately harsh. If a government chooses not to do so, the related responsibility cannot be laid at the former occupying powers’ doors.

In light of the considerations developed in this section, it is submitted that future responses to claims to transform occupied territory should be based not on the attractive, but fundamentally irreproducible, models of the Allied Powers’ occupation of Germany and Japan after World War II, which are the result of a unique combination of factors, but on the much cruder and fragmented reality that emerged throughout the occupation of Iraq and in its aftermath.

2. The occupation of Iraq as precedent

2.1. The irreplaceable function of the law of occupation

As discussed in Chapter 1, some scholars have questioned the relevance of the law of occupation in a contemporary perspective because of its being ‘inadequate for the realities of modern occupation as well as with the demands of peace building and post conflict reconstruction’,45 which require that ‘new rules should be developed’ instead.46

45 Kristen E Boon, ‘The Future of the Law of Occupation’ (2009) Canadian Yearbook of International Law 107. Arguing that it is doubtful that ‘the international law of occupation remains the most appropriate guidepost in the era of modern warfare’, while there is instead an ‘evolving de facto modern law of occupation’ which has replaced the international law of occupation, see Grant Harris, ‘The Era of Multilateral Occupation’ (2006) 24 Berkeley Journal of International Law 1, 2–3. See also Chapter 1, footnote 1.

46 Charlesworth (n 19) 233.
The analysis conducted in Chapter 1 concluded that, from a historical perspective, the arguments suggesting the marginalisation of the law of occupation tend to overlook the justifications that brought this body of law into being and which are still valid in today’s international society. The analysis of the occupation of Iraq only serves to confirm the validity and the irreplaceable protective function of the law of occupation. The Security Council did not replace the law of occupation, but, instead, reaffirmed its necessity by calling on the occupying powers in Iraq to apply it. As it turned out, one of the key issues that emerged during the occupation of Iraq was not that the law of occupation impeded the introduction of democracy in Iraq. The Security Council saw to that by passing resolutions which supported the political and constitutional process set in motion by the CPA. Instead, the problem that arose during the occupation was the limited compliance with the law of occupation. The law of occupation places on the occupying power the responsibility of acting for the protection of the occupied people in the performance of a humanitarian mandate. This includes restoring basic services and also ensuring that schools and medical institutions can function as well as possible by undertaking the necessary re-building and re-structuring to enable the civilian population to lead a reasonably normal life, even under occupation.

Ignoring the provisions of the law of occupation, in whole or in part, not only has serious humanitarian consequences, as confirmed by numerous incidents in Iraq, but it may also exacerbate any problems that emerge during the occupation by widening the gap between the occupant and the occupied, increasing discontent over the presence and the conduct of the occupation forces. Arguably, an occupant eager to transform the institutions and normative systems in place in the occupied territory for the benefit of the occupied people may come closer to its putative aims if it acts in strict compliance with the law of occupation and the responsibilities enshrined within it.

The CPA’s normative production is replete with references to the ‘laws of war’, but there is little specific reference to the norms of the law of occupation, and in particular to those of the Geneva Convention IV, such as those concerning the protection of detainees.47 The case of Iraq highlights the negative consequences resulting from the failure to fully comply with

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47 It was only in revised Memorandum 3 issued on 27 June 2004, that is at the end of its tenure in Iraq, that the CPA determined that the Geneva Convention IV applied to the relationship between Coalition Forces and its detainees. See Chapter 4, s 3.3., 286.
the norms of the law of occupation. One could consider, for example, how the occupation of Iraq might have unfolded if the looting of Baghdad had been stopped and the transgressors punished, or if the Abu Ghraib abuses and tortures (and those in other prisons manned by Coalition Forces) had never occurred. In the same way, it seems fair to suggest that the CPA should have focused on tackling problems of security and regulating the use of force by Coalition Forces when conducting law-enforcement operations so as to become the trusted protector of the Iraqis rather than a possible threat to them. Likewise, the administration of the occupation would have been better served by focusing on the effective and safe provision of basic services, such as electricity, water, and education to the local population, rather than being primarily concerned with shaping the Iraqi society in almost all of its aspects, as though a new state could be built *ex novo* in less than a year. In this regard, it should be emphasised that once the Security Council calls for the respect of a given legal regime such as the law of occupation, it should verify compliance with its request. In order for the requests of the Security Council to be taken seriously and complied with, and in light of the nature of the responsibility the Security Council assumes when endorsing aspects of a transformative project, the occupying powers should be requested to provide reports, accessible to the public, detailing actions taken to ensure compliance with the duties set out in a Security Council Resolution.

The protective strand of the law of occupation is reinforced by the duty to respect the human rights of the individuals under occupation and to safeguard them from the use of force by the occupant.48 During the occupation, while preoccupied with the introduction of human rights reforms within the body of the Iraqi law, the CPA seemed less troubled by the possibility that it could itself breach those rights. Moreover, the US maintained its traditional position that an occupying power is not bound to respect human rights norms in cases of occupation.49 It seems, however, somewhat contradictory to seek to amend the laws of a country in the name of human rights while failing to show the same zeal with regard to the conduct of one’s own forces towards the population of that country. The fact that a country may feel entitled to decide—rightly or, in my view, wrongly—not to comply with its human rights obligations when exercising jurisdiction extraterritorially, makes the protective function of the law of occupation all the more a necessity.

48 See Chapter 2, s 1.2.
49 See Chapter 2, s 1.2, 89–90.
2.2. **Should aspects of the law of occupation be amended?**

Different and more nuanced considerations can be advanced with regard to the economic management of occupied territory and the role of the law of occupation in response to quests for the democratisation of an occupied country. The Iraqi case not only demonstrates the problem of compliance with the law of occupation as a framework for humanitarian protection, which remains paramount in contemporary international law, but also the limits of a normative framework that, by contrast, is generally and substantively inadequate for the management of contemporary economies.

While the overall role designed for an occupying power as an administrator of territory also stands up to scrutiny from a contemporary perspective, it remains that the provisions of the Hague Regulations concerning the economic and financial aspects of the administration of an occupied territory were drafted in the nineteenth century and have not been significantly updated by either the Geneva Convention IV or the Additional Protocol I. Hence, the law of occupation is silent on many of the issues that affect the economy of an occupied territory in today's globalised economy. I would argue that this aspect should not be neglected for the obvious reason that the way the economy is managed has a direct and immediate consequence on the welfare of an occupied people. It is also the lack of detail and specificity in the normative framework applicable to an occupation that may facilitate the commission of abuses. This worrisome perspective demands—as suggested by Vaughan Lowe\(^50\)—the amendment and updating of the law of occupation on economic matters, as this is probably the most unsophisticated and outdated part of the entire legal regime applicable to a contemporary occupation, notwithstanding it is the field that has evolved most rapidly in contemporary international society. True, this book has criticised the practice of the CPA for seeking to change the economic and financial system of Iraq, based on Western domestic models, without authorisation by the Security Council and without demonstrating that such ample and detailed reforms were a priority in the first year of occupation and more particularly in the last months of the occupation, when numerous reforms on financial and economic matters were in fact adopted. However, it should also be recognised that questions such as whether a country should be opened up to foreign investment, the overall level of taxation, the creation of new financial institutions, the engagement in the processes of privatisation of existing companies, the revitalisation of the

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financial market, and others, are all examples of issues that require a more modern and comprehensive treatment than that that can be found in the outdated Hague Regulations or in other parts of the law of occupation. To tackle these issues, a potential amendment could take the form of an additional protocol to the Geneva Convention IV. Or alternatively, at the very least, the Security Council should set requirements and provide guidance whenever tasking an occupation administration with the welfare of an occupied people based on the experience of Iraq, the excesses of the CPA, and the need to administer an occupied territory effectively.

Turning to the question of whether the law of occupation should permit political reforms that lead towards democratisation, the opinion of Rüdiger Wolfrum provides a good starting point. He argues that the case study on Iraq reveals the absence of ‘a legal regime which adequately addresses and governs the specific problems of post-conflict situations’, because:

\[ \text{Belligerent occupation, in principle, does not legitimize the introduction of political changes even if such changes may be necessary for the transformation from a totalitarian government into democracy thus eradicating the causes of internal or international conflict.} \]

There is certainly authority for linking a process of democratisation via occupation to the solution of a conflict and the reaching of a lasting peace. The Allied Powers’ occupation of Germany and Japan are probably the best examples of the possibility of effectively establishing such a linkage. What the occupation of Iraq has shown, however, is that the opposite may also be true: democratisation may not necessarily lead to the end of conflict and may remain—at least in the short and medium term—only a partially successful project, unable to heal the divisions within a society. The fact that the security situation worsened dramatically after the approval of the 2005 Constitution—notwithstanding that the Constitution was imbued with democratic principles and norms designed to protect the human rights of the Iraqis—highlights the need for caution when seeking to devise a generally permissive rule enabling democratisation via occupation. The uncertainty regarding the outcome of the democratisation process in Iraq, in the sense that Iraq is still a rather unstable country riddled by violence, which, in essence, continues at the time of writing, suggests

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that authorising occupants to engage in pro-democratic transformations may not necessarily be the path to a lasting peace.

In light of the Iraqi case, it can be argued that something as complex as deciding when and under what circumstances, a given democratisation process should be pursued in a given country must be determined by an analysis of the specific political circumstances which should be informed by the lessons learned from cases such as Iraq. Amending the law of occupation to accommodate pro-democratic transformative occupations would be tantamount to forging a general rule out of exceptional cases, with all the risks of over-inclusiveness associated with so hasty a process. In fact, there is always a risk that occupants could use this broad authority to merely foster their own interests or impose their own views, rather than showing a genuine commitment to the introduction of a system of rules and institutions compliant with international law and that would fit the particular territory at a sustainable pace. Even for a well-intentioned occupant, it is objectively difficult to identify a comprehensive pattern of reforms that would suit all societies. Arguably, the rather expansive practice of the CPA in Iraq is a confirmation of such fears and, more broadly, of the extreme complexity of carrying out transformative projects that affect a nation of the dimensions of Iraq.

Rather than devising general rules, it can therefore be suggested that there is a need to carve out legally justifiable exceptions to the conservationist principle on a case-by-case basis by those in a position of authority to do so. This would require a division of labour between the norms of the law of occupation and the Security Council. The former would continue setting the general standards of behaviour governing ‘typical’ cases of occupation with the result of protecting not only the sovereignty of the occupied state, but also, implicitly and yet importantly, a people’s right to self-determination.52 The latter, as the Iraqi case demonstrates, could

52 See Ralph Wilde, ‘From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers’ (2009) 31 Loyola Los Angeles International and Comparative Law Review 142, in which Wilde suggests that the Hague Regulations would reinforce the right to self-determination in being a ‘serious impediment’ to transformative occupations:

The Hague model, then, may actually be more consonant with contemporary international norms than is generally acknowledged. Although its modest ambition of reining occupation does not go as
play the role of the ‘judge of the exceptional’ by devising, through a necessary political evaluation of the situation, *ad hoc* normative solutions in specific contexts while, of course, adhering to the need to guarantee the humanitarian protection afforded by the law of occupation and respecting the applicable norms and principles of international law. In so doing, the Security Council would satisfy the legitimate quest for change to the law of occupation in the specific cases where it might be warranted, as the interests at stake, such as the pursuit of international peace and security, or the enablement of a people’s right to self-determination may require it.53 With the support of the Security Council, but also under its close scrutiny, a situation of occupation could, in principle, be an opportunity for an occupant to effectively contribute to the improvement of the conditions of life in the occupied territory by adopting pro-democratic institutions and norms. Of course, the problem of ascertaining what ‘improvement’ means in a given local context remains to be resolved.

From this perspective, it appears necessary to shift the focus of the academic conversation away from the limits of the law of occupation to the practice of the Security Council, with a view to identifying how this practice can become more effective in the pursuit of the tasks entrusted to the Security Council, while remaining fair and complying with the norms and principles of international law. This involves reflecting further on whether the Security Council has the authority to amend certain aspects of the law of occupation, as suggested in this book, and identifying the criteria and limits that the Security Council should follow when expanding the law-making authority of an occupying power in support of processes of democratisation.

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2.3. **Transformative occupation and international territorial administration**

Scholars have drawn attention to the similarities between occupation and international territorial administration (ITA) as instruments of foreign control of territory.\(^{54}\) It has been noted that, in common with the model of occupation, the model of ITA that has emerged, particularly (but not exclusively) in the recent practice of the UN Interim Administration in Kosovo (UNMIK) and of the UN Transitional Administration in East Timor (UNTAET), constitutes a non-consensual form of foreign control of territory based on military force.\(^{55}\) Eyal Benvenisti suggests that ‘those instances of

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\(^{55}\) In the *Behrami and Saramati* case, the ECtHR drew a parallel with the role of UNMIK and that of a state using the notion of effective control. It put it thus:

UNMIK was to provide an interim international administration and its first Regulation confirmed that the authority vested in it by the UNSC comprised all legislative and executive power as well as the authority to administer the judiciary (UNMIK Regulation 1999/1 and see also UNMIK Regulation 2001/9). While the UNSC foresaw a progressive transfer to the local authorities of UNMIK’s responsibilities, there is no evidence that either the security or civil situation had relevantly changed by the dates of the present events. *Kosovo was, therefore, on those dates under the effective control of the international*
international administration where domestic consent was lacking or legally invalid qualify as occupations. Attention has also been drawn to the fact that in both ITAs and occupations, the principle of separation of powers does not apply, as both are fundamentally unaccountable to the people they govern, who can neither challenge their acts nor remove ITA personnel from office. In this regard, it has been pointed out that the personnel of ITAs and occupation administrations and those working for them, such as private contractors, would also be granted immunity from the jurisdiction of local courts, as authorised by the CPA in Iraq through its Order 17. On the basis of these common traits, it has been suggested that ITAs and occupations ‘can resemble each other in the eyes of those living in the occupied or administered territory’. 

presences which exercised the public powers normally exercised by the Government of the FRY. (emphasis added)

Behrami and Behrami v France and Saramati v France, Germany and Norway (Decision as to Admissibility), App Nos 71412/01 and 78166/01 (ECtHR 2 May 2007) para 70. For commentary, see Andrea Gioia, ‘The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict’ in Orna Ben-Naftali (ed), International Humanitarian Law and International Human Rights Law (OUP 2011) 201, 208–9.

56 Eyal Benvenisti, The International Law of Occupation (OUP 2012) 276. See, on the same lines, Ratner (n 54) 695–719; Yoram Dinstein cautions against assimilating UN peacekeeping forces to occupying powers, and argues that only UN enforcement (combat) action can be assimilated to a belligerent occupation. See Yoram Dinstein, The International Law of Belligerent Occupation (CUP 2009) 37. In Simon Chesterman, You, the People, the United Nations: Transitional Administration and State-Building (OUP 2004) 322, Chesterman observes that ‘it is both inaccurate and counter-productive to assert that transitional administration depends upon the consent or “ownership” of local populations’ because ‘if genuine control were possible then a transitional administration would not be necessary’ and ‘insincere claims of local ownership lead to frustration and suspicion on the part of local actors’.

57 Benvenisti, ibid, 277.


59 Benvenisti (n 56) 288–92; Ratner (n 54) 715–17.

60 Ratner (n 54) 716.
On the other hand, there are some ‘genuine differences’ between the two models. Carsten Stahn notes that an ITA is, to an extent, a counter-model to the classic concept of occupation, in that it is performed by international actors under a UN mandate, and the tasks that are normally conferred on an international administration are broader and more far-reaching than those of an occupation administration. The latter would generally include elements of state- and nation-building directed at the establishment of a new political order. From this latter perspective, the objectives pursued by ITAs come closer to the model of transformative occupation, with the exception that ITAs would normally pursue a UN mandate conferred by the Security Council, whereas the goals of a transformative occupation would normally result from policy decisions taken by the occupying states. Moreover, in the case of an ITA, as established by the Security Council, the organ that embodies international legitimacy, it seems permissible to speak of a presumption of the legality of its presence in a given territory.

In light of the common features between occupation and ITAs, it has been suggested that the law of occupation should be applied, in whole or in part, to cases of ITAs, or at least that it should represent a reference framework to fill the gaps that emerge in the practice of ITAs. In this regard, Benvenisti suggests that ‘both in terms of the law and in terms of the preferred policy, the law of occupation should have been invoked to direct and constrain the foreign administrators.’ The recent ICRC Expert Report on Occupation suggests that the law of occupation could also be applied to cases of ITA on the basis of a functional approach, which would entail the de facto application of occupation law when UN forces perform tasks

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63 See generally Ratner (n 54) 700–1.
66 Benvenisti (n 56) 276.
similar to those normally assigned to an occupying power under IHL.\footnote{International Committee of Red Cross, Expert Meeting Report, \textit{Occupation and Other Forms of Administration of Foreign Territory} (2012) 33–4.} Sylvain Vité goes as far as suggesting that the ‘Security Council should explicitly specify the applicability of the law of occupation in Resolutions establishing regimes of international territorial administration, to apply immediately at the outset of the mission’.\footnote{Sylvain Vité, ‘L’applicabilité du droit international de l’occupation militaire aux activités des organisations internationals’ (2004) 96 IRRC 30–1.}

The analysis conducted in the previous chapters concerning the occupation of Iraq has demonstrated not only the need to adhere to the law of occupation promptly, but also to be aware of its limitations, which caution against its unqualified application. Albeit unquestionably setting some fundamental standards of conduct, which provide important parameters for all administrations and forces that control territory by force,\footnote{See the thorough analysis conducted in Robert Kolb, Gabriele Porretto, and Sylvain Vité, \textit{L’application du droit international humanitaire et des droits de l’homme aux organisations internationales, forces de paix et administrations civiles transitoires} (Bruylant, 2005).} it is equally important to emphasise that the law of occupation lacks the kind of detail and comprehensiveness that would be expected from an instrument that should facilitate the administration of the territory of a state in the twenty-first century and enable the fair and effective carrying out of the necessary law-enforcement tasks. The law of occupation provides little guidance, for instance, on how much force should be used when undertaking civilian tasks by seeking to maintain order and stability, such as conducting security operations while patrolling streets, or searching and raiding civilian houses. Nor does it provide a clear indication of how the occupation administration should behave regarding the diffusion of weapons within the civilian population and the growth of private militias; whether to forbid them and, if so, when to begin to do so.

In the absence of strict parameters, there is much that can be claimed to fall within the remit of an occupation administration as ‘necessary’ to ensure security and order or on the basis of reasons of ‘military necessity’. For instance, with regard to cases of major civil disturbances, such as the widespread looting that occurred in Baghdad in April 2003, the norms of the law of occupation task the occupying power with the duty to put an end to them, but the manner in which an occupation administration should undertake this task is not specified. Marco Sassòli observes that oc-
ocupation law offers a pre-existing normative framework ‘adequate for the maintenance of civil life and public order’, which could be ‘applied immediately as soon as an international administration starts’. This approach, says Sassòli, would also include the benefit of avoiding “a la carte” solutions, which would be ‘arbitrary or at least perceived as arbitrary’. But what is ‘adequate’ for the maintenance of civil life and public order during wartime is not necessarily adequate for situations of transition from war to peace, which may require the application of a framework more similar to law-enforcement models as applied in domestic jurisdictions. Furthermore, the application of the law of occupation is, in a sense, an “a la carte” solution as well, as it was designed for the specific situations of occupation. More guidance is needed in situations where the goal is not only to manage the immediate situation, but also to build a lasting peace, creating, in the long term, a relationship of co-operation between the foreign administrators and the administered people. This guidance may, for instance, be provided by a more comprehensive framework, such as that the jus post bellum project, discussed below, aspires to build.

According to Steven Ratner, what is needed is a normative regime that could be applicable to both occupations and ITAs, which, if put within the same category of ‘control of territory by outside entities’, would enable ‘both lawyers and policy-makers to develop optimal doctrine and operating procedures’ by ‘mitigating the harms that arise when foreign forces control territory and exert significant power over its occupants’. But, balancing the complexity of the tasks performed by an ITA and the nature of the tasks of an occupation administration, placing the two under the same category may not be an accurate representation. UN missions are not belligerent occupations within the meaning of the laws of war; an occupying power is authorised to use military means to enforce its duties and govern the occupied territory in a rather despotic and unaccountable way, which is not the model of administration one would expect from a UN administration. The wide reliance on private military and security companies for performing a wide range of ‘security tasks’ by the CPA in Iraq is tell-

71 Ibid.
72 Ratner (n 54) 697.
ing in this regard. While there is unquestionably much sense in borrowing aspects of the law of occupation to fill normative gaps when performing similar activities, it is suggested that it might be insufficient and arguably undesirable to rely on the law of occupation as the principal gap-filler. The overall risk lies in the legitimising effect of the use of military force inherent in the application of the norms of the law of occupation, even when the aspiration is to use it only as a limiting and constraining device. Arguably, by extending to an international administration the normative framework that applies to an occupation without the concomitant elaboration of a more comprehensive and articulated framework, there is the possibility that that administration would become even more similar to an occupation administration than it already is, arrogating for itself the prerogatives of an occupation administration. In such a scenario, it is highly likely that the local population would view such an administration as hostile, despite it carrying the UN flag, augmenting the possibility of clashes when exactly the opposite is desirable.

Moreover, when applying the law of occupation, there is the risk that its norms would prevail *qua lex specialis* over the corresponding human rights provisions. Hence, the possibility that rights such as freedom of assembly, movement, and expression may be severely and yet legitimately curtailed during a situation of ITA cannot be excluded.

In light of these remarks, it is submitted that while the law of occupation may certainly provide useful guidance, it remains a *faute de mieux* remedy that should be reverted to only in the absence of better alternatives. Hence, other avenues should be investigated. One is the possibility of devising a comprehensive normative framework through the prism of the proposed category of *jus post bellum*, which is discussed below. Another is an insistence on the Security Council fulfilling its duty to adequately frame the activity of the administrations it validates. As a corollary of taking so bold a step as establishing an ITA or validating aspects of the transformative project of an occupation administration, it should be the responsibility of the Security Council to fill the relevant normative gaps in a reasonably comprehensive manner. The Security Council may rely on its practice concerning the establishment of the *ad hoc* international criminal tribunals whose statutes were prepared in the case of the ICTY by the UN Secretariat\(^\text{74}\) and in that of the ICTR by the members of the Security Council.

\(^{74}\) UNSC Res 808 (22 February 1993) UN Doc S/RES/808, para 2.
themselves. Whenever authorising the establishment of an ITA, or possibly of any administration that seeks validation from the Security Council, including an occupation administration, the Security Council should also provide those administrations with a charter outlining their rights and duties, which could be attached, as were the Statutes of the ICTY, and ICTR to the text of the authorising resolution. This charter should certainly incorporate references to the law of occupation, but should also try to encapsulate the lessons learned from the recent practice of ITAs and from the occupation of Iraq, developing an ad hoc and yet comprehensive approach. The result, if accomplished, despite the obviously significant difficulties in bringing it about, could be a framework that, if applied promptly, could render international administrations (and perhaps also occupation administrations) more authoritative than authoritarian, drawing them closer to the model of governance they may aspire to introduce in the controlled territory.

2.4. Transformative occupation and jus post bellum

Based on the understanding that ‘a misguided military intervention or a preventive war fought before its time’ may nonetheless ‘end with the displacement of a brutal regime and the construction of a decent one’, Michael Walzer argues for the necessity of a set of jus post bellum criteria that are ‘distinct from (though not wholly independent of) those that we use to judge the war and its conduct’. This would be necessary, according to Walzer, so that ‘we could talk about aftermaths as if it were a new argument’, even though, he adds, ‘it often isn’t’. For Walzer, however, the category of jus post bellum has an essentially moral, not normative connotation: he translates jus post bellum as ‘justice after the war’, rather than ‘law after war’. However, in line with the primary Latin meaning and with the way the word jus is traditionally used in the case of the legal categories of jus ad bellum (the law on recourse to force) and jus in bello (the law govern-

77 UNSC Res 955 (9 November 1994) UN Doc S/RES/955, para 1.
79 Ibid.
ing the conduct of hostilities), in the context of legal analysis, it may be more accurate to translate ‘jus post bellum’ as ‘law after war’.

The need for a *jus post bellum* as a set of normative criteria constituting ‘a uniform legal regime’ to tackle legal issues that ‘arise during the transitional period between the cessation of war and the establishment of a durable peace’ has been proposed, among others, by Kristen Boon. According to Carsten Stahn, the category of *jus post bellum* would fill ‘a certain normative gap’, which is necessary in *post bellum* situations because ‘there is a considerable degree of uncertainty’ about: (i) ‘the applicable law’; (ii) ‘the interplay between different structural frameworks’; and (iii) ‘the possible space for interaction between different legal orders’. Hence, Stahn calls for ‘a pluralist and problem-solving approach to peace-making, uniting affected parties, neutral actors and private stakeholders in their efforts to restore sustainable peace’.

From the perspective taken in this book, the first question that arises when considering the *jus post bellum* project is whether the practice of transformative occupation can be said to fall within its purview. At first sight, it could be argued that a transformative occupation, as any occupation, does not fall within the framework of *jus post bellum* because the principle applicable legal regime to it is that of *jus in bello*. Consequently, neither factually, nor normatively, could a transformative occupation fall into the category of something that follows the ending of a war. Therefore, if the word *post bellum* is identified as synonymous with the end of conflict, as its Latin meaning suggests, it would have little relevance in the context of a transformative occupation.

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81 The matter, however, is also not clear cut among legal scholars. Using the expression ‘justice after war’, see the remarks of Kristen Boon and Jennifer Easterday in Kristen E Boon (ed), ‘Jus Post Bellum in the Age of Terrorism’ (2012) 106 ASIL Proc at 331 and 335 respectively. On the other hand, translating it as ‘law after war’, see Charlesworth (n 19) 233 and Carsten Stahn, ‘Jus Post Bellum: Mapping the Discipline(s)’ in Carsten Stahn and Jann K Kelfner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 93.


84 Ibid 942.
By contrast, if a more flexible and functional interpretation of the term *post bellum* is adopted, a different conclusion may be drawn. As discussed in this study, a situation of transformative occupation would normally operate in the temporal space between the substantial cessation of hostilities, or of a major phase thereof, or even *durante bello*, that is, for instance, in parallel with the international armed conflict that generated it or with an ongoing conflict between occupation forces and insurgents, but before their formal closure. Within this significant temporal framework, an occupying power may be actively engaged in the governance of a territory and in building a sustainable peace, even if, or more correctly because of, the *bellum* had not formally drawn to a close. Therefore, if the concept of *jus post bellum* is construed, as some of the literature on the subject suggests, as comprising a set of legal criteria regulating the transition from active combat activities to peace, thereby governing all activity that would normally be regarded as peace-building and the coordination of the various applicable legal regimes, then the practice of transformative occupation could be regarded as falling within its remit, as would, therefore, the occupation of Iraq.

Another preliminary, and yet fundamental issue, is whether the category of *jus post bellum* should be interpreted only as a set of ‘moral principles that are meant to inform decisions about how international law is best to be established’; or, more relevantly from our perspective, a set of normative provisions ready to be employed in a *post bellum* situation to tackle

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86 According to Larry May ‘jus post bellum refers to any principles that govern the mopping up efforts, namely the efforts at the end and after the end of war that lead into a position of peace ... mopping up efforts occur even while it is pretty clear that war is still waging, although often this will be a very dangerous thing to do’; Larry May, After War Ends: A Philosophical Perspective (CUP 2012) 3. According to Inger Österdahl: ‘the jus post bellum is not only the instrument of the rebuilders, but at least partly also the law that should be instituted in the society which needs reconstruction and according to which the society should work for a foreseeable future’; Österdahl (n 85), 281.

87 May (n 82) 5.
normative issues, or as normative principles and norms encompassing a built-in philosophy of what a post-conflict situation should look like and ought to result in. Only in the latter case, I would argue, is it likely to be possible to speak of a category strong enough to constitute a tripartite conception of the law of armed force.

When considering the existing categorisation of *jus ad bellum* and *jus in bello*, the principal political and moral aspirations underlying them can be easily discerned: the former is based on the elimination of war as a form of solving disputes between states and the consequent monopolisation of the legal use of force by the Security Council, except in cases of self-defence,\(^8^8\) the latter serves the purpose of alleviating the suffering caused by war.\(^9^9\) In the case of the proposed category of *jus post bellum*, it is more difficult to identify clear objectives on which the majority of states could agree so as to confer on them some normative validity. Perhaps it is still premature, considering that the need to develop such a category has come to light only recently. But considering the moral and philosophical ambitions underlying the categories of *jus ad bellum* and *jus in bello*, the question arises whether it is possible to devise a normative framework imbued with a certain coherence and structure, without some generally agreed moral and philosophical basis supporting it and that, most crucially, is coherent—rather than in conflict— with the moral and philosophical basis underlying the existing categories.

One issue is to understand whether the activities falling under the category of *jus post bellum*, which may well involve the direct or indirect use of force, could be considered legal because of serving possible *jus post bellum* objectives, even when not authorised by the Security Council, or because of the perceived justness of the conflict that brought about the *post bellum* situation.\(^9^9\) Along these lines, it should be asked whether the principle of equal application of the laws of war, which, as discussed earlier, postulates the application of the *jus in bello* independently from considerations of *jus ad bellum*, should be applicable also to the *post bellum* phase. Some may argue that the category of *jus post bellum* requires that the sphere of rights and duties that exist in a *post bellum* phase be informed by consid-


\(^{90}\) Orend, (n 80) 577–84.
erations of *jus ad bellum*. However, unless one goes as far as proposing a complete recasting of all the law of armed force, making it contingent on the justness of a given conflict, this argument does not explain why, from a normative perspective, the application of *jus post bellum* should be influenced by considerations of *jus ad bellum*, while the application of *jus in bello* is not, as discussed earlier in this book. Presumably, either all the law of armed force is re-construed on the basis of considerations of *jus ad bellum*, which does not accord with the current content and structure of international law, or the three proposed components of the law of armed force should be construed as applying independently of each other.

In accordance with the latter approach, the practice of the Security Council in Iraq is authority for keeping considerations of *jus post bellum* distinct from consideration of *jus ad bellum*. As seen in Chapter 3, the framework defined by the Security Council in Resolution 1483 was based on determinations made under Chapter VII of the UN Charter, not on the basis of the legality of Operation Iraqi Freedom, a subject deliberately not addressed by the Security Council for the reasons discussed in that chapter. And the subsequent Security Council’s call for the end of the occupation made in Resolution 1511 appears motivated by adherence to the principles of sovereignty and self-determination and support for a political and constitutional process that involved the gradual restitution of authority to the Iraqi people rather than by a post facto validation of Operation Iraqi Freedom. Likewise, the authorisation to the Multinational Force to use force was based on the need to protect the political process leading towards the democratisation of Iraq, and had no formal connection with Operation Iraqi Freedom. By leaving aside considerations of *jus ad bellum*, the Security Council had devised a framework that, as discussed in Chapter 3, could have helped to solve the Iraqi crisis, regardless of whether the occupying powers were ‘aggressors’ or ‘liberators’.

Looking at the matter in the reverse by inquiring whether considerations of *jus post bellum* should inform considerations of *jus ad bellum*, it could be suggested that insofar as the Security Council, rather than refusing to grant any form of legitimisation to an occupation administration, lends support to the objectives pursued by the former invaders and authorises them to use force in defence of the objectives pursued by an occupation, it

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91 Ibid, 574–83.
93 Chapter 2, s 1.1.
also provides some indirect form of legitimisation to the use of force that led to it. Such practice could have some form of precedential value. The outcome of a given post bellum situation could, in principle, provide valid arguments for construing exceptions to the norms concerning the prohibition of the use of force, or for claiming that a given use of force should have been authorised by the Security Council. I doubt, however, that the aftermath of Operation Iraqi Freedom could provide a justification for that intervention or for future interventions, considering that neither weapons of mass destruction were found, nor was democratisation claimed as the main justification for the use of force against Iraq. Nor can the occupation of Iraq be seen as an unquestionably successful case of democratisation so as to justify its repetition. And, in any case, it should not be overlooked that the evaluation of the aftermath of a conflict and its possible influence for future normative developments is a distinct set of issues from the question of the legality of a given use of force. As a matter of adherence to the content of contemporary international law, the latter remains an evaluation to be made ex ante rather than post facto on the basis of the available information and the applicable norms of international law at the time the conduct is carried out (tempus regit actum).  

The need for an underlying rationale to the category of jus post bellum may also be illustrated by the complexity of the issues that emerge in a post-conflict situation, which run deeper than the application of a legal concept. As the case of Iraq demonstrates, the transition from active combat to peace often involves making determinations that are by no means transitory, having instead a foundational character, as they may impact on a given country or territory for many years. The making of these determinations involves considering fundamental issues of moral and political theory relating to democracy, self-determination, popular legitimacy, and local ownership, among others.

The Iraqi case unveiled the complexity of these issues and the differing perspectives from which they could be viewed. It is difficult to ascertain, for instance, when the enablement of the right to self-determination transforms into hetero-determination, and whether foreign actors (including the Security Council) are entitled to proceed with supporting a process

of democratisation when segments of the people for whose benefit the process is undertaken are in effect divided, *inter alia*, on whether to accept the pro-democratic but nevertheless foreign (and force-based) intervention. What I doubt is the possibility of devising new substantive rules and principles in the absence of some kind of agreed moral, political, and philosophical framework to provide an overriding rationale that can be a consistent instrument of guidance and restraint in their formulation. On this basis, I agree with Nehal Bhuta that international law should not contain “[general] rules governing the production of new political orders in territories under occupation or international administration”.95

If, on the other hand, the project of developing the proposed category of *jus post bellum* is, more cautiously, construed as a ‘gap-filling’ project within an existing framework based on the understanding that the lack of comprehensiveness of the framework applicable to peace-building activities may lead to unfairness or ineffectiveness, then the key hurdle for international lawyers becomes identifying concrete issues for the agenda of that project and, acting more as tailors than architects, trying to tackle them.96 With this purpose in mind—in addition to the various suggestions made in this chapter concerning the law of occupation and the role of the Security Council—two further issues may be flagged at this juncture that emerged in the occupation of Iraq, but the complexity of which need further scrutiny, as they may arise in other ‘post bellum’ situations.

A first problem that needs clarification, particularly in light of the complex framework applicable to the occupation of Iraq, is whether the right to self-determination of a people under occupation entails the right of armed resistance against that occupation. This is not a question of disobeying a specific command given by an occupying power, which may depend on the legality of that command, nor of whether single individuals may commit crimes in their struggle, which is an issue of international criminal law. It is the more fundamental issue of whether an occupied people can resort to force to obtain the departure of the occupation forces from its territory, justifying it on the basis of the right to self-determination or other grounds, when the role of such forces in the occupied territory is authorised by the Security Council. Support for the existence of a right of resistance can be found in Article 1(4) of Additional Protocol I, which speaks of ‘peoples … fighting against … alien occupation in the exercise of their right of self-determination’. It seems logical to conclude, therefore, that

95 Bhuta (n 73) 852.
96 See generally Österdahl (n 85) 271–3.
the right to self-determination includes the right of armed resistance. The same conclusion may be reached during a prolonged occupation, which, while lasting longer than the conflict in which it originated, may continue to be based on an (illegal) use of force, impeding the exercise of the right of self-determination.

On the other hand, if the Security Council authorises military forces to defend an occupation administration and what it stands for, as the Security Council did in Resolution 1511, thereby implicitly justifying the presence of that administration within the occupied territory against those who would like it to leave, then, arguably, it would be difficult to speak of the existence of a right of armed resistance, assuming that it was possible to speak of the existence of such a right before Resolution 1511. Depending on the answer given to these complex questions, the insurgency in Iraq in its various phases may be deemed legal or not. Hence, the question that, in light of the events in Iraq, should be clarified in the framework of a *jus post bellum* project is not just whether those involved in a conflict between occupants and resistance groups are complying with applicable international humanitarian law. The more thorny issue is whether the affected people have the right to start such a struggle, whether such a right could eventually be based on an extension of the right to self-determination, and whether it can be trumped by the Security Council under Chapter VII of the UN Charter, and if so, whether the insurgents should be subjected to a process of accountability.

A second issue that requires further investigation concerns the extent of the process of accountability to be ensured and pursued during an occupation. The key question of to whom and for what accountability is owed requires further scrutiny. This is particularly so in a situation of transformative occupation, when the occupying power may tend to adopt for itself the role of the judge of a country’s past and its leaders’ conduct while in office. In a situation of occupation, apart from questions of state responsibility, issues of accountability may emerge in relation to: (i) the conduct of the occupation forces (and those working for them) towards the occupied population; (ii) the conduct of the hostilities during the conflict that generated the occupation; (iii) the conduct of the occupied people towards the personnel and forces of the occupying powers; and (iv) the crimes com-

mitted by the ousted regime towards its citizens prior to the beginning of the conflict that instigated the occupation. In respect of this last category, one aspect that requires analysis concerns the remit of the indictments against political and military leaders.

While a trial with a broader indictment (that concerning the Anfal campaign) was in the pipeline, Saddam Hussein was convicted and sentenced to death for specific crimes that occurred in response to the failed assassination attempt at Dujail in 1982. As a consequence, it may be fair to hold that Saddam Hussein has been found guilty of only a fraction of the crimes that might have been expected to be ascribed to him. One consequence of this outcome is that the possibility of having a reasonably comprehensive record of the events that occurred during the whole of his rule of Iraq has been lost.

According to Newton and Scharf, the decision to begin with the Dujail trial was due to the fact that: (i) it was the ‘first investigation to be completed’; (ii) the ‘evidence for the Dujail prosecution was extremely strong’; (iii) the ‘Dujail case would not lend itself to as many defences as would be available with respect to other charges’; and (iv) ‘it made a lot of sense to begin with a less important and less complex case’ because ‘it enabled the tribunal to focus on the broad legal challenges to the process that were brought by the defence’. From this perspective, Newton and Scharf compare the trial of Saddam Hussein with the ‘1931 trial of Chicago boss Al Capone’, who ‘was prosecuted and convicted for tax evasion rather than for the thousands of murders he orchestrated’. Certainly, the limited scope of the indictment against Saddam Hussein served the purpose of ensuring an expeditious trial. Some may argue that this approach is preferable to the very long indictments that characterised some of the trials at the ad hoc international tribunals. Yet, it is debatable whether trials of this historical and political significance can be conducted on the basis of domestic models as if the only issue at stake is finding the most effective and rapid way to try and convict a suspected criminal. This approach

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98 See Chapter 4, s 3.2.2.
100 Ibid, 82.
may rightly suit the desire for justice of those who have been victims of a
despot. But, on the other hand, it may be considered unfair by those who
have not been his victims and that, therefore, could argue that it would be
unfair to assess the conduct of the ruler of a country for thirty-five years ‘only’ for certain incidents, thus widening the chasm between the various
groups within a society.

While, as often noted, international tribunals are not there to make his-
tory, it cannot be ignored that they constitute a record of events and facts
that, depending on the accuracy of the work done by a given court, may
constitute a source of knowledge and understanding for an affected com-
munity, and more broadly for the international community as a whole. The
knowledge that may be gained through a broader process of accountabil-
ity may assist the reconciliation and re-unification of a people, something
much needed in today’s Iraq. This would be facilitated by understanding
what occurred in the past, who should be considered responsible for it,
and who should not. Now, the fact that Saddam Hussein has been tried is
certainly important, establishing that justice has been done. But the funda-
damental question of whether the approach adopted in the case of Sad-
dam Hussein was not only effective but also fair cannot, in light of the
foregoing considerations, be set aside.

2.5. Whether the Security Council should support pro-
democratic transformative occupations

Contemporary customary international law, which includes the law of
occupation, the principles of sovereignty, and the principle/right to self-
determination, forbids transformative occupations. Possible exceptions
to this general prohibition—the legality of which should be evaluated on
a case-by-case basis—include transformative occupations authorised by
the Security Council or that could be justified as a measure of self-defence
against the threat posed by an aggressor, provided that the requirements
of necessity and proportionality are met. The practice of the countries
that occupied Iraq appears to confirm that a completely unilateral trans-
formation of a country cannot be regarded as legal under contemporary
international law. Despite having acted in defiance of the Security Council
when deciding to use force, the US and the UK subsequently could not

102 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996]
ICJ Rep 226, paras 41. See also Case concerning Oil Platforms (Islamic Republic
of Iran v United States of America) (Merits) ICJ [2003] para 76.
avoid returning to the Security Council to seek some form of international validation for their transformative project, so that other countries could legitimately support it in one way or another if they so wished.

Likewise, the fact that the Security Council called for an end to the occupation is a further indication that the model of unilateral transformative occupation stood on rather shaky grounds, as, in fact, it was brought to an end after less than a year and replaced by a model of administration of territory that was as close as possible to the people concerned. That being so, the key issue that appears to emerge from the Iraqi case is not whether there is a right to unilateral transformation of territories in international law. There is not, as international law stands now, regardless of the reasons adduced by the occupants, apart from possible exceptions of (genuine) self-defence. Rather, it is the more complex and multi-faceted question of whether the Security Council should validate, in whole or in part, processes of democratisation via belligerent occupation.

To begin with, as discussed in Chapters 4 and 5, I believe that, unless it provides a convincing rationale, the Security Council is not at liberty to provide such validation by implying the existence of consent where such consent does not reflect the majority of the people concerned, because it would be an abuse of power ultimately leading to a breach of that people’s right to self-determination and to its own loss of credibility as an organ working for the international community as a whole. On the other hand, the Security Council could, in future, rely on Resolution 1483 to require an occupation administration to create the conditions for enabling a people to exercise their right to self-determination when such action is thought necessary to defuse a threat to international peace and security pursuant to Chapter VII of the UN Charter, and the Security Council provides a convincing rationale for so doing. Again, absent such a rationale, the provision of which is a corollary following from its not being *legibus solutus*, the Security Council would look authoritarian rather than authoritative. Acting under Chapter VII of the Charter, the Security Council may, in principle, even go as far as supporting a process of democratisation via occupation. In light of the case of Iraq, this determination should be made, however, *ex abundante cautela* after clarifying why the right to self-determination of the people concerned would not be impermissibly breached and whether it should entrust an occupation administration with such a far-reaching project.

The case of Iraq is a reminder of the difficulty of carrying out such projects and of the need to distinguish between issues of desirability, feasibility, and legality. Beginning with the issue of feasibility, the following ten-
ission between aspirations and outcomes may be highlighted. In a meeting of the Security Council on 18 June 2009, the Iraqi Ambassador to the UN expressed his appreciation for the outcomes of the process of democratisation initiated during the occupation. He put it thus:

Iraq today is a democratic State that respects freedoms and is governed by a Constitution. The principle of the peaceful rotation of power forms the basis of an open and transparent political process. All Iraqi political forces operate within that process and work through constructive dialogue to reach all important decisions, including on the key issues of building a federal system, legislation on the distribution of natural resources, constitutional amendments and internally disputed borders.\(^\text{103}\)

He also emphasised the efforts of the Iraqis, pointing out that:

The Iraqi people, driven by a belief in their mission to build a free and democratic Iraq, are building a democracy through mechanisms based on ballot boxes and not bullets. The security situation in Iraq continues to improve, despite some security violations.\(^\text{104}\)

According to these remarks, it could be argued that the transformative project started by the CPA was validated by the fact that the Iraqis supported it and were engaged in giving effect to it. On the other hand, considering the precarious security situation which remains and the behaviour of the government currently in office in Iraq, it seems that more sober and less enthusiastic accounts should be made and have, in fact, been posited. Speaking from the pages of *Foreign Affairs*, Ned Parker observed: ‘Nine years after U.S. troops toppled Saddam Hussein and just a few months after the last U.S. soldier left Iraq, the country has become something close to a failed state.’\(^\text{105}\) He claimed that Prime Minister Maliki was presiding ‘over a system rife with corruption and brutality’ and concluded that ‘[t]he dream of an Iraq governed by elected leaders answerable to the people is

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\(^{103}\) UNSC Verbatim Record (18 June 2009) UN Doc S/PV.6145, 7.

\(^{104}\) Ibid.

\(^{105}\) Ned Parker, ‘The Iraq We Left Behind: Welcome to the World’s Next Failed State’ (March/April 2012) 91 FA 94.
rapidly fading away’.106 Equally concerned, Toby Dodge remarked that ‘the lives of ordinary Iraqis, in terms of the relationship to their state and to their economy, are comparable to the situation they faced in the country before regime change’.107

In light of these comments, and taking into account the overall situation in Iraq, which is far from being a country at peace with itself, and whose government has become increasingly authoritarian, it can be suggested that no matter how desirable the pursuit of democracy may look from the perspective of foreign actors, the question of feasibility must be adequately factored into any analysis of whether a transformative occupation should be endorsed. It cannot be discarded that the policies pursued during the occupation of Iraq and the constitutional process supported by the Security Council may have contributed to the igniting of existing tensions and divisions within the Iraqi population and were in part responsible for the increasing of violence that resulted after it, in addition to the widely destructive role of terrorist groups.108 Hence, no serious policy maker or

106 Ibid. Additionally, Ned Parker described the security situation thus: ‘Although the level of violence is down from the worst days of the civil war in 2006 and 2007, the current pace of bombings and shootings is more than enough to leave most Iraqis on edge and deeply uncertain about their future.’ Parker (ibid) 94.


> Across Iraq, the sectarianism that almost tore the country apart after the American-led invasion in 2003 is surging back. The carnage has grown so violent, with the highest death toll in five years, that truck drivers insist on working in pairs—one Sunni, one Shiite—because they fear being attacked for their sect. Iraqis are numb to the years of violence, yet they calculate the odds as they move through the routine of the day ... wondering if death is around the corner.

108 Reflecting on the possible connection between occupation and the eruption of violence and internecine conflict in Iraq, see Ali Allawi, *The Occupation of Iraq* (Yale University Press 2007) 456:

> The law of unintended consequences broke out in Iraq with a vengeance. The US invasion and occupation of Iraq broke the thick crust that had accreted over the country and region as a whole, and released powerful subterranean forces. The emergence of the Shi’ a after decades, if not centuries, of marginalisation was perhaps the most
scholar could advocate the democratisation of a country without considering the Iraqi precedent and the fact that a given process of democratisation may not fit the context of the country in which it is undertaken and—assuming that it is possible to establish a link between such a process and the violence accompanying it—may be incurred at somewhat unacceptable costs in terms of civilian lives and suffering.\(^{109}\) Even if, as the words of the Iraqi Ambassador suggest, the Iraqis, or at least some of them, may have acquiesced in or sought to justify that process and its consequences as a necessary evil in a situation where inaction or the conservation of the status quo may not have been a viable option, the situation should still encourage the Security Council and all those concerned with the success of its policies to reconsider both the strategies and the objectives adopted during an occupation and to evaluate any possible alternative to the approach that was taken in Iraq.

The analysis of the feasibility of transformative occupation as a means of bringing about democratisation should then be accompanied by a reflection on the legal limits on the conduct of the Security Council, and also by the consideration of whether an occupation administration is suitable for such projects. The question of whether an occupant is in a position to effectively deliver on its promises and act as an agent of self-determination for the Security Council, as posited in Resolution 1483, without becoming an agent of hetero-determination, should be given due consideration. In fact, the achievement of a successful outcome may be hindered by the circumstance that an occupying power, more often than not, may find itself in an unsolvable situation of a clash of interests with the occupied people and with the Security Council itself.\(^{110}\) With respect to an occupied people,


\(^{110}\) Expressing doubts on the credibility of the US motives for its presence in Iraq, Allawi (n 105) stated:

> But none now gives any credence to the claims that the purpose of America’s occupation of Iraq was somehow related to America’s es-
the conflict may be due to the fact that, rather than merely benefiting an occupied people, an occupation administration would naturally first and foremost be concerned with the pursuit of the interests of the countries supporting it, notwithstanding claiming otherwise. The law of occupation seeks to resolve this tension, but it is very difficult to do so when no less than the democratisation of a country is at stake. Likewise, a conflict of interest may occur between the occupying powers and the Security Council. While ostensibly acting in pursuit of the overall goals set by the Security Council, the members of the Council in occupation of a country may fail to do so because, in consideration of the financial and human investment made for the success of a given occupation, they may pursue exclusively their own national interests. In fact, if the occupying powers are also permanent members of the Security Council, the power of veto may hinder the Security Council from being able to enforce compliance with any obligations it may place on the occupying powers in question.

That being so, it is suggested that the Security Council’s tasking so broad an entity as the CPA, over which it had, in fact, so little direct control, was somewhat hazardous. In the guise of respecting and accomplishing the conditions for the Iraqi people to freely choose their own political future, the Security Council had, in fact, provided the CPA with a justification for a more expanded role in the governance of Iraq than the law of occupation would allow, which might in turn have facilitated the CPA’s abil-
pousal of and promotion of democratic values. On the ground, these claims ring hollow. The rhetoric of change and reform came easily to the spokesmen for the occupation and to those in official Washington, but it was equally quickly dropped when it clashed with whatever were the exigencies of the moment. No wonder that cynicism runs deep regarding America’s true motives.

Moreover, highlighting the clash of interest between occupant and occupied, Allawi wrote:

Seizure of the oil fields, building Iraq as a base to subvert Iran, breaking up the country as part of a redesigned, fragmented Middle East, removing Iraq as a threat to Israel, these were all arguments held out as the ‘real’ motives behind America’s push in to Iraq. There was no ‘American party’ in Iraq, no people who were open advocates of an alliance with America because it was in the manifest interest of the country to have such an arrangement. America’s only allies in Iraq were those who sought to manipulate the great power to their narrow advantage. It might have been otherwise.
ity to go beyond its assigned tasks. In these circumstances, it is suggested that if the Security Council nonetheless decides to entrust so much to an entity that is as apparently unfit to protect an occupied people’s right to self-determination as an occupation administration may, in general, be, it should exercise an extraordinary level of supervision by, for example, creating effective *ad hoc* supervisory and reporting mechanisms. Without such enhanced mechanisms, a request from the Security Council to an occupying power to administer a country in accordance with certain criteria runs the risk of being more akin to a delegation of authority than to an allocation of responsibility. Moreover, it risks being a justification for a course of conduct chosen by the occupying powers, rather than a restraining order on the discretion of its addressees.

Apart from the possibility of creating an effective mechanism of supervision, the case of Iraq, for all the foregoing reasons, militates against the Security Council’s supporting of democratisation processes pursued through an occupying power. Regardless of the claims made by the occupants and irrespective of the relatively successful—but fundamentally unique—precedents of the Allied Powers’ occupations of Germany and Japan, as discussed, the occupation of Iraq demonstrates how the democratisation of a country is a daunting task—if at all feasible—particularly in situations where a people is either fragmented or reluctant to embrace a foreign-imposed new form of political order, and raises various issues of legality. The forces of an occupying power may perform the valuable function of preventing the return to power of all those opposed to a process of democratisation. Moreover, as administrator of territory, an occupying power may adopt norms suspending the applications of laws and the functioning of institutions harming the human rights of the people concerned. However, when going beyond the ordinary administration of territory and seeking to install a democratic regime in a given territory is accepted as a desirable international objective, the question of whether the Security Council should authorise an occupation administration to do so does arise, and, after Iraq, should probably be responded to in the negative.

In principle, the job of building a new political and economic order within a forcibly controlled territory through a process of democratisation—when, for a number of reasons, it cannot be undertaken by the people concerned—may be better carried out (if by anybody) by entities that are less divisive, less prone to bias, more inclined to comply with international standards, and more experienced than an occupation administration would normally be. Of course, the key hurdle remains of identifying
not only which entities could perform these tasks, but how such entities could perform such difficult tasks in a fair and effective manner.

Last but not least, it should be noted that the Iraqi case constitutes a sobering reminder of the staggering complexity of improving the life of a country after the ousting of its despotic regime when there is no indigenous government that could legitimately replace it. Not only is there the problem of anarchy emerging in such situations, but also the problem of how to deal with the ‘inheritance’ left by that regime, which may not be simply one of poverty and violence, but also one of fragmentation between the supporters of that regime and its enemies and/or victims. A despotic regime—which is characterised by the prevalence of the will of a minority over that of a majority—may have behaved in a manner that cut into the core of a society by creating or fostering already existing divisions that are difficult to heal and that an occupying power may widen through the adoption of unwise and divisive policies. Therefore, when operating in a post-despotic regime, particularly in countries torn apart by the artificial boundaries set by their colonial past and a history of violence, foreign actors should place at the centre of their agenda not only questions concerning the establishment of appropriate institutions and the application of international law standards, but also the finding of ways and means to support processes of mending the tears in a society caused by its past so as to enable the various components of the people inhabiting a given territory to work together for their future if they so wish.
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