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https://doi.org/10.15779/Z38XTSH

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Redefining the Laws of Occupation in the Wake of Operation Iraqi “Freedom”

Hamada Zahawi†

“Was it a Mistake? Some Iraqis say life is worse than it was under a dictator.”

“I think they are right in the sense of the average Iraqi’s life. If I were an average Iraqi, obviously I would make the same comparison, that they had a dictator who was brutal but they had their streets, they could go out, their kids could go to school and come back home without a mother or father worrying: ‘Am I going to see my child again?’”

1. Lyse Doucet, Kofi Annan Interview, BBC WORLD REPORT, Dec. 4, 2006, http://news.bbc.co.uk/2/hi/in_depth/6205056.stm (last visited December 24, 2007). Former United Nations Secretary General, Kofi Annan’s response to Lyse Doucet’s interview question, is a poignant example of the degree to which the international community recognized the failure of the Coalition’s promise for “freedom.” The author believes that the invasion and subsequent occupation of Iraq were both illegal, as it lacked a clear U.N. mandate, and disastrous for Iraq and its people. In fact, far from a cry for “freedom,” the immediate consequences of the occupation and the imminent near state of civil war today demonstrate that unilateral military intervention motivated by self-interested political and economic objectives are highly problematic and inherently destabilizing of the post-World War II international legal system.
INTRODUCTION

On March 19, 2003 President George W. Bush proclaimed, “My fellow citizens, at this hour, American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people and to defend the world from grave danger.” With those words the United States and its “Coalition of the Willing” launched Operation Iraqi Freedom. In less than three weeks, Saddam Hussein’s statue laid face down in Baghdad’s Firdos Square, a symbol of the toppling of Saddam’s regime.

The invasion of Iraq was the culmination of a volatile history between Saddam’s Ba’ath regime and the U.S. government. During the Iran-Iraq War (1980-1988), the U.S. provided Iraq with military aid and financial support. The relationship, however, radically shifted in the 1990s when the U.S. adopted a hostile policy towards Iraq and spearheaded both the Gulf War of 1991 and the crippling sanctions that followed. Much of U.S. policy was driven by a belief that Iraq posed a security threat through its alleged stockpile of Weapons of Mass Destruction (WMDs). The U.S. subsequently targeted Iraq in a full-scale military invasion under the banner of “Freedom” within the context of the U.S.’s post-9/11 global “War on Terror.” The prelude to this invasion was,

2. While the justifications for invasion are not the focus of this Comment, it is nonetheless important to note that the Bush Administration’s formal objectives centered around: (1) Iraq’s shelter and support for terrorist organizations; (2) grave human rights violations; (3) Iraq’s production and use of Weapons of Mass Destruction (WMDs); and (4) flagrant disregard of the terms of the weapons inspection, all in violation of U.N. resolutions and international law. President George W. Bush, President’s Remarks at the U.N. General Assembly (Sept. 12, 2001), http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html (last visited December 24, 2007). According to the Iraq Survey Group Report, “there [were] no credible indications that Baghdad resumed production of chemical munitions thereafter, a policy ISG attributes to Baghdad’s desire to see sanctions lifted, or rendered ineffectual, or its fear of force against it should WMD be discovered.” IRAQ SURVEY GROUP, FINAL REPORT 1 (2004), available at http://www.globalsecurity.org/wmd/library/report/2004/isg-final-report/ (last visited December 24, 2007).


5. In response to the attacks of 9/11, the Bush Administration launched a worldwide “War on Terror.” The goal, as articulated by President Bush, was that the “war on terror begins with al Qaeda . . . we will pursue nations that provide aid or safe haven to terrorism. . . . [f]rom this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.” President George W. Bush, President Declares Freedom at War with Fear (Sept. 20, 2001), http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html (last visited December 24, 2007). This war-cry led to military operations against the Taliban in Afghanistan and later Saddam Hussein’s Iraq. See generally Department of Defense, Defend America, available at http://www.defendamerica.mil/ (last visited December 24, 2007) (providing
however, marred by intense disputes as to the legal permissibility to attack another state as otherwise known as *jus ad bellum*. Yet, while questions surrounding the justifications for the U.S. invasion are important and remain unresolved, this Comment focuses instead on an analysis of the laws governing war or *jus in bello* and the laws of post-war occupation. These terms are used throughout the Comment to analyze the lawfulness, or unlawfulness, of the Coalition’s military and administrative occupation of Iraq.

In the initial months of the occupation, the Coalition Forces skirted their legal responsibilities as “belligerent occupiers,” contributing to the breakdown of law and order in the outset of the invasion. Under conservative occupation law, which is a facet of *jus in bello* as outlined in the Hague and Geneva Conventions, an occupier is “subject to a series of obligations pertaining to the administration of the territories it occupies and the population it controls as a substitute and caretaker for the national authorities.”

The further information on the U.S. War on Terror).

6. Political analyst Yoram Dinstein argues that by March 2003, Iraq had failed to meet the demands made by U.N. inspectors, thus giving the Coalition the green light to initiate a campaign to put an end to Iraq’s “material breach.” Yoram Dinstein, War Aggression and Self-Defence 299 (4th ed. 2005) (1988). However, others have argued that the use of a security threat to justify the Operation was questionable at best, since the case against authorization of the use of force under Security Council Resolution 1441 was far more compelling than the argument in favor of such authorization. See Carsten Stahn, Enforcement of the Collective Will after Iraq, 97 Am. J. Int’l L. 804, 806 (2003). See generally Adam Roberts, Harvard Program on Humanitarian Policy and Conflict Research, End of Occupation in Iraq (2004); David Scheffer, Beyond Occupation Law, 97 Am. J. Int’l L. 842 (2003).

7. Carsten Stahn, ‘Jus ad bellum’, ‘jus in bello’ . . . ‘jus post bellum’? — Rethinking the Conception of the Law of Armed Force, 17 Eur. Soc’y Int’l L. 921 (2006). While there has been much scholarship addressing *jus ad bellum* or the “lawfulness of the recourse to force” in regards to the U.S. invasion of Iraq, this Comment instead focuses on a lesser known, yet equally important, body of law governing the actions of parties in the post-war period. Id.

8. *Jus in bello*, or the Laws of War, governs acceptable practices while combatants are engaged in war. It is one of the oldest subsets of International Humanitarian Law and is generally accepted as customary international law. See generally Documents on the Laws of War (Adam Roberts & Richard Guelff eds., 3d ed. 2000) (1982) (for a more detailed analysis of the conservative laws of occupation). The conservative law of (belligerent) occupation is just one facet of *jus in bello*, and provides for the basic provisions of an occupier’s action in the post-war period. The term “conservative” for the purpose of this Comment is used to distinguish between the older, more traditional laws of occupation, as exclusively laid out by the Hague and Geneva Conventions, and the more modern approach of transformative occupation encompassed by the term *jus post bellum* (see infra note 25). The very fact that the laws of occupation are under the body of law described as the “laws of war” leads one to believe that they should be revised to incorporate necessary provisions to better regulate modern *post-conflict* management. Scheffer, supra note 6, at 843. See infra Section I (A)-(B).


Coalition breached its obligations when it failed to enforce measures to prevent looting of the state and impeded efforts to provide humanitarian assistance to the people. These failures were later attributed to poor post-war planning and self-interested priorities that placed economic objectives over humanitarian and cultural needs.

In the following months, the Coalition Provisional Authority (CPA) issued a series of "Orders" that overstepped the traditional legal bounds of an occupying force. The CPA, for example, systematically cleansed the government of Ba’athist party members under the provisions of Order 1, which hindered effective post-war administration. Order 2 sought to demilitarize the state, which in fact undermined Iraq’s security and stability. In accordance with Orders 39 and 40, the CPA radically liberalized and privatized the economy without forethought to the sovereign economic will of the Iraqi people. Finally, the CPA codified these Orders and other U.S.-influenced provisions in the Transitional Administrative Law (TAL), which served to unlawfully overhaul Iraq’s pre-war legal system. While the Coalition did uphold some of its legal obligations as occupiers, its strategy of selecting only those obligations that were self-serving was a dangerous and fatal policy.

The actions of the Coalition Forces and the CPA set the stage for the chaotic civil, economic, and political strife that continues to plague Iraq today. Therefore, the lessons of the occupation of Iraq reaffirm the necessity

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11. The CPA instituted 100 Orders that sought to radically alter the social, political, and economic well-being of the state, which went well beyond what is mandated by traditional occupation law. There were, however, obligations that were upheld such as trying to enforce anti-corruption measures and preserve basic human rights. Yet, these were symbolic gestures that have done little to alleviate the post-occupation morass. For a complete analysis of the CPA’s Accomplishments, see generally COALITION PROVISIONAL AUTHORITY: A HISTORIC REVIEW OF THE CPA ACCOMPLISHMENTS 2003-2004, available at http://www.cpa-iraq.org/pressreleases/20040628_historie_review_cpa.doc (last visited December 24, 2007).


16. While Iraq was in a state of humanitarian crisis and economic stagnation during the sanctions period (1991-2003), this pales in comparison to the current deplorable situation of Iraq in the post-occupation period. Since March 2003, "Iraq has faced a growing humanitarian emergency. . . . Hundreds of thousands of Iraqis have been forced to flee from their homes and hundreds of thousands more are casualties of the violence through death and injury. Education has
of modern occupation law. In the absence of such laws an occupier can undertake any action deemed necessary to advance its own interests. The likely outcome is not only socially, politically, and economically destabilizing and destructive for the people and the state, but sets dangerous international legal precedent.

Despite the failures of Operation Iraqi Freedom, the invasion of Iraq is part of a continuing trend of modern “transformative occupations,” which seek to foster a viable post-war state to prevent a relapse of the crisis that required assistance in the first place. To ensure that such acts of intervention are carried out in the most beneficial, effective, and equitable manner, and to prevent abuses by self-interested occupiers, future transformative occupations should be limited to “exceptional” circumstances. These circumstances exist outside the purview of the U.N. and center on gross, wide-scale human rights violations, such as genocide and ethnic-cleansing. Of course, simply limiting when occupations can take place has not in the past, and may not in the future, fully address the concerns of self-interested interventions and the dereliction of occupation law.

Through an application of the laws of occupation, this Comment seeks to critique the de jure and subsequent de facto occupation of Iraq by illustrating how the Coalition forces and the CPA flouted the tenets of this body of law to the detriment of Iraq and its people. Occupation law, therefore, failed Iraq in that it could not adequately regulate the actions of the occupiers and protect the inhabitants of the occupied state. As such, the Comment will then use the example of post-war Iraq to critique the conservative laws of occupation by demonstrating their general inability to limit the degree in which an occupier can transform the structures of an occupied state, and their insufficiency in addressing social, economic, and legal issues that presently arise in modern transformative occupations. Consequently, the laws of occupation should be modified to accommodate the special needs that arise in “exceptional” circumstances. This would require the adoption of additional provisions to the
current tenets of conservative occupation law that provide a legally viable framework to cultivate a sustainable and stable post-war state. Such a revision should include the incorporation of human rights law within, not in lieu of, the existing body of occupation law as well as additional considerations stemming from the lessons learned in Iraq. Adherence to such principles of human rights laws and proper occupation protocols will regulate the actions of the occupier by encouraging the use of occupation law as a guide to positively transform the fragile post-war state.

This Comment presents a three-part analysis that ultimately critiques and redefines occupation law to prevent a repetition of the failures that transpired in the wake of Operation Iraqi Freedom. Section One lays out the fundamental provisions of the conservative laws of occupation as embodied in the Hague Regulations and Geneva Conventions as well as the U.S. Army Field Manual. It also discusses the growing trend towards humanitarian intervention and the need for transformative occupation to ensure a successfully stable post-war state. Section Two uses the tenets of occupation law as outlined in Section One to describe the dire consequences of the Coalition’s breach of this body of law, through its actions that revamped the administrative, political, economic, and legal structures of the state. Section Three uses the analysis of Section Two to demonstrate that the conservative laws of occupation are inadequate and need to be redefined. This Section lays out the “exceptional” circumstances for a non-U.N. mandated intervention. It then proposes a revision to occupation law that seeks to incorporate human rights law, as well as additional considerations derived from post-war Iraq, to formulate a modified and modernized legal regime “under a new umbrella labeled jus post bellum.”

21. While occupation law speaks to issues that arise from war and temporary occupation, human rights law more broadly addresses social, political, and economic factors that typically arise from a war-torn state. An incorporation of such a body of law that is both sensitive to humanitarian and development issues as well as geared towards longer-term action can ensure the accomplishment of positive transformative measures without breaching international law or infringing the long-term sovereignty of the state. See infra Section III (E).

22. The primary means of regulating occupation should continue to be traditional occupation law as it is still “a sensible and essentially conservationist set of rules to cover a type of emergency situation that frequently arises in war.” Roberts, supra note 18, at 622.

23. It is not hard to imagine that full compliance to such a modification of occupation law will be challenging in light of the weak enforcement mechanisms that are currently in place. While it is important to recognize the dilemma of enforcement, proposing solutions to remedy these enforcement issues is outside the scope of this Comment.

24. The U.S. Army Field Manual provides a practical code of conduct and legal guidance to officers in the field including remedies for violations of international law during military occupations. See infra Section I (B)(3).

25. Roberts, supra note 18, at 582. The term jus post bellum has generally been used to describe the laws governing post-war occupation. Brian Orend defines the term as “justice after war.” Brian Orend, The Fundamental Norms of Jus Post Bellum, 31 J. Soc. Phil. 117, 118 (2000). Carsten Stahn similarly sees the term as encompassing the law governing “the restoration of peace after conflict.” Stahn, supra note 7, at 926. While the term has slowly evolved since the end of World War II, little scholarly attention has been paid to this body of law in the past 50 years. For
It is difficult to impute *full* responsibility for the present deplorable conditions in Iraq to the invasion and occupation of the Coalition. Rather, there are many historical social, economic, and political factors that have collectively sowed the seeds for the present tensions in Iraq.\(^{26}\) Even if the Coalition forces had adhered to the conservative laws of occupation, one cannot unequivocally assert that Iraq would have emerged a stable state in April 2003 given these historical tensions. That said, while the founding of Iraq as a nation-state and its modern history fostered divisions in society, the Coalition precipitated a release of these deep-seated tensions with the illegal regime change of April 2003. Moreover, the Coalition's short-sighted policies and subsequent blatant transgressions outside the laws of occupation exacerbated the post-war tensions, jeopardizing the security, economy, and administration of the state and the safety of the people. It is for these reasons that transformative occupation should be restricted to only "exceptional" circumstances and regulated through a modified legal regime. Otherwise, the harm done *ex-post facto* can be greater than the *ex-ante* harm the intervention sought to prevent.

I

THE PARAMETERS OF CONSERVATIVE OCCUPATION LAW

It is difficult to isolate with precision the factors that precipitated the current weakening of the Iraqi state. This Comment argues that the failures of the Coalition forces,\(^{27}\) as well as the subsequent mistakes of the CPA,\(^{28}\) set the stage for the disintegration of Iraq. These short-sighted actions and their consequences can be traced to a conscious disregard for the laws of occupation—laws which were created to prevent just such disasters.

As the case of Iraq highlights, there exists a fundamental discord in the purposes of this Comment *jus post bellum* is conceived as *simultaneously* guarding the central duties and responsibilities of *jus in bello* while invoking legally regulated allowances using human rights law. However, this Comment does not seek to reinvent occupation law, but rather proposes additions and cursory modifications to the existing law in order to address the inherent need to modernize *jus in bello*, especially after the occupation of Iraq.

\(^{26}\) In general terms the tensions that envelop modern Iraq were partly created at its birth under the British mandate and perpetuated during its modern history. Issues such as favoritism for the Sunni minority in governance and the army, oil exploitation and dependency, tolerance for military authoritarianism, and strained relations with neighboring states, collectively contributed to the political complications and social tensions of present-day Iraq. See generally *Phoebe Marr*, *The Modern History of Iraq* (2d ed. 2003) (laying out an in-depth analysis of the creation of modern Iraq and the ensuing social and political challenges).

\(^{27}\) These included the inability to prevent widespread looting, restore law and order, and establish crucial humanitarian assistance to the population in the aftermath of Saddam's removal from power.

\(^{28}\) The CPA’s Orders, as will be discussed *infra* Section II, strayed far from the literal interpretation of the laws of occupation. Their initiatives to revamp the economy (Orders 39 and 40), demilitarize the state (Order 2), as well as de-Ba’athify the government (Order 1) had far-reaching effects, which undermined the security, administration, and sovereignty of the fragile state.
letter and practice of conservative occupation law. This body of law “views occupiers as trustees, preserving the status quo ante bellum” whereas the Coalition forces saw themselves, as “agents of political and social change.” This discord raises doubts as to whether these polar opposite views can coexist. While the Coalition recognized the need to uphold the laws of occupation in Iraq, it also undertook actions that did not comport with those laws. This can be better appreciated through an understanding of the various provisions of occupation law as set forth in this Section.

A. Belligerent Occupier & State Sovereignty

The laws of occupation are part of International Humanitarian Law and are framed by conventions and agreements which seek to limit the “means and methods of warfare” and protect civilians and soldiers who are no longer engaging in combat. The laws come into legal effect when the territory is “actually placed under the authority of the hostile army” and the belligerent occupier is in a position to impose its control over that area. Yet, an occupation does not need to be a matter of controlling “the whole of another State’s territory, but arises when authority is established over any portion of its territory.” Therefore, the obligations of a belligerent occupier under this body of law extend to all parts of the state and the inhabitants under occupation.

Occupation does not transfer sovereignty of the occupied territory to the occupier. Instead, international law is based on “the principle of sovereign equality” of all U.N. member nations, to undermine the sovereignty of an occupied state is akin to annexion and strictly prohibited. Therefore, the occupying power functions as the administrator of the area and assumes provisional authority over the functions of the ousted national government as

29. Fox, supra note 17, at 234.
34. U.N. Charter, ch. 1, art. 2, para. 1.
35. See Roberts, supra note 18, at 582-85.
well as some of its legislative and judicial responsibilities.\textsuperscript{36} It is required to ensure “to the fullest extent of the means available” that the local population has adequate food, medical supplies, clothing, shelter, and essential public services.\textsuperscript{37} However, an occupying power does have a “restricted capacity to implement reforms in occupied territory where those reforms may prejudice the eventual exercise of discretion by a sovereign government in the occupied state.”\textsuperscript{38}

Commentators have noted that many occupying powers during the twentieth century refused to acknowledge their status as ‘occupiers’ “for a variety of reasons, including a reluctance to accept formally the extensive duties and restrictions the law imposes” on them.\textsuperscript{39} Therefore, these occupiers have asserted that they did not “exercise the requisite control over the occupied territory”\textsuperscript{40} and have even claimed that they are “liberating” the formerly sovereign territory in order not to incur the responsibilities of a belligerent occupier. Despite the justification for occupation, it is not legally relevant that the occupiers claim to be “liberating” the population; so long as an international armed conflict is underway, such a justification for the conflict has no bearing on whether the laws of occupation apply.\textsuperscript{41}

\textbf{B. The Structure of Conservative Occupation Law}

Conservative occupation law, as a subset of \textit{jus in bello}, is largely governed by the Hague Convention of 1907, the Geneva Convention of 1949, and customary international law, which collectively encapsulate the legal obligations and duties of the belligerent occupier.\textsuperscript{42} The primary purpose of this body of law is to preserve the sovereignty of the occupied territory and ensure the humane treatment of the local population.\textsuperscript{43} The occupying power does not become the government of the occupied territory, but rather exercises temporary authority in accordance with the defined terms of the Hague and Geneva Conventions.\textsuperscript{44} In this respect, the laws of occupation aim to “preserve

\begin{itemize}
\item \textsuperscript{36} See Schmitt, supra note 33, at 2.
\item \textsuperscript{37} Id.
\item \textsuperscript{39} Jeffrey Dunoff, \textit{International Law} 590 (2d ed. 2006) (2002).
\item \textsuperscript{40} Id.; see Fox, supra note 17, at 231 (stating that rare acknowledgments of occupation led to “a lack of state practice that might give depth and nuance to often spare treaty provisions and assess their relation to cognate bodics of international law.” This therefore limited the evolution of occupation law).
\item \textsuperscript{41} Dunoff, supra note 39, at 590.
\item \textsuperscript{42} Scheffer, supra note 6, at 843; see also supra note 8 (outlining \textit{jus in bello}). \textit{jus in bello} encompasses many different laws, conventions, and treaties that describe the conduct of a belligerent state in war, covering issues that range from prisoner treatment to aerial warfare to outlawing certain weapons in combat. Facilitating the restoration of peace under the laws of occupation is just one subset of \textit{jus in bello}.
\item \textsuperscript{43} Benvenisti, supra note 31, at 28.
\item \textsuperscript{44} John Kampfner, \textit{Blair Told It Would Be Illegal to Occupy Iraq}, \textit{New Statesman}, May
the status quo, not to entitle the occupying power to transform the territory it holds,"\textsuperscript{45} lest the door would be “wide open for abuse by aggressive armies.”\textsuperscript{46} Therefore, as long as the aggressor state is an occupier, the laws of occupation, as promulgated by the Conventions, serve to regulate and limit the actions of the occupier. It is for this reason that occupiers should strictly adhere to the central tenets of occupation law regardless of the short- or long-term goals of a particular campaign. Without this legal safeguard, the likely consequence is abuses by the occupier at the expense of the occupied state’s sovereignty and the inhabitants’ well-being.

1. Hague Convention of 1907: Responsibilities of the Occupier

The Hague Convention of 1907 expanded upon the first Hague Peace Conference of 1899, and laid the cornerstone of international occupation law by outlining the duties and responsibilities of a belligerent occupier over the territory of an occupied state. As an international treaty governing war, the Convention is considered part of customary international law and therefore is legally binding on all states.\textsuperscript{47} The provisions of the Hague Convention addressed concerns with prisoner treatment and the use of certain weapons in battle and provided instructions dealing directly with occupier’s conduct once the territory was placed “under the authority of the hostile army.”\textsuperscript{48} The articles addressing the financing of an occupation, the maintenance of the political and economic status quo of the occupied state, and the respect of laws in force are directly relevant to analyzing the obligations of the Coalition Forces as belligerent occupiers in Iraq, outlined in Section Two.

Hague Convention Articles 48 and 49 address issues of financing an occupation and require that any taxes the occupier levies on the local population be used only for the needs of the army and administration of the state.\textsuperscript{49} However, the Articles employ expansive language that can be creatively interpreted to allow the occupier to abuse these duties. This could jeopardize the credibility of the occupiers among the occupied inhabitants and

\textsuperscript{45} Scheffer, supra note 6, at 851.

\textsuperscript{46} Id.

\textsuperscript{47} Dörmann & Colassis, supra note 32, at 297 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136, para. 89 (July 9)).

\textsuperscript{48} Fourth Hague Convention, Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907 (hereafter “Hague Convention”), 36 Stat 2277, 1 Bevans 631.

\textsuperscript{49} Article 48 states plainly, “If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall . . . be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.” Article 49 further states that “If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.” Id. at art. 48-49.
encourage corruption and embezzlement of state funds to the detriment of a war-torn economy.

An important aim of occupation law is to maintain the status quo during an occupation to ensure a return to normalcy after war for the inhabitants. In this respect, Articles 55 and 56 require that the occupier “shall be regarded only as [an] administrator” of public properties and “must safeguard the capital of these properties”\(^\text{50}\) such as “institutions dedicated to religion, charity and education, the arts and sciences.”\(^\text{51}\) The Hague Convention is also resolute on the issue of safeguarding these properties and warns that “all seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”\(^\text{52}\) While the Convention appears to address damage done exclusively by occupiers, this provision can also be read to mandate that the occupier safeguard public property from any source of destruction whether domestic or foreign.

Article 43 is by far the most contentious clause of the Hague Convention because of doubts as to its realistic adherence. The Article states that once the occupant has taken control of a given territory it is required to take “all the measures in [its] 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.”\(^\text{53}\) Scholars have varying interpretations as to when an occupier is “absolutely prevented” from respecting the laws in force yet “few [scholars] propose justifications wholly divorced from military necessity.”\(^\text{54}\) Political analyst Conor McCarthy, however, contends that it is generally “not permissible for an occupying power to allow an occupied territory to fester in a state of economic, social, political and infrastructural retardation created by the conflict from which the occupation has resulted.”\(^\text{55}\) Although, this raises an issue as to the degree to which the laws of the occupied state can be amended to prevent such an occurrence.\(^\text{56}\)

\(^{50}\) Id. at art. 55.

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) Id. at art. 43.

\(^{54}\) DUNOFF, supra note 39, at 603.

\(^{55}\) McCarthy, supra note 38, at 62.

\(^{56}\) Kampfner, supra note 44 (stating that following the Iraq war, British Attorney General, Lord Goldsmith, advised Prime Minister Blair that there are several limitations placed on an occupying power. While changes to the laws of public order are permissible under Article 43, “more wide-ranging reforms of governmental and administrative structures . . . [as well as] the imposition of major structural economic reforms would not be authorized under international law.”); see also Fox, supra note 17, at 284 (contending that “[a]part from general obligations to provide for the welfare of inhabitants, as well as provisions concerning an occupier’s use of public and private property, matters of economic regulation are almost wholly absent from the treaties”).
2. Fourth Geneva Convention of 1949

World War II profoundly impacted the international legal landscape. In the months leading to the fall of the Third Reich, the Allies saw that their duty to dismantle the Nazi system would require them to go far beyond the bounds of the then-existing laws of occupation. The original laws of occupation from the Hague Convention served two purposes: to protect the sovereign rights of a legitimate government in the occupied territory, and to protect the occupied inhabitants from being exploited by the occupant. The first purpose was not applicable in Nazi Germany because it was agreed by the Allied Forces that any vestige of the Nazi Party and its policies would no longer be tolerated. The Allies justified their actions "on the grounds that enforcement of the existing systems would itself have been a violation of the 'principles of the law of nations,'" and therefore reasoned that they were ""absolutely prevented' from respecting the laws in force in the country."\(^{59}\)

Despite the apparent laudable justifications for dismantling the Nazi party, an inherent contradiction emerged. The Allies recognized the need to intervene in the humanitarian crisis and overhaul the legal and political system, but the Hague Convention required that the occupier respect the sovereign right of the occupied government. \textit{Jus in bello} had no explicit exception for circumstances where the ousted government was the perpetrator of the crisis.\(^{60}\) Where the aim of ending a humanitarian crisis is legally-sanctioned, it seems to logically follow that implementing a strategy to remove the perpetrating regime during occupation should also be legal.\(^{61}\) However, this logic can lend itself to outright abuse by the occupier who, like the Coalition in Iraq, may undertake transformative operations to remove governments who it views as disagreeable to its own foreign policy.\(^{62}\) This dilemma was not adequately addressed until the Allies attempted to revise the laws of occupation in the Fourth Geneva

\(^{57}\) Roberts, supra note 18, at 602.
\(^{58}\) Fox, supra note 17, at 290-91. The case of post-war Germany was unique for its time since it was generally recognized that the Allied forces had to breach the narrow bounds of the Hague Convention if they were to adequately administer post-war Germany. However, the Allies recognized this was a dangerous precedent and therefore included safeguards to limit abuse in the Geneva Convention of 1949.
\(^{60}\) See Fox, supra note 17, at 264 (highlighting that those who believe that \textit{jus in bello} is obsolete may argue “that maintaining a distinction between the legitimate prerogatives of a \textit{de jure} government and the limited legislative capacities of an occupier makes little sense when a war is undertaken precisely to remake the political and legal institutions of the target state.” Thus, “where international actors seek to enhance human rights in the territory, the obstructing conservationist principle is simply an anachronism”).
\(^{61}\) \textit{Id.}
\(^{62}\) While this Comment does not focus on the Coalition's justifications for its actions in Iraq, it is important to note that this dilemma greatly afflicted U.S. policymakers who eventually chose to base their justifications for invasion on the need to remove a security threat, namely WMDs, that was closely linked with the regime.
Convention of 1949.63

After World War II, the Fourth Geneva Convention addressed the restrictive and dated nature of the laws of occupation by providing a broader framework in which occupying powers can invoke necessary transformative changes to the economy, judiciary, human rights standards, and political structures of an occupied state. These changes had not been fully contemplated by the Hague Convention or the domestic law of some occupied territories.64 The final language of the Geneva Convention is primarily concerned with the conduct of an occupying power in relation to the population. Therefore, it may be more applicable to a longer-term occupation than to a temporary intervention designed to simply liberate a society from despotism.65 Moreover, certain provisions of the Geneva Convention are similar to an international “bill of rights,” expanding human rights beyond the Hague Convention.66 As such, the articles requiring the occupier to secure the maintenance of law and order, ensure food and medical supplies, and maintain an orderly government of the occupied territory are discussed here to provide a framework in which to later analyze the obligations of the occupying forces in Iraq.

In terms of post-war occupation and nation-building, there are several relevant articles that are important to highlight. Article 47 requires that occupied inhabitants are protected and “shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as a result of the occupation.”67 Therefore, no institutions can be created or laws enacted that would violate the Convention. This provision serves to check the occupier’s desire to take actions that are motivated by self-interest rather than the well-being of the population. Moreover, in an effort to secure the maintenance of law and order in a post-war state, Article 54 requires that “[t]he Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them.”68

To ensure the well-being of the inhabitants, Article 55 requires that “to the

64. See Scheffer, supra note 6, at 849.
65. See McCarthy, supra note 38, at 50.
66. See Fox, supra note 17, at 264-65 (illustrating that the specific prohibitions in Articles 27-34 and 47-78 of the Fourth Geneva Convention involve the protection of individual rights which were not enumerated in the Hague Convention. This illustrates the convening parties’ acknowledgment of the need to uphold human rights).
67. Geneva Convention, supra note 63, at art. 47. The latter part of Article 47 reads that the inhabitants shall not be deprived of benefits of the Convention which include “any agreement concluded between the authorities of the occupied territories and the Occupying power” through the creation of a puppet-style domestic government that furthers the interests of the occupying power.
68. Id. at art. 54
fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population." Article 55 is further enforced by Article 56, which states that occupying powers must also be required to "ensure[e] and maintain[ ] with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory." The affirmative duty to carry out these humanitarian tasks in lieu of the domestic authority cannot be underestimated. If an occupying power allows the medical infrastructure to fall into disrepair, thereby jeopardizing the general health of the population, this can further encourage civilian hostility towards the occupier.

Article 64 may have done the most to change the face of occupation law. It allows the occupying power to "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain an orderly government of the territory, and to ensure the security of the Occupying Power." This Article can be read broadly as endorsing expansive policies of an occupier that seek to radically alter the social and political structures of the occupied state under the guise of needing to fulfill their legal duties as occupiers. Thus, although the broad terms of the Geneva Convention were designed to help ensure the welfare of inhabitants, these provisions nevertheless are susceptible to manipulation by occupiers to serve their own ends.

The Geneva Convention was later amended by the Geneva Protocol I of 1977, which sought to enhance the protection of civilians in the occupied territory. It is presently ratified by 167 countries, but notably, not by the U.S. or Iraq. Protocol I attempted to bridge *jus in bello* and recent advances in universal human rights. Article 51, for example, states that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations." Similar to the duties outlined in the Hague Convention, not only should the occupier refrain from such actions, but they also have a duty to protect the civilian population from both foreign and domestic violence that may emanate from the state of occupation.

Though the Geneva Convention and Protocol represented huge advancements in the laws of occupation, they lacked a means to adequately operationalize this body of law on the ground. Instead, the national military

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69. *Id.* at art. 55.
70. *Id.* at art. 56.
71. *Id.* at art. 64.
74. *Id.* at art. 51.
field manuals, issued by states to guide their military’s conduct, have generally been successful in combining “the active element of practice with the reflective detachment of legal commentary that has been notably missing from most considerations of occupation law.”


The U.S. Army Field Manual provides a practical code of conduct and legal guidance to officers in the field including remedies for violations of international law during military occupations. The Field Manual was created in 1956 with the goal of diffusing and formulating international humanitarian law. There are two benefits of the U.S. Army Field Manual: first, it is grounded in law and makes specific references throughout to the Geneva and Hague Conventions; second, it offers the Army interpretation of those international laws in order to provide guidance on the tasks that need to be carried out. While the Field Manual is the only current doctrine that offers any substantive information on the required tasks to execute an occupation, it nonetheless fails to include substantive guidance on how to conduct an occupation. The sections described below illustrate how the manual functions as an instructive source that elucidates the precise duties and responsibilities of the U.S. army during an occupation such as that of Iraq.

Section 353 states that during an occupation the “sovereignty of the occupied territory is not vested in the occupying power.” Rather, the occupation and the occupiers’ authority over the inhabitants are purely temporary. This provision implies that occupying forces should not invoke unilateral political, economic, and legal policies or undertake radical transformative actions that are self-interested and long-term in nature.

Similar to Article 43 of the Hague Convention, Section 367(b) is one of the most contentious yet vital obligations of the occupier. It requires that once “the authority of the legitimate power [has] 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.” This high standard serves to limit the ability of an occupier to radically alter fundamental structures of the state to suit its own interests. Moreover, Section 367(b) also

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75. Fox, supra note 17, at 231-32.
78. FIELD MANUAL, supra note 76, § 353.
79. Id. § 363.
advises the occupier to allow "the [original] government of the country to perform some or all of its normal functions." It is likely that the authors of the Field Manual foresaw the potential linguistic, cultural and credibility barriers that occupying forces often confront in foreign territory. The Manual recommends overcoming these barriers by retaining local civil servants to fulfill basic administrative roles.

To facilitate the restoration of public order and safety, Section 370 requires that, "the occupant . . . continue [to enforce] the ordinary civil and penal laws of the occupied territory except to the extent [that] it may be authorized by Article 64, [Geneva Convention], and Article 43, [Hague Regulation] to alter, suspend, or repeal such laws." Additionally, "these laws will be administered by the local officials as far as practicable." The Field Manual recognizes the need to uphold the independence and sovereign right of the occupied inhabitants to administer their own affairs through the legitimate authority of a domestic government.

While the practical regulations of the Field Manual buttress the goals of the laws of occupation, a gulf still exists between the continuing trend of modern transformative occupation and the conservative nature of occupation law. The case of Iraq exacerbated this cleavage and only reinforced the pressing need to amend the legal instruments of occupation law. If this body of law is not modified to provide a practical, comprehensive, and regulated legal framework for the occupier to undertake a positive and sustainable transformative operation, then these laws will likely be discarded at the expense of inhabitants and even occupiers themselves, as exemplified by the deplorable situation in Iraq.

C. Challenging the Absolute Application of Jus in Bello through
Transformative Occupation

_Jus in bello_ evolved at a time when its framers envisioned occupiers as "transient custodians," with little interest in the long-term governance of the occupied territory. Consequently, current laws of occupation were not designed to permit "the occupier to act, but rather [were] a system of restraints limiting the powers of belligerent occupier and the ability of that occupier to remain aloof from concerns for the welfare of the people in occupied territories." This changed tremendously after World War II, when occupiers sought the complete "restructuring of political, economic, and social life of the occupied territory" in what is sometimes referred to as a "transformative

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80. Id. § 367(b).
81. Id. § 370.
82. Id.
occupation,” or long-term peace building in post-war situations. International law scholar, Carsten Stahn, argues that this form of post-war occupation is evidenced by the waning of territorial punishment for acts of aggression, the humanization of post-conflict reparations, and the institutionalization of individual and group rights in post-conflict peace processes. In this light, the conservative laws of occupation may be incompatible with the current trend of peace-building and long-term transformative operations.

There are valid arguments questioning the legitimacy of various transformative goals, the potential benefiting parties, and most importantly, the actual ability of foreign armed forces to successfully arrive “in a society with deep-seated problems . . . [and] bring[] about fundamental change to that society.” Iraq, for example, has a highly heterogeneous society, a contemporary history tainted by foreign occupation and war, and a geo-strategic location endowed with vast oil resources. By all accounts Iraq is a sui generis state. As such, a single uniform application of transformative occupation cannot be universally adopted because if insufficient attention is given to the unique social, political, and economic history of the country, then the transformative occupation is liable to cause more harm than good.

There are fundamental risks associated with transformative occupation as well as the potential for states to disregard international law in times of occupation. To minimize these risks, modern occupation law should only apply to transformative occupation where there are “exceptional” circumstances, such as genocide and ethnic-cleansing. Recognizing “exceptional” humanitarian circumstances would serve to limit the scope of justified intervention, thereby inhibiting states from intervening simply to satisfy self-interested objectives. Unfortunately, this requirement may be difficult to administer since current enforcement mechanisms are often overseen by the very perpetrators of the acts of which the standards were designed to prevent in the first place. Therefore, despite the need to limit intervention to “exceptional” circumstances, there will undeniably be instances where states will venture outside the scope of those standards. It is for this reason that there needs to be a further safeguard in the form of a framework established within the laws of occupation to provide a guide for action and accountability for mistakes in transformative occupation.

While this Comment focuses on belligerent occupation rather than justifications for war, noting the concerns surrounding the growing use of

85. Id.
86. Stahn, supra note 7, at 939.
87. Roberts, supra note 18, at 622.
88. While intervention and occupation should be mandated by the U.N., there are instances where political wrangling in the Security Council and bureaucratic red tape may paralyze the U.N. from delivering immediate humanitarian assistance, as exemplified by Kosovo. Therefore, despite the weaknesses in enforcement this should not deter the international system from striving to adopt these standards as universally accepted “exceptional” circumstances. See infra Section III (A)(1) (discussing “exceptional circumstances” for the purposes of this Comment).
humanitarian intervention in cases of gross human rights violations is nonetheless important. These concerns center on balancing "virtues of humanitarian rescue against the horror of having expanded opportunities for aggressive war." As a matter of customary international law, the International Court of Justice concluded in the seminal case, *Nicaragua v. United States*, that custom does not permit unilateral humanitarian intervention. Oscar Schachter, an international law scholar who helped pioneer the legal framework used by the U.N., adds that "it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention." This, he argues, is because "it is better to acquiesce in a violation . . . than to adopt a principle that would open a wide gap in the barrier against unilateral use of force." Despite divergent state practices in the 1990s, the legal prohibition still persists under both treaty and custom. Many opponents of this general prohibition, such as Humanitarian Law Professor, Ryan Goodman, claim that "in the contemporary era . . . the proponents have essentially lost the debate" given the recent transformative occupations, like that in Kosovo, which were initiated for humanitarian purposes.

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89. An analysis of *jus ad bellum* is unquestionably important in the present global political landscape. However, short of presenting a basic universal standard for intervention, the justifications of war and mechanisms for enforcement are outside the scope of this Comment and will only be addressed to emphasize the need to limit intervention.


93. Id. at 126.

94. R. Goodman, *supra* note 90, at 108. The Kosovo campaign is an illustrative example of the benefits of transformative occupation. While the grounds for invasion were different to those of Iraq, there are lessons from post-war Kosovo which are instructive for future interventions. In brief, the case of Kosovo stands as a paradigmatic example of how intervention and occupation have fundamentally changed. In Spring 1999, after allegations that the Slobodan Milosevic government was conducting ethnic cleansing, NATO initiated a 78-day bombing campaign that served "multiple interests [including] securing regional stability, maintaining the credibility of NATO, and protecting human rights." *Id.* at 130. As such, the case of Kosovo highlights that there are instances when intervention is warranted outside U.N. involvement, such as in cases of genocide and ethnic cleansing. *See infra* Section III (A). While the campaign was not sanctioned by the Security Council, the fact that it was carried out by a well respected regional organization for the sake of humanitarian intervention made a significant difference in asserting credibility and providing resources to the campaign. Moreover, various regional organizations and later the U.N. (United Nations Interim Administration Mission in Kosovo) played a significant role in the post-war reconstruction and management of Kosovo. They constructed a transformative framework to build a police force and civil administration, and to enable the development of democratization, reconstruction, and economic growth. *See* S. C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999). While Iraq has a radically different ethnic, political, and economic history, the inability of the CPA and Coalition forces to legally justify their invasion, the disregard for the laws of occupation, and the general unwillingness to include the U.N. in post-war reconstruction, prevented Iraq from following in the footsteps of Kosovo’s successful transformative model.
In sum, the laws of occupation were created principally to prevent, or at least regulate, "bad occupants occupying a good country." However, it was during World War II that a scenario emerged where occupying forces with good intentions intervened to repeal the acts of an evil regime. This new scenario introduced the expectation that a "good" occupier has the responsibility to rebuild the occupied state for the benefit of the inhabitants. This expectation was eloquently articulated by the International Commission on Intervention and State Sovereignty in its Responsibility to Protect Report:

The responsibility to protect implies the responsibility not just to prevent and react, but to follow through and rebuild. This means if military intervention action is taken . . . there should be a genuine commitment to helping to build a durable peace. . . . Conditions of public safety and order have to be reconstituted by international agents acting in partnership with local authorities, with the goal of progressively transferring to them authority and responsibility to rebuild.

That said, this shift in responsibilities can still be quite dangerous. Depicting the occupant as the bearer of progress can lead to a "dangerous mix of crusading, self-righteousness, and self-delusion." This is arguably what happened in ex-ante and ex-post Operation Iraqi Freedom. As such, one of the most enduring lessons of the occupation of Iraq is that under no circumstances should the occupier deviate from the laws of occupation. To outright dismiss a state's laws as simply outdated and inapplicable would "blur the line between occupation and annexation" of a territory. The occupier would have no "international responsibility" for its actions as there would be no legal restrictions to prevent sweeping transformative measures that suit the occupier's interests. Moreover, state autonomy would be jeopardized as

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95. Roberts, supra note 18, at 601.
96. Id. The examples of Germany and Japan highlighted a new trajectory in occupation law, whereby the occupier was free to change the legal, political, and economic structures of each respective country without remonstration by the international community. Germany and Japan were truly exceptional for their time given the devastation of World War II. Until the 1990s these two examples stood out as unique precedents, however, the global political landscape began to shift after the end of the Cold War. In the past twenty years, intervention and longer-term occupation are more commonly relied on to assure the stability, viability, and sustainability of the post-occupied state as illustrated by the case of Kosovo.
97. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), REPORT: THE RESPONSIBILITY TO PROTECT, December 2001, at art. 5.1 (hereafter "RESPONSIBILITY TO PROTECT REPORT"), http://www.iciss.ca/pdf/Commission-Report.pdf (last visited December 24, 2007). The ICISS was proudly supported by Kofi Annan, indicating a shift towards this mode of thinking at the highest level of the international organizational system.
98. See Roberts, supra note 18, at 601.
99. While a modification of the conservative laws of occupation is in order, these modifications should supplement not overhaul the existing body of law, see infra Section III.
100. Fox, supra note 17, at 264.
101. See id. (arguing if the most important marker distinguishing de jure from de facto regimes were erased then the status of the occupied state would be altered and legal recourse to
there would be no recourse to prevent an occupier from dissolving the
government and conquering the territory. Such possibilities would greatly
undermine the achievements made in human rights, self-determination, and
global peace and security since World War II.

II

OCCUPYING IRAQ: SETTING THE STAGE FOR AN UNCERTAIN FUTURE

The invasion and occupation of Iraq arguably helped create the immense
civil strife that the Iraqi people currently face.102 International Human Rights
Law professor, David Scheffer, points to several factors that led to the
deporable conditions witnessed in post-war Iraq: 1) The United States’
resistance to supporting a significant role for the U.N., whose expertise in post-
conflict management would have greatly benefited the Iraqi people; 2) The
failure of the occupying powers to deploy a sufficient number of military
personnel and international civilian police to the region early enough to make a
critical difference on the ground, particularly with respect to law and order; and
3) The failure of the Bush Administration to request sufficient appropriations
from Congress to cover the full range of Iraq’s security, reconstruction, and
humanitarian needs.103 This lack of pre-war planning and intransigence in the
face of international pressure adequately summarizes how the occupation was
undermined before it even started.

These initial policy mistakes materialized during the early occupation of
Iraq as the Coalition failed to maintain law and order and deliver much-needed
humanitarian assistance to the inhabitants. Once occupation was
institutionalized by the creation of the CPA, the early failures were
compounded by numerous and serious violations of occupation law through the
radical makeover of Iraq’s state structure, which had devastating effects on the
people and integrity of state. To demonstrate the consequences of these
violations on Iraqi society, this Section explores some of the duties outlined in
Section One that were transgressed by the Coalition and the CPA.104 Using this
analysis, one can better critique conservative occupation law by illustrating its
general failure to protect inhabitants and limiting the degree to which the

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102. \text{The Coalition’s non-U.N. mandated occupation of Iraq was a watershed. Before the}
\text{invasion, Iraq was suffering from chronic economic depression and facing an acute humanitarian}
\text{crisis primarily stemming from the comprehensive sanctions. Today Iraq is in a near state of civil}
\text{war with enough death and destruction to warrant a causal link to the invasion. However, this}
\text{Comment will keep projections of long-term consequences to a minimum and instead focuses on}
\text{the more immediate impact of the Coalition and CPA’s failure to abide by their duties as}
\text{occupiers.}
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103. \text{See Scheffer, supra note 6, at 856.}
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104. \text{The examples used in this Section do not constitute an exhaustive list of the}
\text{violations, but are used to demonstrate that both the Coalition Forces and the CPA skirted}
\text{responsibilities and overstepped the legal bounds of an occupying power, thereby violating the}
\text{laws of occupation.}
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occupier could transform the administrative, political, economic, and legal structures of post-war Iraq.

A. The Start of Occupation: Belligerent Occupiers or Benevolent Liberators?

In the early stages of planning the 2003 invasion of Iraq, U.S. government officials believed that the Iraqi population would welcome the U.S. forces as "liberators." Many in Washington subscribed to this fiction of liberation and consequently believed that as liberators, American forces did not need to abide by international obligations reserved for occupiers. On May 1, 2003, after just forty days of fighting, President Bush theatrically landed on a U.S. aircraft carrier off the coast of San Diego and declared, "Major combat operations in Iraq have ended." International Law professor, Yoram Dinstein, argues that from that date forth "pursuant to international law—the legal status of the Coalition forces in Iraq [was] not that of liberators but that of belligerent occupants." The Coalition forces legally became belligerent occupiers, as the Iraqi government was unable to exercise its authority over the state and instead the U.S. and the U.K. announced their intention to administer the entire state in lieu of Saddam’s deposed regime. U.N. Security Council Resolution 1483 later affirmed this legal status as an “occupier” when it recognized “the specific authorities, responsibilities, and obligations under applicable international law of [the Coalition forces] as occupying powers under [a] unified command (the ‘Authority’).”

Since the U.N. never officially authorized the invasion of Iraq, the international community saw the invasion as an illegal foreign military

105. Roberts, supra note 18, at 608 (citing Paul Wolfowitz, Interview with Melissa Block, NATIONAL PUBLIC RADIO, Feb. 19, 2003). See Nir Rosen, When a Liberator Is an Occupier, ASIA TIMES, Dec. 4, 2003, http://www.atimes.com/atimes/Middle_East/EL04Ak04.html (last visited December 24, 2007) (stating that when U.S. military forces entered Baghdad on April 9, 2003, Coalition Commander General Tommy Franks also proclaimed that the Americans had “come as liberators, not occupiers”). See David Glazier, Ignorance is Not Bliss: Law of Belligerent Occupation and the U.S. Invasion of Iraq, 58 RUTGERS L. REV. 121, 189 (2005) (demonstrating that it is quite possible that this “pattern of high-level denial was deliberate,” as U.S. leaders may have had the impression that they would have a freer hand in administering Iraq, and perhaps in changing the existing order, if unconstrained by occupation law as occupiers in Iraq).

106. While President Bush did reference the Ba’ath’s human rights record in his speech to the U.N. General Assembly (see supra note 2), it is well recognized that the *casus belli* for the invasion was not humanitarian, but primarily grounded in the new doctrine of preemptive self-defense, see infra notes 226 and 236. It is therefore difficult to see how the Coalition can be viewed as liberators. Rather, it seems that the Administration knew that their justification that war could further increase international pressure was weak and instead opted to cloak the invasion under the banner of “freedom” and “liberation” in order to gain the support of the international community.


108. Id.


Resolution 1483’s acceptance of the illegal occupation established an unprecedented basis for the U.S. and U.K. post-war presence in Iraq. In a letter sent to the U.N. Secretary General on May 8, 2003, the U.S. and U.K. recognized their obligations as occupiers:

[M]aintaining the territorial integrity of Iraq and securing Iraq’s borders; . . . facilitating the orderly and voluntary return of refugees and displaced persons; maintaining civil law and order, . . . responsible [for] administration of the Iraqi financial sector, for humanitarian relief, for economic reconstruction, for the transparent operation and repair of Iraq’s infrastructure and natural resources, and for the progressive transfer of administrative responsibilities to such representative institutions of government, as appropriate.

In accordance with Resolution 1483, the Coalition was called upon “to comply fully with its obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.” Thus, the Coalition had reasonable notice as to its obligations to the inhabitants and the strict limits placed on its transformative objectives as occupiers in Iraq, not liberators.

B. U.N. Mandate versus Unilateral Intervention

The purpose of the occupation in Iraq, as outlined by Resolution 1483, went far beyond the confines of traditional occupation law. International law scholar David Scheffer notes that to achieve its transformative goals, the onus was on the CPA to aggressively employ principles of “democratization, economic initiatives, and perhaps controversial use of force principles in the name of domestic security.” Therefore, although the transformative goals were authorized by the U.N., many of the CPA’s actions to achieve these goals cut against the conservative laws of occupation. This was due to an inherent conflict of interest between “advancing the welfare of the Iraqi people as
subjectively as the Authority [was] likely to do and adhering to the more narrow constraints of occupation law." As such, the Coalition stepped outside the bounds of both occupation law and the U.N., thereby greatly jeopardizing its status as occupier, both domestically and internationally.

Through a compromise in the Security Council, the U.N. rescinded its strict adherence to occupation law when it included provisions condoning transformative objectives as early as May 2003 in Resolution 1483. This is indicated by the "schizophrenia" of the Resolution which "espouses both a commitment to reform and fidelity to international law within a single paragraph." In no previous case had the Security Council been so closely involved in setting the framework and justification for an occupation, "let alone . . . explicitly backing some of the occupant’s transformative projects." Subsequent resolutions, reaffirming the transformative purposes of the occupation, unfortunately failed to address this disjunction between occupation law and transformative purpose.

Had there been an explicit U.N. authorized military deployment in the immediate aftermath of the intervention and an establishment of a formal U.N. civilian administration, adherence to occupation law would have been safeguarded, and confusion over the law would have been muted. This is because under the guise of the U.N., occupation law "would be narrower in scope due to the U.N. mandate." This would stem from "a fresh mandate that removes any unrealistic constraints of occupation law while advancing the more relevant principles and nation-building practices that other fields of international law now compel." As such, it is safer and more practical to have the U.N. involved in any action of intervention. However, due to political wrangling over the legality of the invasion and the U.S.'s insistence on near unilateral control of post-war Iraq devoid of a U.N. authorized legal regime or the U.N.'s command and control, this opportunity to rebuild the post-war state was severely curtailed to the detriment of both the Iraqi people and the Coalition. Since the U.S. opted to go to war without the U.N., it acted as a

117. Id. at 845.
118. Fox, supra note 17, at 259 (stating that Resolution 1483 was a compromise document that accommodated conflicting views among Council members about whether the U.S. or the U.N. should take the lead in post-war Iraq).
119. Id. at 260.
120. Roberts, supra note 18, at 614.
121. See Glazier, supra note 105, at 192 (noting that some analysts viewed the contradictions in Resolution 1483 not as a failure of international law but as an example of the continuing trend of transformative occupation and the recent evolution in the laws of occupation).
122. Scheffer, supra note 6, at 843. Incidentally, a U.N. mandated legal regime had also been applied in Haiti (1994), Bosnia (1995), and Afghanistan (2002), as well as Kosovo (1999).
123. Id. at 850-51.
124. Id. at 853. It seems that the U.S. military and the Bush Administration rejected a U.N. mandate because they did not want to wait for diplomatic initiatives to be exhausted. Moreover, the U.S. did not want to be encumbered by what it viewed as an archaic system of law and an organization that would restrict its operations, while still leaving it accountable to higher
legally-defined belligerent occupier, and as such, should have complied fully with occupation law.

C. Early Occupation Blunders: Losing the Battle for "Hearts & Minds"\textsuperscript{125}

At the outset of Operation Iraqi Freedom, the Coalition forces transgressed international law in a series of ways. These actions plagued the rest of the occupation and promoted flagrant disregard of the duties promulgated by the laws of occupation. Leading up to the war, the U.S. Department of Defense, as the chief architect of the war, did not begin post-war planning until just two months prior to hostilities.\textsuperscript{126} Many were later shocked to learn that “senior officers in the Pentagon . . . were told not to bother themselves with plans for the occupation, and a State Department study preparatory to the occupation was ignored.”\textsuperscript{127} Instead, the Pentagon was fixated with carrying out an offensive war strategy “intended to achieve direct military objectives with the minimum practicable force levels.”\textsuperscript{128} In other words, the U.S. wanted to win a quick and relatively inexpensive military victory. This approach was very limited because it focused on removing Saddam without plans for filling the resulting leadership void.\textsuperscript{129} As International Constitutional Law professor Noah Feldman recounted, “some Americans may have arrived in Iraq expecting to re-create Iraqi politics in their own image. But it did not take long on the ground in Baghdad for that kind of grandiose thinking to be replaced by the more immediate self-protective goal.”\textsuperscript{130} Therefore, poor pre-war planning and short-sighted objectives gave

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\item[125.] The policy of winning the “Hearts and Minds” of the Iraqi people was a psychological campaign to gain the confidence and support of the Iraqi people for the occupation under the guise of liberation. However, with rampant looting and law and order in ruin, “American efforts have not only failed, they may also have achieved the opposite of what they intended.” Nell Mackay, \textit{US Admits the War for Hearts and Minds in Iraq is Now Lost}, \textit{Sunday Herald}, Dec. 26, 2004, http://findarticles.com/p/articles/mi_qn4l56/is_20041226/ai_n12573978 (last visited December 24, 2007).
\item[126.] Glazier, \textit{supra} note 105, at 184.
\item[127.] Roberts, \textit{supra} note 18, at 608. One such study written with the cooperation of Iraqi dissidents was the Public International Law & Policy Group's (PILPG), PILPG & THE CENTURY FOUNDATION, \textit{Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations} (2003), http://www.publicinternationallaw.org/publications/reports/IraqReport.pdf (last visited December 24, 2007) (discussing a number of very important issues ranging from human rights to effective governance). Some of the reports provided to the State Department may have been naive in their anticipation of a wholehearted welcome of Coalition soldiers into Iraq, nonetheless they did provide foundational information concerning the means with which to effectuate a realistic transformation of Iraqi society. Despite their inherent value, many of these reports were sidelined, which jeopardized the effectiveness and sustainability of post-war planning in occupied Iraq. \textit{See generally} Bob Woodward, \textit{Plan of Attack} (2004) (for a more detailed account of the Department of Defense’s blatant dismissal of effective pre-war planning efforts).
\item[128.] Glazier, \textit{supra} note 105, at 185.
\item[129.] \textit{See id.}
\item[130.] Noah Feldman, \textit{What We Owe Iraq} 19 (2004). Feldman was also an advisor on
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rise to mistakes that greatly diminished the credibility of the Coalition in the hearts and minds of the Iraqi people and set the stage for the social tensions and violence that continue to plague Iraq today.

1. Looting Public Property

After the fall of Saddam Hussein in early April 2003, the Iraqi police "self-demobilized" opening the floodgates for the looting of the nation's riches.\textsuperscript{131} While 40,000 American soldiers and Marines occupied greater Baghdad, according to U.S. Central Command in the Arabian Gulf (USCENTCOM) "[the Coalition] didn't yet have enough troops in Baghdad to 'secure key tactical objectives'—traffic circles, bridges, power plants, banks, and munitions dumps—as well as patrol the streets."\textsuperscript{132} As a result of the occupying powers' failure to plan and prepare for post-war desperation and crime, hospitals, museums, schools, power plants, oil facilities, nuclear facilities, government buildings, and other infrastructural facilities in Baghdad and other major metropolitan areas were looted and destroyed.\textsuperscript{133} While the Bush Administration blamed Saddam for the degradation of the country's infrastructure, "most damage was from looting . . . which took down state industries, large private manufacturing, the national electric system," thereby potentially delaying Iraq's progress and development for decades.\textsuperscript{134}

The Coalition shirked one of the central duties of an occupier as outlined by the Hague Convention when it failed to plan for, and adequately protect, public institutions in the chaos of post-Ba'ath Iraq.\textsuperscript{135} Article 56 of the Hague Convention states that all institutions dedicated to religion, education, the arts and sciences, and state property must be treated as private property\textsuperscript{136} and protected during occupation. In fact, "all seizure of, and destruction, or intentional damage done to such institutions . . . should be made the subject of legal proceedings."\textsuperscript{137} Political analyst, Peter Galbraith points out that as looters attacked the world famous Museum of Baghdad "the museum staff

\begin{thebibliography}{99}
\bibitem{131} L. Paul Bremer, My Year in Iraq 14 (2006). The term self-demobilization seems incongruent with the gradual policy of desecuritization of the CPA, see infra Section II (D)(2).
\bibitem{132} Id.
\bibitem{133} See Peter W. Galbraith, The End of Iraq: How American Incompetence Created a War Without End 110 (2006).
\bibitem{134} Glazier, supra note 105, at 192.
\bibitem{135} IHL Research Initiative, supra note 10 (citing the Hague Convention Article 43 that "The occupying power . . . is also responsible to take all measures in its power to restore and ensure, as far as possible, public order and safety (see Article 43 of the Hague Regulations). In this context, while the U.S. is not responsible for all the looting that occurred in the territory it controls, it must exercise due diligence to avoid such looting. The claim that its "forces are not sufficient in number or not appropriately trained is not a sufficient excuse.").
\bibitem{136} Hague Convention, supra note 48, at art. 46.
\bibitem{137} Id. at art. 56; see Scheffer, supra note 6, at 847 n.24 (for a more comprehensive list of the pertinent rules and obligations of the U.S. under occupation law).
\end{thebibliography}
begged for help from Marines at a nearby traffic circle. Although just one hundred yards away, they refused to help.”138 Likewise, according to eyewitness reports, soldiers and tanks standing guard outside the Oil Ministry watched as nearby ministries were looted and burnt.139 As one analyst concluded, “Baghdad’s ransacking completely undermined the Bush Administration’s plan to demonstrate immediate material benefits from liberation.”140 In fact, “[b]y not protecting Iraq’s museums and National Library, the Administration failed in its legal duty as an occupying power to safeguard the country’s cultural heritage.”141 The failure to guard these institutions constituted a major cultural tragedy and cost the Coalition the hearts and minds of the Iraqi people who became skeptical and deeply resentful of their liberators.142

While it is difficult to measure the long-term effects of this dereliction of duty, one can posit that the looting of Iraq jaded millions of inhabitants who came to believe that the sole intention of the Coalition was exploitation rather than liberation. This impression likely strengthened and gave resolve to the insurgency in Iraq. Had the Coalition focused on maintaining the law and order of the state through adequate pre-war planning, it could have prevented, or at least expeditiously curtailed, the cycle of looting, revenge killings, and general public lawlessness that destroyed the cultural heritage of the state, inhibited the delivery of humanitarian aid, and hindered the duties required of an occupier in a war-torn state.

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139. See Galbraith, supra note 133, at 113 (citing the burning of the Ministry of Irrigation as a juxtaposition with the high security afforded the Ministry of Oil); see Maggie Farley, Relief Groups Say Efforts Hindered by Military Distrust, LA TIMES, Apr. 19, 2003, at A3 (asserting that while the Coalition failed to protect the Iraqi National Museum, they did safeguard Iraqi oil facilities, though they apparently had no similar legal obligation to undertake such protection, indicating that economic interest overrode humanitarian obligations. According to Amnesty International’s head Irene Khan “[t]he response to disorder has been shockingly inadequate . . . [i]t would seem more preparation was made by the coalition to protect oil wells than to protect hospitals or water plants. The first taste of the coalition’s approach to law and order will not have inspired confidence in the Iraqi people”).


141. Galbraith, supra note 133, at 111.

142. See id. at 110-12 (for a good summary of the looting).
2. Impeded Humanitarian Assistance

In the aftermath of the fall of Saddam’s regime, “pockets of fighting, rampant looting and restrictions by the allied forces frustrat[ed] . . . efforts to provide food, water and medical help to the Iraqi people.” One of the major reasons for these impediments was that the “Pentagon distrust[ed] the U.N. bureaucracy . . . which . . . result[ed] in excruciating delays.” Underscoring the gravity of the situation, on August 19, 2003 a truck bomb tore through the U.N. headquarters in Baghdad killing twenty U.N. staff members. As a result of the rising levels of violence and the inability of the Coalition to maintain peace and order, relief organizations such as the U.N. and the Red Cross were driven out of the country, and with them went the ability to ensure timely humanitarian assistance to the Iraqi people. While the violence was exceptionally high, it did not negate the obligation of the Coalition, as the occupying power, to restore law and order and oversee the unhindered delivery of aid to the inhabitants.

In addition, the Coalition flagrantly disregarded the crucial responsibilities articulated in Articles 55 and 56 of the Geneva Convention, which significantly compounded the humanitarian crisis and stalled economic development during the occupation. These Articles demand that occupying powers exercise the duty of maintaining, “to the fullest extent of the means available to them,” medical services and to work with local authorities to ensure the public health and hygiene of the Iraqi people. The Coalition failed to meet these standards by not adequately providing infrastructural repairs for sewage treatment, electrical

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143. Farley, supra note 139, at A3 (further stating that “[w]idespread looting and chaos in Iraq’s cities also have set back relief efforts, and agencies are urging coalition forces to protect hospitals, food and water supplies. In Baghdad, only about a third of the city’s 34 hospitals [were] functioning. Medical staffers [were] afraid to show up to work, and many patients [were] sent home despite needing care”). Id.
144. Id. Some of the relief organizations stated that “bureaucracy, not security concerns, [were] behind the delay[s] and that the Pentagon [was] stifling their efforts to deliver aid.” In addition, the secrecy shrouding the pre-war planning made it difficult for relief groups to plan and execute a swift response to the needs of the inhabitants.
146. Glazier, supra note 105, at 187.
147. See Michael Dennis, Application of Human Rights Treaties: Extraterritorially in Times of Armed Conflict and Military Occupation, 99 Am. J. Int’l L. 119, 135 (2005) (stating that the Coalition imposed substantial restrictions on the liberty of movement of the Iraqi people, when “they reportedly surrounded entire villages that appeared to be harboring guerillas, or from which mortar fire had come, with barbed wire fences” so that “[v]illagers were required to come and go according to a strict curfew.” The Coalition therefore impeded humanitarian assistance to targeted locations. Dennis goes on to assert that this is in contravention of the International Covenant on Civil and Political Rights (ICCPR) which both Iraq and the U.S. (with reservations) were signatories. While this does not constitute binding customary law, it does serve as an example of the additional protections afforded to inhabitants, see infra Section III (C)(1).
148. Geneva Convention, supra note 63, at art. 55.
149. Id. at art. 56.
grids, and supply routes for hospitals. By ignoring these critical duties, the Coalition jeopardized the well-being of the inhabitants which eventually turned the population against the occupiers of Iraq.

In sum, the divided and poorly coordinated U.S. government policy was unready for the post-conflict management of Iraq when the Ba’ath regime fell. The Coalition Forces "were not tasked, manned, trained, or equipped to secure the country, prevent looting, and deal with . . . the start of low-intensity conflict." Instead of trying to rectify a disintegrating situation, the U.S.-led CPA "was unprepared for the virtual collapse of governance at virtually every level" and only served to further compound this already dire situation through inherently illegal "Orders" that overhauled Iraq’s state structures. As such, it is uncontestable that the Coalition’s "unpreparedness to maintain public order from the start or to anticipate the potential fervor of the resistance has had significant adverse consequences" specifically on the well-being of the population and the unity and strength of the post-war Iraqi state.

D. The Coalition Provisional Authority (CPA): Origins, Actions, and Consequences

The CPA assumed authority over the occupation one month after Coalition forces took control of Baghdad. Its mandate was to "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, [and] to create conditions in which the Iraqi people can freely determine their own political future." The Bush Administration appointed career diplomat L. Paul Bremer III, as the chief U.S. Administrator of Iraq, even though Bremer had limited knowledge of Iraq’s culture or its

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150. Farley, supra note 139, at 3.


152. Id.

153. See Glazier, supra note 105, at 188.

154. The CPA was also charged with "advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development." CPA Regulation No. 1, CPA/REG/16 May 2003/01 (May 16, 2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf (last visited December 24, 2007). The powers of the CPA were quite broad and appeared to step outside the obligations mandated under the laws of occupation. After thirteen months as custodians of Iraq, the CPA was finally dissolved, along with the Iraqi Governing Council (IGC) on June 28, 2004. This effectively ended “the Coalition as an occupying power as specified in the United Nations resolutions.” Elaine L. Halchin, Congressional Research Service, The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities, 1 (Apr. 29, 2004), available at http://www.fas.org/man/crs/RL32370.pdf (last visited December 24, 2007).

155. Bremer had replaced Jay Garner who had originally headed the first administrative
political complexity.156

There is an ongoing debate among scholars and political commentators about whether the CPA was officially created by U.N. Resolution 1483 or by a Presidential Directive.157 The lack of clarity over the CPA’s origins and legal status posed a grave danger to Iraqis because there were no clear lines of oversight or accountability.158 Political historian Elaine Halchin predicted that the “tangle of resources, laws, and documents” would make it challenging for groups to monitor the CPA because it was unclear under what authority the CPA was acting.159 Halchin’s assessment came true as the CPA is currently accused of embezzling billions of dollars of federal and domestic Iraqi funds in violation of Articles 48 and 49 of the Hague Convention.160 Moreover, the CPA also took advantage of the general confusion surrounding which higher authority would regulate their Orders by undertaking radical unchecked economic and political policies that revamped the structures of the Iraqi state.

In an effort to legitimize these directives, the CPA worked closely with the unelected U.S.-supported Iraqi Governing Council (IGC). The IGC was created by U.N. Resolution 1483 specifically to introduce an Iraqi voice into domestic policymaking during the occupation.161 International Law scholar, Gregory Fox, theorizes that the U.S. may have found legitimacy in their actions based on the creation of the IGC, since the IGC “operate[d] to waive any claims of infringement on the rights of the post-occupation de jure regime, whose interests the CPA, as de facto temporary authority, was bound to protect.”162 The IGC was, however, called into question by legal scholars, as it

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156. See Halchin, supra note 154, at 2.
157. See Roberts, supra note 18, at 612 (contending that that the CPA was created by the U.S. Department of Defense and as such was accountable to the federal government as a federal entity).
158. Halchin, supra note 154, at 4.
159. Id. at 33 (concluding that knowing how the CPA was established and under what authority would help to determine whether it was a federal agency and what the forms, types, and mechanisms of accountability it was subject to).
160. It should be noted that the CPA is currently accused of embezzling up to $8.8 billion, which can be attributed to the lack of transparency as well as the limited number of auditors who monitored the spending of the CPA. This severely discredited the Authority’s role in Iraq. Moreover, this careless spending, primarily from Iraq’s own resources (i.e. money left over from the Oil-For-Food Program and oil revenues), violated Articles 48 and 49 of the Hague Convention. See Mark Gregory, Baghdad’s ‘Missing’ Billions, BBC World News, Nov. 9, 2006, available at http://news.bbc.co.uk/2/hi/business/6129612.stm (last visited December 24, 2007) (for a more detailed report of this charge); see also Pratap Chatterjee, Iraq, Inc.: A Profitable Occupation (2004) (providing a more detailed discussion on the financially exploitative nature of the occupation).
161. Fox, supra note 17, at 247 (claiming that although the CPA did not seek the Governing Council’s formal approval for each of its reforms, Council members made public statements generally supporting CPA initiatives).
162. Id.
was not the de jure sovereign government of Iraq, and therefore, in no position to give political legitimacy to the CPA’s policies. Moreover, Article 47 of the Geneva Convention prohibits the creation of a ‘puppet’ domestic government, which serves to promote the interests of the occupying power at the expense of depriving the inhabitants of the benefits of occupation law. As such, the relative weakness of the IGC as Iraq’s first post-Ba’ath government created an image of a weak, U.S.-dominated Iraqi leadership that has undermined Iraq’s subsequent governments.

The controversies surrounding the CPA did not end with its ambiguous formation, but persisted with its desire to revamp Iraq’s state structures. The CPA sought to overhaul Iraq’s existing criminal, economic, and civil legal systems, replacing them with a foreign implant that was not necessarily conducive to the unique social and economic context of Iraq. This overhaul was approached through the promulgation of approximately 100 Orders, which were political, legal, social, and economic in nature, with the possible goal of transforming Iraq into a politically decentralized and economically liberal state. These Orders and Regulations were to “take precedence over all other laws and publications to the extent such other laws and publications are inconsistent.” While it may appear as though the CPA was abiding by Article 64 of the Geneva Convention, many of these Orders went far beyond the bounds of occupation law. This was most egregiously illustrated by the De-Ba‘athification, desecuritization, radical economic liberalization, and legal overhaul through the TAL, in post-war Iraq.

1. De-Ba‘athification: CPA Order 1

After World War II, the Allied Forces in Germany set about removing all traces of the Nazi party from state leadership to ensure there would be no resurgence of the party and to safeguard Allied reforms against a hostile domestic presence. The U.S. forces felt the same paradigm should be applied to Iraq. As a result, on May 16, 2003, the CPA enacted Order 1, entitled “De-Ba‘athification of Iraqi Society,” which summarily removed any member of the

163. See id. at 247-49.
164. Geneva Convention, supra note 63, at art. 47; see supra note 57.
165. While there are 100 Orders, this sub-section will only look at a few to illustrate how the CPA repeatedly overstepped its legal duties. See http://www.iraqcoalition.org/regulations/index.html#Regulations (last visited December 24, 2007) (for a complete list of the Orders/Regulations).
166. Coalition Provisional Authority Regulation No. 1, CPA/REG/16 May 2003/01 § 3(1) (May 16, 2003). However, the Regulation goes on to state that existing Iraqi law “as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.”
167. See PHILLIPS, supra note 140, at 144.
168. See BURGESS, supra note 77, at 45-46 (providing further insight on U.S. justifications for De-Ba‘athification).
Ba‘ath party of a certain rank and barred such persons from holding any position of public sector employment.\textsuperscript{169} The CPA justified its action under Article 43 of the Hague Convention, which requires that the occupier establish and maintain public order and safety. Moreover, the Bush Administration saw the implementation of Order 1 as a means of “distributing power to [other] Iraqis who subscribed to [their] vision of the new Iraq.”\textsuperscript{170}

The blanket purging of Ba‘ath members served to alienate Iraqi civil servants who had valuable administrative skills, historical knowledge, and ample experience of a politically and socially complex country.\textsuperscript{171} Often, purged members were not guilty of any crimes but had joined the Ba‘ath Party “due to necessity rather than for ideological reasons.”\textsuperscript{172} This Order had a nucous effect on the ability of the CPA to find qualified people to administer the state. The U.S. Army Field Manual Section 367(b) encourages the occupier to allow “the government of the country to perform some or all of its normal functions,” especially when there are language, cultural, and credibility barriers.\textsuperscript{173} This provision instead went unheeded by the CPA. Furthermore, the actions of the occupying powers in altering the status of, and permanently removing, certain Iraqi public officials and judges from their posts proved to be very costly for the long-term development of Iraq. This is evident in terms of the massive numbers of unemployed\textsuperscript{174} as well as a dearth of qualified civil servants to run the various key ministries of the state, in violation of Article 54 of the Geneva Convention.

By De-Ba‘athifying Iraq, the CPA unwittingly disenfranchised the staunchest supporters of Iraqi nationalism and a sizable portion of the Iraqi intelligentsia. In a country torn by sectarian tensions, there was little that could be substituted for this socially unifying force.\textsuperscript{175} The loss of this cohesive element in society was disastrous to Iraq’s unity, especially in light of the possible fragmentation of Iraq and the ominous prospect of civil war, an outcome the laws of occupation sought to prevent. In fact, the wholesale purging of former regime members is arguably “prohibited, or at least radically circumscribed” by international law.\textsuperscript{176} The CPA finally heeded the criticism of this indiscriminate Order and on June 28, 2004 rescinded the IGC’s authority to continue the De-Ba‘athification process.\textsuperscript{177} This was, however, too little, too

\begin{itemize}
\item \textsuperscript{169} CPA Order Number 1, \emph{supra} note 12.
\item \textsuperscript{170} \textsc{Phillips}, \emph{supra} note 140, at 146.
\item \textsuperscript{171} See id.
\item \textsuperscript{172} Fox, \emph{supra} note 17, at 209.
\item \textsuperscript{173} \textsc{Field Manual}, \emph{supra} note 76, § 367(b).
\item \textsuperscript{174} Glazier, \emph{supra} note 105, at 192 (citing analyst reports estimating that unemployment was between 50 to 65 percent, which understandably feeds the anti-Coalition resistance movement that exists in Iraq).
\item \textsuperscript{175} \textsc{Phillips}, \emph{supra} note 140, at 148.
\item \textsuperscript{176} Fox, \emph{supra} note 17, at 282.
\item \textsuperscript{177} \textsc{Id.} at 209.
\end{itemize}
late, since this Order had effectively disenfranchised many educated Iraqis who would later have immense difficulty reintegrating themselves back into a highly fragmented society.

2. Desecuritization: CPA Order 2

Bremer’s Order 2, passed on August 23, 2003, sought to disband a vast number of military, security, and governmental entities. Fox posited possible justifications for this Order, including the belief that “an effective transition to democracy require[d] civilian control of the military” as well as a fear that “the Ba’athist-era military had become an instrument of repression” and therefore needed to be disbanded. Both these arguments, however, do not meet the threshold of “absolute necessity” required by the Hague and Geneva Conventions or by the provisions of Resolution 1483. The resulting desecuritization created a power vacuum that endangered Iraq’s sovereignty and territorial integrity.

The decision to discharge the armed forces sent shock waves throughout Iraq. Without a strong police presence, looting and other acts of public lawlessness could not be checked. Moreover, the lack of an effective military force left Iraq’s borders, and consequently its sovereignty, largely unprotected. Order 2 made redundant approximately half a million Iraqi soldiers, profoundly affecting almost ten percent of the Iraqi population, as many of these soldiers provided for their immediate families. Some Iraqi officials, such as U.N. Iraqi Representative Faisal al-Istrabadi, expressed confusion as to why anyone would “take 400,000 men, who were highly armed and trained, and turn them into your enemies.” His words rang true as large numbers of desperate and disgruntled ex-soldiers later made up the bulk of the insurgency.

Article 43 of the Hague Convention, Article 64 of the Geneva Convention, and Section 363 of the Field Manual collectively require an occupier to maintain public order and safety in the occupied territory. Thus, Order 2 placed responsibility on Iraq’s occupiers to protect the country’s inhabitants who would have otherwise been protected by Iraqi police and military forces. Yet after demilitarizing Iraq’s security system, the CPA failed to fill this void and institute effective law enforcement mechanisms during the early months of the occupation. Inadequate protection and security resulted, among other things, in many children having limited or no access to

178. CPA Order Number 2, supra note 13.
179. Fox, supra note 17, at 282.
180. PHILLIPS, supra note 140, at 148.
181. Id. at 152.
182. See Glazier, supra note 105, at 187 (claiming that opposing the occupation has become a common goal that cuts across most sectarian lines in Iraq. Some credit the failure of the U.S. to maintain order as a key contributor to the rise of the opposition against the occupation, fueling support for the insurgency).
education—a fundamental right under Article 50 of the Geneva Convention. The Iraqi population consequently resorted to self-help, protecting themselves along sectarian, religious, ethnic, and tribal lines, thereby fueling the near civil war afflicting the country today.

The CPA later issued Order 22, which created a new Iraqi Army. Thousands of new recruits, however, were killed for simply joining the U.S.-backed and trained military forces, which undermined Order 22. Additionally, the new army is not united, but is divided along sectarian lines, which further weakens its effectiveness as a national security force. The security meltdown resulting from Order 2 thus lead some military analysts to brand this Order as one of the “greatest errors in the history of U.S. warfare,” since it greatly jeopardized the stability of the fragile state by exposing Iraq to internal discontent and external encroachment.

3. Privatization of Iraq: CPA Order 39

Decades of war and economic sanctions severely stunted Iraq’s economic growth. The U.N. reported that, as of 2002, over 80% of the Iraqi population lived in poverty. Therefore, Resolutions 1483 and 1511 justifiably “[c]all[ed] upon Member States and concerned organizations to provide the resources necessary for rehabilitating and reconstructing Iraq’s economic infrastructure.” The U.S., however, interpreted the U.N. resolutions as giving it the unrestricted right to reconstruct Iraq’s economy. Bremer argued that the

183. Geneva Convention, supra note 63, at art. 50 (reading in part, “[t]he Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children”).
184. See Glazier, supra note 105 at 186-87 (claiming that the “missed opportunity to establish security at the beginning of the post-conflict period has had devastating consequences for the course of state-building in Iraq. Once it became apparent to the Iraqi people that law and order had dissolved and that no one exercised effective control, the emergence of self-help and self-defense systems—and worse, ones that privileged communal identities—was the predictable and dangerous consequence”).
186. See Anthony Cordesman, CTR. FOR STRATEGIC & INT’L STUDIES, IRAQI FORCE DEVELOPMENT AND THE CHALLENGE OF CIVIL WAR: CAN IRAQI FORCES DO THE JOB? (Oct. 4, 2006), http://www.csis.org/media/csis/pubs/061004_iraqi_force_dev.pdf (last visited December 24, 2007) (finding that the Iraqi forces are far too reliant on the U.S. military and therefore it will take years to become an effective independent force).
187. Phillips, supra note 140, at 153. External threat includes the inability of Iraq to protect its borders from any destabilizing external influences, while internal discontent reflects the inability of the Iraqi government to effectively preside over the domestic affairs of the state and to provide internal security, especially from the local insurgency.
Ba’athist Iraqi economy was “a closed, dead-end system,” which could impede Iraq’s future development and global economic standing.\textsuperscript{190} The CPA’s objective was to open up Iraq as a “vibrant place to do business” and to foster a “transition from a state-dominated to a private sector economy” by enacting reforms that would bring about a “demanding, but exciting economic transformation” in the country.\textsuperscript{191} Such an objective, however, far exceeds the limits envisioned by the Hague and Geneva Conventions.

The CPA began to transform Iraq’s economy by enacting a series of Orders. Chief among them was Order 39, enacted on December 20, 2003, which promoted “foreign investment through the protection of the rights and property of foreign investors in Iraq.”\textsuperscript{192} Order 39 allowed foreign investors to own Iraqi companies fully without having to reinvest profits into the country—a privilege the former Iraqi Constitution previously accorded only to Arab countries.\textsuperscript{193} In fact, Order 39 along with other economic reforms such as Order 40, which altered Iraq’s banking system structure,\textsuperscript{194} ran counter to the Socialist-oriented provisions of the previous Iraqi Constitution and Commercial Code.\textsuperscript{195} These Orders subsequently privatized many core sectors of the Iraqi state, including education, health, and transportation. Yet the U.S. justification for seeking to align the new Iraqi economy with the current global trend toward free market economy was quite overreaching, since, for example, “no Arab state has taken the CPA’s approach of eliminating virtually all restrictions on foreign direct investment.”\textsuperscript{196}

Occupation law and the U.N. require that economic reforms be undertaken in a fair and equitable manner\textsuperscript{197} and be carried out in such a way that enables a


\textsuperscript{191} Id.

\textsuperscript{192} CPA Order Number 39, supra note 14; see also ROBERTS 2004, supra note 6, at 9.

\textsuperscript{193} See Roberts, supra note 18, at 615.

\textsuperscript{194} Order 40 transformed the state-dominated and centrally controlled banking system to a new structure that grants foreign banks the right to enter and regulate the Iraqi financial market. See CPA Order Number 40, supra note 14.


\textsuperscript{196} Fox, supra note 17, at 288.

\textsuperscript{197} The CPA and the U.S. Administration monopolized construction contracts, which were in some cases improperly reserved solely for supporters of the U.S. occupation of Iraq. Some of these contractors were corrupt and not the most qualified for the task at hand; see Angela Styles, Seller Beware: Assessing the Risks of Iraq Reconstruction Contracting, 81 FED. CONTS. REP. 2, 65 (2004) (stating that the U.S., through the Department of Defense, awarded most development/military contracts, at least initially, to the Army as well as private U.S. corporations. Those that were able to gain contracts through the CPA were warned that, “[t]he rights and
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legitimate and sovereign post-occupation government to lead the reforms. In fact, Order 39 dramatically altered Iraq’s economic system, a system that according to Article 43 of the Hague Convention should not have been altered unless absolutely necessary. Instead of a well-planned, incremental, and tailored reconstruction of a ravaged nation, the U.S.’s hasty reforms invoked resistance and undermined the sustainable economic development of war-torn Iraq.

Domestic hostility to Order 39 finally forced the U.S. to rescind and replace it with a less expansive Order 46. The vestiges of Order 39 nevertheless remained, significantly influencing subsequent laws, such as the new Investment Law of October 2006, and Iraq’s overall economic framework, which remains heavily privatized. Fox concludes that “only when states choose to codify a particular economic model in law should an argument be made for its recognition by occupation law” and its application in any occupied territory.

4. Legal Overhaul - Transitional Administrative Law

The U.S. later codified the CPA Orders into a single body of law, to ensure that these provisions survived after the end of the de jure occupation of Iraq. This codification process resulted in the TAL. The TAL became the provisional Iraqi Constitution, which came into effect on June 28, 2004 following the official transfer of power from the CPA to the sovereign Iraqi government, and remained until the Iraqi Constitution was ratified on October remedies available to parties contracting with the United States will not be available in a contractual relationship with the CPA).
15, 2005. While U.S. officials maintained that the new Iraqi Constitution was exclusively drafted by Iraqis, the underlying constitutional terms borrowed heavily from the CPA dominated TAL, which in turn has fostered instability and violence in the post-war Iraqi state.

The Coalition's dominant hand in creating Iraq's Constitution directly contradicts the laws of occupation. Article 43 of the Hague Convention unequivocally states that an occupier must respect "unless absolutely prevented, the laws in force in the country" which includes a state's Constitution. The TAL and the new Constitution instead radically altered the state structure and its laws by codifying the decentralization of the federal government through the empowerment of the regions and the system for the distribution of oil revenues—all of which have severely undermined Iraq's unity. Therefore, by clearly revamping the existing laws to suit the occupier's goals, the CPA has impeded Iraq's development and its sense of national propriety over its own economy and administration.

The full effects of the new Constitution and the CPA Orders have not been entirely felt yet. The country is still struggling to overcome the internal security crisis, which is preventing the domestic government from truly challenging the bounds of the new state. However, if and when the security situation subsides, then the future of a sovereign unitary state will be greatly tested. This is largely due to the CPA's lasting legacies and the Coalition force's continuing presence in Iraq.

E. The Legacy of Occupation

As detailed above, many of the CPA's actions have had profound repercussions well after they were issued. Despite the official transfer of sovereignty back to the Iraqi people, little in Iraq has changed. The legacies of occupation persist, as evidenced by the economic and legal structures that are

205. Steven Wheatley, The Security Council, Democratic Legitimacy and Regime Change in Iraq, 17 EUR. J. INT'L L. 551, 550 (2006) (stating that Iraqis "were not accorded a free choice in determining the form and functioning of democracy in Iraq, given the existence of a political system imposed by the occupying powers, and endorsed by the Security Council, in the form of the Transitional Administrative Law").

206. Hague Convention, supra note 48, at art. 43. See also Field Manual, supra note 76, § 362.

207. The decentralization of power through federalism has weakened the strength of the federal government and empowered regional authorities. This has only served to further jeopardize the unity of the Iraqi state, since there is much confusion between federal and regional laws, resources distribution, and area of control by security forces. Moreover, the distribution of oil is also weakening the state's economic structure and development, as there is less of a viable check to ensure the equitable distribution of oil revenues for the co-equal development of Iraq. Moreover, the blanket revamping of much of Iraq's commercial and civic laws, through the CPA's Orders, served to impede a return of law and order, as these revisions did not adequately address the needs of all Iraqis after the end of Ba'ath rule. For a good overview of the problems of the Constitution, see Kanan Makiya, Op-Ed., Present at the Disintegration, NY TIMES, Dec. 11, 2005, at D13.
still enforced in Iraq and by the institutional establishments that administer the country. This indicates that the Coalition’s status merely shifted from *de jure* to *de facto* occupiers of Iraq.

1. *The Symbolic Transfer of Sovereignty*

President Bush stated on April 13, 2004 that there will be a “transfer of sovereignty back to the Iraqi people . . . [as] America’s objective in Iraq is limited, and it is firm: We seek an independent, free and secure Iraq.”208 Yet, under the laws of war, an occupied state never transfers sovereignty to a belligerent occupier for fear that such action may be construed as an act of annexation rather than a temporary occupation.209 Accordingly, it is unclear why a transfer of sovereignty from the CPA to the Iraqis occurred when international law clearly does not mandate it.

Many hoped that the transfer of sovereignty back to the Iraqi people could provide an opportunity for the Iraqi interim government to reassert Iraq’s independence and national unity in the post-occupation period. Yet, even before the official transfer of sovereignty took place, it became apparent to the Iraqi people and the international community that this was merely an empty gesture. To encourage adherence to the CPA policies enacted during the occupation, the Coalition countries supported the drafting of U.N Resolution 1546 to include a provision preventing the interim government from “taking any actions affecting Iraq’s destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office.”210 This effectively paralyzed the interim government’s ability to maintain law and order, causing it to lose the respect of its constituents.211 Moreover, the development of a unified, functional, and truly sovereign government has been severely impeded by the empowerment of regional authorities and by sectarian infighting and rivalry, both on the streets and within the government itself. Consequently, the general weakness of Iraq’s leadership demonstrated to Iraqis that the transfer of sovereignty on June 28, 2004 was purely symbolic, as the real power still lay.

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209. Sections 353 and 358 of the U.S. Army Field Manual clearly confirm this rule. See *supra* Section I (B)(II). Moreover, in UN Sec. Council Resolution 1483, Preamble, the U.N. reaffirmed the “sovereignty and territorial integrity of Iraq” during and after the occupation period.


211. ROBERTS 2004, *supra* note 6, at 10. According to Roberts, the Iraqi interim government “represented in large part a reshuffling of the hand-picked Governing Council . . . which never gained sufficient legitimacy in Iraq” thereby undermining its position in the post-occupation period. Ironically, the constraints on the interim government by the CPA, in having to refrain from making fundamental changes to the legal system of Iraq and to behave generally in a trustee-like manner, has striking similarities to the limits that should have applied to a foreign occupying power such as the Coalition.
with the U.S. in its *de facto* occupation of Iraq.

2. De Facto Occupation and the Applicability of Post-Occupation Jus in Bello

The CPA’s actions indicated that the U.S. would remain in Iraq longer than anticipated. Before handing over power to the Iraqis, Bremer signed Order 17, which granted immunity from Iraqi law to U.S. and other Western civilian contractors and officials while performing their jobs in Iraq.\(^2\) Together with the new Constitutional provisions, the CPA’s final order, Order 100, effectively substituted “the names of new Iraqi institutions and officials for those of the CPA” in order to “project the [CPA] reforms into the future.”\(^3\) Furthermore, the consolidation of up to four U.S. “Contingency Operating Bases,” which include “long-lasting facilities,”\(^4\) and the construction of the world’s largest U.S. embassy in Baghdad\(^5\) both indicate that the U.S. has long-term intentions to remain in Iraq in both a military and administrative capacity. This permanent foreign presence will likely compromise Iraq’s sovereignty and the central government’s legitimacy, both domestically and regionally.

The U.N. and many other legal and political analysts still consider Iraq to be under occupation. Article 2 of the Geneva Convention requires that occupation law apply to all international armed conflicts and to all cases of partial or total occupation of a country.\(^6\) After the transfer of sovereignty,

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\(^5\) “The U.S. Embassy in Baghdad is among the largest American embassies in both staff size and budget. According to the State Department, the U.S. Mission in Baghdad is staffed with about 1,000 Americans representing various U.S. government agencies and between 300 and 400 locally engaged staff.” Susan B. Epstein, *CRS REPORT FOR CONGRESS, U.S. EMBASSY IN IRAQ* 2 (Updated Apr. 11, 2005), available at http://www.fas.org/sgp/crs/mideast/RS21867.pdf (last visited December 26, 2007).

\(^6\) Geneva Convention, *supra* note 63, at art. 2. The need to uphold occupation law, specifically provisions related to the rights of detainees, is particularly relevant today in light of the insurgency and the possibility of abuse and torture of suspected insurgents detained by Coalition forces. If Iraqi or Coalition forces detain suspected insurgents in the future, they will be bound by the terms of the Geneva Conventions, specifically Article 76 regarding prisoner rights; see generally Aaron Glantz, *How America Lost Iraq* 131-40 (2005) (for a detailed analysis of the Abu Ghraib prison scandal and the consequential overstepping of the CPA’s bounds as an occupier vis-à-vis detainees). See also generally Dörmann & Colassis, *supra* note 32 (discussing the status of prisoners and detainees during and after occupation).
Resolution 1546 explicitly approved the presence of a U.S.-led multinational force and also laid out specific provisions for the post-occupation phase of deployment in Iraq. Indeed, the term “occupation” remains in legal use for as long as the Coalition forces are in Iraq and exercise significant influence in the state’s administration. Therefore, if de facto occupation persists, the laws of occupation should be kept in force to regulate the occupier’s actions—a necessary measure for protecting the state and its people.

In sum, Iraq today still suffers the effects of the Coalition’s failure to uphold its responsibilities as an occupying power. In hindsight, Iraq’s present dire situation could have been avoided had the U.S. not invaded Iraq or had, at a minimum, awaited a U.N. mandate. With the invasion a fait accompli, the Coalition should have abided by the conservative laws of occupation, which would have both broadly guided its actions and prevented abuses of international law. However, the above analysis suggests that Iraq was an unregulated transformative operation, where the Coalition enacted its own laws and ignored others to further its self-interested goals for the new Iraq. This had disastrous consequences for Iraq and its people—the very outcome the terms of occupation law sought to prevent. As such, this body of law ultimately failed to protect the inhabitants because of its inability to limit the degree to which the Coalition and the CPA could transform the administrative, political, economic, and legal structures of post-war Iraq.

III

THE EVOLVING LAWS OF TRANSFORMATIVE OCCUPATION: JUS POST BELLUM

Operation Iraqi Freedom and its dire aftermath demonstrate the need for an occupying power to abide by the conservative laws of occupation. Such adherence should apply in both non-exceptional circumstances, such as Iraq, and in interventions involving “exceptional” humanitarian circumstances.

217. S. C. Res. 1546, supra note 210, Preamble (welcoming “the willingness of the multinational force to continue efforts to contribute to the maintenance of security and stability in Iraq”); see also id. at art. 13 (outlining the framework for the continued presence of the Multinational Forces).

218. Roberts, supra note 18, at 617.


220. Roberts, supra note 18, at 615 (showing that the presence of foreign military force in a country like Iraq, “with [its] long memories of colonialism, war, and foreign occupation, was always likely to cause tension . . . [So that t]he emergence of resistance illustrates a potential hazard, and vulnerability, of transformative occupations”).

221. This Comment argues that countries should only intervene in “exceptional” circumstances. However, because of poor enforcement mechanisms there will undoubtedly be instances where a state will undertake unilateral intervention for causes that are outside the standards set in this Section. Therefore, until enforcement structures are strengthened to prevent such unilateral actions, the application of conservative occupation law should be universally adhered to in both “exceptional” and non-exceptional circumstances in order to ensure the welfare of the state’s future and its inhabitants.
situations that will be explored in more detail below.\textsuperscript{222} Admittedly, there needs to be a stronger enforcement mechanism to compel states to abide by the laws of occupation and to ensure that they do not engage in transformative occupations when they are not justified. As this Section will explore, where transformative occupations are justified by “exceptional” circumstances, a modification to the regime of \textit{jus in bello} would be beneficial. Such a regime would provide a more practical and modern legal framework for transformative occupation, which would hold occupiers accountable for their actions and restrict deviation from the law. Moreover, it would help promote the well-being of the inhabitants during occupation and provide more suitable and sustainable development measures to benefit the inhabitants after occupation. Therefore, using the existing framework of conservative occupation law outlined in Section One and the lessons learned from the recent occupation of Iraq in Section Two, this Section will redefine occupation law to reflect these goals.\textsuperscript{223}

\textbf{A. Limiting Intervention: Exceptional Circumstances for non-U.N. Mandated Action}

Before proposing a modification of the existing legal regime, it is imperative to define what is meant by “exceptional” circumstances, as a modification to the existing legal regime in “exceptional,” non-U.N. mandated circumstances can still be dangerous.\textsuperscript{224} With a clear working definition of what qualifies as an “exceptional” circumstance, nations, such as the U.S., will be deterred from using the modified legal doctrine as a green-light to “legally” invade another nation under the guise of a necessary transformative intervention.\textsuperscript{225} Thus, even before a legitimate unilateral intervention can be

\begin{footnotesize}
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\item[\textsuperscript{222} See \textit{Responsibility to Protect} Report, \textit{supra} note 97, at 29-37 (outlining a comprehensive criteria for “exceptional” circumstances that warrant military intervention).
\item[\textsuperscript{223} While proposing a definitive universal standard for the permissible use of force is largely outside the central scope of this Comment, it is nonetheless important to define “exceptional” circumstances so that the standards can help the international community to differentiate between a legitimate transformative occupation and one that is undertaken solely for self-interest. While the proposed standards for non-U.N. mandated intervention herein are not exhaustive or readily employable for future use, they nevertheless seek to quell a well-founded fear that future occupiers will fail to learn from the mistakes of Iraq and will abuse this already fragile legal regime, especially given the inherently weak enforcement mechanisms to prevent such abuse.
\item[\textsuperscript{224} Ideally any intervention should be undertaken with the consent and mandate of the U.N. However, if the U.N. cannot prevent the initial act of unilateral intervention, then there should be provisions which will allow the U.N. to effectively administer the post-war state. See O’Connell, \textit{supra} note 138, (arguing that in the outset of the occupation, “the United Nations [could] legitimately administer Iraq, not the representatives of an unlawful occupying power. . . . Ideally, the Council would . . . authorize a major peacekeeping and police force from states that did not take part in the war” which she points out follows the precedents of Cambodia, Bosnia, East Timor, Kosovo, and Afghanistan). However, non-U.N. mandated missions are still probable, which means that one cannot rely solely on a desire to have the U.N. involved in regulating and expanding \textit{jus in bello} in the post-war period.
\item[\textsuperscript{225} See Fox, \textit{supra} note 17, at 270-90 (arguing that as a possible theory to legitimize the
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granted, there should be "stringent limiting conditions, among them [a] demonstrated and immediate need, Security Council unwillingness to address the matter, exhaustion of non-forcible remedies, and an action narrowly tailored to achieve humanitarian ends."226 Under these conditions, two circumstances—genocide and ethnic cleansing—are "exceptional" situations that justify armed intervention in the absence of a U.N. mandate.


One of the fundamental lessons from the post-World War II period was the need to respect and uphold fundamental human rights norms, a realization later enshrined in the 1948 Universal Declaration of Human Rights (UDHR) and subsequent Conventions. Among the accepted norms that emerged from this period was the requirement that nations not engage in acts of genocide, in light of the atrocities committed by the Nazi Party during World War II. This was codified in the Convention on the Prevention and Punishment of Genocide, which defined genocide as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."227 Later, through customary practice, genocide was also deemed a violation of *jus cogens*.

There is a growing consensus in the international community that genocide cannot be tolerated, and that the ban on it even supersedes national sovereignty. With the memory of the Rwandan genocide in mind, former U.N. Secretary General, Kofi Annan stated emphatically that "even harder experience has led us to grapple with the fact that no legal principle—not even..."
sovereignty—should ever be allowed to shield genocide, crimes against humanity and mass human suffering.”

The perpetuation of acts of genocide within a state should therefore be the fundamental marker of “exceptional” circumstances that would permit unilateral intervention in the face of U.N. inaction. Ryan Goodman argues persuasively for this position, stating that because acts of genocide have occurred and are still occurring without U.N. intervention, such as in Rwanda and Darfur, unilateral intervention is warranted. Consequently, the need to challenge and prevent genocide, as well as other massive human rights violations, necessitates intervention in the face of U.N. inaction. It is, however, untenable to argue that the U.S. invasion of Iraq was justified under this “exceptional” circumstances requirement.

Another “exceptional” circumstance warranting intervention is ethnic cleansing. Ethnic cleansing includes state policies and practices aimed at the forcible displacement of a specific ethnic group from a particular territory. The U.N. has condemned ethnic cleansing as an egregious act of inhumane violence that “is unlawful and unacceptable, and [one that] will not be permitted.” Ethnic cleansing became the subject of much global attention during the wars in Bosnia and Kosovo and after instances of ethnic cleansing in Rwanda and more recently in Darfur, causing the death and displacement of millions of people. Intervention in such circumstances is necessary not only to protect victims from such an atrocity, but also to prevent the destabilizing concomitant that can result, illustrated by refugee movements into neighboring states, the economic collapse of the state in turmoil, and the general long-term political repression perpetrated by the regime in power. Again, this qualification is inapplicable to trigger the invasion of Iraq in 2003.


229. R. Goodman, supra note 90, at 110.

230. While it was evident that Saddam Hussein gassed the Kurds during the Iran-Iraq war and severely repressed sectarian revolts in the post-Gulf War period, intervention under the “exceptional” circumstances criteria should only be warranted to prevent the actual and immediate act of genocide. On the eve of the Coalition’s invasion of Iraq in 2003, it is doubtful that any group in Iraq was in immediate danger of suffering from Saddam’s “intent to destroy” that particular group. While the Bush Administration did not officially justify the invasion in terms of preventing genocide, it is nevertheless important to illustrate that the invasion of Iraq could not have qualified under this “exceptional” circumstance. See generally Tripp, supra note 4, ch. 6 (for a more detailed history of these human rights violations by Saddam).

231. See Drazen Petrovic, Ethnic Cleansing - An Attempt at Methodology, 15 EUR. J. INT’L L. 342 (1994) (tracing the origins of the term “ethnic cleansing” as a literal translation of the expression ‘etnicko ciscenje’ in Serbo-Croatian/Croato-Serbian, which was used to describe the forcible displacement of a particular ethnic population during the Bosnian war of the 1990s).


233. Although Saddam did engage in ethnic cleansing directed at the Kurds and Southern
Some might wonder why transformative occupation is needed at all, even in these “exceptional” circumstances, if the goal of the occupier is simply to halt the humanitarian crisis. Transformative occupation is, however, critical both in ending acts of genocide and ethnic cleansing and in helping foster an environment that can prevent a repetition of such actions. Broadly speaking, transformative occupation can: 1) facilitate free elections, which could change the regime perpetrating the acts, illustrated by Kosovo; 2) set up domestic or international tribunals to prosecute those responsible for the atrocities, as seen in the International Criminal Tribunal of Yugoslavia and the Tribunals in Rwanda; 3) erect systems of domestic law enforcement to maintain law and order, as in Kosovo; 4) provide peace-keepers to ensure the well-being of the population, like the International Fellowship of Reconciliation (IFOR) in Bosnia; and 5) encourage international financial assistance to help the economy and people, demonstrated by the European Union’s assistance to Kosovo. These transformative measures can help ensure a sustainable peace once the “exceptional” circumstance has been terminated.

2. Checking Self-Interested Intervention

Although transformative occupation may be beneficial in cases of genocide and ethnic cleansing, it is imperative that they only be allowed in those two “exceptional” circumstances. Setting a high standard for justified intervention can help allay fears that nations will abuse the right to intervene. Under this standard, intervention should be discouraged when self-interested concerns such as political, economic, social (religious or ethnic expansion), hegemonic, or geo-strategic gains predominate the purpose of action. With these standards in place, the onus is on the belligerent state to prove that their unilateral intervention falls within these “exceptional” circumstances, otherwise their actions could be condemned by the international community and their domestic population. Thus, interventions that detract from the central goal of alleviating genocide or ethnic cleansing could be deterred.

234. Public opposition against poorly-planned and exploitative unilateral missions can serve to create feelings of skepticism and diminish support for the occupier. Moreover, such opposition can serve as a self-regulating mechanism to help put pressure on states considering whether to directly engage in or support unilateral interventions; for example, public opposition led to the withdrawal of Italian and Spanish soldiers from Iraq. See Italy plans Iraq troop pull-out, BBC WORLD REPORT, Mar. 15, 2005, available at http://news.bbc.co.uk/2/hi/europe/4352259.stm (last visited December 26, 2007); Spain PM Orders Iraq Troops Home, BBC WORLD REPORT, Apr. 18, 2004, available at http://news.bbc.co.uk/2/hi/europe/3637523.stm (last visited December 26, 2007).

235. See R. Goodman, supra note 90, at 110 (contending that mandating states to intervene only in times of humanitarian need will in fact “facilitate conditions for peace between those states and their prospective targets.”) He explains that this will occur because potential belligerents will have to stay within the bounds of the standards mentioned. This will also limit the occupier in
The justification for intervention in Iraq did not directly satisfy the above standards and should not have warranted unilateral action. Instead, the invasion of Iraq was arguably undertaken for economic, strategic, and political gains, rather than for humanitarian purposes. Post-occupation efforts by the U.S. to transform Iraq in accordance to its own interests demonstrate why such interventions should be regulated if not prevented as part of this evolving standard. Furthermore, in acting outside the boundaries of a U.N. mandate and "exceptional" circumstances, the U.S. may have created a precedent that "will be available, like a loaded gun, for other states to use as well." This can create the potential to completely undo the post-World War II system of collective security. Moreover, the U.S.'s clear violation of the international legal norms undermines its credibility within the international community and both augments anti-U.S. sentiment and undercuts confidence in U.S. initiatives of "democracy" and "freedom."

The lessons of Iraq will hopefully act as a catalyst in ensuring that transformative occupations occur only in cases of "exceptional" circumstances. Yet, the possibility still exists that these standards can be ignored. Using such a high standard of intervention requires enforcement and common usage so as to be universally applied, a process that can take many years. Therefore, an additional safeguard in the form of a modified regime of occupation law is needed because it is very likely that occupations will continue to occur improperly outside of situations involving "exceptional" circumstances. As such, a modified regime of occupation law could help to mitigate the harmful effects that result from such situations. In addition, even if countries were to intervene only in "exceptional" circumstances, a modification of occupation law would still act to ensure that the sovereignty of occupied states and the universal rights of people are respected. Therefore, the modification of occupation law discussed below should be implemented in any situation of occupation, whether in a legitimate or illegitimate intervention, in order to protect the inhabitants and create a sustainable post-war state.

terms of its transformative goals, as their main purpose should be aimed at alleviating a humanitarian crisis and creating the conditions for a sustainable post-war state).

236. O'Connell, supra note 226, at 19 (arguing that as a founder and member of the present international legal system, the U.S.'s use of preemptive military force "would establish a precedent that the U.S. has worked against since 1945." As a direct result "preemptive self-defense would provide legal justification for Pakistan to attack India, for Iran to attack Iraq . . . for North Korea to attack South Korea, and so on. Any state that believes another regime poses a possible future threat—regardless of the evidence—could cite the United States' invasion of Iraq").

237. See JAMES BAKER III, IRAQ STUDY GROUP REPORT 38 (2006), available at http://www.usip.org/isg/iraq_study_group_report/report/1206/iraq_study_group_report.pdf (last visited) (stating, "the longer the United States remains in Iraq without progress, the more resentment will grow among Iraqis who believe they are subjects of a repressive American occupation. As one U.S. official said to us, 'Our leaving would make it worse . . . [however] the current approach without modification will not make it better'”).
B. The Advent of Jus Post Bellum

This Comment argues that under no circumstance should an occupier ignore *jus in bello* in occupied states. Yet, even if the Coalition abided by the laws of occupation in Iraq, these laws are still an inadequate means of regulating the occupier’s actions in the face of transformative occupation. This inadequacy, in turn, would encourage the occupier to undertake unilateral actions that violate the very tenets of occupation law. Such an egregious act can lead to disastrous consequences at the expense of the inhabitants and the future of the state as illustrated by post-war Iraq.\(^{238}\) Disregarding the conservative laws of occupation is, however, not a solution, since dire consequences can result even when the occupier has the best of intentions. Instead, this Comment seeks to generate discourse over the need to modernize this body of law. A modernization of occupation laws could provide legally recognized provisions through the lessons learned in Iraq, and help better regulate economic, social, legal, and political reforms of a post-war state. These provisions could have greatly benefited post-2003 Iraq.

The debate over modernizing occupation law is not new, but emerged through a steady change in the international legal and political landscape, especially towards the end of the Cold War.\(^{239}\) Commentators at that time argued that occupation law was anachronistic and incompatible with modern transformative operations.\(^{240}\) In the 1990s, lessons from various transformative occupations strengthened the case to contemporize *jus in bello* and make it more compatible with 21st century trends in post-war occupation. The modernized legal regime, for the purposes of this Comment, will be referred to as *jus post bellum* or laws governing the post-war period.\(^{241}\)

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\(^{238}\) See Robbie Sabel, *The Problematic Fourth Geneva Convention: Rethinking the International Law of Occupation*, JURIST, Nov. 13, 2003, available at http://jurist.law.pitt.edu/forum/forumnew120.php (last visited December 26, 2007) (pointing out that the U.S. and U.K. never sought to apply the Fourth Geneva Convention because of its inherent dualistic role, since “the laws of occupation are intended to safeguard the rights of the previous sovereign as well as making humanitarian provisions for the population. . . . The explicit aim of the U.S. and U.K. administrations [was] to change the regime in Iraq, clearly not an aim sanctioned by the laws of occupation”).

\(^{239}\) As early as 1985, Davis Goodman argued for a revision of occupation law, which he saw as lacking in credibility and inadequate in its application in social, political, and legal structures of the post-war occupied state. *See generally D. Goodman, supra note 59; see Glazier, supra note 105, at 191* (proposing that “[i]n observed state practice, the international community has been willing to accept substantially more significant changes. There was seemingly no objection to . . . Vietnam overthrowing the horrific Cambodian Khmer Rouge regime of Pol Pot and replacing it with a more acceptable People’s Republic of Kampuchea, including both the political and economic restructuring of that nation.” As such, he argues that even though the Hague law is expressed in the form of international conventions, as customary international law, it is subject to further development by evolving state practice).

\(^{240}\) Fox, *supra* note 17, at 262-69.

\(^{241}\) The term *jus post bellum* has been used in the writings of various scholars but primarily by Adam Roberts, Brian Orend, and Carsten Stahn, *see supra* note 25. While there is no strict definition of *jus post bellum*, the current analysis will explain how human rights law and the
As conceived herein, *jus post bellum* is a concept that guards the central duties and responsibilities of *jus in bello*. It also invokes legally regulated allowances using human rights law and additional considerations from the occupation of Iraq, including unregulated economic and legal reform. This is undertaken with the goal of constructing a comprehensive and definitive legal framework for enacting transformative measures that seek to ameliorate and protect an otherwise damaged society, especially within the bounds of "exceptional" non-U.N. mandated circumstances. Thus, it is important to assess the evolving norms of *jus post bellum* to better understand the need for a modification of occupation law.

*Jus post bellum* can be understood as encapsulating a number of fundamental human rights norms that are already evident in existing law and practice. For example, Carsten Stahn argues that current international practice indicates a transition toward long-term peace-building in post-war situations, an important component of *jus post bellum*. In supporting his contention, Stahn cites the recent common international practice of requiring procedural fairness in the formation of peace settlements, the need to uphold post-war individual and group rights, and the need to internationalize peacemaking to legitimate governance and intervention. Moreover, recent actions by the U.N. also exemplify the principles underlying *jus post bellum*: first, the establishment of internationalized criminal institutions for the restoration of the rule of law in post-conflict territories, such as Yugoslavia, Rwanda, and Sierra Leone; second, the evolution of peacekeeping, from a device of neutralization to a mechanism of promoting social, economic and legal reconstruction in post-conflict territories. Finally, another fundamental principle of *jus post bellum* is conflict management, which has been included in a number of modern peace agreements in the form of power-sharing arrangements, human rights mechanisms, and third party monitoring.

Professor of Ethics and Human Rights, Brian Orend, further examines several fundamental norms of *jus post bellum* in light of the first Gulf War in 1991. He cites the need to use proportional force when countering an act of lessons from Iraq can help modify this legal regime to adequately regulate future modern transformative occupations.

242. See generally Stahn, supra note 7.
243. Id. at 6.
244. Id. at 2.
245. Id.
246. Orend, supra note 25, at 117-37. However, the ensuing sanctions on Iraq could be branded as collective punishment; see also Brian Orend, *Justice after War*, 16 ETHICS & INT’L AFF. 43 (2002), available at http://www.cceia.org/resources/journal/16_1/articles/277. html/res/id=sa_Fi1e1/277_oren1d.pdf (last visited December 26, 2007) (discussing the parameters of *jus post bellum* in terms of the vindication of rights in a peace settlement; proportionality and unconditional surrender; socio-economic sanctions and the protection of civilians in the post-war period; war crimes trials; fiscal restitution; and the rehabilitation of a country defeated in war).
aggression through intervention. Additionally, intervention must have the right intent and a just cause for termination such that the rights of the violated are vindicated and compensation is attained. Finally, Orend posits that collective punitive penalties or undue hardships should not be imposed on the civilian population. U.S. actions during the Gulf War and subsequent peace agreements were consistent with these *jus post bellum* norms. Nevertheless, these norms of post-war peace-building were not applicable in the 2003 invasion and occupation of Iraq, as they did not adequately account for unilateral regime change and unchecked radical transformative intervention. The need to modernize the legal regime in light of the recent occupation of Iraq has become even more pressing.

C. Creating a Framework for Transformative Occupation through *Jus Post Bellum*

War and occupation raise unique social, political, economic, and legal issues that need to be individually addressed to develop a viable and sustainable post-war state. The present laws of occupation, however, do not adequately provide a peace-building framework that addresses such issues. Instead, *jus post bellum* will serve to benefit the occupied inhabitants, even in instances outside of the "exceptional" circumstances, by creating a comprehensive legal framework that provides guidance in light of emerging legal norms such as those in human rights law, which can be tailored to suit the unique nature of each transformative occupation. While critics may argue that such a legally modified regime will only be seen as an added burden to the occupier, there are many reasons cited herein for the adoption of *jus post bellum* that outweigh this concern.

Broadly applying a more expansive and modernized legal regime of occupation is understandably challenging. In the case of Iraq, political

248. *Id.* at 123-24.
249. *Id.*
250. These issues arise uniquely in occupied countries and largely depend on the political, social, and economic history of the pre-war society as well as the *jus ad bellum* of intervention.
251. It is important to note that the following analysis does not seek to reinvent the laws of occupation. Instead, this Comment argues that a discussion of the benefits of human rights law and the lessons learned from Iraq will compel a modification of occupation law to prevent another Operation Iraqi Freedom and its aftermath.
252. There are numerous difficulties that impede international law and consequently occupation law. See D. Goodman, *supra* note 59, at 1597 (contending that "the means of developing law and adapting it to changing circumstances are cumbersome, inefficient, and often ineffective. Participants in the international legal system have differing political, economic, social, and legal backgrounds, so that even when specific ideas or language are incorporated into the law, the practical meaning is uncertain. Finally, the lack of a system of enforcement leaves the future of particular laws in the hands of those whose freedom to act is circumscribed by those laws"). However such difficulties should not detract from the fact that a modification is needed in those "exceptional" circumstances that warrant transformative intervention.
transformation “constituted a significant part of the rationale for intervention—and was perhaps more important in the minds of some policymakers than disarmament.” 253 Occupation law was therefore simply seen as an ‘artificial’ impediment to the real reason for intervention, namely “turning a dictatorship into a democracy.” 254 As such, a danger emerges that an occupier today will either ignore the laws of occupation entirely or simply pick and chose which articles best comport with its interests. The occupier would then substitute its own provisions for action, which may breach international legal norms and consequently have a detrimental effect on the occupied state. By providing limited “exceptional” circumstances for unilateral intervention coupled with a modified legal regime that combines globally recognized human rights law with realistic considerations from the occupation of Iraq all within jus in bello, the abuse of intervention should be curtailed.

I. Human Rights Law

International human rights law arose from the collective desire of states after World War II to prevent acts of genocide and general disrespect for human rights. 255 This culminated in the UDHR of 1948, seen as an “International Bill of Human Rights,” which outlined the norms that emerged in this post-war period. 256 While the UDHR is not a legally binding instrument, it still stands as a testament of a collective will to ensure that the rights of mankind are respected by all nations. Since the UDHR is non-binding, two subsequent binding Covenants were created: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)—both were formulated in 1966 with the aim of giving citizens legal recourse when human rights abuses occurred. 257 Moreover, the Convention Against Torture of 1984 also sought to buttress the Geneva Conventions and has played a prominent role in an area of human rights that is vague and problematic, especially in times of

253. Roberts, supra note 18, at 607-08
254. Id.; see also generally Fox, supra note 17, at 262-69.
255. See generally ANTONIO CASSESE, INTERNATIONAL LAW (2d ed. 2001), at 349-74 (for a more nuanced discussion on the evolving importance of human rights law). As stated, the desire to modernize occupation law is not new. See Glazier, supra note 105, at 191 (stating that the Fourth Geneva Convention itself was just such an example of this desire to modify and modernize occupation law).
256. Roberts, supra note 18, at 590.
257. International Covenant on Civil and Political Rights, Dec. 16, 1966, (hereafter “ICCPR”), available at http://www2.ohchr.org/english/law/ccpr.htm (last visited December 26, 2007) (156 signatories); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, (hereafter “ICESCR”), available at http://www2.ohchr.org/english/law/cescr.htm (last visited December 26, 2007) (153 signatories). While these covenants are not customary law, it is hoped that with the increasing application of human rights laws in occupation law this will enable these covenants to become more binding, universally accepted, and eventually become non-derogable (jus cogens).
occupation.\textsuperscript{258}

There have also been several regional agreements that have helped shape international norms in human rights, among them are the American Convention on Human Rights of 1969 (ACHR) and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.\textsuperscript{259} These and other international human rights conventions have addressed such issues as “the right to physical integrity, health, and family, the right to work, to participate in property ownership, and to receive education and training, and to participate freely in religion and culture.”\textsuperscript{260} While these conventions were drafted to help guide state action in regard to its populations, many of these same issues arise in times of occupations. These same conventions can therefore be incorporated into \textit{jus in bello}, in order to guarantee the rights of inhabitants in post-war occupied states.

\section*{2. Applying Human Rights Law in Jus in Bello}

Human rights conventions cover a wide array of protections for inhabitants\textsuperscript{261} that supplement the existing laws of occupation. One persistent theme in human rights law, for example, is access to education. Efforts to provide education have been met with mixed success in Iraq primarily due to a lack of security, funding, and oversight during the occupation.\textsuperscript{262} While occupation law mentions education,\textsuperscript{263} several human rights law instruments

\begin{footnotesize}
\textsuperscript{258} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (74 signatories).


\textsuperscript{260} D. Goodman, supra note 59, at 1600.

\textsuperscript{261} The examples mentioned below are just a few of the many provisions that can help regulate the actions of an occupier and address the social issues that arise in occupation, issues that are not clearly mandated in conservative occupation law.

\textsuperscript{262} On paper, the Coalition has tried to rebuild the education system in Iraq, see U.S.AID, Assistance to Iraqi Education, available at http://www.usaid.gov/iraq/accomplishments/education.html (last visited December 26, 2007). However, this sector has suffered much during and especially after the \textit{de jure} occupation of Iraq due to a lack of funding and violence. This will undoubtedly have a detrimental impact on a whole generation and with it the development of human capital in the country. See Ghali Hassan, The Destruction of Iraq’s Educational System under U.S. Occupation, May 11, 2005, available at http://www.globalresearch.ca/articles/HAS505B.html (last visited December 26, 2007); see also Dahr Jamail & Ali al-Fadhily, It’s Either Occupation or Education, \textit{Inter Press Service}, Dec. 18, 2006, available at http://www.commondreams.org/headlines06/1218-07.htm (last visited December 26, 2007).

\textsuperscript{263} Geneva Convention, supra note 63, at art. 50; Geneva Protocol II, art. 4 (3)(a), June 8, 1977, 1125 U.N.T.S. 609 (stating in part that “Children shall . . . receive an education”). However, these provisions are not specific and do not provide a framework for the implementation of educational facilities.
\end{footnotesize}
address the issue in more detail, such as the UDHR (Article 26),\textsuperscript{264} Convention on the Rights of the Child (Article 28),\textsuperscript{265} and more particularly the ICESCR (Articles 6 and 13), which requires that a state “work out and adopt a detailed plan of action for the progressive implementation . . . of compulsory education free of charge for all.”\textsuperscript{266} Because of the disruptive nature of war and occupation, the belligerent occupier should facilitate education to help ensure the “full development of the human personality and the sense of its dignity, and . . . strengthen the respect for human rights and fundamental freedoms” as well as encourage human capital development for the future well-being of the state.\textsuperscript{267}

Article Six of the ICESCR, which addresses the right to work, offers a framework to states on providing “technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”\textsuperscript{268} This Article is designed to promote the provision of a better more productive future for the state and its inhabitants. This safeguard, however, was not afforded to the Iraqi people, because the Coalition’s De-Ba’athification policy as well as the demilitarization of the security apparatus caused a massive upheaval in unemployment as well as a breakdown in Iraq’s security and administrative functionality.\textsuperscript{269} Both of these policies arguably contributed to the anti-occupation sentiment and violence still seen today.\textsuperscript{270}

Human rights law also provides structural provisions for the protection of inhabitants under a state of occupation. For example, the ICCPR prohibits torture (Article 7) and provides a right to fair judicial hearing (Article 14). It

\begin{itemize}
  \item \textsuperscript{264} Universal Declaration of Human Rights (UDHR), art. 26(1), Dec. 10, 1948 (stating in part that “[E]veryone should have the right to education . . . [t]echnical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit”).
  \item \textsuperscript{265} Convention on the Rights of the Child, art. 28, Nov. 20, 1989, 28 I.L.M. 1448, (declaring; “(a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means”).
  \item \textsuperscript{266} ICESCR, supra note 266, at art 6(2).
  \item \textsuperscript{267} Id. at art. 13(1); see also D. Goodman, supra note 59, at 1600-01.
  \item \textsuperscript{268} ICESCR, supra note 257, at art. 6(2).
  \item \textsuperscript{270} Through CPA Order Number 2’s uncompensated demilitarization of Iraq and Order Number 1’s De-Ba’athification, many inhabitants were forced to leave their jobs, in many instances without compensation, thereby contributing to the unemployment rates and rising levels of indigence in Iraq. These overbroad and short-sighted Orders greatly fed into the violence, which has further impeded development and exacerbated unemployment.
\end{itemize}
also affords victims' the right to remedies (Article 3), humane treatment in
detention (Article 10), and measures to ensure the recognition of personal
freedoms and rights (Article 2). Collectively, these provisions help ensure that
the occupier will uphold the rights of the inhabitants. In Iraq, while the
Coalition instituted several of these provisions, there were still abuses of human
rights that clearly tainted the foreign occupation. 271

More broadly, human rights law can help resolve many domestic issues
that arise in the post-war period. By implementing civil and political rights
during occupation, found for example in the ICCPR and the ICESCR, the post-
war state can benefit from a framework for the subsequent incorporation of
these rights into domestic law. 272 The incorporation of human rights law can
further bolster the credibility of the new national government, as the inhabitants
will feel more assured of their rights—an important consideration that was not
addressed effectively in post-war Iraq. Human rights law can also provide
procedures and redress for individual complaints, which are not adequately
provided for in jus in bello. For example, under human rights law, individuals
may raise matters directly with international courts such as the European Court
of Human Rights (ECHR), as demonstrated by Iraqi prosecution of British
soldiers in the Al-Skeini et al. v. Secretary of State of Defense case at that
forum. 273 Numerous other post-conflict tribunals, including the International
Criminal Court and the International Court of Justice have also emerged to help
provide forums for redress that were formerly unavailable under conservative
occupation law.

The general universal character of human rights law, “as a body of law
subscribed to equally by the occupying state and by the occupied state,” can
help ensure that human rights are not ignored in times of crisis and
occupation. 274 Some treaties, however, do permit a state to suspend some of its

271. Under Order Number 60, the Coalition for example created the Ministry for Human
Rights, Ministry of Human Rights, Coalition Provisional Authority Order No. 60, CPA/ORD/19
(Feb. 19, 2004), available at http://www.cpa-iraq.org/regulations/20040220_CPAORD60.pdf (last
visited December 26, 2007). Nevertheless, there were prolific human rights abuses in Iraq, as seen
in the Abu Ghraib prison scandal, see generally GLANTZ, supra note 216, at 131-40.
272. Roberts, supra note 18, at 594. See PILPG, supra note 127, at 54-56 (stating that the
report makes a recommendation for the incorporation of human rights law by advising that “a bill
of rights that sets forth the most basic human and minority rights could be immediately
promulgated prior to the adoption of a constitution.” After this bill of rights has been promulgated,
“the drafters of the constitution can focus on a more detailed articulation of human and minority
rights and the incorporation of instruments for the protection of international human rights and
minorities into Iraqi domestic law”).
273. See Roberts supra note 18, at 598 (for a good account of this case and how it has
benefited from human rights law). However, one cannot ignore the inherent weakness of criminal
prosecution for violators of human rights law given the unequal power of the occupiers and the
occupied. This is demonstrated by the dearth of prosecutions brought against U.S. agents since the
onset of occupation in Iraq.
274. Id. at 593. To confirm the universal character of human rights law, the U.K. Attorney
General, Lord Goldsmith, noted that “a further complicating factor for the United Kingdom is the
extent to which the ECHR and other international human rights instruments are likely to apply to
obligations and duties in times of emergency. Generally, if an occupying state is not a party to a particular human rights treaty, the treaty’s requirements are not binding on the state, and it can therefore avoid the liabilities of occupation. These exceptions and qualifications can, in turn, sap the strength and enforcement of human rights law. Yet, by infusing this body of law within *jus in bello*, the customary power and influence of the traditional laws of war should help ensure that most important rights are not ignored. Consequently, common practice and the recognition of its importance will strengthen human rights law so that disregard of the law, even in times of emergency, will no longer be tolerated.

Professor of International Relations, Adam Roberts, concludes that “stressing application of human rights law . . . can give [occupation] law an important element of flexibility in response to “exceptional” situations; and it can reduce the intensity of international criticism of the occupant’s actions.” Thus, by embracing human rights law, the occupier has a framework for action while gaining much needed credibility among the inhabitants as well as the international community—a benefit denied to both the Coalition and the Iraqi people.

3. Additional Considerations for Jus Post Bellum

While human rights law covers many issues that arise in post-war situations, there are few additional considerations that emerged during and after occupation of Iraq, which are not sufficiently addressed in *jus in bello*. These include the extent to which a state can revamp an economy of another state; the degree to which an occupier can overhaul domestic laws; and the need to ensure the application of occupation law regardless of the justification for war and the official transfer of sovereignty. These issues need to be addressed through a modification of *jus in bello* so that the legal abuses that took place in Iraq are not repeated.

According to Gregory Fox, there are no existing regulatory standards guiding situations like that in Iraq, where an occupier revamps the occupied country’s banking, taxation, corporate law, bankruptcy law, securities

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275. ECHR, supra note 259, at art. 15; ICCPR, supra note 257, at art. 4; and ACHR, supra note 259, at art. 27.
276. See Dennis, supra note 147, at 146 (pointing out that despite its universal nature, human rights law was never intended to apply extraterritorially during armed conflict).
277. See Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 104 Isr. Y. B. Hum. RTS. 116 (1978) (making a crucial distinction, vis-à-vis the occupation of Palestine by Israel that “a military occupation is not tantamount to a democratic regime and its objective is not the welfare of the local population. Most peacetime human rights are suspended in time of belligerent occupation”); see D. Goodman, supra note 59, at 1600 n.102. (stating that “belligerent occupation, though, by definition can only exist when order and control are maintained, so that derogation from standards should not be permitted”).
278. Roberts, supra note 18, at 622.
regulation, media regulation, traffic control, and state-owned enterprises. In fact, apart from "general obligations to provide for the welfare of inhabitants, as well as provisions concerning an occupier’s use of public and private property, matters of economic regulation are almost wholly absent from [international law] treaties." As such, there should be specific protections in *jus post bellum* that directly limit the occupiers’ ability to transform an economy during occupation, but that perhaps only allows for temporary economic reforms to the degree necessary to prevent an economic collapse in the occupied state. Such a restriction is important in preventing a belligerent state from introducing economic reforms that may be motivated by potential latent benefits to the occupier during and after the occupation.

There is also a need to have specific restrictions in *jus post bellum* that limit the degree to which an occupier can suspend or completely revamp the laws of the occupied state. During the occupation of Iraq, the “CPA made no showing that pre-existing Iraqi law permitted forms of abuse prohibited by the Convention.” Yet, the Coalition suspended many Iraqi laws, and even helped draft provisions that were later incorporated in the new Iraqi Constitution, with little foresight as to the consequences of such provisions. Occupiers must respect the laws of an occupied state and not overhaul the existing legal and governmental systems purely to impose a western paradigm of “democracy.” According to International Law scholar, Davis Goodman, any new laws must be publicized prior to coming into force and the local populace should have an opportunity to participate in the drafting of the laws. This can help prevent belligerent occupiers from “undermining fundamental structures” and “make it easier for the belligerent occupier, the occupied territory, and the rest of the world community to judge the legality of any new legislation.” Such provisions may have helped prevent the wholesale removal of Iraqi law and the long-term detrimental effects of the new Constitution on Iraq’s unity.

*Jus post bellum* should also include provisions that require the occupier to uphold this new modified body of law, regardless of the *jus ad bellum* and the transfer of sovereignty. An act of perceived liberation does not change the status of a belligerent state from an occupier to a “liberator.” A state infringing on the sovereignty of another, regardless of the circumstances, is still legally an occupier and must abide by occupation law. Moreover, if a *de facto*
occupation persists after a hand over of sovereignty, then the *jus post bellum* should remain in force. Since transformative occupations have a long-term focus, it is necessary that the occupier is held accountable to the standards set out in *jus post bellum* to help protect the rights of the population and the long-term well-being of the state. The self-identification of the Coalition forces as Iraq’s “liberators” and the symbolic transfer of sovereignty to the Iraqi interim government did not suffice to dismiss the application of occupation law in post-occupation Iraq.

In sum, although the case of Iraq illustrates the dangers that can occur when transformative occupation takes place outside a U.N. mandate, the modified legal regime of *jus post bellum* still recognizes that there are “exceptional” circumstances that should warrant transformative occupation. *Jus post bellum* incorporates human rights law and the lessons of Iraq within *jus in bello* to help develop a legal framework that seeks to regulate transformative occupation in order to foster a sustainable and viable post-war state. Both the occupier and the occupied state benefit from such an arrangement: the occupier gains both a comprehensive and universally accepted legal framework for their actions as well as the approval of the domestic and international community for adhering to human rights, while the inhabitants reap the benefits of transformative actions that give rise to a sustainable post-war society and preserves their rights under international law. This mutually beneficial scenario would have done much to offer hope to the Iraqi people when the Coalition forces marched into Baghdad in April 2003. Today, one can only hope that a modification of occupation law may help prevent a repeat of the dire consequences that befell Iraq in the wake of Operation Iraqi “Freedom.”

**CONCLUSION**

On the Fourth Anniversary of Operation Iraqi “Freedom,” President Bush proudly declared that “nearly 12 million Iraqis have voted in free elections under a democratic constitution that they wrote for themselves,” and he further announced that Iraq’s democratic leaders “are now working to build a free society that upholds the rule of law, respects the rights of its people, that provides them security and is an ally in the war on terror.”

Such a proclamation, however, tells a skewed and one-sided account of present day Iraq.

There were specific initiatives enacted by the Coalition to help ameliorate Iraq’s post-war economic, political, and social woes. Economic initiatives, such

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There were specific initiatives enacted by the Coalition to help ameliorate Iraq’s post-war economic, political, and social woes. Economic initiatives, such
as debt forgiveness, as well as the establishment of anti-corruption institutions, sought to put the new Iraq on the right economic path. Moreover, minorities in Iraq, especially the Kurds, benefited tremendously from the promulgation of regional oil distribution and regional empowerment under a federal model, first within the TAL and later within the Constitution. Many also applauded the high voter turnout for the Transitional National Assembly in January 2005, the referendum on the new Constitution in October 2005, and the subsequent elections for the National Assembly in December 2005. Finally, the creation of the Ministry of Human Rights and the codification of basic protections of human rights were significant steps toward remedying the violations committed by the Ba'ath regime.

While these achievements appear admirable, the disturbing realities on the ground—including the huge refugee flow out of Iraq, the massive numbers of dead civilians, and the economic and political stagnation—confirm the limits of what has been achieved socially, politically, and economically by an unchecked transformative occupation. A household survey of Iraqis has found that over 600,000 people have been killed in war-related violence since the U.S. invasion in March 2003. An additional 53,000 deaths “above the pre-invasion mortality rate” occurred due to “non-violent causes . . . suggesting a worsening of health status and access to health care.” In addition, statistics cannot adequately convey the despair and feeling of hopelessness among the populace caused by the war and its aftermath. The situation in Iraq looks even bleaker for the future, with the recent publication of the Iraq Study Group Report stating:


287. See Fox, supra note 17, at 288 (asserting that the Iraq Commission of Public Integrity and the Supreme Board of Audit are two such institutions).


289. Iraq Constitution §4, Art. 112, broadly discusses oil ownership and distribution. The proposed federal oil law, awaiting ratification from parliament, makes further provisions for regional control of oil, (see Federal Hydrocarbon Law (unofficial copy, pending ratification), available at http://www.iraqdevelopmentprogram.org/images/tools/iraqoillaw.pdf (last visited December 26, 2007)). Section 5 of the Constitution generally enumerates the power of the regional authorities. These provisions, however, are serving to weaken the central authority of Iraq and consequently jeopardizing the unity of the state.


291. See Fox, supra note 17, at 278 (for a more detailed commentary on the CPA’s human rights reforms).


293. Id.
If the situation continues to deteriorate, the consequences could be severe. A slide toward chaos could trigger the collapse of Iraq’s government and a humanitarian catastrophe. Neighboring countries could intervene. Sunni-Shia clashes could spread. Al Qaeda could win a propaganda victory and expand its base of operations. The global standing of the United States could be diminished. Americans could become more polarized.\textsuperscript{294}

While blame for the apocalyptic disaster that has befallen Iraq cannot be attributed wholly to the mistakes of the Coalition, this Comment has demonstrated that the stage was set on its watch.

The devastating aftermath of Iraq may force nations to rethink unilateral intervention. However, it is still likely that transformative occupation will be undertaken again in the future. In recent years the U.N., for example, has established and expanded its United Nations Peacebuilding Commission,\textsuperscript{295} and the U.S. has also created the Office of the Coordinator for Reconstruction and Stabilization, which is charged with a goal to “prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife.”\textsuperscript{296} Indeed, in some cases, transformative occupations may be a necessity. Several post-Cold War incidents of unilateral or collective humanitarian intervention outside the bounds of traditional international law, such as in Kosovo, demonstrate that unilateral intervention in the face of U.N. inaction is desirable to stem acts of genocide or ethnic cleansing.\textsuperscript{297} In addition, without stronger enforcement mechanisms to prevent unilateral actions outside the scope of these “exceptional” circumstances, it is quite foreseeable that such actions will reoccur, which could lead to crises similar to the one currently experienced in Iraq.

One particular problem of a transformative occupation is changing the fundamental principles and procedures by which a society organizes and governs itself. Such change is, however, a long and drawn out process. The desire to democratize nations en masse in the post-Cold War period has in some cases proven to be disastrous if not done incrementally and within the ambit of international law. Although the U.S. planned to transform Iraq in a short period of time and planned its occupation accordingly, it will likely take years, even decades, to develop a constitutional system in Iraq, based on competent administration, rule of law, and the acceptance of peaceful and

\textsuperscript{294} BAKER, supra note 237, at xiv; see Riverbend Blog, Girl Blog from Iraq . . . let’s talk war, politics and occupation, available at http://riverbendblog.blogspot.com/ (last visited December 26, 2007) (for a heartfelt and telling account of the dismal state of Iraq during and after occupation).


\textsuperscript{297} See R. Goodman, supra note 90.
consensual political procedure. In this regard, drastic transformative measures undertaken without heeding international law can lead to disaster, which is exactly what the laws of war and occupation were designed to prevent. This provides further support for the proposition that transformative occupations outside the purview of the U.N. should be restricted to “exceptional” circumstances. Nonetheless, a further safeguard is needed in the form of modified laws that provide a framework for transformative operations, based primarily on human rights law and the lessons of Iraq, to help prevent abuses—both in cases involving “exceptional” circumstances and in unfortunate cases where invasions occur under non-exceptional circumstances, such as in Iraq.

This modified body of law—jus post bellum—would provide many benefits for occupied inhabitants by affording them, among other things, better access to education, human rights institutions, right to work legislation, and recourse in certain regional courts such as the ECHR. This would help foster a more sustainable post-war state in ways that the current system of jus in bello does not.298 Yet, by the same token, it is imperative that the laws of occupation restrain occupiers so that they are not permitted to act as “liberators” exempt from any governing laws or obligations to conduct themselves appropriately. It was this delusion of liberation and the lack of respect for jus in bello that precipitated the current quagmire in Iraq. If the laws of jus in bello were properly adhered to, they could have, for example, prevented looting, ensured the state’s security, and created a constructive, culturally sensitive, and sustainable economic system.299 The Coalition’s neglect and misplaced reforms instead created further tensions that have endangered the well-being of Iraqis and the viability of a strong, stable, and united Iraqi state.

Some may argue that a solution which aims to provide a modified legal regime, rather than reprimanding an occupier for breaching international law, may be counter-productive. However, this view does not take into account the continuing trend of modern transformative occupations and the need to find a sustainable long-term solution for such future interventions. Until enforcement mechanisms are strengthened and the U.N. Security Council proactively addresses each possible “exceptional” circumstance, a modified framework that is universally applied and legally comprehensible will act to deter the arbitrary application of reforms and hold the occupier accountable for its actions, thereby safeguarding the future of the state and its inhabitants.

In his final official interview, Kofi Annan lamented that Iraq is in a perilously grave period of its history. He stated: “A few years ago, when we had the strife in Lebanon and other places, we called that a civil war. This is much worse.”300 Accordingly, if Operation Iraqi Freedom and its aftermath have taught the world anything, it is that intervention for the sake of liberation,
but predominated by unchecked self-interested objectives, is ultimately destructive for the occupier and fatal for the occupied. Therefore, while the future of the Iraqi people remains sadly precarious, I can only hope that nations will heed the lessons of Iraq so that the outcome of transformative occupation is not made worse than the *ex-ante* harm the act of “freedom” was designed to alleviate.