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## TRANSFORMATIVE MILITARY OCCUPATION: APPLYING THE LAWS OF WAR AND HUMAN RIGHTS

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Within the existing framework of international law, is it legitimate for an occupying power, in the name of creating the conditions for a more democratic and peaceful state, to introduce fundamental changes in the constitutional, social, economic, and legal order within an occupied territory? This is the central question addressed here. To put it in other ways, is the body of treaty-based international law relating to occupations, some of which is more than a century old, appropriate to conditions sometimes faced today? Is it still relevant to cases of transformative occupation—i.e., those whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule? Is the newer body of human rights law applicable to occupations, and can it provide a basis for transformative acts by the occupant? Can the United Nations Security Council modify the application of the law in particular cases? Finally, has the body of treaty-based law been modified by custom?

These questions have arisen in various conflicts and occupations since 1945—including the tragic situation in Iraq since the United States–led invasion of March–April 2003. They have arisen because of the cautious, even restrictive assumption in the laws of war (also called international humanitarian law or, traditionally, *jus in bello*) that occupying powers should respect the existing laws and economic arrangements within the occupied territory, and should therefore, by implication, make as few changes as possible. This conservationist principle in the laws of war stands in potential conflict with the transformative goals of certain occupations.

This survey suggests that the law on occupations remains both viable and useful, and has proved reasonably flexible in practice. The article explores two particular ways that potential conflicts between the conservationist principle on the one hand, and transformative goals on the other, may be mitigated. One is the application of international human rights law, which offers principles and procedures that can help to define the means and ends of an occupation. Another is the involvement of international organizations, especially the United Nations, that can assist in setting or legitimizing certain transformative policies during an occupation.

The existence of a possible legal justification for pursuing transformative projects in military occupations might be thought to have two consequences, but neither of them follows automatically from it. First, it is no basis for general optimism about transformative occupations. Law may allow for certain possible courses of action, but that does not mean that transformative goals are always desirable or attainable. Only in exceptional circumstances are occupations likely to bring about a successful democratic transition in a society. There is ample ground for skepticism about the propositions that democracy can be spread by the sword, and that the

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holding of multiparty elections in itself constitutes evidence that a society is moving beyond authoritarianism.<sup>1</sup>

Second, a legal framework for a transformative project under the *jus in bello* does not mean that, under the *jus ad bellum*, states can be said to be vested with anything approaching a general right to invade other sovereign states with the stated purpose of reforming their political systems in a democratic direction. Since at least the time of the French Revolution of 1789, there have been many visions and projects of democratic transformative conquest. In contemporary international law a transformative political purpose does not on its own justify intervention.

The question of whether intervention on transformative grounds can be justified overlaps with the longstanding and contentious question of “humanitarian intervention.” A strong tradition of skepticism has developed among international lawyers about whether, in the absence of specific UN Security Council authorization, any “right of humanitarian intervention” obtains.<sup>2</sup> However, there is scope for a nuanced view that allows for some possibility of humanitarian intervention even without specific Security Council authorization. In such a view, it is neither logical nor helpful to frame the consideration of interventions in humanitarian crises in terms of a general “right” of humanitarian intervention. Rather, humanitarian intervention should be seen as an occasional necessity, requiring that the legal issues on both sides be finely balanced, and that the states taking military action accept a degree of legal risk. If it were accepted along these lines that on rare occasions intervention on humanitarian grounds might be justifiable, even without explicit Security Council authorization, each individual case of intervention would need to be based on meticulous consideration of the factual situation and legal issues involved.<sup>3</sup>

The question of whether an occupant is entitled to transformative goals is in principle distinct from the question of the original reason for the intervention. The distinction is especially important because, at least in some cases, an occupation may be initiated primarily as a response to the international conduct of the target state—such as offensive military operations or violations of its international commitments on any of a wide range of matters. In such cases the transformative purpose of an occupation may at best be a secondary reason for invading, or may emerge as a goal only after the armed conflict and/or the resulting occupation has commenced. Yet an element of artificiality marks the proposition that transformative goals may be acceptable, but only as a byproduct of military action, not as its real justification.

Several episodes, including events in the defeated Axis countries after 1945 and Iraq since 2003, indicate that a transformative political purpose can often arise in occupations, and also in some other situations resembling occupations in certain respects (such as UN administrations of postconflict territories). In the cases where occupation law is applicable, the lawfulness, or lack of it, of such a purpose has to be assessed partly as a question relating to the lawful powers of occupants.

This survey, which focuses mainly on the *jus in bello* question of the limits of the powers of an occupant, is divided into four main parts. The first part looks at certain underlying rules of the laws of war that set a framework of minimal alteration of the existing order in the occupied

<sup>1</sup> On the distinction between the external trappings of democracy and political systems in which freedom is deeply entrenched, see especially FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2003).

<sup>2</sup> Yoram Dinstein has been characteristically consistent, clear, and unequivocal in denying the existence of such a right. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 70–73, 90–91, 315 (4th ed. 2005).

<sup>3</sup> For elaboration of such a view, see Adam Roberts, *The So-Called “Right” of Humanitarian Intervention*, 2000 Y.B. INT’L HUMANITARIAN L. 3.

territory, and considers certain challenges to them. The second part discusses the applicability of the international law of human rights to military occupations. Because this is a relatively new and controversial issue, this part includes not only a general discussion, but also brief reference to certain occupations and analogous situations in which this question has arisen. The third part examines post-1945 foreign military presences with a fundamentally transformative purpose, and considers, *inter alia*, the implications of such a purpose for the law governing occupations. This part focuses on the role of international organizations (especially the United Nations), and on Iraq since 2003. The fourth part suggests some general conclusions about transformative military presences, with an eye mainly to the challenges to, and continuing relevance of, the laws of war and also human rights law.

## I. THE LAWS OF WAR

The assumption that, the occupant's role being temporary, any alteration of the existing order in occupied territory should be minimal lies at the heart of the provisions on military occupation in the laws of war. Three aspects of the law relating to occupied territories exemplify this requirement: the prohibition of annexation, the rules regarding the occupant's structure of authority, and the rules regarding the maintenance of existing legislation in occupied territory. The first, the prohibition on annexation, has survived, battered but unbowed. The second and third are under much greater pressure. Each is considered in turn.

All three of these rules are related to the understanding of occupation as a concomitant of war and a temporary state of affairs pending a peace agreement. In this sense these rules fit well within the mainstream of the *jus in bello*. However, occupation has long been accepted as not always a mere temporary phase during a war. For example, there is a tradition of thought about *post-debellatio* occupation, which occurs when a country is so completely defeated at the end of a war that it has virtually ceased to exist as a state.<sup>4</sup> Modern transformative occupations can be distinguished from *post-debellatio* occupation, but they do bear certain similarities to it. In the period since 1945, several occupations have endured long after the hostilities that caused them: the Israeli-occupied territories, northern Cyprus, and Iraq are cases in point. This phenomenon has given rise to thoughtful consideration by some writers as to whether occupation law faces a crisis of relevance. At the most general level, it has been asked whether occupation law should be viewed as coming under a new umbrella labeled *jus post bellum*, but this suggestion has been tempered by awareness of the importance of effective implementation of the present body of occupation law, which is seen as remaining relevant to many problems raised in modern occupations.<sup>5</sup>

### *Prohibition of Annexation*

The rule of international customary law that prohibits unilateral annexation of territory, at least while a conflict is still continuing, is a necessary foundation for the whole idea that occupation is subject to a distinct regulatory framework. The rule serves as a reminder of the limits imposed on an occupying power—limits that might also have implications for “transformative” occupations. Although annexation and transformation are conceptually and legally very

<sup>4</sup> Adam Roberts, *What Is a Military Occupation?* 1984 BRIT. Y.B. INT'L L. 249, 267.

<sup>5</sup> Daniel Thürer & Malcolm MacLaren, “*Jus post bellum*” in *Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law?* in WELTINNENRECHT: LIBER AMICORUM JOST DELBRÜCK 753 (Klaus Dicke et al. eds., 2005).

different, they do have one thing in common—they tend to involve extending to the occupied territory the type of political system adhered to by the occupying power.

Many acts of annexation have been defended by the rhetoric of transformation. Thus, when in September 1911, Italy presented an ultimatum to the Ottoman government, it complained that Tripoli and Cyrenaica had been left in a “state of disorder and neglect,” insisting that “these regions should be allowed to enjoy the same progress as that attained by other parts of Northern Africa. This transformation, which is required by the general exigencies of civilization, constitutes, so far as Italy is concerned, a vital interest . . .”<sup>6</sup> In November 1911, Italy decreed the subjection of Tripolitania and Cyrenaica to complete Italian sovereignty. Many saw this annexation as illegal. As Sir Thomas Barclay wrote, shortly after:

If annexation could be decreed by an invader without the consent of the invaded Power the whole population of the annexed territory might at once be made to pass under the allegiance of the invading sovereign, its legitimate acts of defence be made rebellious and punishable as such and the troops opposed to the invader be made to forfeit their right to be treated as belligerent. This is a *reductio ad absurdum* of any such proposition.<sup>7</sup>

Modern practice, which finds expression in several international agreements, denies the right in most circumstances to annex occupied territory unilaterally—i.e., to change its legal status to that of a component part of the occupant’s sovereign state. Even if the whole country is occupied, and the legitimate government goes into exile and does not participate actively in military operations, the occupant does not have any right of annexation.<sup>8</sup>

If the occupying power does (illegally) annex the whole or part of the occupied territory, the population must not by that act be deprived of the benefits of the Fourth Geneva Convention of 1949.<sup>9</sup> An example of the international community’s observation of this principle in response to an attempted annexation occurred on August 2, 1990, when Iraq occupied Kuwait. On the same day the UN Security Council demanded that Iraq “withdraw immediately and unconditionally,” and on August 6, declaring itself “[d]etermined to bring the invasion and occupation of Kuwait by Iraq to an end,” the Council imposed economic sanctions on Iraq.<sup>10</sup> On August 8, Saddam Hussein announced the merger of Kuwait with Iraq—i.e., annexation. On the following day, the Security Council decided “that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void.”<sup>11</sup> The Council subsequently stated explicitly that “the Fourth Geneva Convention applies to

<sup>6</sup> Ultimatum from Italy to Turkey Regarding Tripoli (Sept. 26, 1911), 6 AJIL Supp. 11, 11 (1912).

<sup>7</sup> THOMAS BARCLAY, THE TURCO-ITALIAN WAR AND ITS PROBLEMS 45 (1912). On the strong international Muslim feeling about this conquest, see the additional chapter by the Rt. Hon. Ameer Ali at 101–08. See *id.* at 109 for the text of Italy’s ultimatum of September 26, 1911 (also *supra* note 6), and *id.* at 113 for its Decree of Annexation of November 1911.

<sup>8</sup> The prohibition on annexations is part of customary law and finds expression in Article 2(4) of the UN Charter and in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), annex (Oct. 24, 1970). See also Georg Schwarzenberger, *The Law of Belligerent Occupation: Basic Issues*, 30 NORDISK TIDSSKRIFT FOR INT’L RET 10, 12–18 (1960).

<sup>9</sup> Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 47, 6 UST 3516, 75 UNTS 287 [hereinafter Geneva Convention IV].

<sup>10</sup> SC Res. 660 (Aug. 2, 1990), 29 ILM 1325 (1990); SC Res. 661, pmb. (Aug. 6, 1990), 29 ILM 1325 (emphasis omitted). The texts of these and all other Security Council and General Assembly resolutions and certain other UN documents mentioned in this survey are available at <<http://www.un.org/documents>>.

<sup>11</sup> SC Res. 662, para. 1 (Aug. 9, 1990), 29 ILM 1327 (1990).

Kuwait.”<sup>12</sup> Thus, in this case at least, the most drastic form of transformation of a territory and its political order—namely, incorporation into another state—was viewed as clearly contrary to international law; and the rules governing occupations remained a valid benchmark by which the actions of the occupant were to be judged.

Other cases of annexation or quasi annexation demonstrate that the prohibition of annexations, while crystal clear in theory, is by no means as straightforward in practice. A principal problem is that many cases of annexation or attempted annexation have taken place in circumstances where the original status of the annexed territory was itself less than one of full sovereignty. The Chinese invasion of Tibet (1950), the Indian invasion of Goa (1962), and the Indonesian invasion of East Timor (1975) are all cases in point. Only the last of these three actions was eventually reversed, in 1999–2002.

Annexation has often been seen, quite naturally, as linked to aggression. Many international lawyers have propounded the principle that unilateral acts inconsistent with fundamental rules of international law should be viewed as null and void, and no prescriptive rights should accrue in favor of the aggressor. Thus, annexation resulting from aggression should not be recognized. Yoram Dinstein raises the interesting question of the long-term effectiveness of the legal principle of nonrecognition. “If the *de facto* control of the territory annexed by the aggressor continues uninterrupted for generations, the non-prescription rule may have to give way in the end. International law must not be divorced from reality.”<sup>13</sup>

What if an occupation arises, not from an act of aggression, but following a defensive war in which a state defending its territory occupies neighboring lands? This is one factually well-grounded view of the position of Israel regarding the territories occupied since 1967. In certain parts of these territories (the Golan Heights, and East Jerusalem with extended boundaries) subsequent acts of annexation or quasi annexation have been taken, mainly in the form of applying Israeli law to them. The overwhelming tendency of states and international bodies has been not to recognize these purported annexations but, rather, to view the law on occupations as remaining applicable to the situation. The general prohibition on annexation, in other words, continues to be seen as a key principle, even though it is under pressure.

Despite its undeniable importance, annexation is by no means the only way that fundamental and lasting change may be brought about in a territory. One of the common ways for occupying forces to change the political order in occupied territory is by attempting, not an act of annexation, but changes, for example, in the composition of the government, and in the constitutional or legal system. These changes may be aimed at achieving what is in effect the opposite of annexation: the full resumption of sovereignty by the territory concerned. There is nothing new about such practices. As Sharon Korman has written in *The Right of Conquest*, the post-1789 French revolutionaries believed that they had replaced the old-fashioned right of conquest with a new principle—the right of peoples to determine their political affiliations freely:

Thus, in accordance with the principle of “no conquests” which it had proclaimed in 1790, revolutionary France declined to invoke the right of conquest in the countries to which its arms were supposedly bringing liberty. But if it no longer substituted its own sovereignty *directly* in the occupied territories, it did so in an *indirect* manner. Judging that the people were the sole sovereign, it overthrew the ancient sovereignty of “usurper” kings, only to

<sup>12</sup> SC Res. 670, para. 13 (Sept. 25, 1990), 29 ILM 1334 (1990); SC Res. 674, pmb. (Oct. 29, 1990), 29 ILM 1561.

<sup>13</sup> DINSTEIN, *supra* note 2, at 171.

establish in their place popular authorities which it placed under the “revolutionary guidance” of France.<sup>14</sup>

This episode serves as a useful reminder that transformative occupations have a long history. They arguably grew out of the disapproval of annexations but are not their opposites in all respects. Indeed, in many cases, from the French Revolution to twentieth-century Germany and Japan, and twenty-first-century Iraq, transformative occupation may be considered to have emerged as a more honorable, but still deeply controversial, successor to the discredited notion of annexation.

### *The Occupant's Structure of Authority*

The occupant, including such occupying forces or officers as are mentioned in the conventions, usually exercises authority by virtue of its effective factual control rather than any legal entitlement. That factual power is accorded a degree of recognition in the conventions, which reflect the assumption that the occupant maintains a structure of authority and extensive responsibilities in the occupied territory. Transformation, which necessarily involves handing over power to authorities that come from within the territory, threatens this assumption.

What is an occupation administration supposed to look like? The 1907 Hague Regulations refer variously to “the hostile army,” “the occupant,” “a commander-in-chief,” “the commander in the locality occupied,” “an army of occupation,” and “the occupying state” as the entities exercising authority in occupied territory.<sup>15</sup> The Regulations clearly imply that a well-ordered chain of military command and legal responsibility emanates from the government of the occupying state: and, indeed, most occupation administrations have had such a character.

The Fourth Geneva Convention refers throughout to the “Occupying Power” as the body with authority in occupied territory.<sup>16</sup> This term applies essentially to the central government of the state whose forces have carried out the invasion and occupation. Nothing is said in this Convention about the precise administrative form of the occupation regime. Additional Protocol I of 1977 also uses the term “Occupying Power” without defining it or suggesting the administrative forms it might assume.<sup>17</sup> Thus, the Geneva stream of law establishes that the government of the occupying state bears responsibility for actions taken in occupied territory, but it does not elaborate on the brief references in the Hague Regulations as to who exerts this authority on the spot.

Many writers, properly stressing the idea of temporary trusteeship, which is found at the core of much occupation law, have indicated that the constitutional changes an occupying power

<sup>14</sup> SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 122 (1996). For a historical perspective on transformative occupations, see also Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721 (2005).

<sup>15</sup> Regulations Respecting the Laws and Customs of War on Land, Arts. 42, 43, 48, 49, 51, 52, 53, 55, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

<sup>16</sup> In Geneva Convention IV, *supra* note 9, the term “Occupying Power” appears in Articles 4–6, 30, 47–61, 63–68, 70–75, 78, and 143. A continuing role for the authorities of the occupied territories is implicitly envisaged in Articles 6 and 47.

<sup>17</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, Arts. 14, 15, 63, 64, 69, 85, 1125 UNTS 3 [hereinafter Protocol I]. The same term is used in the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, Art. 5, 249 UNTS 240.

may bring about are limited. Jean Pictet, commenting on Article 47 of the Fourth Geneva Convention, has expressed this view:

During the Second World War Occupying Powers intervened in the occupied countries on numerous occasions and in a great variety of ways, depending on the political aim pursued; examples are changes in constitutional forms or in the form of government, the establishment of new military or political organizations, the dissolution of the State, or the formation of new political entities.

International law prohibits such actions, which are based solely on the military strength of the Occupying Power and not on a sovereign decision by the occupied State. Of course the Occupying Power usually tried to give some colour of legality and independence to the new organizations, which were formed in the majority of cases with the co-operation of certain elements among the population of the occupied country, but it was obvious that they were in fact always subservient to the will of the Occupying Power. Such practices were incompatible with the traditional concept of occupation (as defined in Article 43 of the Hague Regulations of 1907) according to which the occupying authority was to be considered as merely being a *de facto* administrator.<sup>18</sup>

Pictet's underlying idea, that the occupying power normally has the role of *de facto* administrator, is indeed justified. However, in the sweeping form in which he presents it, his condemnation of political interventions by occupying powers is open to challenge. Occupants often attempt to disguise or limit their own role by operating indirectly: by setting up some kind of quasi-independent puppet regime; by operating through the existing system of government, which remains in post within occupied territory; by establishing an international administration of the territory; or by introducing a new constitutional system. Sometimes they may seek to justify such actions as steps toward creating a new democratic system of government in the occupied territory. Particularly strong reasons can argue for doing so if a war is concluded without any prospect that the territory will simply revert to its former rulers.<sup>19</sup>

Although many of the wide variety of governmental arrangements imposed by occupying powers undoubtedly differ from what is envisaged in the Hague Regulations and the Fourth Geneva Convention, states have been reluctant to conclude that in every case such practices are unlawful. Specifically, they hesitate to condemn in principle the introduction of constitutional democracy in the occupied territory. However, the emergence of a legitimate government inevitably modifies the responsibilities and structure of authority of the occupant.

### *Existing Legislation of the Occupied Territory*

What are the rules under occupation law that govern the nature and extent of changes that can be introduced within occupied territory? On the face of it, they are straightforward. Their basics are enshrined in the much-quoted words of the 1907 Hague Regulations, which provide in Article 43:

<sup>18</sup> INTERNATIONAL COMMITTEE OF THE RED CROSS [ICRC], COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 273 (Jean Pictet gen. ed., 1958), available at <<http://www.icrc.org/ihl>>.

<sup>19</sup> In regard to Israel's role in the West Bank, the term "trustee occupation" was proposed by Allan Gerson in 1973. He suggested that since this occupation had certain special features, not all the provisions of the law on occupations need necessarily apply. He himself conceded that Israel had not in the end assumed the role of "trustee occupant." ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 76–82 (1978).

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>20</sup>

This article presents some problems. The assumption that the previous ruler of a territory was a “legitimate power” is not easy to square with U.S. or indeed many other views of Adolf Hitler and Saddam Hussein. The article’s implication that the “laws in force in the country” were basically satisfactory has often been called into question by events. The escape clause, “unless absolutely prevented,” has provided a basis for introducing certain changes to the laws of occupied territories.

The basic requirement to respect the existing legal framework of a territory has long been under pressure, for a variety of reasons. This apparently straightforward rule needs interpretation in light of the particular facts of a situation, and the particular nature of certain laws. In practice, certain types of law (e.g., laws relating to military conscription and to national elections) are often suspended during occupations.<sup>21</sup> Moreover, in occupations of countries that had previously been under dictatorial or extremist rule, numerous other laws may be suspended. In the occupation of parts of Italy and Germany toward the end of World War II, the Allies abolished fascist laws. They did so right from the start, during the belligerent occupation phase before the Italian armistice and the German surrender. This measure might appear to have transgressed the letter of Article 43. However, many writers indicated that the nature of the Axis regimes and their laws was such as to “absolutely prevent” the Allies from accepting their continuation.<sup>22</sup>

Against this background, in the negotiations leading to the 1949 Geneva Civilians Convention, the extent to which an occupying power can legitimately alter the laws in force in occupied territory was naturally discussed. The states concerned eventually agreed on a modest modification of Article 43 of the Hague Regulations, allowing a little more scope for changes in the existing local laws. This is Article 64 of the Civilians Convention:

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

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and

<sup>20</sup> Hague Regulations, *supra* note 15, Art. 43; *see also id.*, Art. 23(h). For a useful discussion of Article 43 and its flexibility in practice, see Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupiers*, 16 EUR. J. INT’L L. 661 (2005).

<sup>21</sup> U.S. DEP’T OF ARMY, LAW OF LAND WARFARE 143 (Field Manual No. 27–10, 1956); UNITED KINGDOM [UK] WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW 145 (1958) [hereinafter 1958 UK MANUAL]. Its successor, the 2004 triservice manual, states that the occupant may suspend or amend existing laws of the occupied territory in certain defined circumstances. UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 278–79, 284 (2004) [hereinafter 2004 UK MANUAL].

<sup>22</sup> F. S. V. DONNISON, CIVIL AFFAIRS AND MILITARY GOVERNMENT: NORTH-WEST EUROPE 1944–46, at 381–82, 477–78 (1961); C. R. S. HARRIS, ALLIED MILITARY ADMINISTRATION OF ITALY 1943–1945, at 14 (1957); 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 446–47 (Hersch Lauterpacht ed., 7th ed. 1952); *see also* 2004 UK MANUAL, *supra* note 21, at 143.



to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.<sup>23</sup>

The negotiation in 1949 that preceded this text included proposals that would have more explicitly acknowledged the right of the occupying power to change the laws. The U.S. delegate, Robert W. Ginnane, proposed replacing draft Article 55, which became the above-quoted Article 64, with a much shorter, simpler, and (for the occupying power) more permissive text: “Until changed by the Occupying Power the penal laws of the occupied territory shall remain in force and the tribunals thereof shall continue to function in respect of all offences covered by the said laws.”<sup>24</sup>

The Soviet delegate, Platon Dmitrievitch Morosov, spotted the obvious problem with this proposal, “that it gave the Occupying Power an absolute right to modify the penal legislation of the occupied territory. Such a right greatly exceeded the limited right laid down in the Hague Regulations . . . .”<sup>25</sup> Less powerful but no less perceptive, the distinguished French international lawyer Paul de Geouffre de la Pradelle, representing Monaco, suggested that, in the case of occupied Germany after World War II, U.S. modification of the laws of the country was acceptable, but that this modification did not provide a basis for a general rule:

What would be the position in the opposite case, that of an invader other than a democratic Power, who exercised that right? Under the United States amendment the invader could change the penal legislation of the occupied territory. The Committee should think very carefully before amending the wording of the Convention in the way suggested.<sup>26</sup>

In the discussion that followed, Mexico suggested “the adoption of a wording to the effect that the Occupying Power could only modify the legislation of an occupied territory if the legislation in question violated the principles of the ‘Universal Declaration of the Rights of Man’.”<sup>27</sup> This solitary reference to a human rights benchmark was not followed up at the conference.<sup>28</sup> Yet in the long run, the issue of human rights was to have a profound effect on the rules governing occupations. It was to supply one basis for altering the laws of the occupied territory.

Overall, the rule that the laws in force in the country should be respected continues to provide an important benchmark for occupants. In many cases, however, occupants, for a wide variety of reasons, have changed laws in the occupied territory without incurring international criticism. Transformative occupations increase the pressure for changing those laws. As a result, if Article 64 of the Fourth Geneva Convention were rewritten today, pressure would be

<sup>23</sup> Geneva Convention IV, *supra* note 9, Art. 64. In the 1958 UK Manual it was implied that an occupant may also repeal or suspend laws if in the occupied territory there is no “adequate legal system in conformity with generally recognised principles of law.” 1958 UK MANUAL, *supra* note 21, at 145. In similar spirit, its 2004 successor states: “The occupying power should make no more changes to the law than are absolutely necessary, particularly where the occupied territory already has an adequate legal system.” 2004 UK MANUAL, *supra* note 21, at 284.

<sup>24</sup> 3 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 139, amend. 294; *see* 2A *id.* at 670. The draft text of Article 55 that the United States sought to replace is in *id.* at 858. A useful report on Article 55 appears in *id.* at 833. These negotiations on the text of the Civilians Convention were conducted in the conference’s Committee III.

<sup>25</sup> 2A *id.* at 670.

<sup>26</sup> *Id.* at 671.

<sup>27</sup> *Id.*

<sup>28</sup> See the further discussion in *id.* at 672, and the report back by the Drafting Committee, *id.* at 771. In the index of contents of the four volumes of the *Final Record*, there is no entry for “human rights” or “Universal Declaration.”

applied to provide for laws of the occupied territory to be repealed or suspended in two additional types of circumstance—where they hamper the exercise by the inhabitants of fundamental human rights and the implementation of transformative purposes approved by the UN Security Council.

In the Civilians Convention, one other provision might at first sight seem relevant to transformative occupations but actually illustrates failure to come to grips with them. In Article 6, which addresses occupations that continue for more than a year after the end of a war and envisages the progressive handing over of the functions of government by the occupant, it is stated:

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.<sup>29</sup>

Thus, if the occupant is still in charge one year after the war, Article 64 with its moderate conservationist thrust is among the many that would still apply. However, Article 6 provides no other guidance on the extent to which an occupant pursuing long-term transformative goals may make changes in existing legislation. In any case, the “one year after” rule is widely seen as bearing little or no relevance to actual occupations, and it was effectively rescinded by a provision of Additional Protocol I, as between states parties to the latter.<sup>30</sup> Despite its limitations, Article 6 is a reminder of the old and important fact that not all occupations can be subject to exactly the same rules.

## II. THE INTERNATIONAL LAW OF HUMAN RIGHTS

Traditionally, the laws of war have been seen as the main—even the only—branch of international law applicable to occupations. However, there is no a priori reason why multilateral conventions on other matters should not be applicable to occupied territories. Increasing evidence indicates that one other body of law may be especially relevant: human rights law. Setting out as it does to spell out certain fundamental human rights, human rights law is not specifically tailored to the situation considered here—military occupation. Like the law on crimes against humanity, it has a wider scope of application than the laws of war: it applies in peacetime, and it applies within states, affecting, for example, the relations between governments and their own subjects.

Human rights law developed from custom over a long period. A key document in its codification was the 1948 Universal Declaration of Human Rights.<sup>31</sup> Adopted by the UN General Assembly, the Declaration did not take the form of a legally binding instrument, and it does not contain the normal machinery whereby states can become parties to it. Rather, it commands the status of an authoritative guide to the relevant parts of the UN Charter. It was followed by the conclusion of a large number of human rights treaties, four leading examples of which are the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),<sup>32</sup> the 1966 International Covenant on Civil and Political

<sup>29</sup> Geneva Convention IV, *supra* note 9, Art. 6(3).

<sup>30</sup> Protocol I, *supra* note 17, Art. 3(b).

<sup>31</sup> Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948).

<sup>32</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221 [hereinafter ECHR].

Rights,<sup>33</sup> the 1966 International Covenant on Economic, Social and Cultural Rights,<sup>34</sup> and the 1984 UN Convention Against Torture.<sup>35</sup>

Some have viewed such instruments as the 1948 Universal Declaration and the two 1966 Covenants as together constituting an "International Bill of Human Rights," an authoritative interpretation of the UN Charter's human rights clauses that hence is binding on all states, establishing a human rights standard of universal applicability.<sup>36</sup> This view, as indicated below, is contested.

The application of international human rights law to several occupations has been urged since the mid-1960s. However, experience has shown that the application of international human rights law in this way can give rise to considerable problems. Before certain grounds for caution are addressed, the overall relationship between this branch of law and the laws of war needs to be examined.

### *Relationship Between Human Rights Law and the Laws of War*

International human rights law is in some respects a new body of law that has been evolving quite rapidly since the end of World War II. It is therefore not surprising that the relationship of human rights law to armed conflict in general, or to occupations in particular, should still be in need of exploration.<sup>37</sup>

That human rights law and the problem of war and military occupation are indeed connected is indicated by the origins of the modern movement for human rights law. It can be said to have begun with the international concern about the disregard for human rights shown in many occupied countries, as well as in the territory of Germany itself and that of its allies, during World War II. As William Bishop wrote: "The greatest impetus for United Nations action for international protection of human rights grew out of the almost universal reaction against the German Nazi oppressions of persons in Germany and in the territories occupied by Germany during World War II."<sup>38</sup>

This concern not only contributed to the development of the body of human rights law, but also had its effect on international agreements on the laws of war. This influence is evident in the terms of the four 1949 Geneva Conventions. As Dietrich Schindler has written, with that tinge of optimism that occasionally marks his commentary on the Conventions: "[A] tendency may be detected in the *Geneva Conventions of 1949* for their provisions to be considered not only as obligations to be discharged by the High Contracting Parties but as individual rights of the protected persons."<sup>39</sup>

<sup>33</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

<sup>34</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 [hereinafter ICESCR].

<sup>35</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 UNTS 85 [hereinafter Convention Against Torture].

<sup>36</sup> Frank C. Newman, *The International Bill of Human Rights: Does it Exist?* in CURRENT PROBLEMS OF INTERNATIONAL LAW: ESSAYS ON UN LAW AND ON THE LAW OF ARMED CONFLICT 107 (Antonio Cassese ed., 1975).

<sup>37</sup> Many works on human rights law make little or no reference to the problems of armed conflict and military occupation. See, e.g., PAUL SIEGHART, THE LAWFUL RIGHTS OF MANKIND: AN INTRODUCTION TO THE INTERNATIONAL LEGAL CODE OF HUMAN RIGHTS (1985).

<sup>38</sup> WILLIAM W. BISHOP JR., INTERNATIONAL LAW: CASES AND MATERIALS 470 (3d ed. 1971).

<sup>39</sup> Dietrich Schindler, *The International Committee of the Red Cross and Human Rights*, INT'L REV. RED CROSS, No. 208, Jan.-Feb. 1979, at 3, 7.

Additional Protocol I on international armed conflict overlaps with human rights law much more directly than the 1949 Conventions, which it supplements. Article 72 specifies that the provisions outlined in that section of the Protocol are additional not only to the rules in the Fourth Geneva Convention, but also “to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.” Moreover, Article 75 (on fundamental guarantees) is directly derived from the 1966 International Covenant on Civil and Political Rights. In the 1977 Additional Protocol II on noninternational armed conflict, Article 6 (on penal prosecutions) is similarly derived from the same 1966 Covenant.<sup>40</sup> True, the various instruments of human rights law are not mentioned by name in Geneva Protocols I and II, but their presence is there nonetheless.

Further evidence of a connection between human rights law and the laws of war is the fact that it was a UN conference on human rights (held in 1968 in Tehran) that marked the first occasion when the United Nations showed real interest in the further development of the laws of war. This concern contributed to the diplomatic process that led, *inter alia*, to the conclusion of Protocols I and II.<sup>41</sup> UN committees and conferences have often discussed laws of war issues under the heading “respect for human rights in armed conflicts.”<sup>42</sup>

Writers on the law of armed conflict were not all equally alert to the possible significance of human rights law in occupied territories. To be sure, in 1944 Ernst Fraenkel, in *Military Occupation and the Rule of Law*, did urge that an “international bill of rights” should apply to an occupation regime “at least after the purely military phase of the occupation has ended.”<sup>43</sup> However, in works published in the 1950s the question received only modest attention. No specific reference to human rights law appeared in Gerhard von Glahn’s *The Occupation of Enemy Territory*, published in 1957.<sup>44</sup> The British *Manual of Military Law*, published in 1958, referred to human rights only in general terms.<sup>45</sup>

Gradually, a change set in as writers came to recognize the potential applicability of human rights in occupied territories. Morris Greenspan, in his major work *The Modern Law of Land Warfare*, published in 1959, briefly adverted to human rights accords—notably, the 1948 Universal Declaration and the 1950 European Convention—and evidently accepted their applicability.<sup>46</sup> Martin and Joan Kyre, in a study of U.S. policy on military occupations published in 1968, noted the significance of the Universal Declaration of Human Rights for military

<sup>40</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, *opened for signature* Dec. 12, 1977, Art. 6, 1125 UNTS 609.

<sup>41</sup> On the various factors leading to the negotiations, which were ultimately to result in the 1977 Geneva Protocols I and II, see particularly Frits Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts, 24 May–12 June 1971*, 1971 NETH. Y.B. INT’L L. 68.

<sup>42</sup> See, for example, the two-volume survey prepared by the UN Secretariat, *Respect for Human Rights in Armed Conflicts: Existing Rules of International Law Concerning the Prohibition or Restriction of Use of Specific Weapons*, UN Doc. A/9215 (1973).

<sup>43</sup> ERNST FRAENKEL, *MILITARY OCCUPATION AND THE RULE OF LAW* 205 (1944).

<sup>44</sup> However, see Gerhard von Glahn, *The Protection of Human Rights in Time of Armed Conflicts*, 1971 ISR. Y.B. HUM. RTS. 208, 213–14, where he accepts the applicability, in time of armed conflicts, of fundamental human rights.

<sup>45</sup> 1958 UK MANUAL, *supra* note 21, at 143. Its 2004 successor includes reference to the applicability of human rights law. 2004 UK MANUAL, *supra* note 21, at 282.

<sup>46</sup> MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 161 n.34; 247 n.123; 250 n.133; 504 n.393 (1959); see also Morris Greenspan, *The Protection of Human Rights in Time of Warfare*, 1971 ISR. Y.B. HUM. RTS. 228, 229 (stating that human rights instruments “apply in war as well as in peace”).

occupations, but regretted “a shift in mood within the United States away from internationalism” that had restricted the U.S. role in helping to develop the international law of human rights.<sup>47</sup>

The relation between human rights law and the laws of war began to attract international attention in the late 1960s and early 1970s. This notice was due in part to the adoption of the two International Human Rights Covenants in 1966; international concern over various wars of the period, including in Vietnam; and the Israeli occupation of certain Arab territories in the 1967 war. Many writers recognized a relationship between the two bodies of law, even if it was not a simple one. G. I. A. D. Draper wrote in 1971:

Human Rights do not dissolve in time of war or public emergency affecting the life of the nation, but are subject to a controlled and limited derogation from specific Human Rights to be justified by the extent of that emergency.

. . . The precise relation between the law of war and the regimes of Human Rights has not yet been elaborated.<sup>48</sup>

Professor Draper also said, in an article published in 1971 in the *Israel Yearbook on Human Rights*: “The essential nexus between the law of war and the regime of human rights has been made in theory, viz., that the former is an essential part of the latter. The law of war is a derogation from the normal regime of human rights . . .”<sup>49</sup>

The idea that the law of war could be seen, in large measure, as one important body of rules and principles for safeguarding human rights in situations of armed conflict and occupation was supported by many other writers. Dinstejn, in an article in 1978, also in the *Israel Yearbook*, entitled *The International Law of Belligerent Occupation and Human Rights*, actually wrote almost entirely about the rules laid down in the laws of war. This approach followed quite naturally from the fact that he was preoccupied with the problem of belligerent occupation, especially that of the Israeli-occupied territories, and not with transformative occupation, as the following passage indicates:

The government of an occupied territory by the occupant is not the same as a State’s ordinary government of its own territory: 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.<sup>50</sup>

In a work published in 1980 exploring the relation of human rights law to the laws of war, Aristidis Calogeropoulos-Stratis stressed the applicability in time of armed conflict of certain human rights instruments.<sup>51</sup> In a 1993 study specifically devoted to military occupations, Eyal Benvenisti reached a more nuanced conclusion, which is especially relevant to cases of transformative occupations:

<sup>47</sup> MARTIN & JOAN KYRE, *MILITARY OCCUPATION AND NATIONAL SECURITY* 97 (1968).

<sup>48</sup> G. I. A. D. Draper, *The Status of Combatants and the Question of Guerilla [sic] Warfare*, 1971 BRIT. Y.B. INT’LL. 173, 218.

<sup>49</sup> G. I. A. D. Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflicts*, 1971 ISR. Y.B. HUM. RTS. 191, 206.

<sup>50</sup> Yoram Dinstejn, *The International Law of Belligerent Occupation and Human Rights*, 1978 ISR. Y.B. HUM. RTS. 104, 116; see also Yoram Dinstejn, *Human Rights in Armed Conflict: International Humanitarian Law*, in *HUMAN RIGHTS AND INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 345 (Theodor Meron ed., 1984).

<sup>51</sup> ARISTIDIS S. CALOGEROPOULOS-STRATIS, *DROIT HUMANITAIRE ET DROITS DE L’HOMME: LA PROTECTION DE LA PERSONNE EN PÉRIODE DE CONFLIT ARMÉ* (1980).

In the interplay between the conflicting interests, the law of occupation concedes that certain civil and political rights will from time to time be subjected to other concerns. Ultimately, as in other cases, the occupant is required to balance its interests against those of the occupied community. Thus, as hostilities subside, and security interests can permit, the occupant could be expected to restore civil and political rights. Under such circumstances, the human rights documents may well serve as guidance for reestablishing civil and political rights in the occupied territory.<sup>52</sup>

In 2004 Kenneth Watkin suggested that, in general, the use of force in armed conflict is increasingly assessed through human rights law as well as international humanitarian law. In briefly considering the specific case of military occupation, he indicated that both normative regimes may come into play, but that the use of force within occupied territory (for example, against an insurgency) is not always amenable to a human rights framework.<sup>53</sup>

On specific issues, especially those relating to individual liberty and political freedoms, there is an element of tension between human rights law and the law on occupations. For example, Article 9 of the International Covenant on Civil and Political Rights prohibits arbitrary detention and requires that “[a]nyone who is arrested shall be . . . promptly informed of any charges against him.”<sup>54</sup> By contrast, the first paragraph of Article 78 of the Fourth Geneva Convention states: “If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”<sup>55</sup> Even though the second paragraph adds that such measures must be made “according to a regular procedure,” this provision is more draconian than those of the Covenant. The tension between these two approaches is mitigated by the fact that, in time of public emergency threatening the life of the nation, states may derogate from certain obligations under the Covenant, whereas the Convention has to be considered the *lex specialis* for occupations.

In many occupations one basis for asserting the applicability of human rights law may be its near-universal character, as a body of law subscribed to equally by the occupying state and by the occupied state. However, in some occupations the question has arisen as to whether certain specific obligations under human rights law of the occupying power extend to territories that it occupies. An example is the application of the European Convention on Human Rights (which offers not merely a statement of principles, but also an unusually strong legal procedure for obtaining redress) in territories outside those of states parties to the Convention.

The overall question of whether human rights treaties apply extraterritorially is still contested. Michael Dennis of the U.S. Department of State, in a general survey of the subject, goes so far as to conclude:

The obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict. Nor were they intended to replace the *lex specialis* of international humanitarian law. Extending the protections provided under international human rights instruments to

<sup>52</sup> EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 189 (1993).

<sup>53</sup> Kenneth Watkin (deputy judge advocate general/operations, Canadian Forces), *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AJIL 1, 1–2, 26–28 (2004).

<sup>54</sup> ICCPR, *supra* note 33, Art. 9(2).

<sup>55</sup> Geneva Convention IV, *supra* note 9, Art. 78(1).

situations of international armed conflict and military occupation offers a dubious route toward increased state compliance with international norms.<sup>56</sup>

This conclusion is based on serious considerations, including a strict interpretation of Article 2, paragraph 1 of the International Covenant on Civil and Political Rights, under which a state is obliged to ensure the Covenant's rights "to all individuals within its territory and subject to its jurisdiction."<sup>57</sup> The core of Dennis's argument is that both these conditions must be met. Yet it remains unconvincing to argue that human rights law cannot apply at all to situations that arise in a military occupation. A clearer distinction than Dennis offers needs to be drawn between armed conflict (where the application of human rights law is more problematic) and occupation; and also a further distinction between occupation in general and the holding of certain specific persons by outside forces. In the latter situation the application of human rights law may be particularly appropriate. Such distinctions have not always been clearly drawn in addressing the extraterritorial application of human rights norms. For a territory that is indeed occupied—i.e., under the control of the occupying power—a stronger *prima facie* case that human rights law should apply can be made than for situations of armed conflict. Where prisoners or internees are held under the direct control of the occupant, the case may be stronger still. To the extent that an occupying power exercises control, which it certainly should do in its own prisons, it has the kind of administrative apparatus necessary to make human rights protection effective.<sup>58</sup>

The implementation of human rights law may be advocated as a matter of legal obligation, or as a matter of choice irrespective of whether, as a matter of law, the occupant is required to implement it. Such advocacy of implementation may come from interested parties from two different perspectives: (1) the inhabitants, or outside bodies claiming to act on their behalf, may invoke human rights standards so as to bring pressure to bear on the occupant—e.g., to ensure the human rights of inhabitants, internees, and others; and (2) an occupant with a transformative project may view human rights norms as constituting part of the beneficent political order being introduced into the territory, which has been the U.S. position in the UN Security Council from 2003 onward as far as Iraq has been concerned, but it is not clear how far it has percolated through the U.S. government.

The relation between human rights law and the laws of war is not just a simple confrontation between the *lex generalis* of human rights and the *lex specialis* of the laws of war. In occupations some practical issues can arise (such as discrimination in employment, discrimination in education, and the importation of educational materials) that are addressed in considerable detail in certain human rights agreements but are not so addressed in the law on occupations. Or human rights law may offer procedures for individual complaint and redress that are unknown to the laws of war. As regards such issues, international human rights standards may not merely fill in gaps in the laws of war, but also provide procedures for assisting in the implementation of key provisions of those laws.

In short, the relation between the laws of war and human rights law under conditions of occupation is extraordinarily complex. More than any writings or theories, events would be the

<sup>56</sup> Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AJIL 119, 141 (2005). This article is part of *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, *id.* at 1 [hereinafter *Agora*].

<sup>57</sup> ICCPR, *supra* note 33, Art. 2(1).

<sup>58</sup> See also the further discussion of Dennis's article as it relates to the Israeli-occupied territories and Iraq, in text at notes 74 and 76 *infra*.

engine to reveal the complexity of the interrelations, the different perspectives on them, and their importance in transformative occupations.

### *Application of Human Rights Law to Particular Occupations*

The general principle that human rights law can apply to military occupations is now widely, but by no means universally, accepted. Evidence for this proposition can be found in statements since the mid-1960s by international, and in some cases national, bodies of various types.

*The United Nations role.* The United Nations has played a major part in urging the application of human rights rules to occupations. Of the various UN organs, the General Assembly has played the most prominent (and often contentious) role in this regard. Starting in 1968, it has urged the observance of human rights law in armed conflicts and military occupations generally.<sup>59</sup> It has also done so, not always with perfect evenhandedness, with respect to particular occupations. The occupation that has received the most attention from the General Assembly, both in general and as regards the application of human rights, is that by Israel of the territories taken over in 1967: the application of human rights law to these territories has been urged in numerous UN resolutions.<sup>60</sup>

Although the Security Council has frequently urged respect for human rights in armed conflict generally, for a long time it did not address the more specific issue of human rights in occupations to the same extent as the General Assembly. This posture has begun to change. Where UN bodies established by the Security Council have had a major role in administering post-conflict territories, as in Kosovo and East Timor (situations in some ways comparable to occupations), these bodies have placed emphasis on human rights law, while keeping silent about the application of the laws of war.<sup>61</sup> Following the commencement of the U.S.-led occupation of Iraq in 2003, the Security Council emphasized the importance of human rights law as well as the laws of war.<sup>62</sup>

*Namibia: The 1971 ICJ advisory opinion.* Several occupied territories have been viewed by international tribunals as subject to human rights law. With respect to Namibia, it may have been partly with human rights law in mind (as well as the humanitarian laws of war) that the International Court of Justice, in its 1971 advisory opinion, pointed to the applicability of "certain general conventions such as those of a humanitarian character."<sup>63</sup>

*Czechoslovakia after 1968: Charter 77.* The range of circumstances in which human rights law may be relevant is extremely wide, but the classic situation to which such law applies is in the relations between the government of a state and its own citizens. This situation can arise in some occupations when an indigenous government has been left in post or a new one has been put in place. In such instances, which might be viewed by some as occupations, but where

<sup>59</sup> See, e.g., Respect for Human Rights in Armed Conflicts, GA Res. 2444 (XXIII) (Dec. 19, 1968) (adopted unanimously).

<sup>60</sup> UN General Assembly resolutions specifically urging the application of human rights in the Israeli-occupied territories include GA Res. 2443 (XXIII) (Dec. 19, 1968); GA Res. 2546 (XXIV) (Dec. 11, 1969); GA Res. 2727 (Dec. 15, 1970); and the subsequent annual resolutions entitled "Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories."

<sup>61</sup> On the foundational regulations of the Kosovo and East Timor administrations, see *infra* notes 130 and 131.

<sup>62</sup> See text at notes 75, 136, 152 *infra*.

<sup>63</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, para. 122 (June 21). Note also the references to human rights law in *id.*, paras. 92, 131.



that status is strongly contested by some or all of the parties concerned, human rights law may take on special importance. For example, the indigenous government may reject the pejorative label of occupation, but it may accept the application of human rights standards. One such case was Czechoslovakia following the formal entry into force in 1976 of that country's ratification of the two 1966 UN Human Rights Covenants. Both the Communist government (grudgingly) and its critics accepted in principle that international human rights instruments were applicable. The idea of the "Charter 77" movement was conceived on the day—November 11, 1976—when an official ordinance was published in Prague relating to Czechoslovakia's accession to these two conventions. Vladimir Kusin records a conversation in a Czech home on that day:

We stood in the kitchen door and she said "Something ought to be done about it" and made three more steps and turned on the tap to make water run over our voices . . . The day was Thursday, 11 November 1976, when they began selling *Collection of Laws* No. 23 which contained among other things the Foreign Minister's ordinance of 10 May 1976, numbered 120 and bearing a title full of hope: International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.<sup>64</sup>

In the late 1970s and 1980s, human rights law provided one framework for dialogue both within Eastern European states and between them and the West. The 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe<sup>65</sup> (not a legally binding document as such) and the diplomatic procedures established under it played a part in this process. Those involved in resisting the occupation of Czechoslovakia and its consequences were left with no doubt about the significance of human rights principles.

*Northern Cyprus since 1974: role of the European Convention.* Both the European Commission of Human Rights and the European Court of Human Rights have confirmed the general principle of the applicability of human rights law to the areas of northern Cyprus occupied by the armed forces of Turkey in 1974. In three decisions in 1975, 1978, and 1996 in cases brought by Cyprus against Turkey, the Commission ruled that applications by the government of Cyprus regarding the Turkish occupation were admissible.<sup>66</sup> The cases concerned the application of the European Convention on Human Rights, Article 1 of which states that the high contracting parties shall secure certain rights and freedoms to everyone "within their jurisdiction."<sup>67</sup> The Commission found (in the words of its decision in the second case):

[T]his term is not equivalent to or limited to "within the national territory" of the High Contracting Party concerned. . . . [T]he High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad.<sup>68</sup>

<sup>64</sup> VLADIMIR V. KUSIN, FROM DUBČEK TO CHARTER 77: A STUDY OF 'NORMALISATION' IN CZECHOSLOVAKIA 1968–1978, at 304 (1978). On the role of human rights accords in the Charter 77 movement, see also VÁCLAV HAVEL ET AL., THE POWER OF THE POWERLESS 69–78 (1985). The text of the original Charter 77 declaration, published at the beginning of January 1977 and referring extensively to international human rights agreements, is reprinted in *id.* at 217.

<sup>65</sup> Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), reprinted in 14 ILM 1292 (1975).

<sup>66</sup> *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125 (1975); *Cyprus v. Turkey*, App. No. 8007/77, 13 Eur. Comm'n H.R. Dec. & Rep. 85 (1978) [hereinafter *Cyprus v. Turkey II*]; *Cyprus v. Turkey*, App. No. 25781/94, 86–A Eur. Comm'n H.R. Dec. & Rep. 104 (1996).

<sup>67</sup> ECHR, *supra* note 32, Art. 1.

<sup>68</sup> *Cyprus v. Turkey II*, *supra* note 66, at 149.

In the third of these cases on northern Cyprus, and the first of them to be referred to the European Court of Human Rights, the Court reaffirmed earlier decisions of the Commission, and indicated that Turkey had extensive responsibilities under the European Convention on Human Rights. This also confirmed the Court's earlier decisions in the *Loizidou* case.<sup>69</sup>

These conclusions did not mean that the law of armed conflict was supplanted by human rights law. On the contrary, when in the first case the detention of Greek military personnel in Turkey was raised, the Commission ruled that the law relating to prisoners of war, the Third Geneva Convention of 1949, was applicable, and that the Commission therefore did not need to "examine the question of a breach of Article 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war."<sup>70</sup>

*Israeli-occupied territories: 2004 ICJ advisory opinion in the "Wall" case.* The application of human rights norms to the Israeli-occupied territories is a much-contested matter. In many statements the Israeli authorities have denied that human rights law is formally applicable to the territories occupied since 1967. The question has been explored in depth in numerous writings, and in decisions of the Supreme Court of Israel.<sup>71</sup> This extensive body of experience of problems relating to the application of human rights norms in occupied territories is beyond the scope of this article.

However, the advisory opinion of the International Court of Justice in the *Wall* case in 2004 merits attention here because it is so definite, so wide-ranging in its scope, and so controversial. The ICJ concluded "that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."<sup>72</sup> In the occupied territories, therefore, Israel was deemed to be bound by its terms. This forthright conclusion, like other parts of this advisory opinion, appears to be weakened by some shaky legal reasoning.<sup>73</sup> Dennis has criticized this part of the opinion on the grounds that the Court (1) placed a questionable interpretation on the preparatory work for the International Covenant on Civil and Political Rights; (2) paid remarkably little attention to the role of the Palestinian Authority as a body that may have responsibilities for implementing human rights law in the areas under its control; and (3) assumed too easily that the law of armed conflict had only limited applicability to the situation on account of the (highly contestable) argument that, under the rule in Article 6 of the 1949 Geneva Civilians Convention that becomes effective "one year after the general close of military operations," certain provisions of the Convention no longer applied to the territories occupied in 1967.<sup>74</sup> These and other specific criticisms of the ICJ advisory opinion are serious, and suggest that the Court has done less than it may have thought to advance the view that human rights law does apply in at least some circumstances in occupied territories.

<sup>69</sup> *Cyprus v. Turkey*, 2001–IV Eur. Ct. H.R. at 22–26. On *Loizidou v. Turkey*, see 310 Eur. Ct. H.R. (ser. A) at 23 (1995) (Preliminary Objections); 1996–VI Eur. Ct. H.R. 2216, 2234–35 (Merits).

<sup>70</sup> *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 4 Eur. H.R. Rep. 482, 533 (1982) (Commission report).

<sup>71</sup> See ISR. Y.B. HUM. RTS. (almost all issues); ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967–1982 (1985); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AJIL 44, 70–74 (1990).

<sup>72</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, para. 111 (July 9). The Court focused particularly on the ICCPR, *supra* note 33, Art. 12, guaranteeing freedom of movement.

<sup>73</sup> For a range of views on the ICJ advisory opinion on the security barrier, see the nine contributions in *Agora*, *supra* note 56.

<sup>74</sup> Dennis, *supra* note 56, at 122–37.

*Iraq: UK Court of Appeal in 2005.* The promotion of human rights was proclaimed as one purpose of the occupation of Iraq in two UN Security Council resolutions passed in May 2003 and June 2004 with the support of the United States and the United Kingdom.<sup>75</sup> Curiously, in some American discussion of the application of human rights law to the U.S.-led coalition's occupation of Iraq, including the article by Dennis cited above, this fact has been ignored.<sup>76</sup> Yet important questions have been raised about whether the actions of U.S.-led coalition forces could be governed by human rights law as well as by the laws of war.

The fact that a situation, or an individual, is within the control and authority of an outside power was a key consideration in a UK Court of Appeal decision in December 2005 involving the coalition forces in Iraq from 2003 onward. The *Al-Skeini* case was brought on behalf of Iraqi families who claimed that six deceased relatives had been mistreated and killed by British troops in southern Iraq, and that such acts were violations of the European Convention on Human Rights and the national legislation based on that Convention, the UK Human Rights Act, 1998. Five of the relatives had died as a result of incidents resulting from the activities of British Army patrols. The sixth, Baha Mousa, died after having been taken into the custody of British forces. These incidents all happened between August and November 2003. The key issue in the case was the extent of applicability of British and European human rights norms. As Lord Justice Brooke stated in his leading judgment, the case

is about acts done by the soldiers of an army which, with others, has overthrown the government of a sovereign state and is temporarily in occupation of the territory of that state pending the establishment of a new national government. This is why it is being contended that the United Kingdom was obliged to secure to the citizens of that part of Iraq which its forces occupied the rights and freedoms defined in the ECHR because, it is said, those citizens were temporarily within this country's jurisdiction.<sup>77</sup>

He drew a distinction between the applicability of laws of war and human rights rules to the overall situation in southern Iraq, stating that "[i]n my judgment it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time."<sup>78</sup> He continued:

It would indeed have been contrary to the Coalition's policy to maintain a much more substantial military force in Basrah City when its over-arching policy was to encourage the Iraqis to govern themselves. To build up an alternative power base capable of delivering all the rights and performing all the obligations required of a contracting state under the ECHR at the very time when the [Governing Council of Iraq] had been formed, with [the Coalition Provisional Authority's] encouragement, as a step towards the formation by the people of Iraq of an internationally recognized representative Government, would have run right against the grain of the Coalition's policies.<sup>79</sup>

The conclusion of the case was as follows: "[T]he UK did not possess Article I jurisdiction in relation to those killed in the first five incidents with which we are concerned, and that the

<sup>75</sup> SC Res. 1483 (May 22, 2003), 42 ILM 1016 (2003); SC Res. 1546 (June 8, 2004), 43 ILM 1459 (2004); see text at notes 136, 152, respectively.

<sup>76</sup> Dennis, *supra* note 56, at 120 & n.13.

<sup>77</sup> Regina, *ex parte* Al-Skeini v. Sec'y of State for Def., [2005] EWCA Civ 1609, para. 5, available at <<http://www.bailii.org>>.

<sup>78</sup> *Id.*, para. 124.

<sup>79</sup> *Id.*, para. 125 (citation omitted).

appeals of the first five claimants must be dismissed.<sup>80</sup> The case of Mr. Mousa, however, was different. The UK government, after initially taking the opposite view, had conceded that in his case it was exercising extraterritorial jurisdiction for purposes of the European Convention on Human Rights. Accordingly, the Court had only to consider whether the UK Human Rights Act applied to this case. It did so decide, and therefore concluded that the case on behalf of Mr. Mousa is justiciable in UK courts.<sup>81</sup> The judgments in this case, including the separate opinions of Lord Justices Sedley and Richards, recognized that the issues were complex and would need further consideration by the House of Lords.<sup>82</sup> As far as the application of human rights law is concerned, the Court of Appeal has drawn a vital distinction between situations where an individual is plainly under the control of UK forces (e.g., because of being in custody) and those where, even in times of occupation, individuals are not under such control.

### *Human Rights Law: Criteria for Assessment*

A range of experience in the years since 1945 leads to the conclusion that human rights law is widely, but not yet universally, seen as applicable in occupied territories; and that in many cases the responsibility for applying the law lies with the occupant. However, the precise relevance of human rights law in times of foreign military occupation needs to be carefully examined in any particular instance. What follows is a first attempt at enunciating criteria for assessing the relevance and applicability of human rights law in circumstances of occupation.

Before considering criteria that might point to the relevance of human rights law, certain grounds for caution, five of them in particular, should be plainly laid out.

First, commentators have expressed different views on whether the scope of application of human rights agreements—especially the 1966 International Covenants—encompasses occupied territories.<sup>83</sup>

Second, many human rights conventions permit parties to derogate from some of their provisions, for example, in times of public emergency threatening the life of the nation. Some military occupations occur in circumstances (which may well include a continuing armed conflict) that could be viewed by at least one party as constituting such an emergency.

Third, more states are parties to the four 1949 Geneva Conventions (and with fewer declarations and reservations) than to the conventions on human rights. No fewer than 193—virtually all—states are parties to the four 1949 Geneva Conventions, and 165 to their 1977 Additional Protocol I.<sup>84</sup> By contrast, the two 1966 International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights have 156 and 153 parties, respectively; and the 1984 Convention Against Torture has 141.<sup>85</sup> Thus, there is further scope for debate as to whether a particular human rights convention is applicable in the event that either the occupying power is not a party to the convention, or the power that previously held the territory

<sup>80</sup> *Id.*, para. 142.

<sup>81</sup> *Id.*, paras. 142, 143, 147.

<sup>82</sup> *Id.*, paras. 147 (Brooke), 206 (Sedley), 210 (Richards).

<sup>83</sup> These differences of view, which are not new, resurfaced over post-2003 Iraq. The strongest critique of the proposition that human rights law is applicable in times of occupation is that by Dennis, *supra* note 56, at 119–41.

<sup>84</sup> Figures of states parties to the Geneva Conventions and Additional Protocols from the ICRC as of July 21, 2006, are available at its Web site, <<http://www.icrc.org>>.

<sup>85</sup> These figures are current as of June 30, 2006. Figures of states parties to the ICCPR, *supra* note 33, the ICESCR, *supra* note 34, the Convention Against Torture, *supra* note 35, and other human rights treaties are available from the United Nations at <<http://www.ohchr.org/english/>>.

is not—or at any rate was not when the occupation began. Debate on this issue is not likely to be entirely eliminated by claims that human rights law is binding on all states.

Fourth, human rights agreements were not drawn up with the circumstances of armed conflict and occupation primarily in mind. The Universal Declaration of Human Rights does not specifically refer in any of its provisions to human rights in armed conflict.<sup>86</sup> Indeed, some human rights agreements—for example, the 1966 Covenant on Economic, Social and Cultural Rights—have the character more of a program than of a binding set of detailed rules. No human rights agreement draws distinctions between different categories of individuals in the way that the laws of war do.

The final ground for caution in assessing the applicability of human rights law to occupations is that over a wide range of issues, the laws of war rules regarding military occupations, as laid down in the Hague Regulations and the Geneva Conventions, may offer more extensive, detailed, and relevant guidance than the general human rights conventions; and their supervisory machinery, although allowing less room for legal redress than some human rights treaties, may be more appropriate to the circumstances.

Despite these considerations, human rights conventions can play an important role in some situations that either constitute occupations, or closely resemble occupations in certain key respects. They may impose formal obligations on parties; be instrumental in political debate, as a basis for assessing the actions of external powers and local actors; provide legal procedures for taking action; or serve as one basis for pursuing transformative goals. These conventions can be particularly relevant in the following instances:

- If it is claimed—for example, on the basis of a status-of-forces agreement, a purported mandate to act as liberator, and the existence of an indigenous government—that there is no occupation at all. This could well be the case with some “transformative” projects in the wake of military interventions. Whether or not such a denial of occupation is legally defensible in the circumstances, it may suggest that human rights law is the most useful set of standards to which to appeal.
- If an occupation is deemed to continue in some form, an indigenous government is in post, and problems revolve around the relations between individual citizens and their own government. In such a case, many issues concerning the relations between inhabitants and their own governmental authorities could properly be considered as human rights matters.
- If the provisions of a human rights instrument have been incorporated into the domestic law of the occupied territory and/or the occupying power.
- If some individuals or groups of people in occupied territory (e.g., certain terrorist suspects) are considered by the detaining power not to fall within the various broad categories of protected persons as laid down in, say, the four 1949 Geneva Conventions and the 1977 Protocols. There may be human rights protections that relate to their situation.
- If applicable human rights instruments in the circumstances concerned deal with subject matter that fills gaps in the law of war on occupations—e.g., importing of educational materials. Partly because of the broad subject matter coverage, they may be cited particularly often in occupations that continue for a long time, even into something approximating peacetime, and that present problems different from those addressed by the laws of war.

<sup>86</sup> Schindler, *supra* note 39, at 7.

- If a human rights agreement contains procedures for dealing with an issue of concern, for example, enabling individuals to raise a matter directly with some outside institution. The role of the European Court of Human Rights in situations involving the use of force is evidence of possibilities in this regard.
- If a specific issue arising in an occupation involves violations of those parts of human rights law that are not derogable in times of crisis;<sup>87</sup> or, alternatively, if the power against which a claim is made has not made a derogation in respect of the occupation.<sup>88</sup>
- If the occupant and/or international bodies properly refer to human rights law as providing a legal basis for changing certain laws of the occupied territory, or even as setting goals for a transformative occupation. For example, Article 1 of the 1966 International Human Rights Covenants contains implications for political arrangements under occupations: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status . . . .”<sup>89</sup>

In such instances human rights conventions can reinforce the idea that there are some important basic rules to be applied, and principles to shape the conduct of the states and individuals involved. Each of the eight instances listed above could take place in a transformative occupation.

### III. POST-1945 OCCUPATIONS WITH A TRANSFORMATIVE PURPOSE

Many interventions and occupations since 1945 have been more than mere byproducts of war: they have often been designed to affect the political order in the territory concerned. Cases during the Cold War years include, for example, Czechoslovakia after 1968, northern Cyprus after 1974, Cambodia after 1978, and Grenada in 1983.

This part looks selectively at foreign military presences aimed at a fundamental democratic transformation, and considers their possible implications for the law on occupations. Put crudely, the traditional assumption of the laws of war is that bad (or potentially bad) occupants are occupying a good country (or at least one with a reasonable legal system that operates for the benefit of the inhabitants). In recent years, especially in some Western democratic states, various schools of thought have been based on the opposite idea, crudely summarized as good occupants occupying a bad country (or at least one with a bad system of government and laws).

Both of these crude views of occupations are questionable. The second view—of the occupant as the bringer of progress—can lead to a dangerous mix of crusading, self-righteousness, and self-delusion. Yet this view is the product of serious considerations based on actual events, including the post-World War II occupations, the interventions since the end of the Cold War, and the case of Iraq. Each will be considered in turn.

#### *Postsurrender Occupations at the End of World War II*

The Allied occupations of Germany and Japan after World War II typify postsurrender occupations, and also reluctance to be formally bound by the Hague Regulations. Here, as well

<sup>87</sup> Nonderogable provisions include the ECHR, *supra* note 32, Arts. 2, 3, 4(1), 7; and the ICCPR, *supra* note 33, Arts. 6, 7, 8(1) & (2), 11, 15, 16, 18.

<sup>88</sup> For example, the United Kingdom did not make a derogation in respect of the European Convention on Human Rights in connection with the occupation of Iraq from 2003 onward. In general, it might be hard to argue that there was a “threat to the life of the nation” arising from the occupation of a distant country.

<sup>89</sup> ICCPR, *supra* note 33, Art. 1; ICESCR, *supra* note 34, Art. 1.

as elsewhere, the victors desired to exercise their power freely, and in particular to make drastic political and other changes in the defeated states. The basic character of these occupations raised issues to which relatively little attention had been paid by international lawyers. Previously, it had sometimes been assumed that the normal consequence of surrender by a state was its subjugation, or possibly even annexation, by the victor; but this fate did not befall the bulk of German or Japanese territory at the end of the war, or some other occupied territories at that time. What took place instead, especially in Germany and Japan, were occupations that went beyond the letter of the Hague Regulations, yet fell short of annexation or assumption of sovereignty.

With respect to the occupation of Germany, which began in 1944–1945, a legal memorandum to the UK Foreign Office in March 1945 set out the basic problem:

The truth is that the Allies are dealing with a situation without previous parallel; they are proposing to exercise their authority with respect to Germany in order to expel the Nazi system and its manifestations completely and utterly, and to continue this process indefinitely until it has succeeded. These objects, far ranging as they are, do not necessarily amount to annexation and to the positive and complete transfer of sovereignty whether by cession or by conquest. But they do undoubtedly go far beyond the exercise of military occupation as limited by previous international law. . . . Looking, therefore, at the matter broadly, we cannot regard the international law which will apply to the case now in prospect as limiting the right of the Allies to those attaching to a mere military occupation unless there is a positive assumption of sovereignty as a whole.<sup>90</sup>

After the Germans accepted unconditional surrender on May 7, 1945, Germany was completely occupied by the Allies. What, then, was the position so far as the application of the Hague Regulations was concerned?<sup>91</sup> On this point Robert Jennings, in an authoritative article in 1946, argued persuasively that the law of belligerent occupation had been designed to serve two purposes: first, to protect the sovereign rights of the legitimate government of the occupied territory, and second, to protect the inhabitants of the occupied territory from being exploited for the prosecution of the occupant's war. Neither of these purposes had much bearing on the situation the Allies faced: "Thus the whole *raison d'être* of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany, and to attempt to apply it would be a manifest anachronism."<sup>92</sup>

Wolfgang Friedmann adopted a very similar position:

[E]ven the widest interpretation of the rules of warfare [could not] bring the powers claimed and exercised by the allies in Germany within the scope of belligerent occupation. . . . [E]ven the most elastic interpretation could not bring the wholesale abolition of laws, the denazification procedure, the arrest of thousands of individuals, the introduction of sweeping social reforms, the expropriation of industries, and above all the sweeping

<sup>90</sup> Opinion of the Lord Chancellor and the Law Officers of the Crown (Mar. 1945), typescript copy of FO 371/50759 (U 1949), Public Record Office (now National Archives). On the British discussion about the legal status of Germany, see F. S. V. DONNISON, *CIVIL AFFAIRS AND MILITARY GOVERNMENT: CENTRAL ORGANIZATION AND PLANNING* 125–36 (1966).

<sup>91</sup> The position before May 7, 1945, is widely viewed as one of normal belligerent occupation. However, as some anti-Nazi measures taken early in the belligerent phase show, there was not a completely sharp distinction between the two stages of the occupation of Germany.

<sup>92</sup> R. Y. Jennings, *Government in Commission*, 1946 BRIT. Y.B. INT'L L. 112, 136.

changes in the territorial and constitutional structure of Germany within the rights of belligerent occupation. These are symbols of sovereign government, yet it is of the essence of belligerent occupation that it does not claim such powers.

. . . .

. . . It is not . . . surprising that International Law—inadequate to cope with many problems of our days—should not be fully equipped to deal with an entirely unprecedented situation.<sup>93</sup>

A curious aspect of the legal arrangements for the post–World War II occupations was Article 107 of the UN Charter. It states, in full: “Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.”

Article 107 can be seen as a way of keeping the Allied occupations of Germany and Japan outside the control of the UN Security Council. It is also a spiritual precursor of an approach that has sometimes surfaced in the thinking of the U.S. government, which views certain governments (and particularly that of the United States) as entitled to take action internationally with only a restricted role for the UN Security Council. Following the 2005 UN World Summit, Article 107 may be in process of being consigned to legal oblivion, but its unilateralist spirit is not entirely dead.<sup>94</sup>

After the entry into force of the 1949 Geneva Conventions, it became doubtful whether a claim could ever again be made that an occupation fell outside the framework of the laws of war, or would not be subject to certain conservationist provisions. The scope of application of the Conventions, as outlined in common Article 2, was “to all cases of partial or total occupation of the territory of a High Contracting Party.” Although Article 6 of the 1949 Civilians Convention did allow for the cessation of certain rules one year after the general close of military operations, the occupant (if still exercising governmental functions) would have remained bound by many conservationist rules.<sup>95</sup>

### *International Military Actions Since the End of the Cold War*

Since the end of the Cold War, international circumstances have created strong pressures, and also opportunities, for military action to help bring about change in certain states. The international problems that have led to this tendency have included:

- internal repression within states, in many cases leading to large numbers of internally displaced persons and refugees;
- civil wars within states (which may cause concern on humanitarian grounds because of their capacity to spread, and also because of their tendency to cause refugee flows); and
- toleration by certain states of terrorist activities aimed at targets abroad.

<sup>93</sup> W. FRIEDMANN, *THE ALLIED MILITARY GOVERNMENT OF GERMANY* 65, 67 (1947).

<sup>94</sup> In the UN World Summit Outcome document of September 16, 2005, the United Nations member states declared that “we resolve to delete references to ‘enemy States’ in Articles 53, 77 and 107 of the Charter.” GA Res. 60/1, para. 177, at 38 (Oct. 24, 2005).

<sup>95</sup> Geneva Convention IV, *supra* note 9, Arts. 2, 6. On the meaning and status of Article 6, see *supra* text at notes 29–30.



These problems are serious, and a complete refusal by the international community to tackle them is not an option. Of the many effects of international interventions since 1989, one of the most striking is the tendency for refugees to return in large numbers. Another is the attempt to bring about political change in the territory concerned—not always with success.

Many post–Cold War military actions have been characterized by a tendency to avoid being seen as occupations, or even being thought of as amenable to the application of occupation law. A possible rationale for this approach is that in most cases involving a foreign military presence with a transformative purpose and some participation in governmental functions, this presence has been accorded a degree of formal consent by the government of the country concerned. Examples of a foreign military presence with consent include (1) Haiti (1994–2000 and from 2004 onward); (2) Bosnia and Herzegovina (from December 1995 onward); (3) Albania (March–June 1997); (4) Kosovo (from June 1999 onward); (5) East Timor (October 1999–May 2002); and (6) Afghanistan (from December 2001 onward). Further factors in all these cases are that the UN Security Council formally authorized (although not always from the start) the foreign military presence in the territory concerned; that the foreign presence had a multinational character; that the intervention was preceded by Council expressions of concern over the humanitarian situation in the territory; and that human rights were emphasized as one key concern of the intervening forces.

Neither the fact of formal consent of the government of the country nor formal UN authorization makes it impossible for the law on occupations to be considered applicable to these cases. When troops from abroad interact with the population of another country, there must always be a strong case for viewing the law on occupations as a necessary safety net. However, the law on occupations is not the only lens through which one can examine this wide range of interventionist activity.<sup>96</sup>

Of these six cases, the one most similar to post-2003 Iraq is the U.S.-led external involvement in Afghanistan. In Afghanistan the United States had a clear transformative purpose; there, as in Iraq, the major U.S.-led military action was aimed explicitly at deposing the ruling regime; and the deposition did not end all armed opposition. The two situations differed mainly in that the establishment of a foreign military occupation regime was not necessary in Afghanistan. After the fall of the Taliban and the accession to power of the Afghan Interim Authority on December 22, 2001, the coalition's role was essentially to aid the government.

### *Iraq Since 2003*

There was a precedent, of sorts, in Iraq: the “safe haven” established in northern Iraq in 1991. The U.S.-led military intervention that began on April 17, 1991, resulting in the establishment of the zone, enjoyed neither the specific authorization of the UN Security Council, nor, initially, the consent of the Iraqi government, whose forces had only a few months before been repulsed from Kuwait. After the initial phase, northern Iraq was protected from Iraqi government incursions almost entirely through the establishment of a U.S.-initiated air exclusion zone. The history of this protected zone illustrates certain transformative possibilities of foreign military involvement. However, the zone never assumed the character of anything approaching a full occupation regime. Initiated to enable large numbers of refugees from the region to return home, it resulted in the application of enough coalition military pressure to keep Hussein's

<sup>96</sup> A useful study of cases of international administration since 1995 is RICHARD CAPLAN, *INTERNATIONAL GOVERNANCE OF WAR-TORN TERRITORIES: RULE AND RECONSTRUCTION* (2005).

forces out of northern Iraq, enabling the Iraqi Kurds to develop their own administrative structures in the region. Here, indeed, was a transformation facilitated by a foreign military role: but that role took the form of a short-term military presence on the ground, followed by a more remote one in the air that could not be viewed as an occupation.

*Transformation as one basis of the decision to use force in Iraq.* The military operations launched in Iraq on March 19–20, 2003, raised numerous issues relating to the *jus ad bellum*. These are not reviewed here, partly because of the familiar principle that the laws of war apply irrespective of the legality or otherwise of the original resort to force. However, one question must be briefly addressed: is transformation a legitimate reason for resorting to force? This question is distinct from whether transformation is a legitimate goal once force has (for whatever reason) been used.

The case of Iraq confirms that a complex mixture of political motives may underlie intervention, and a no less complicated mixture of legal and other justifications. The U.S.-led invasion followed a prolonged and confused legal-cum-political debate, in which the stated purposes of intervention varied not just over time, but also within and between different U.S. agencies and participating states.

On March 20, 2003, the United States made a statement to the United Nations seeking to justify the military operations that had just commenced. The purpose of the action was specified very precisely: “These operations are necessary in view of Iraq’s continued material breaches of its disarmament obligations under relevant Security Council resolutions, including resolution 1441 (2002). The operations are substantial and will secure compliance with those obligations.”<sup>97</sup> As to the basis of authority to use force, the statement made a claim of continuing or revived authority on the basis of earlier resolutions: “The actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991).”<sup>98</sup> No mention at all was made of a politically transformative purpose or the prevention of terrorism.

In reality, the idea of political transformation had long been one significant element in U.S. debates about Iraq. As early as 1998, the joint houses of Congress, in passing the Iraq Liberation Act, had called for the United States “to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime.”<sup>99</sup> However, this clarion call for transformation did not exist in a vacuum, since it was based on complaints about Iraq’s conduct, including violations of international rules. The Act cited Iraq’s conduct in the war against Iran of 1980–1988, its invasion and occupation of Kuwait in 1990–1991, its orchestration of a failed plot to assassinate President George H. W. Bush in 1993, its repression of the Kurds, its violation of the disarmament conditions of the 1991 cease-fire, and its denial of democracy.<sup>100</sup> In subsequent U.S. debates and decision making, regime change featured not simply as a likely consequence of intervention, but a principal purpose of it. It was claimed that enforced regime change would lead to substantial beneficial consequences both within Iraq and in the region generally.

<sup>97</sup> Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2003/351.

<sup>98</sup> *Id.*

<sup>99</sup> H.R. 4655, §3, 105th Cong. (1998), passed by the House of Representatives on October 5, 1998, 144 CONG. REC. H9483 (daily ed. Oct. 5, 1998), and the Senate on October 7, 1998, *id.* at S11,811 (Oct. 7, 1998), as Pub. L. No. 105-338.

<sup>100</sup> H.R. 4655, *supra* note 99, §2.

In Britain no significant body of opinion supported the idea that transformation—however desirable in principle it might be—was in itself a justification for going to war in Iraq. In April 2002, when he met with President George W. Bush in Crawford, Texas, Prime Minister Tony Blair

said that the UK would support military action to bring about regime change, provided that certain conditions were met: efforts had been made to construct a coalition/shape public opinion, the Israel-Palestine Crisis was quiescent, and the options for action to eliminate Iraq's [weapons of mass destruction] through the UN weapons inspectors had been exhausted.<sup>101</sup>

The memorandum of July 21, 2002, which recorded this position, also stated: "US views of international law vary from that of the UK and the international community. Regime change per se is not a proper basis for military action under international law. But regime change could result from action that is otherwise lawful."<sup>102</sup> Blair subsequently stated that regime change and weapons of mass destruction (WMD) "were linked in the sense that it was the regime that was producing the WMD."<sup>103</sup> In the House of Commons debate just before the war, he stated:

I have never put the justification for action as regime change. We have to act within the terms set out in resolution 1441—that is our legal base. But it is the reason why I say frankly that if we do act, we should do so with a clear conscience and a strong heart.<sup>104</sup>

The thrust of public presentations of government policy involved alleged Iraqi noncompliance with disarmament obligations. In a secret memorandum to the prime minister on the legality of military action against Iraq, dated March 7, 2003, the attorney general, Lord Goldsmith, developed the argument that "a violation of Iraq's obligations under resolution 687 which is sufficiently serious to undermine the basis of the cease-fire can revive the authorisation to use force in resolution 678."<sup>105</sup> The final paragraph of the memorandum expressed nervousness about political transformation as a rationale for the use of force. It did so in the context of a discussion of proportionality—which, famously, is a matter that constitutes a link between the *jus ad bellum* and the *jus in bello*. The paragraph reads:

36. Finally, I must stress that the lawfulness of military action depends not only on the existence of a legal basis, but also on the question of proportionality. Any force used pursuant to the authorisation in resolution 678 (whether or not there is a second resolution):

- must have as its objective the enforcement [of] the terms of the cease-fire contained in resolution 687 (1990) and subsequent relevant resolutions;
- be limited to what is necessary to achieve that objective; and

<sup>101</sup> Conditions for Military Action, Secret Cabinet Office paper, para. 2 (July 22, 2002), partially leaked in SUNDAY TIMES (London), May 1, 2005, and published in full in SUNDAY TIMES (London), June 12, 2005, at 10, *available at* <<http://www.downingstreetmemo.com/cabinetofficetext.html>>, *and* <<http://www.informationclearinghouse.info/article9112.htm>>.

<sup>102</sup> *Id.*, para. 11.

<sup>103</sup> Secret Downing Street memo of the Prime Minister's meeting, Ref. S 195/02 (July 23, 2002), published in SUNDAY TIMES (London), May 1, 2005, at 7, *available at* <<http://www.downingstreetmemo.com/timeline/home.html>>, *and* <<http://www.informationclearinghouse.info/article8709.htm>>.

<sup>104</sup> Tony Blair, statement opening the debate on Iraq, HANSARD, House of Commons, pt. 365, col. 772, Mar. 18, 2003, *available at* <<http://www.parliament.uk/hansard/hansard.cfm>>.

<sup>105</sup> Lord Goldsmith, attorney general, Iraq: Resolution 1441, para. 7 (Mar. 7, 2003) (secret memo to prime minister, released on April 28, 2005), *at* <<http://www.number-10.gov.uk/files/pdf/Iraq%20Resolution%201441.pdf>>.

— must be a proportionate response to that objective, ie securing compliance with Iraq's disarmament obligations.

That is not to say that action may not be taken to remove Saddam Hussein from power if it can be demonstrated that such action is a necessary and proportionate measure to secure the disarmament of Iraq. But regime change cannot be the objective of military action. This should be borne in mind in considering the list of military targets and in making public statements about any campaign.<sup>106</sup>

Dinstein developed a justification for the use of force against Iraq that was similar to that of Lord Goldsmith, but with certain differences. Deploring the confusion in rationales for the Iraq action, and noting that the political considerations that had resulted in intervention were broader than the legal ones, Dinstein sought to reduce the chaos of arguments about the legal basis of the 2003 action to some kind of order. He argued that the original 1991 coalition's use of force over Kuwait had been lawful not only because it had been authorized by Security Council Resolution 678 of November 29, 1990, but also because it was a lawful exercise of collective self-defense following the attack on Kuwait. He went on to suggest that "the legal basis of the 2003 hostilities was a revival of the Coalition's right to use force against Iraq consequent upon the Iraqi material breach of the cease-fire" that had been concluded between Iraq and the coalition in 1991.<sup>107</sup> He did not devote attention to the U.S. emphasis on regime change as a reason for the use of force, but was critical of U.S. notions of preventive self-defense. Compared with Goldsmith's argument, this analysis was less dependent on Security Council resolutions, and put more emphasis on a continuing right of self-defense as a basis for responding to violations of the terms of the 1991 cease-fire.

The legal justifications of the 2003 Iraq intervention advanced by Goldsmith and Dinstein are stronger than most. However, like all views of the Iraq intervention, they are by no means free of problems. Both of these justifications relied heavily on the propositions that Iraq had engaged in major violations of the cease-fire deal, that these had become very serious by 2003, and that the crisis was so severe as to justify the fateful step of invasion and regime change, as distinct from continuing and adapting the policy of containment.

There were, and are, many grounds for reservations over the coalition governments' assessments in 2002–2003 of evidence of Iraqi breaches of the terms of the cease-fire. True, these assessments were largely shared by other governments and their intelligence services. Yet it was not, and is not, obvious that a crisis had developed over Iraqi weapons in March 2003 of such gravity as to justify withdrawing the inspectors and resorting to full-scale invasion. Hans Blix, charged with conducting UN inspections in Iraq, had doubted the accuracy of the assessments made about Iraq in Washington and London in March 2003.<sup>108</sup>

The debate about Iraq in the years before the outbreak of war in March 2003 revealed a difference of view between the United Kingdom and the United States over whether the political transformation of Iraq, or of the region more broadly, could serve as a reason for intervention. The United Kingdom felt more strongly that, on its own, regime change was an insufficient reason in international law. The project of political transformation of Iraq, and of the Arab world more generally, was particularly strong in the United States for years before 2003, to the point where it constituted a significant part of the rationale for intervention—and was perhaps

<sup>106</sup> *Id.*, para. 36.

<sup>107</sup> Yoram Dinstein, *The Gulf War, 1990–2004 (and Still Counting)*, 2005 ISR. Y.B. HUM. RTS. 1, 5.

<sup>108</sup> HANS BLIX, *DISARMING IRAQ: THE SEARCH FOR WEAPONS OF MASS DESTRUCTION* (2004).

more important in the minds of some policymakers than disarmament. Many advocates of transformative intervention saw something artificial in a situation where the law is such that a real reason for intervention—turning a dictatorship into a democracy—could play at best a minimal part in the debate about the legal justification of military action.

*Transformative occupation of Iraq from April 2003.* Since the initial U.S.-led invasion and subsequent military presence obviously occurred without the agreement of the government of Hussein, and involved direct responsibility for running the country, the resulting situation was much closer to a military occupation than in most cases of foreign military presence after the Cold War. Naturally, a wide range of laws of war issues arose, in light of which the policies of the coalition authorities were extensively justified and critically scrutinized.<sup>109</sup>

The occupation of Iraq was not well planned. As early as July 2002, a UK government memorandum had noted: “There was little discussion in Washington of the aftermath after military action.”<sup>110</sup> Some senior officers in the Pentagon with legal expertise were told not to bother themselves with plans for the occupation, and a State Department study preparatory to the occupation was ignored. The undertaking was also marked by conceptual confusion, especially in the United States. In the public debate on the matter in Washington, D.C., in the first few months of 2003, some policymakers made the basic error of asserting that, because the action amounted to a liberation of Iraq, it was not an occupation at all. A typical comment was that by Paul Wolfowitz, U.S. deputy secretary of defense and a leading advocate of the intervention. In February 2003, shortly before the military action, he said: “[W]e’re not talking about the occupation of Iraq. We’re talking about the liberation of Iraq. . . . Therefore, when that regime is removed we will find [the Iraqi population] . . . basically welcoming us as liberators.”<sup>111</sup> U.S. officials made countless similar statements.

This view was accompanied by a U.S. tendency—not confined to the government—to ignore or downplay certain laws of war rules,<sup>112</sup> which led to some corrective statements by international lawyers. Dinstein wrote:

The Coalition was very eager to present its forces in Iraq as an army of liberation. But notwithstanding the fact that the overthrow of the Saddam Hussein regime brought liberation to the Iraqi people, it must be appreciated that—pursuant to international law—the legal status of the Coalition forces in Iraq is not that of liberators but that of belligerent occupants.<sup>113</sup>

<sup>109</sup> Two assessments of the Iraq occupation in relation to the laws of war that address many issues not tackled here are Michael N. Schmitt & Charles H. B. Garraway, *Occupation Policy in Iraq and International Law*, in 9 INTERNATIONAL PEACEKEEPING: THE YEARBOOK OF INTERNATIONAL PEACE OPERATIONS, 2004, at 27 (2005); Thürer & MacLaren, *supra* note 5.

<sup>110</sup> Secret Downing Street memo of the Prime Minister’s meeting, *supra* note 103.

<sup>111</sup> Paul Wolfowitz, Interview with Melissa Block (National Public Radio, Feb. 19, 2003), available at <[http://www.defenselink.mil/transcripts/2003/t02202003\\_t0219npr.html](http://www.defenselink.mil/transcripts/2003/t02202003_t0219npr.html)>. Sixteen months later, this interview was cited critically by Senator Hillary Rodham Clinton when Wolfowitz gave testimony to the U.S. Senate Committee on Armed Services on the transition in Iraq (June 25, 2004), available at <<http://www.defenselink.mil/speeches/2004/sp20040625-depscedef0541.html>>.

<sup>112</sup> There was no reference at all to the laws of war rules on occupations in an otherwise thoughtful study of Iraq by two U.S. nongovernmental institutions in which international lawyers were strongly represented. See PUBLIC INTERNATIONAL LAW & POLICY GROUP, & CENTURY FOUNDATION, ESTABLISHING A STABLE DEMOCRATIC CONSTITUTIONAL STRUCTURE IN IRAQ: SOME BASIC CONSIDERATIONS (May 2003), available at <<http://www.pilpg.org>>.

<sup>113</sup> Yoram Dinstein, *Jus in Bello Issues Arising in the Hostilities in Iraq in 2003*, 2004 ISR. Y.B. HUM. RTS. 1, 12.

In the Middle East, where concern about the Israeli-occupied territories is widespread, the United States would understandably wish to avoid the odium accompanying the term “occupation.” However, it was a legal and political mistake to counterpose “liberation” and “occupation” as opposites, hence to imply that the law governing occupations was scarcely relevant. A legally sounder approach, one that would have elicited less political scorn, would have stated from the start that the United States, while its intention was to liberate Iraq, accepted that one main body of international rules that should govern the conduct of its forces was the law of occupation. Eventually, after the main combat phase in Iraq, the United States and its coalition partners did adopt this position. Security Council Resolution 1483 of May 22, 2003, mentioned further below, marked their acceptance that occupation law applied to their presence in Iraq, and at the same time reflected their intention to achieve a fundamental transformation of the constitution and laws of the country.

While the intervention was still in its major combat operations phase, concerns surfaced in some parts of the coalition governments that the transformative project for Iraq might violate the legal norms governing occupations. On March 26, 2003, in a detailed memorandum spelling out his advice to the British Cabinet on the same day, Attorney General Goldsmith stated:

In short, my view is that a further Security Council resolution is needed to authorise imposing reform and restructuring of Iraq and its Government. In the absence of a further resolution, the UK (and US) would be bound by the provisions of international law governing belligerent occupation, notably the Fourth Geneva Convention and the 1907 Hague Regulations.<sup>114</sup>

The attorney general went on to note in particular that “the imposition of major structural economic reforms would not be authorised by international law.”<sup>115</sup> On a separate point, he stated that

a further complicating factor for the United Kingdom is the extent to which the ECHR [European Convention on Human Rights] and other international human rights instruments are likely to apply to any territory of which the UK is the Occupying Power. I am advising the Ministry of Defence separately on the extent of our ECHR obligations in Iraq.<sup>116</sup>

Following this memorandum, the UK government did publicly emphasize the framework of Hague and Geneva law. In a statement in the House of Commons on April 14, 2003, outlining plans for Iraq’s reconstruction, Prime Minister Blair said: “In the first phase, the coalition and the Office of Reconstruction and Humanitarian Assistance will have responsibility under the Geneva and Hague conventions for ensuring that Iraq’s immediate security and humanitarian needs are met.”<sup>117</sup> He also stressed that the United Nations would have a “vital role.” He did not use the term “occupation”; instead, he said, optimistically: “Iraq is a nation with a creative people, potentially wealthy, with a dynamic and prosperous future ahead of it. They do not need to be run from the outside by the US, the UK or the UN, and they will not be.”<sup>118</sup>

The occupation had already begun during the course of the fighting, when progressively more areas of Iraq came under coalition control. Although in particular places and phases determining exactly when occupation began could be difficult, there was apparently no dispute in

<sup>114</sup> Lord Goldsmith, Iraq: Authorisation for an Interim Administration (Mar. 26, 2003), *in* John Kampfner, *Blair Was Told It Would Be Illegal to Occupy Iraq*, NEW STATESMAN (London), May 26, 2003.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Tony Blair, Statement on Iraq, HANSARD, House of Commons, pt. 384, col. 616 (Apr. 14, 2003).

<sup>118</sup> *Id.*, cols. 616–17.

principle about the status of these areas as “occupied territory,” as was confirmed by the use of this term in a Security Council resolution of March 28.<sup>119</sup>

The countrywide occupation administration is described in some official documents as having begun on April 16, 2003, one day after a meeting of various Iraqi factions, held at a makeshift U.S. air base near Ur, agreed on a thirteen-point plan (including as point 10 the dissolution of the Ba’ath Party) for steering Iraq to a democratic future.<sup>120</sup> This plan was seen by the United States and its coalition partners as providing some kind of mandate for embarking on drastic change. The next day General Tommy Franks, commander of the coalition forces, issued a “Freedom Message to the Iraqi People.” While not using the word “occupation,” he announced: “I am creating the Coalition Provisional Authority [CPA] to exercise powers of government temporarily . . . .”<sup>121</sup> In this message he also announced a range of transformative policy measures, including the disestablishment of the Ba’ath Party. Oddly, this manifesto for the transformation of an entire country—a document later briefly claimed by the CPA to be foundational in character—was little noted at the time and has been hard to locate subsequently.<sup>122</sup> The same day, April 16, was also the date on a message issued by General Franks, “Instructions to the Citizens of Iraq,” containing down-to-earth advice aimed at ensuring the safety of the population and the coalition forces, which was also little noted.<sup>123</sup>

There was some early confusion about which person, and indeed organization, was in charge. The occupation was initially perceived as being under General Jay Garner, director of the Office of Reconstruction and Humanitarian Assistance (ORHA), which had been set up within the Department of Defense in January to meet the challenges of reconstructing Iraq. He had been present at the meeting near Ur on April 15, and arrived in Baghdad on April 20. Within less than three weeks he was sidelined. On May 6, in a statement that made no reference to the Coalition Provisional Authority, President Bush appointed Ambassador L. Paul Bremer as U.S. presidential envoy to Iraq, stating that, as “the senior Coalition official in Iraq,” he would be responsible for overseeing reconstruction and institution-building efforts, while

<sup>119</sup> SC Res. 1472 (Mar. 28, 2003), 42 ILM 767 (2003). The preamble stated:

*Noting* that under the provisions of Article 55 of the Fourth Geneva Convention . . . , to the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The word “humanitarian” features fourteen times in this resolution.

<sup>120</sup> 13-Point Statement on a Democratic Iraq (Apr. 15, 2003), GUARDIAN UNLIMITED, Apr. 16, 2003, at <<http://www.guardian.co.uk/Iraq/Story/0,2763,937856,00.html>>.

<sup>121</sup> General Tommy R. Franks, Freedom Message to the Iraqi People (Apr. 16, 2003). There is a question regarding its status. It was referred to as an important foundational document in certain later statements, including CPA Order No. 2 of May 23, 2003, see text at note 144 *infra*. An Arabic text of the “Freedom Message” was probably delivered by air over Iraq. However, the message does not appear to have been mentioned in the main daily press conferences given by the U.S. military at that time, or in the English-language international press. Its text is hard to locate on the Internet: it was not on the CPA, Pentagon, State Department or related Web sites when searched in March–May 2006. It was not noted at all in a study of the basic CPA framework, L. ELAINE HALCHIN, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES (Congressional Research Service, updated June 6, 2005), available at <<http://www.fas.org/man/crs/RL32370.pdf>>. Nor is its existence noted in many later books about the 2003 Iraq war. However, it can be found (in English), Ref. IZ C148, on the Aerial Propaganda Leaflet Database of the Web site of the PsyWar Society, at <<http://www.psywar.org/apdsearchform.php>>.

<sup>122</sup> See *supra* note 121.

<sup>123</sup> Tommy R. Franks, Instructions to the Citizens of Iraq: Coalition Provisional Authority Directive (Apr. 16, 2003). For an English-language text, see Ref. IZ C149, at PsyWar Society Web site, *supra* note 121.

General Franks would retain command of coalition military personnel in the area.<sup>124</sup> On May 9, President Bush gave Bremer the formal letter of appointment as presidential envoy “with full authority over all U.S. government personnel, activities and funds there.” Shortly thereafter, Secretary of Defense Donald H. Rumsfeld designated him as administrator of the CPA.<sup>125</sup> On May 12, Bremer arrived in Baghdad, and for the following thirteen months he was effectively in charge but under an arrangement that divided power between the administrator and CPA on the one hand, and the military chain of command on the other, both reporting to the secretary of defense.<sup>126</sup>

The term “Coalition Provisional Authority” came into prominence only from May 8 onward. On that day, without mentioning the word “occupation,” the United States and the United Kingdom informed the president of the UN Security Council that “[t]he States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq.”<sup>127</sup> They had created the “Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.”<sup>128</sup>

In the first regulation of the CPA, which he signed on May 16, 2003, Bremer outlined its basis of authority and goals in the opening words:

*Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war,*

I hereby promulgate the following:

#### *Section 1*

##### *The Coalition Provisional Authority*

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

(2) The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.<sup>129</sup>

<sup>124</sup> Statement by the White House Press Secretary (May 6, 2003), *available at* <<http://www.whitehouse.gov/news/releases/2003/05/20030506-5.html>>.

<sup>125</sup> L. PAUL BREMER (with Malcolm McConnell), *MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE* 12–13 (2006).

<sup>126</sup> For an intelligent and historically informed account of the structure and role of the CPA by one of its constitutional advisers, see NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION-BUILDING* (2004).

<sup>127</sup> Letter Dated 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, UN Doc. S/2003/538.

<sup>128</sup> *Id.*

<sup>129</sup> CPA Regulation No. 1, §1, ¶1 (May 16, 2003), *available at* <<http://www.iraqcoalition.org/regulations/index.html#Regulations>> [hereinafter CPA Regulations & Orders]. CPA regulations, orders, and other materials



In its reference to a key UN Security Council resolution, and in encompassing executive, legislative, and judicial authority, this passage is virtually identical to the equivalent part of Regulation No. 1 in two cases of international administration that were not considered to be occupations: the UN Administration in Kosovo in 1999,<sup>130</sup> and the Transitional Administration in East Timor in the same year.<sup>131</sup> A notable difference is that, whereas the regulations for Kosovo and East Timor had referred to “internationally recognized human rights standards,” the CPA regulation refers to “the laws and usages of war.” This reflects the view that, of the three cases, only Iraq was an occupation.

The process by which the CPA emerged was more obscure than in these two earlier cases: it has given rise to three basic questions.

First, when was the CPA established? The simple answer would be April 16, 2003, the date of General Franks’s “Freedom Message” and his CPA directive. However, one finds little evidence that the CPA existed as an actual administrative body in April. As noted, the letter of May 8 refers to it as already existing. It appears to have gradually come into existence, and to have assumed a form distinct from the military chain of command in Iraq, in the first half of May.

Second, what was the CPA’s status in U.S. law? While it had close connections with the Department of Defense, it may not have been a federal agency.<sup>132</sup> It was mainly, but not exclusively, an American entity, constituting the administrative arm of a U.S.-led multinational coalition, but its exact status in U.S. law remains unclear.

Third, did the UN Security Council supply a legal framework for the CPA’s work? The CPA’s first regulation, issued on May 16, twice referred to the Council’s Resolution 1483 as providing a guiding framework, even perhaps a degree of legal authorization. However, Resolution 1483 was actually passed by the Security Council only on May 22—six days after the regulation that invoked its name. This is odd. Nevertheless, the principal terms of Resolution 1483 had been on the table two weeks in advance, when the United Kingdom and Spain submitted a draft text.<sup>133</sup>

As eventually passed on May 22, Resolution 1483 noted the letter of May 8 from the United States and the United Kingdom, and then used the term “occupying powers” when it referred to the “specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (‘The Authority’).” Immediately thereafter, it indicated that “other States that are not occupying powers are working now or in the future may work under the Authority”:<sup>134</sup> this statement raised the interesting possibility that, in an occupation with transformative purposes, some countries involved may collaborate with the occupying powers without themselves being so labeled. Such status, however, does not imply a complete escape from the law on occupations. The resolution went on to state that the Council “[c]alls

are also available on the CPA Web site at <<http://www.cpa-iraq.org/#>>. After the CPA’s role ended on June 28, 2004, it was originally indicated that the Web site would remain open for historical purposes only until June 30, 2006, but it in fact remained open after that date.

<sup>130</sup> On the Authority of the Interim Administration in Kosovo, UNMIK/Reg/1999/1, §1, ¶1 (July 25, 1999), available at <<http://www.unmikonline.org/regulations/index.htm>>.

<sup>131</sup> On the Authority of the Transitional Administration in East Timor, UNTAET/Reg/1999/1, §1 (Nov. 27, 1999), available at <<http://www.un.org/peace/etimor/untaetR/r-1999.htm>>.

<sup>132</sup> HALCHIN, *supra* note 121, at 8–42 *passim*.

<sup>133</sup> By the morning of May 9, 2003, the BBC and news agencies already had a draft text of what was to become, thirteen days later and after further amendment, Security Council Resolution 1483 (full draft text on file with author).

<sup>134</sup> SC Res. 1483, *supra* note 75, pmb. The resolution passed by a vote of 14-0. Syria was absent from the meeting.

upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”<sup>135</sup>

Resolution 1483 also proclaimed certain objectives for the occupation. Apart from some broad indications in the preamble, these objectives are mainly to be found in paragraph 8, which deals with the role of the UN special representative for Iraq. The special representative was mandated, in coordination with the CPA, to assist the people of Iraq through

(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;

...

(g) promoting the protection of human rights;

...

(i) encouraging international efforts to promote legal and judicial reform.<sup>136</sup>

Taken as a whole, the purposes of the occupation as outlined in Resolution 1483 went beyond the confines of the Hague Regulations and the Fourth Geneva Convention. Yet the resolution did not explain the relation between the transformative purposes of this occupation and the more conservative purposes of the existing body of law on occupations. These two things were set out separately. Subsequent resolutions, reaffirming the transformative purposes of the occupation, did not address this disjunction between occupation law and transformative purpose.<sup>137</sup>

In late 2003, David Scheffer, noting the significance of Resolution 1483, observed that it “rested uncomfortably within occupation law” and that the latter “was never designed for such transforming exercises.”<sup>138</sup> Concerned about the emerging confusion in Iraq, he suggested: “The legal environment in Iraq would be better rationalized with a fresh UN mandate setting forth the responsibilities and mission objectives of the military powers operating in Iraq and by establishing UN civilian administrative functions that would assume powers held by the Authority under Resolution 1483.”<sup>139</sup>

Some have argued that, from the start of the occupation of Iraq, the United States should have sought an even more central role for the United Nations. Gregory Fox, who is skeptical about the transformative project, and shows respect for the conservationist principle, suggests that a stronger and clearer Security Council mandate would have been needed to buttress the drastic series of reforms attempted in Iraq. Such a mandate “would have superseded the conservationist principle by invoking a superior international obligation and could have provided an opportunity to make clear that a consensus within the United Nations supported reform in Iraq.”<sup>140</sup>

Unfortunately, arguments for a more central UN Security Council role in the transformation of Iraq are not persuasive. After the Council divided so bitterly on the use of force in the

<sup>135</sup> *Id.*, para. 5.

<sup>136</sup> *Id.*, para. 8.

<sup>137</sup> See, e.g., SC Res. 1511 (Oct. 16, 2003), 43 ILM 254 (2004).

<sup>138</sup> David J. Scheffer, *Beyond Occupation Law*, 97 AJIL 842, 845, 849 (2003). His excellent discussion of the relation between transformative and conservationist objectives in Iraq is part of the continuation of *Agora: Future Implications of the Iraq Conflict*, 97 AJIL 803.

<sup>139</sup> Scheffer, *supra* note 138, at 859.

<sup>140</sup> Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT’L L. 195, 296 (2005).

months leading up to the war, that it could have given more extensive support for the reform effort in Iraq than it actually did is hardly imaginable; and the extent of that mandate, as indicated above, was impressive. In no previous case had the Council been so closely involved in setting the framework for an occupation at all—let alone by explicitly backing some of the occupant's transformative projects.

The actual conduct of the occupation was seriously flawed from the start.<sup>141</sup> It had begun badly in April with the conspicuous failure to carry out a basic duty of occupying forces: the prevention of looting. Since some fighting was still going on, prevention of looting may not have been the top priority of the coalition forces, but the episode was an early indication of a lack of preparedness. It demonstrated that, whereas it had proved possible to do “invasion-lite” in Iraq, “occupation-lite” was not an option. Troops were needed on the ground for public order and guard duties, and they were not available. Astonishingly, even nuclear facilities were left unprotected.<sup>142</sup>

Subsequently, cases involving a pattern of maltreatment of prisoners in coalition hands came to light—a problem that led to numerous reports and several trials. In addition, the understandable U.S. emphasis on force protection inevitably brought about the occasional taking of lives of Iraqi citizens if there was even a possibility that they, or their locations, posed a threat to the occupation forces. As a result of these factors, what was intended as a liberation looked very different to many Iraqis.

In the occupation of Iraq, the inevitable legal interplay between the contending imperatives of conservation and reform played out mainly in favor of drastic change. Some change was necessary and effective, such as the introduction of a new currency. However, some policies of the CPA caused considerable controversy. Three much-criticized CPA orders illustrate the point. All could be seen as in tension with the conservationist assumptions of the law of the Hague Regulations and the Fourth Geneva Convention. They also raised a question about the prudence of the ambitious transformative policy of the CPA, and in particular about the wisdom of a decision-making procedure that (paradoxically for a body supposedly imposing liberal values) allowed little room for serious internal discussion or consultation with allies.

The first such example is CPA Order No. 1, De-Ba'athification of Iraqi Society, which was issued on May 16, 2003. Implementing the announcement in the “Freedom Message” of April 16 that had “disestablished the Ba'ath Party of Iraq,” it went on to specify that four categories of senior party members were banned from future employment in the public sector.<sup>143</sup> This major decision was not the product of consultations, and took no account of the more subtle approach to Ba'ath Party members that had been taken in the years since 1991 in the Kurdish-run areas of northern Iraq.

The second such example is CPA Order No. 2, Dissolution of Entities, issued on May 23, 2003. Reconfirming the “Freedom Message” of April 16, it announced the abolition, as of April 16, of the Ministry of Defense; the Ministry of Information; the Ministry of State for Military Affairs; the Iraqi Intelligence Service; the National Security Bureau; the Directorate of National Security; the Special Security Organization; Saddam Hussein's bodyguards; the

<sup>141</sup> For useful accounts of the Iraq events, drawing attention to the limitations of the plans and activities of ORHA and CPA, see especially ANTHONY H. CORDESMAN, *THE IRAQ WAR: STRATEGY, TACTICS, AND MILITARY LESSONS* 493–516 (2003); MICHAEL GORDON & BERNARD TRAINOR, *COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ* 152–63 (2006); DAVID L. PHILLIPS, *LOSING IRAQ: INSIDE THE POST-WAR RECONSTRUCTION FIASCO* 121–68 (2005).

<sup>142</sup> Ian Traynor, *Nuclear Looting Alarms UN Watchdog*, *GUARDIAN*, May 14, 2003, at 16.

<sup>143</sup> CPA Order No. 1 (May 16, 2003), available at CPA Regulations & Orders, *supra* note 129.

army, air force, and navy; the Air Defense Force; and twelve other regular military, paramilitary, and other organizations.<sup>144</sup> Administrator Bremer has sought to justify the abolition of the army on the grounds that many units had disbanded in the wake of the invasion anyway, and to have recalled them would have been to end up with a largely Sunni force.<sup>145</sup> Yet this was a drastic step, leaving a vast cadre of unemployed and embittered military personnel.

The third such example is CPA Order No. 39, Foreign Investment, issued on September 19, 2003, with (in theory) immediate effect. The order allowed foreign investors to own Iraqi companies fully without being required to reinvest profits into the country, a privilege that had previously been restricted by the Iraqi Constitution to citizens of Arab countries.<sup>146</sup> In the following months, this measure did not have the intended effect of opening Iraq up to foreign investment, mainly because the insurgency, which the order can have done nothing to check, made outsiders cautious. The order's sweeping terms raised concerns—within the CPA, and inside and outside Iraq—that the transformation being imposed was more extensive than the law permitted and the situation warranted. This dramatic act of economic transformation, unlike the political changes, lacked a convincing mandate either in human rights law or in Security Council resolutions.

Within three months of the end of major combat operations, announced by President Bush on the USS *Abraham Lincoln* on May 1, 2003, a major insurgency developed. Some evidence suggests that the insurgency was preplanned by the Iraqi authorities, well before the U.S.-led invasion of March 2003—as Bremer has asserted.<sup>147</sup> The presence of a foreign military force in a region with long memories of colonialism, war, and foreign occupation was always likely to cause tension. The emergence of resistance illustrates a potential hazard, and vulnerability, of transformative occupations. Any attempt at a major restructuring of society was likely to provoke opposition, especially when a large segment of that society—in this case the Sunni Muslim population—saw reforms as threatening a long-established pattern of political and economic dominance. The speedy dismissal of huge numbers of officials and the wholesale disbanding of the Iraqi army added to the risks. The insurgency was mainly centered in three of Iraq's eighteen provinces but had effects throughout the country. Using tactics that were a nightmare inversion of the notions of combat enshrined in the laws of war, the insurgency made the achievement of transformation very much more difficult. By attacking a wide range of outsiders—soldiers, UN officials, International Committee of the Red Cross personnel, civilians, and aid workers—the insurgents discouraged the outside world from sending troops or other personnel to Iraq. The UN special representative for Iraq, Sergio Vieira de Mello, was assassinated in an attack in Baghdad on August 19, 2003, which destroyed much of the UN headquarters there.<sup>148</sup> This was a clear sign that the insurgents were aiming at vulnerable targets, and sought to stop international assistance for the transformation project. By using suicide bombers who were indistinguishable in appearance from civilians, the insurgents increased the

<sup>144</sup> CPA Order No. 2 (May 23, 2003), *available at id.*

<sup>145</sup> BREMER, *supra* note 125, at 54–59.

<sup>146</sup> CPA Order No. 39 (Sept. 19, 2003), *available at* CPA Regulations & Orders, *supra* note 129.

<sup>147</sup> BREMER, *supra* note 125, at 126–27.

<sup>148</sup> The attack on the UN headquarters in Baghdad occurred five days after the passage of Security Council Resolution 1500 of August 14, 2003, establishing the UN Assistance Mission for Iraq. (The vote was 14 in favor, with Syria abstaining.) After the bombing, UNAMI was unable to function as planned in Iraq. Security Council Resolution 1546 of June 8, 2004, *supra* note 75, para. 7, cautiously provided for the resumption of its activities “as circumstances permit.”

tension between coalition personnel and ordinary Iraqis, any of whom might pose a hidden threat.

The U.S. administration, with its self-generated illusions about liberation and transformation, had not anticipated such a sustained insurgency. President Bush, when asked in December 2005 whether he now acknowledged that the mission had not gone as originally planned, and in particular that the U.S. forces had not been welcomed as liberators, gave this characteristic reply, which merits inclusion in a lexicon of Bushisms: "I think we are welcomed, but it was not a peaceful welcome."<sup>149</sup> U.S. public support for the intervention in Iraq declined sharply between March 2003 and the summer of 2005 for two reasons: first, the change of objective from restraining Iraq's weapons capability to participation in an internal political struggle; and second, the high human cost and halting progress of the occupation.<sup>150</sup>

Considering the circumstances of insurgency, a remarkable degree of political transformation was achieved in Iraq. The movement toward Iraqi self-rule, though facing difficult problems and subject to constant criticism, was brisk. The Governing Council of Iraq, established under the wing of the CPA, held its first meeting on July 13, 2003. A notably high number of voters turned out in the elections for the Transitional National Assembly in January 2005, the referendum on the new Constitution in October 2005, and the elections for the National Assembly in December 2005. This participation was evidence that the transformative project, flawed as it may have been, struck a chord with Iraqis. Finally, on May 21, 2006, after many delays, the National Assembly approved a new national unity government. Meanwhile, the huge refugee flows out of Iraq (mainly to Syria and Jordan) confirmed the limits of what had been achieved.

The process by which the Iraqi occupation had formally ended on June 28, 2004, illustrates a problem of transformative occupations.<sup>151</sup> While all such occupations aim at establishing a political order based on the principle of self-government, determining at what point one can say that the transformation has been achieved, and the government of the occupied territory is in a position to exercise the powers of sovereignty, is genuinely difficult. This question is much easier to answer when a more conventional occupation ends in a more traditional way, either as a result of reconquest of the territory by its original ruler, or as part of the terms of a peace agreement. Where what is involved is a gradual transfer of powers to the indigenous authorities as their capacity to govern is built up, there is bound to be an arbitrary element in fixing on a single date as the symbolic ending of the occupation. Political controversy figured in this case as well, since critics viewed the formal ending as concealing continued U.S. dominance of a puppet government.

At the United Nations, the ending of the occupation, within a framework laid down by the U.S. government, was provided for in Security Council Resolution 1546 of June 8, 2004. It began by "[w]elcoming the beginning of a new phase in Iraq's transition to a democratically elected government, and *looking forward* to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of

<sup>149</sup> President George W. Bush, Interview with Brian Williams (NBC television news, Dec. 12, 2005), *available in* LEXIS, News Library, Transcripts File.

<sup>150</sup> This is the conclusion of the most thorough assessment of the subject, Richard C. Eichenberg, *Victory Has Many Friends: U.S. Public Opinion and the Use of Military Force, 1981–2005*, 30 INT'L SECURITY 140, 176 (2005).

<sup>151</sup> For a fuller exposition, completed at the time of the transfer of authority in June 2004, see Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L & COMP. L.Q. 27 (2005).

Iraq by 30 June 2004.”<sup>152</sup> The resolution reaffirmed “the right of the Iraqi people freely to determine their own political future and control their own natural resources.”<sup>153</sup> It laid down a detailed road map for Iraq’s future political development, including the holding, before January 31, 2005, at the latest, of democratic elections to the Transitional National Assembly. (These were in fact held on January 30, 2005.) The resolution welcomed the fact that Iraqi security forces were “responsible to appropriate Iraqi ministers,” and that there was to be a “full partnership between Iraqi security forces and the multinational force.”<sup>154</sup> It contained extensive provisions on the roles of the multinational force and the Iraqi government, both of which were envisaged as taking a wide range of security measures. It referred three times to the promotion of human rights in Iraq as a key goal.

The new situation after June 28, 2004, was not just an occupation by another name. There were real differences, including the fact that the Interim Government had an explicitly recognized right to demand the withdrawal of the U.S.-led forces in Iraq. As the Security Council put it in the same resolution: “the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, . . . and [the Council] *declares* that it will terminate this mandate earlier if requested by the Government of Iraq.”<sup>155</sup>

Yet the prospect that there would be continuing significant similarities with an occupation found reflection in certain provisions of the resolution about the application of international rules. A preambular clause inserted fairly late in the long negotiations over the text recognized the continued application of international humanitarian law: “*Noting* the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations.”<sup>156</sup> The inclusion of this clause can be interpreted as one way of conceding that, even if the occupation was theoretically over, the likelihood remained that uses of force, perhaps even exercises of administrative authority, that closely resembled a situation of occupation would occur. This scenario, of course, has been played out repeatedly in the two years since the occupation notionally ended. Indeed, many continued to use the term “occupation” with respect to Iraq and will no doubt do so as long as coalition forces are present and exercise significant influence in the management of the country.

In addition, the first operative paragraph of Resolution 1546 confirmed the incomplete nature of the transfer of sovereignty for which the resolution provided. It stated that the Security Council

<sup>152</sup> SC Res. 1546, *supra* note 75, pmbl. This resolution, which passed unanimously, was a substantially revised version of earlier drafts; the first had been presented at the United Nations on May 24, 2004. See also the detailed listing of the broad range of tasks of the multinational force (including even internment), and the assurance about the continued fulfillment of obligations under the law of armed conflict, contained in the letter of June 5, 2004, from the U.S. secretary of state to the president of the Security Council, annexed to the resolution.

<sup>153</sup> *Id.*, pmbl.

<sup>154</sup> *Id.*, para. 11.

<sup>155</sup> *Id.*, paras. 9, 12. See also the text of letters (both dated June 5, 2004) from the prime minister of the Interim Government of Iraq and the U.S. secretary of state to the president of the Security Council, annexed to the resolution.

<sup>156</sup> *Id.*, pmbl. There had been no equivalent clause in the draft of Resolution 1546 presented at the United Nations by the United States and the United Kingdom on May 24, 2004. The revised draft presented on June 1 had included the clause in a shorter version than the final one. Only the final text, which was first circulated on June 7, contained the phrase “including obligations under international humanitarian law.”

*Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below.<sup>157</sup>

This important limitation on “taking any actions affecting Iraq's destiny beyond the limited interim period” reportedly resulted from pressure by various Iraqi groups fearful that the position of Kurds, Shiites, or others might be undermined irrevocably by actions taken by the “sovereign” Interim Government. This constraint placed the Interim Government, paradoxically, in a position analogous to that of an occupying power. The CPA interpreted the provision as limiting the Interim Government's power to conclude treaties. The constraint bears obvious similarities to the obligations on occupying powers to refrain from making fundamental changes in the legal system of the occupied territory, and to behave generally in a trustee-like manner. The fact that the term “caretaker government” was often used with reference to the Interim Government confirmed this interpretation. Thus, ironically, a transformative occupation challenging the very foundations of the law of the Hague Regulations and the Fourth Geneva Convention had the effect of leading to a reassertion of the conservative principles that underlie occupation law—even at the moment when the occupation was deemed to be at an end.

#### IV. CONCLUSION: THE RELEVANCE OF THE LAWS OF WAR AND HUMAN RIGHTS

The idea of achieving the transformation of a society through a military intervention is far from new. It was a key element in much European colonialism and in France's wars after the Revolution of 1789. The United States, with its long-held vision of itself as reformer of a corrupt international system, has been particularly attracted by the idea, but has devoted surprisingly little attention either to the checkered history of transformative interventions or to the prescriptive question of how they should be conducted.<sup>158</sup>

The need for foreign military presences with transformative political purposes is not going to disappear. The U.S. government belatedly recognized this circumstance (and implicitly recognized that mistakes had been made in Iraq) in 2004–2005, when it established the Office of the Coordinator for Reconstruction and Stabilization. Based in the State Department, the office was charged with leading U.S. government civilian capacity “to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife, so they can reach a sustainable path toward peace, democracy and a market economy.”<sup>159</sup> Similarly, in December 2005, the United Nations established a Peacebuilding Commission, an advisory body to assist in postconflict peacebuilding and recovery.<sup>160</sup>

Transformative military presences may be attempted by states, coalitions, and international bodies, including the United Nations. While the management of such projects largely consists in the prudent and informed conduct of policy, the laws of war and human rights continue to

<sup>157</sup> *Id.*, para. 1.

<sup>158</sup> One post-2003 U.S. attempt to look at the matter, which it does from a policy rather than a legal perspective, is David M. Edelstein, *Occupational Hazards: Why Military Occupations Succeed or Fail*, 29 INT'L SECURITY 49 (2004).

<sup>159</sup> U.S. Dep't of State, Office of the Coordinator for Reconstruction and Stabilization (established by presidential directive Dec. 7, 2005), at <<http://www.state.gov/s/crs/>>.

<sup>160</sup> The establishment of the Peacebuilding Commission was recommended in the September 2005 World Summit Outcome document, *supra* note 94, paras. 97–105, and implemented on December 20, 2005, in concurrent Resolutions 60/180 of the General Assembly, and 1645 and 1646 of the Security Council.

regulate the conduct of those engaged in them. In the light of the experiences of transformative military presences, the following conclusions can be offered about the law relating to these enterprises.

### Jus Post Bellum

Underlying all consideration of transformative occupation is the fact that it is not a temporary wartime occupation, liable to be ended by the fortunes of war or a peace agreement. Rather, it typically arises *after* a war—whether civil or international—and/or after a foreign military intervention; and it is likely to end in a different way, as stable government emerges in the territory itself. In such circumstances, the *jus in bello* is unlikely to be a perfect fit. It might even be tempting to invoke an emerging or future *jus post bellum* as a better basis for handling these situations.

The idea of military intervention with a transformative purpose stands in tension with the existing system of international law as it applies to states. Under the *jus ad bellum*, a transformative goal is not a valid basis for resorting to force. As for the *jus in bello*, at least some aspects of the laws of war as they address occupations conflict with the transformative intentions of outside powers. Sobering evidence of this conflict is that two of the most successful transformative occupations of the twentieth century—those of Germany and Japan from 1945 onward—were explicitly conducted outside the framework of the law of the Hague Regulations, with their assumption that the occupant has a largely conservationist role.

#### *“Occupation” Not a Completely Distinct Category*

In the post–Cold War international system, democratic transformation has been a declared goal of many foreign military and administrative presences of theoretically distinct types. These include some (such as those in Kosovo and East Timor in 1999) that have not been considered to be occupations—partly, it appears, because there was a degree of consent from the state concerned and/or from the population of the area where the troops and administrations were deployed; and perhaps also because the administrations were UN-led rather than U.S.-led. While the foreign military presence in Iraq from May 2003 onward resembled some of these other cases in its powers and declared purposes, it was explicitly viewed as an occupation for the good reason that it plainly lacked the consent of the government of the state concerned. Yet even after the resumption of Iraqi sovereignty on June 28, 2004, the situation continued to exhibit certain features comparable to those of an occupation. In general, the similarity of different situations—some viewed as occupations, some not—raises a question about the extent to which military occupation is a distinct category, and points to the conclusion that the law governing occupations may have some application to certain situations not specifically called occupations. In addition, human rights law can apply to occupations, as well as to a range of comparable situations.

These conclusions suggest that in all military interventions, however labeled, a case can be made for developing a common legal approach involving a proper balance between the laws of war and human rights law. Steven Ratner has argued that the case for achieving such a balance is particularly strong in transformative occupations.<sup>161</sup>

<sup>161</sup> Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J. INT'L L. 695 (2005).



*Human Rights Law*

Human rights norms are increasingly recognized as applicable in military occupations, and also in situations that resemble military occupations in various ways yet are distinct from the classic case of occupation. Their application, by no means free of difficulty, offers some important opportunities—especially where the inhabitants find themselves within the power of the outside forces. These opportunities include (1) individuals can press cases in certain regional courts (specifically, the European Court of Human Rights and the Inter-American Court of Human Rights) in ways that the laws of war do not offer; and (2) occupying powers can justify certain transformative policies on the basis that these are the best way to meet certain goals and principles enshrined in international human rights law, including the right of self-determination.

*Illusions of Welcome as Liberators*

Two propositions have contributed to the view that the laws of war are of limited relevance to transformative occupations. The first is that “liberation” and “occupation” are in some way opposites—when, in reality, liberators, to be effective, may need to observe rules of restraint that apply to occupying forces. The second is that a transformative project imposed by outsiders is likely to be, and to remain, universally welcomed by the inhabitants—when, in reality, trouble is likely to result when the outsiders are of a different religion and culture, and are intervening in a society that is already deeply fractured and is in a part of the world with extended experience of foreign domination and occupation. An appreciation of the limits of these propositions points to the continued relevance of the laws of war.

*Compatibility Between Existing Law and Transformative Purposes*

The seriousness and extent of any fault line between the conservationist thrust of the law and the transformative nature of some occupations should not be exaggerated. The requirement in the Hague Regulations that the occupant respect the laws in force in the territory “unless absolutely prevented” does not create a straitjacket. It was modified slightly in 1949—though much less than the United States had naively sought. Under the Hague rule, thus modified, certain occupants—and not only those with a generally transformative purpose—have been able to give cogent reasons why they were indeed “absolutely prevented” from maintaining each and every part of the existing legal system. For example, in the Israeli-occupied territories some significant changes were made to laws, including by abolishing the death penalty.

In addition, experience suggests that even overtly transformative occupants would be wise to recognize the strength and continuing validity of the law on occupations in general, and the conservationist principle in particular. Numerous errors in the occupation of Iraq arose from the failure to recognize that the laws of war can play a valuable role in focusing attention on certain perennial problems of armed conflicts and occupations—such as looting and the management of economic life—and do so in a sensible and constructive way. Ironically, Security Council Resolution 1546 of June 8, 2004, required the United States to accept a conservationist role for the new sovereign Interim Government of Iraq, which was obliged to refrain “from taking any actions affecting Iraq’s destiny.”<sup>162</sup>

<sup>162</sup> SC Res. 1546, *supra* note 75, para. 1.

Where, after an occupation has commenced, clashes take place between the conservationist principle and a perceived need for transformation, the occupant could seek specific authorization from international bodies. The UN Security Council has played such a role in Iraq, and has supported transformative projects in certain postconflict situations that, in some respects at least, are analogous to occupations. On occasion, the Security Council may be unable to reach agreement, in which case the question of whether other global or regional bodies can serve as a substitute will remain a matter of contention.

### *Distinguishing Between Transformative Projects*

Just because the occupant has a transformative purpose does not mean that it is sensible to transform numerous aspects of a society at the same time. The Iraqi case counsels caution about proposals for sudden and large-scale transformations. It suggests that on a wide range of matters, including the economic structuring of society, fundamental decisions should be made by the sovereign institutions of a state after a system of representative government has been put in place, and cannot be imposed in a hurry by diktat from outside. An occupant, even one with transformative aims, needs to give priority to getting the basic infrastructure of society to work. On such matters, the demands of the conservative element in the laws of war, and of their humanitarian provisions, may coincide with the dictates of prudence.

Of all the elements of a transformative project, the ones likely to have the strongest appeal include the introduction of an honest electoral system as part of a multiparty democracy. To be sure, in Iraq the introduction of democracy necessarily involved contentious constitutional change on such fundamental matters as whether the structure of the state was to be federal in character, and if so on what model; and the imposition of such change may have contributed to the strength of the insurgency. The circumstances in which such change is impossible from outside are rare. Yet there is a serious case for such an approach—reflecting as it does the sense that democracy and self-determination, for all the difficulties of defining and applying them, constitute not only an important part of the human rights package, but also an acceptable means of hastening the end of an occupation. To the extent that a new and effective government emerges through such a process, an occupation may fade away progressively, rather than disappear suddenly at a set date.

The fact that democratic transformation has strong appeal does not mean that it is a panacea, or that occupants have a general entitlement to facilitate it. If an occupant invades part of a country to “liberate,” say, an ethnic group inhabiting that area, the fact that the inhabitants are offered a democratic path will not assuage states’ skepticism about such projects; nor will it dispel suspicions that power-political as well as idealistic motives may have informed the action. In other cases, there may be fears that the sudden imposition of democracy will result in chaos, civil war, or dictatorship.

A further hazard of any general advocacy of transformative occupation is that democracy is far from being the only transformative project on offer in the international marketplace of ideas. In the post–Cold War era, the predominant transformative projects have been based on liberal and democratic ideas, but other possible candidates exist.

### *Two Possible Legal Approaches to Transformation*

Many developments in practice, and in decisions of international bodies, suggest that custom with respect to the law on occupations has undergone significant evolution. However, this

evolution does not amount to a general recognition of the validity of transformative policies imposed by occupants. A more modest conclusion follows—that any expansion of the purposes of occupations beyond the narrow confines of existing occupation law could in principle be addressed by either of two legal approaches.

The first approach is essentially *ad hoc*, and follows some (but by no means all) aspects of the practice regarding Iraq. It seeks to secure a variation in the application of the law by obtaining a resolution from the UN Security Council (or other major international body) setting out the goals of the occupation. Such authorization can perform an important function. By imparting at least some measure of legitimacy to certain actions and goals, and by stressing the application of human rights law as well as humanitarian law, it can give 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. This approach raises the question of the extent to which the Security Council has a free hand to vary the application of even quite fundamental rules of international law—including, in this case, both the *jus ad bellum* and the *jus in bello*. In light of the powers vested in the Council, its capacity to act in such a way is hard to deny—especially in a case where what is at issue is reconciling divergent principles of international law on a specific and limited matter relating to the maintenance of peace and security. This course of action is very different from waiving the rules in some more general way.

The second approach would be to attempt to secure a formal modification of the Hague Regulations and the Fourth Geneva Convention to make allowance for transformative occupations, especially in the light of human rights law. The case for attempting to devise new law in this way is weak. The heart of occupation law remains a sensible and essentially conservationist set of rules to cover a type of emergency situation that frequently arises in war. Where the intent is transformative, there should be time to seek authorization from international bodies. A further reason for caution about making allowance in general terms for transformative occupation is that there are historically well-founded doubts about the extent to which foreign armed forces, arriving suddenly in a society with deep-seated problems, are really capable of bringing about fundamental change in that society. This situation has to be the exception rather than the norm. Military occupation remains a contentious issue on which differences of perspective and opinion, including on the extent to which transformative goals are legitimate, will inevitably emerge. The status of any given occupation *vis-à-vis* the principle of nonuse of force, and the right of self-determination, is necessarily problematical. An attempt to revise the laws of war provisions on occupations to accommodate the special and important case of transformative occupations would be open to criticism and likely to fail. It is simply not worth going down that road when other remedies for any claimed defects of the law on occupations are at hand in the form of human rights law, UN Security Council authorizations, and evolving custom about how the international community can properly assist in the transformation of damaged societies.