

# CPA DICTATES ON IRAQ: NOT AN UPDATE TO THE CUSTOMARY INTERNATIONAL LAW OF OCCUPATION BUT THE NUCLEUS OF BLOWBACK WITH THE EMERGENCE OF ISIS

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## INTRODUCTION

The lack of legitimate populace-government relations in a state has become an imperative concern and a circumstance that can make the reasons for a war or intervention more compelling under international law and politics.<sup>1</sup> Foreign military support was provided to insurgents

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1. Jeff McMahan, *The Morality of Military Occupation*, 31 LOY. L.A. INT'L & COMP. L. REV. 7, 7 (2009) (noting that while there are a bountiful number of books written on just war, there are fewer works written on occupation even though the latter is a critical and related topic).

to foster violent uprisings in Libya and the U.S. military executed bombing operations that facilitated the overthrow of the 42-year dictator Muammar al-Gaddafi in 2011.<sup>2</sup> The uprising in Syria against President Bashar al-Assad, whose family has controlled the country since 1970,<sup>3</sup> continued for over two years and killed 160,000 through May 2014,<sup>4</sup> but there was no overt foreign intervention. Populist division remains in Ukraine among those who prefer closer relations with Western Europe and those who desire tighter relations with Russia, with foreign powers selecting sides to support their respective political alliance but without external powers officially announcing an intention to militarily intervene.<sup>5</sup> Overt occupation is found in the case of Israel occupying Palestinian territories, with relations periodically erupting into armed conflict.<sup>6</sup> U.S. troops exited Iraq in December 2011 after an eight-year occupation and after the Bush White House's Coalition Provisional Authority ("CPA") dictated legal reforms and new institutions of government,<sup>7</sup> ostensibly postulating that the institutions would furnish the infrastructure for peaceful relations, but instead Iraq is in danger of splintering.

These cases illustrate that the international community can be divided with varying levels of support for intervention on behalf of either a regime or opposing non-government actors. The depth of

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2. Joshua Norman, *The World's Enduring Dictators: Muammar Qaddafi, Libya*, CBS NEWS (Aug. 21, 2011, 7:49 PM), available at <http://www.cbsnews.com/news/the-worlds-enduring-dictators-muammar-qaddafi-libya/> (last visited Apr. 1, 2015).

3. *Profile: Syria's Ruling Baath Party*, BBC (July 9, 2012, 10:30 AM), available at <http://www.bbc.com/news/world-middle-east-18582755> (last visited Apr. 1, 2015).

4. Faith Karimi & Salma Abdelaziz, *Syria Civil War Death Top 160,000, Opposition Group Says*, CNN (May 20, 2014, 6:19 AM), available at <http://www.cnn.com/2014/05/19/world/meast/syria-civil-war/> (last visited Apr. 1, 2015).

5. *Landslide Crimea Vote To Split From Ukraine*, SKY NEWS (Mar. 17, 2014, 9:11 AM), available at <http://news.sky.com/story/1226921/landslide-crimea-vote-to-split-from-ukraine> (last visited Apr. 1, 2015) (noting that Crimean people, who are 58% ethnic Russian, voted 97% in favor of becoming part of Russia in a referendum vote because of their displeasure with the government in Kiev). When Russia began to increase involvement in other parts of eastern Ukraine and supported Ukrainian rebels, the US voiced more objections and placed a series of sanctions on Russia.

6. Ashley Fantz, *Why are so Many Civilians Dying in Hamas-Israel War?*, CNN (Aug. 4, 2014, 9:16 AM), available at <http://www.cnn.com/2014/08/04/world/meast/gaza-israel-why-civilian-deaths/> (last visited Apr. 1, 2015) (reporting that the most recent fighting began in July 2014 with the Israeli Defense force invading Gaza and that during the first month of fighting, 1,800 Palestinian were killed (including 300 children) and 10,000 wounded and 64 Israeli soldiers and three Israeli civilians were killed).

7. Mark Landler, *U.S. Troops to Leave Iraq by Year's End, Obama Says*, N.Y. TIMES (Oct. 21, 2011), available at <http://www.nytimes.com/2011/10/22/world/middleeast/president-obama-announces-end-of-war-in-iraq.html?pagewanted=all> (last visited Apr. 1, 2015).

international support may be amalgamated by factors such as the extent that curbing human rights violations is needed, whether the interest in humanitarian intervention sufficiently outweighs the cost of incursion on sovereignty, whether foreign intervention can actually effectively relieve the adverse conditions, and the stake in diplomatic relations with the regime in question. The outcome of the case of Iraq, due to the recent insurgency, updates the lessons for the manner in which an occupier should be permitted to impose institutional and legal reforms that endeavor to modify government-societal relations. The Bush White House's CPA unilaterally imposed dictates that were heavily criticized by Iraqis and the international community,<sup>8</sup> but fundamental to the lack of long-term success is an imperative distinction between reforms that were permissible and essential under occupation law and those modifications that may have set a foundation for blowback and abetted the recent crisis.

Iraqi Prime Minister Nouri al-Maliki was an Iraqi defector-exile for 23 years prior to the 2003 invasion<sup>9</sup> and has been prime minister for eight years which means that not long after he reentered Iraq, Maliki became prime minister and has held that position ever since. Maliki alienated Kurds and Sunnis,<sup>10</sup> was corrupt, deemed himself the "preeminent military leader," suppressed peaceful protests with his security services, called protesters terrorists, hired thugs to beat and kill dissenters, and arrested and tortured thousands of objectors until protests ended.<sup>11</sup> Remarking about Maliki's special forces, Zaid Al Ali

8. See Robert Bejesky, *The Enigmatic Origin of the CPA: An Attribute of the Unitary Executive*, 51 WILLAMETTE L. REV. (forthcoming Oct. 2015) (manuscript at 279-98) [hereinafter Bejesky, *The Enigmatic Origin*]; see also *infra* Part II (C)(i).

9. Jason Burke, *Iraq: How Much is the Divisive Approach of Maliki Responsible for the Turmoil?*, GUARDIAN (June 14, 2014, 1:30 AM), available at <http://www.theguardian.com/commentisfree/2014/jun/15/nouri-al-maliki-is-he-the-man-to-blame-in-iraq> (last visited Apr. 1, 2015).

10. See Jay Solomon & Matt Bradley, *Iraqi Parties Pressure Prime Minister Nouri al-Maliki to Step Down*, WALL ST. J. (June 23, 2014), available at <http://online.wsj.com/articles/u-s-s-kerry-arrives-in-baghdad-for-meeting-with-prime-minister-maliki-1403508006> (last visited Apr. 1, 2015).

11. Zaid Al-Ali, *How Maliki Ruined Iraq*, FOREIGN POL'Y (June 19, 2014), available at [http://www.foreignpolicy.com/articles/2014/06/19/how\\_maliki\\_ruined\\_iraq\\_armed\\_forces\\_isis](http://www.foreignpolicy.com/articles/2014/06/19/how_maliki_ruined_iraq_armed_forces_isis) (last visited Apr. 1, 2015); Sandy Berger, *U.S. Must Forge New Ties with Iraq to Tackle ISIS Threat*, TIME (Aug. 17, 2014), available at <http://time.com/3130983/sandy-berger-iraq-isis-maliki/> (last visited Apr. 1, 2015) (national security advisor during the Clinton administration stating that "Maliki had governed in such an overtly anti-Sunni fashion that the Sunni tribes in the north had come to hate him more than they feared ISIS."); Lord Maginnis, *A Fictitious ISIL to Scare Us Away From the Truth in Iraq*, HUFFINGTON POST (Aug. 15, 2014), available at [http://www.huffingtonpost.co.uk/lord-maginnis/iraq-isis\\_b\\_5494529.html](http://www.huffingtonpost.co.uk/lord-maginnis/iraq-isis_b_5494529.html) (last visited Apr. 1, 2015) (U.K. House of Lords member stating that

writes: "Groups of young men were arrested in waves, often in the middle of the night, and would be whisked to secret jails, often never to be seen again."<sup>12</sup> A member of the U.K. House of Lords recently wrote that "Maliki has created a Mafia-like network of criminals and assassins to eliminate the voice of opposition at every level" and estimated that an average of a thousand Iraqis have been killed every month over the past decade by these assassins.<sup>13</sup> Political leaders called for the formation of a new and inclusive Iraqi government.<sup>14</sup>

Maliki reluctantly resigned after two months of urging,<sup>15</sup> but several days later was appointed to the position of vice president.<sup>16</sup> Meanwhile, the group that led the insurgency to end Maliki's rule has been labeled brutal zealots,<sup>17</sup> leaders of a larger movement of Sunni "revolutionaries,"<sup>18</sup> and a group that is seeking to regain oil production facilities, many of which are now operated by foreign multinationals.<sup>19</sup>

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"Corruption in the [Iraqi] government and those affiliated to the government is almost unimaginable with billions of dollar embezzled and laundered, thus crippling the country's economy.").

12. Al-Ali, *supra* note 11.

13. Maginnis, *supra* note 11.

14. Jay Solomon & Carol E. Lee, *U.S. Signals Iraq's Maliki Should Go*, WALL ST. J. (June 19, 2014), available at <http://online.wsj.com/articles/u-s-signals-1403137521> (last visited Apr. 1, 2015) ("The Obama administration is signaling that it wants a new government in Iraq without Prime Minister Nouri al-Maliki"); Mark Tran, *Iraqi Prime Minister Rejects Pleas for Government of 'National Salvation'*, GUARDIAN (June 25, 2014), available at <http://www.theguardian.com/world/2014/jun/25/iraqi-prime-minister-rejects-calls-salvation-government> (last visited Apr. 1, 2015) (German Chancellor Angela Merkel stating "We need a government in Iraq that embraces all parts of the population. For years this has not happened and because of this the pressure needs to be raised.").

15. *Iraq Crisis: Maliki Quits as PM to End Deadlock*, BBC (Aug. 15, 2014), available at <http://www.bbc.com/news/world-middle-east-28798033> (last visited Apr. 1, 2015).

16. *See What Do Iraqi Leaders Hope to Hear From Obama's Strategy?*, PBS NEWSHOUR (Sept. 10, 2014), available at <http://www.pbs.org/newshour/bb/iraqi-leaders-hope-hear-obamas-strategy/> (last visited Apr. 1, 2015).

17. Leon Watson, *Jihadi Terror Group PLC: ISIS Zealots Log Assassination, Suicide Missions and Bombings in Annual Report for Financial Backers*, DAILY MAIL (June 17, 2014), available at <http://www.dailymail.co.uk/news/article-2661007/15-000-fighters-1-000-assassinations-4-000-IEDs-How-Isis-publishes-annual-report-detailing-reign-terror-Middle-East.html> (last visited Apr. 1, 2015).

18. Scott Peterson, *Maliki or Isis? Neither Looks Good to Sunni Awakening Veterans*, CHRISTIAN SCI. MONITOR (June 18, 2014), available at <http://www.csmonitor.com/World/Middle-East/2014/0618/Maliki-or-ISIS-Neither-looks-good-to-Sunni-Awakening-veterans> (last visited Apr. 1, 2015) (reporting that "the stunning ISIS advance is riding what some top Sunni politicians—echoed by local players like Abu Omar—say is a much wider "revolution" against the unabashedly Shiite-first policies of Prime Minister Nouri al-Maliki.").

19. *Iraq Crisis: Baghdad Requests US Air Strikes Against Sunni Militants—Live*, GUARDIAN (June 18, 2014), available at <http://www.theguardian.com/world/middle-east-live/2014/jun/18/iraq-crisis-maliki-sacks-officers-and-calls-for-national-unity-live-updates>

Consequently, the eruption of violence in Iraq, just two years after the U.S. military departed, could also be perceived as an insurgency ignited by the existence of institutions that the Bush administration imposed and a continuation of rule under those institutions by an Iraqi exile who has evoked vehement opposition and has confronted insurmountable tribulation over his obligation to respect the human rights of citizens.

To assess the broad question of the balance between foreign powers respecting sovereignty and choosing to pressure or direct reforms on an occupied population, this article assesses how the Bush White House's CPA ordered many legitimate reforms but so expansively discerned its own authority that the recent backlash of violence jeopardized the efficacy of the permissible reforms. Hence, this recent precedent is evidence that an occupier should ensure that anything other than sanctioned reforms should be a byproduct of the sovereign choice of citizens in an occupied territory. Part II discusses competing principles of occupation law along an historical spectrum and rectifies how some departure in the strictness of occupation law is justified by new international law principles. Part III addresses how the Bush Administration's CPA presumed that dictated reforms were a product of Iraqi democratic control, which is inaccurate and inconsistent with the language of Security Council mandates. Part IV considers the opposing interpretations of the current state of occupation law and maintains that the precedent of Iraq affirms that the customary law of occupation should reside precisely where the Hague and Geneva Conventions placed it, except with the accommodation for institutionalizing human rights norms and principles of representative government. Part V concludes by emphasizing that excessive transgressions by a foreign power that deeply and callously transplant foreign institutions during an occupation can violate rules of occupation law, undermine the universal humanitarian interest at stake with a foreign intervention, and beget a backlash that nullifies the entire reason for the intervention.

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(last visited Apr. 1, 2015); Nafeez Ahmed, *Iraq Blowback: Isis Rise Manufactured by Insatiable Oil Addiction*, GUARDIAN (June 16, 2014), available at <http://www.theguardian.com/environment/earth-insight/2014/jun/16/blowback-isis-iraq-manufactured-oil-addiction> (last visited Apr. 1, 2015) ("The meteoric rise of Isis is a predictable consequence of a longstanding US-led geostrategy in the Middle East that has seen tyrants and terrorists as tools to expedite access to regional oil and gas resources").

## I. COMPETING PRINCIPLES OF OCCUPATION

There are two polar conceptions of a belligerent military occupation authority—one that is archaic and another that is contemporary treaty law—and an apparent gray area that many commentators have contended exists following the occupation of Iraq.<sup>20</sup> This Part addresses distinctions between the extremes and punctuates that the obscure zone can be partially elucidated by recognizing the applicability of universal human rights standards and the preference for ensuring that there is a virtuous nexus between the governor and the governed.

The first conception is historical conquest, which presumed that military occupation imparted an authority to govern<sup>21</sup> and to impose rules on foreign lands, even if those institutions would be anathema to the local population.<sup>22</sup> Alexander the Great panegyricized the principle that conquerors dictated law on the defeated and assumed that subjugated people were mandated to obediently adhere to occupier imposed laws.<sup>23</sup> The British, French, Spanish, Portuguese, and other colonial powers, all imposed rules in foreign lands, including with the objective of retaining control over territorial possessions.<sup>24</sup> The international law norm that permitted the colonial power to subjugate and attain title to territory by conquest was the practice of rule by the mighty.<sup>25</sup>

The U.S. Supreme Court also generally followed this precedent in the case of the South's attempted succession during the Civil War, but the distinction was that a foreign sovereign was not imposing rule, but instead the national government was wielding sovereignty over a territory that was already locally prescribed. The Union's temporary subjugation sought to terminate rivalries and feuding with the mission

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20. See *infra* Part III.

21. *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878).

22. JANE STROMSETH, DAVID WIPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 195 (2006).

23. James Thuo Gathii, *Commerce, Conquest, and Wartime Confiscation*, 31 BROOK. J. INT'L L. 709, 730 (2006) (noting that the Roman Empire expanded pursuant to the principle that it was an "indubitable right of war, for the conqueror to impose whatever terms he pleased upon the conquered.").

24. See Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159, 1171-72 (2005) (stating that European powers "established nominally independent puppet-states" and used straight-forward colonial regimes in Africa, Asia, and South Asia).

25. Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT'L L. 91, 143-44 (2012).

of preserving unification of the United States.<sup>26</sup> The Supreme Court held that Americans on opposing sides temporarily became enemies to each other<sup>27</sup> until relations could be permanently changed by government reform.<sup>28</sup> While reforms were being imposed, the occupying military possessed immunity from local civil and criminal laws,<sup>29</sup> which is similar to the terms of some contemporary Status of Force Agreements that allow one state's military to operate within another sovereign territory. The Supreme Court followed the then-dominant precedent under international law, which was that the military occupier bore the right to govern the occupied territory, enact laws, and even ensure that the relationship between the occupied population and the unlawfully acting Confederate government would be severed.<sup>30</sup>

Over the past century, international law has cashiered the historical practice of consecrating rule by the mighty belligerent and has rebuked the right of an occupier to impose institutional reform on a subjugated population. The universally accepted right of self-determination under international law<sup>31</sup> is the guiding norm that foremost undergirds the law of occupation.<sup>32</sup> Detailed rules of occupation law are found in the Hague Convention of 1907, the Geneva Convention of 1949, and customary international law,<sup>33</sup> and the rules automatically apply as soon as territory is placed under the authority of an invading hostile

26. *Dow v. Johnson*, 100 U.S. 158, 165 (1879) (explaining that the immunity for the occupier is due to the need to uphold the "efficacy of the army as a hostile force").

27. *Id.* at 164 ("The people of the loyal States on the one hand, and the people of the Confederate States on the other, thus became enemies to each other . . .").

28. *Mrs. Alexander's Cotton*, 69 U.S. 404, 406 (1864) ("[A]ll the people of each State or district in insurrection against the United States, must be regarded as enemies, until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.").

29. *Coleman*, 97 U.S. at 517 (noting that the residents of the occupied territory were subject to local laws); *Dow*, 100 U.S. at 165-66, 170 (immunity applied to the laws of an officially occupied country as they would to civil laws of any other country).

30. *Coleman*, 97 U.S. at 517-18; *Ford v. Surget*, 97 U.S. 594, 604-05 (1878) (noting that the Confederate government's actions were considered void and "simply the military representative of the insurrection against the authority of the United States").

31. Rep. of the Int'l L. Comm'n, 53rd Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10, at 207-08 (2001); G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 66 (1961); G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 121 (1970).

32. Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 17-18 (2006).

33. See Melissa Patterson, *Who's Got the Title? Or, The Remnants of Debellatio in Post-Invasion Iraq*, 47 HARV. INT'L L.J. 467, 469 (2006); David Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 843 (2003).

military.<sup>34</sup> Rules for belligerent occupation preclude an occupier from exercising sovereignty over the territory, adopting expansive legal change, abusing the population,<sup>35</sup> and contravening laws of occupation and inflicting damage on local inhabitants without providing recompense.<sup>36</sup>

Article 43 of the Hague Regulations imposes a trusteeship on the occupier<sup>37</sup> that requires “preserv[ing] the status quo” and forbids transforming the occupied territory,<sup>38</sup> but does permit the occupier to establish a “system of administration” to preserve the status quo<sup>39</sup> and to protect the local population.<sup>40</sup> Article 43 states that once the occupying

34. Convention Respecting the Law and Customs of War on Land, art. 42 para. 1, Oct. 18, 1907, 36 Stat. 2277, 3306, 205 Consol. T.S. 277, 295 (“territory is considered occupied when it is . . . placed under the authority of the hostile army.”); *MacLeod v. United States*, 229 U.S. 416, 425 (1913) (stating that a military occupation occurs when there is an “invasion plus possession of the enemy’s country for the purpose of holding it temporarily at least.”); U.S. DEP’T ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 355 (July 18, 1956), available at [http://www.loc.gov/frd/Military\\_Law/pdf/law\\_warfare-1956.pdf](http://www.loc.gov/frd/Military_Law/pdf/law_warfare-1956.pdf) (last visited Apr. 1, 2015) (defining an official occupation “as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority and . . . successfully substituted its own authority” over an area that it intends to hold).

35. Eric De Brabandere, *The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 VAND. J. TRANSNAT’L L. 119, 129-30 (2010).

36. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277, 187 Consol. T.S. 227 [hereinafter Hague Convention] (providing that an occupying power that violates the Hague Regulations shall “be responsible for all acts committed by persons forming part of its armed forces.”); see also Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 91, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I] (“A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”).

37. Ralph Wilde, *From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers*, 31 LOY. L.A. INT’L & COMP. L. REV. 85, 101-02 (2009) (expressing that the occupant administers a territory for the local people and in this status is a trustee).

38. See generally Scheffer, *supra* note 33, at 851; Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi “Freedom,”* 95 CALIF. L. REV. 2295, 2309-10 (2007); Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT’L L. & POL’Y 23, 27 (2004).

39. Breven C. Parsons, *Moving the Law of Occupation into the Twenty-First Century*, 57 NAVAL L. REV. 1, 9-10 (2009).

40. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT’L L. 1, 24 (2004) (stating that pursuant to the 1907 Hague Regulations, the military is required to change from destroying as combatants to preserving as the occupant). The Geneva Protocol I of 1977, which was ratified by over



military obtains control and power over the territory, the occupier, “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” existing at the time of the invasion.<sup>41</sup> The occupier’s duties to preserve existing institutions and protect the civilian population are instrumental to facilitating self-determination because these conditions permit local people to exercise free choice.<sup>42</sup>

Despite provisions of the 1907 Hague Regulations and subsequent international law conventions, there has been some discrepant precedent of occupiers imposing reform on an occupied population during this century.<sup>43</sup> The U.S. Supreme Court upheld the U.S. military authority to construct government institutions in Puerto Rico in 1909 after the former government was displaced<sup>44</sup> and in the Philippines in 1913.<sup>45</sup> Occupier dictates were typical under the World War I colonial-power

170 countries but not by the US or Iraq (until 2010), sought to add greater protections to civilians in occupied territories. See *International Humanitarian Law - Treaties & Documents*, INT’L COMM. RED CROSS, available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited Apr. 1, 2015) (highlighting a full list of signatories); Geneva Protocol I, *supra* note 36, art. 51 (“The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.”).

41. Hague Convention, *supra* note 36, art. 43 (emphasis added); Wolff Heintschel von Heinegg, *The Rule of Law in Conflict and Post-Conflict Situations: Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL’Y 843, 862 (2004) (“[An occupier] is not entitled to enact comprehensive changes to the political, legislative, administrative, and social structures in the occupied territory.”).

42. See generally EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 4-6 (2004) (noting that the Hague and Geneva Conventions restrict the occupying power and therein grants rights to the occupied population).

43. See Minxin Pei & Sara Kasper, *Lessons from the Past: The American Record on Nation Building*, CARNEGIE ENDOWMENT FOR INT’L PEACE POL’Y BRIEF 2 (2003), available at <http://carnegieendowment.org/files/Policybrief24.pdf> (last visited Apr. 1, 2015) (considering sixteen cases of US military “nation-building” over the past one hundred years and only two (Germany and Japan) were identified as clear successes); David Wippman, *Sharing Power in Iraq*, 39 NEW ENG. L. REV. 29, 30 (2004).

44. *Santiago v. Nogueras*, 214 U.S. 260, 265 (1909) (“By the ratifications of the treaty of peace [of 1898 with Spain], Porto Rico [sic] ceased to be subject to [that country] and became subject to the legislative power of Congress . . . . The authority to govern such ceded territory is found in the laws applicable to conquest and cession . . . . [U]nder the military control of the President as Commander in Chief.”).

45. *MacLeod v. United States*, 229 U.S. 416, 425 (1913) (“The local government [of a conquered country] being destroyed, the conqueror may set up its own authority, and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation.”).

controlled League of Nation mandates.<sup>46</sup> Likewise, following World War II and from 1943 to 1945, the Allied powers unilaterally established deep occupational control and introduced new government institutions on Germany<sup>47</sup> and engaged in fairly transformative occupations of Germany and Japan.<sup>48</sup>

The historical right to subjugate a population (due to the ability to subdue) following conquest is no longer valid and occupier dictates are not sanctioned, but exceptional and distant cases can be distinguished from institutional alterations implemented for the objective of actualizing standards encountered in human rights agreements.<sup>49</sup> Even if an occupier imposed reform in a contemporary occupation process that could be procedurally akin to the historical practice of unilateralism, the substantive result would presumably differ if the goal is to alter abusive institutions and legal structures and to preserve a civilized status quo. The target state is not entitled to retain oppressive institutions pursuant to universal human rights standards. However, in most cases, the substance of legal institutions may not be faulty, but instead structures are abusive on application for lack of government adherence or enforcement, which had been the case for eight years with

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46. Brian Deiwert, *A New Trusteeship for World Peace and Security: Can an Old League of Nations Idea Be Applied to a Twenty-First Century Iraq?*, 14 *IND. INT'L & COMP. L. REV.* 771, 777-79, 782-84 (2004).

47. *Dostal v. Haig*, 652 F.2d 173, 176 (D.C. Cir. 1981) (discussing that the U.S. military possessed "supreme authority," controlled "local government institutions and courts," and holding that "[t]he U.S. military, entering Berlin as conquerors, were immune from jurisdiction of the courts of the conquered country, or would have been if any such courts had remained"); *Madsen v. Kinsella*, 343 U.S. 341, 361-62 (1952) (noting that the US did apply certain aspects of the German Criminal Code to non-Germans in the occupied territory).

48. JAMES GALLEN, *Jus Post Bellum: An Interpretive Framework*, in *JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS* 58, 62 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014); see generally RAY A. MOORE & DONALD L. ROBINSON, *PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR* (2002); CHARLES HARRIS, *ALLIED MILITARY ADMINISTRATION OF ITALY, 1943-1945* (1957); WOLFGANG FRIEDMANN, *THE ALLIED GOVERNMENT OF GERMANY* (1947).

49. RICHARD N. HAASS, *INTERVENTION: THE USE OF AMERICAN MILITARY FORCE IN THE POST-COLD WAR WORLD* 13 (rev'd ed. 1999) ("when states violate minimum standards by committing, permitting, or threatening intolerable acts against their own people or other nations, then some of the privileges of sovereignty are forfeited."); Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 *LOY. L. REV.* 821, 829-31 (2012) (discussing that mandatory human rights standards are provided in a number of human rights agreements); Mark W. Janis, *Human Rights and Imposed Constitutions*, 37 *CONN. L. REV.* 955, 957 (2005) (stating that there was even a form of human rights transplant constitutionalism that was "prodded on" Eastern Europe after the demise of the Soviet Union).

Iraqi Prime Minister Maliki.<sup>50</sup>

In addition to ensuring that institutions meet global human rights standards so that self-determination can be soundly exercised by a free people,<sup>51</sup> self-determination can also be reasonably interpreted to require a political system that permits citizens to democratically choose their government<sup>52</sup> or at least to ensure that there is a widely-shared and legitimate connection between the populace and government.<sup>53</sup>

50. Michael M. Farhang, *Reconstructing Justice: The Coalition Provisional Authority Took Giant Steps to Guarantee Iraq a Functioning Criminal Justice System*, 27 L.A. LAW. 44, 46 (2004) (noting that previous Iraqi criminal law institutions had flaws that should be supplemented). For example, pre-invasion Iraqi law prohibited torture and coercive confessions, but the former regime often ignored provisions. Law on Criminal Proceedings with Amendments, No. 23 of 1971, Decree No. 230, at para. 27 (Iraq), available at [https://web.archive.org/web/20061208171014/http://www.law.case.edu/saddamtrial/documents/Iraqi\\_Criminal\\_Procedure\\_Code.pdf](https://web.archive.org/web/20061208171014/http://www.law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf) (last visited Apr. 1, 2015); see *supra* Introduction (noting Maliki's rule).

51. Failure to maintain human rights may undermine the states right to self-determination because of the adverse relation between the populace and government, while sustaining human rights can promote the theory of state sovereignty derived from a free people. See e.g. STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 4 (1999) (emphasizing that principles of sovereignty should not only include the traditional definition of Westphalian sovereignty with respect to foreign relations, but must also include "domestic sovereignty," which requires the government to also rule in the interests of the people); GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 58 (1993) ("In a world of dual and conflicting loyalties, the state's demand for exclusive loyalty is rapidly losing its grip."); Nehal Bhuta, *New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation*, 60 U. TORONTO L.J. 799, 807 (2010) (noting the theory of emphasizing the sovereignty in the people, which was inherent in the popular sovereign struggles between the Crown and Parliament in England during the seventeenth century and during the French Revolution of 1789).

52. Self-determination and sovereignty can be interpreted in different ways. Bhuta, *supra* note 51, at 810-11 (stating that the United Nations was formed not on representative governments within states, but on self-determination, rejection of foreign rule and domination, non-intervention, equality of states, and political legitimation). Self-determination permits a people with a common connection to a given territory to have the right to govern their own affairs, which was a critical principle during the era of decolonization. See G.A. Res. 2625 (XXV), *supra* note 31, para. 2. Self-determination could support a sub-national secession, based on popular will, if there is a licit justification. See *In re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 134 (Can.) (holding that there is a right to secede when the people are disrespected or deprived of rights of the larger state); Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 379 (2003); JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 134 (2d ed. 2006) (discussing Quebec's 49% vote to secede from Canada in 1995).

53. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 21 (1948) ("The will of the people shall be the basis of the authority of government."); see also International Covenant on Civil and Political Rights art. 25, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (stating that all citizens have the right to participate in public affairs, to be elected, to choose representatives, and to vote). Harvard Political Science Professor Arthur Isak Applbaum remarks of a generally agreed-upon definition of

Whether voting and democratic institutions are mandated to sanction the public choice accord between the government and populace have been controversial and may not be required by customary international law.<sup>54</sup> After all, the principle of sovereign rights grounds the U.N. system and affirms that “[e]ach state has the right to freely choose and develop its political, social, economic and cultural systems.”<sup>55</sup> On the other hand, since the end of the Cold War, there has been a progressing acceptance of the assumption that a democratic government is more palatable than an undemocratic government<sup>56</sup> and this preference is accordant with the theoretical view of international law that presumes sovereignty resides with the people and not the government.<sup>57</sup> Moreover, the International Covenant on Civil and Political Rights (“ICCPR”), which entered into

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political legitimacy: “[T]he test of legitimate government is two-pronged. There needs to be an adequate connection between the governors and the governed, and there needs to be adequate protection of at least basic human rights.” Arthur Isak Applbaum, *Forcing a People to be Free*, 35 PHIL. & PUB. AFF. 359, 288 (Fall 2007). Experts also maintain that legal institutions must be a representation of “widely shared societal commitment” and public will. See Daniel Bodansky, *Establishing the Rule of Law*, 33 GA. J. INT’L. & COMP. L. 119, 131 (2004); Kristen Boon, *Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers*, 50 MCGILL L.J. 285, 323 (2005).

54. See Niels Petersen, *The Principle of Democratic Teleology in International Law*, 34 BROOK. J. INT’L L. 33, 56-59, 81 (2008) (stating that it does not appear that there is a customary international law right to democratic governance); Joseph S. Nye, *Public Diplomacy and Soft Power*, 616 ANNALS 94, 98 (2008) (noting that fewer than half of the countries in the world are democracies).

55. GA Res. 2625 (XXV), *supra* note 31.

56. See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, para. 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) (“Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives”); U.N. Secretary-General, *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, para. 82, U.N. Doc. A/47/277 (June 17, 1992) (“Democracy at all levels is essential to attain peace for a new era of prosperity and justice.”); Harold Hongju Koh, *Preserving American Values: The Challenge at Home and Abroad*, in *THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11*, at 143, 143-47 (Strobe Talbott & Nayan Chanda eds., 2001); Petersen, *supra* note 54, at 57 n.132 (since 1988, the UN General Assembly has issued over a dozen resolutions on “Enhancing the Effectiveness” of elections without explicitly affirming a “right to democratic elections”); Ronald Rich, *Bringing Democracy into International Law*, 12 J. DEMOCRACY 20, 25 (2001); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT’L L. 539 (1992); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

57. See C. MICHAEL BARRY, *THE AMERICAN REPUBLIC: THE FOURTH FORM OF GOVERNMENT* 35 (2011) (noting that the U.S. Constitution’s Framers viewed that “People are Sovereign,” meaning that sovereignty resided in the people); BENVENISTI, *supra* note 42, at 94-96; W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 243 (Gregory H. Fox & Brad R. Roth eds., 2000).

force in 1976 and has been ratified by more than 160 countries, states in Article 1 that “[a]ll peoples have the right of self-determination,” the right to “freely determine their political status and freely pursue their economic, social, and cultural development.”<sup>58</sup> Article 25 of the ICCPR explicitly endows a right to electorally select a government.<sup>59</sup>

Beyond reaching human rights standards, one can contest whether given occupier-fiduciary reforms are valid as necessary to properly administrate and preserve the status quo of a citizenry’s way of life<sup>60</sup> or whether newly imposed, modern legal norms should depose antiquated rules inconsistent with standards of civil society.<sup>61</sup> A convincing retort to a reformist position espousing a *carte blanche* is that there are no antiquated rules, other than those that fail to meet human rights standards or minister criterion of representative government, and an intervener that unilaterally issues fiats for reform is administrating immorally, improperly, and possibly illegally because every society has the self-determined prerogative to elect its own culturally-distinct institutions.<sup>62</sup>

A United Nations authorization could also constitute an institution to execute an occupier role or might leverage the actual or perceived

58. ICCPR, *supra* note 53, art. 1.

59. *Id.* art. 25.

60. Patterson, *supra* note 33, at 473.

61. Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLA. J. INT’L L. 1, 3 (2006) (Army JAG prosecutor expressing that “American advisors had to accomplish these and other tasks without offending the pride of the Iraqi lawyers and judges and without insulting their legal traditions, despite the fact that some of these traditions were barbaric and far outside the norm of modern jurisprudence.”); Mirko Bagaric & John R. Morss, *Transforming Humanitarian Intervention from an Expedient Accident to a Categorical Imperative*, 30 BROOK. J. INT’L L. 421, 439–40 (2005) (stating that “whether other nations should forcibly defend only the basic right to life, or whether they should also be concerned with lesser rights, such as the right to own property” and other liberties are matters that should be contemplated).

62. STROMSETH, WIPPMAN & BROOKS, *supra* note 22, at 310 (emphasizing that simply imposing new legal rules without a focus on matching culture of the ordinary people is not likely to produce lasting reform); SAMUEL HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 243 (1981) (noting that a foremost reason to oppose interventionism is that “it is morally wrong for the United States to attempt to shape the institutions of other societies. Those institutions should reflect the values and behavior of the people in those societies. To intrude from outside is imperialism or colonialism, which also violates American values.”); Madeleine K. Albright, *Speech: Remarks Based on New Book Memo to the President Elect: How We Can Restore America’s Reputation and Leadership*, 20 FLA. J. INT’L L. 1, 4 (2008) (“You cannot impose democracy. Imposing democracy is an oxymoron.”); Francis Fukuyama, *Nation-Building 101*, ATLANTIC (Jan. 1, 2004, 12:00 PM), available at <http://www.theatlantic.com/magazine/archive/2004/01/nation-building-101/302862/> (last visited Apr. 1, 2015) (maintaining that “outsiders can never build nations.”).

authority of the state-military occupier. The U.N. can exercise significant governance authority over a territory under U.N. Charter Article 81,<sup>63</sup> particularly to the extent that the governance would foster other core U.N. objectives, such as to facilitate self-rule and terminate colonialism.<sup>64</sup> In 1949, the U.N. General Assembly appointed a U.N. Commissioner for Libya, a former Italian colony;<sup>65</sup> a Trusteeship Council over Palestine;<sup>66</sup> and authorized Australia, New Zealand, and the U.K. to exercise full legislative, administrative and jurisdictional powers over the territory of Nauru<sup>67</sup> and required the occupation to compensate for occupier-associated wrongs.<sup>68</sup>

If a U.N. body does not administrate, one concern over the United Nations validation is whether the state-occupier's domain derives from the Security Council or the General Assembly. The Security Council should remain within its primary prerogative of addressing threats to international peace and security,<sup>69</sup> whereas the General Assembly has universal membership and possesses broader missions,<sup>70</sup> which not only imparts heightened accreditation with broad-based approval from across the world but also is more appropriate for authorizing civilian and inclusive government objectives during an occupation. Perhaps observing this logic of selecting the most appropriate UN institution, no Security Council resolutions or international agreements have ever sanctioned expansive occupations, which includes the operations that

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63. U.N. Charter art. 81 (recognizing that the UN can be a potential Administering Authority over territories); see generally Ralph Wilde, *From Danzig to East Timor: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583 (2001).

64. U.N. Charter arts. 2(4), 73, 76 para. 1(b); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 22 (2d ed. 2010) (stating that paramount UN goals included ending non-self-governing rule and assisting territories achieve self-government).

65. G.A. Res. 289 (IV)A, U.N. GAOR, 4th Sess., U.N. Doc. A/1089, at 10 (1949).

66. G.A. Res. 181(II), U.N. GAOR, 2nd Sess., U.N. Doc. A/516, at 132 (1947).

67. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, 1992 I.C.J. 240, 240-70 (June 26).

68. *Id.* at 240; see Deiwert, *supra* note 46, at 795 (stating that Nauruans were entitled to AUS \$107 million in compensation because Australia mined out one-third of the island while under Australian administration).

69. U.N. Charter art. 24(1). On the dangers of broadly-construed Security Council missions, see Susan Lamb, *Legal Limits to United Nations Security Council Powers, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 361, 388 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999) (emphasizing that the Security Council's "open-textured and discretionary powers could be inherently subject to abuse, with profound consequences for the fundamental rights of States and individuals bearing the brunt of such measures").

70. U.N. Charter arts. 9-10 (noting universal membership and that the General Assembly can "discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter").

were authorized for Afghanistan, Bosnia, East Timor, Haiti, Herzegovina, and Kosovo; all of which only permitted temporary and specific military and civilian administration tasks.<sup>71</sup>

To summarize the trajectory of change, the following chart contextualizes these forms of occupation and includes their underlying justifications:

<i>Full Prerogative</i>				<i>Very Limited Prerogative</i>
Historical notions of colonialism	Post-World War II occupation	Temporary occupation with dictates following the US Civil War	United Nations authorizations and actions to uphold human rights	Hague and Geneva Conventions: No alteration under occupation except to preserve and protect
<i>Justification:</i> Rule of the mighty	<i>Justification:</i> Ending belligerency and quelling anger when cities and infrastructure were destroyed	<i>Justification:</i> Maintain peace inside an existing sovereign state	<i>Justification:</i> The UN possesses a peace and security mission and endeavors to uphold paramount principles of self-determination and human rights	<i>Justification:</i> Uphold self-determination and terminate remnants of colonialism

71. Scheffer, *supra* note 33, at 852-53; STROMSETH, WIPPMAN & BROOKS, *supra* note 22, at 6 (referencing similarities of post-conflict involvement in Kosovo, East Timor, Afghanistan, and Iraq); see e.g. S.C. Res. 1244, para. 10, U.N. Doc. S/RES/1244 (June 10, 1999) (stating the international civil presence in Kosovo is designed to “provide an interim administration for Kosovo under which the people can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.”); S.C. Res. 1244, Annex 2, U.N. Doc. S/RES/1244 (June 10, 1999) (approving the United Nations Interim Administration Mission in conflict-ridden Kosovo in June 1999); S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (creating the United Nations Transitional Authority in non-self-governing East Timor in October 1999).

To briefly prelude the next Part's discussion of the Bush White House's Coalition Provisional Authority by contextualizing this chart and its justifications, the occupier's colonial-like dictates have been universally rejected for most of the twentieth century and the justification for imposing reforms following World War II were conducted to address peace and security considerations of aggressors and the societal crisis of the Axis powers after defeat. Both Germany and Japan have been subjected to a seventy-plus year, and counting, occupation. By contrast, the Bush administration committed the aggression on Iraq without the assent of the Security Council<sup>72</sup> and the allegations of security threats from Iraq were patently false,<sup>73</sup> making similar justifications for the compelled reform encountered in the post-World War II cases inappropriate. Moreover, none of these reasons for war had anything to do with overthrowing a government and remaining in a near-nine year occupation,<sup>74</sup> but the decisive post-invasion development was that the Security Council adopted Resolution 1483 and specified terms for the occupation. The following part discusses the Bush Administration's pre-resolution rhetoric, the terms of Resolution 1483's sanction, and the fact that the CPA effectively ignored occupation law and liberally interpreted the terms of Resolution 1483 to

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72. See generally Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L. & COM. 295 (2011) [hereinafter Bejesky, *Weapon Inspections*]; Bodanky, *supra* note 53, at 132 (stating that a significant percentage of the global populace and Iraqis viewed the military invasion as illegitimate, making byproducts of that invasion potentially coercive).

73. Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 875-82 (2011) [hereinafter "Bejesky, *Intelligence Information*"] (stating that intelligence assessments were specious and that the Bush administration pushed the allegations without reservation); see Charles Lewis & Mark Reading-Smith, *False Pretenses*, CTR. FOR PUB. INTEGRITY (Jan. 23, 2008), available at <http://www.publicintegrity.org/2008/01/23/5641/false-pretenses> (last visited Apr. 1, 2015) (aggregating a summary of 935 false statements).

74. Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 464 (2011) (emphasizing that Congress provided the Executive with a limited authorization to use force, conditioned on the existence of an actual imminent threat, which means that when the White House began offering additional rationalizations after the war, particularly of humanitarian intervention, "such talk was blatantly inconsistent with the plain language of the 2002 resolution."); Bejesky, *Weapon Inspections*, *supra* note 72, at 350-69. While overthrowing a government is not a direct legal justification for intervening, arguments have been made to support a connection between democracy (which might be the result of replacing an authoritarian regime) and peace with other states. See U.N. Doc. S/2001/1154 (Dec. 5, 2001) (former Secretary-General Boutros-Ghali stating that "democratic institutions and processes . . . minimize the risk that differences or disputes will erupt into armed conflict . . . In this way, a culture of democracy is fundamentally a culture of peace.").



do whatever it pleased.

## II. IRAQI DEMOCRATIC CONTROL

### A. Bush Administration Rhetoric

The Bush and Blair administrations often refrained from referring to the presence of the American and British militaries in Iraq as an “occupation,”<sup>75</sup> but frequently preferred to use the phrase “liberation” and assured that Iraqi citizens would quickly control their own government.<sup>76</sup> The importance of conveying a general message of liberation to the Iraqi people was deliberated three months prior to the invasion in a Pentagon operation called “Rapid Reaction Media Team,” which arranged for disassembling the current Iraqi media network and

75. BENVENISTI, *supra* note 42, at ix.

76. *President Rallies Troops at MacDill Air Force Base in Tampa*, WHITE HOUSE (Mar. 26, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030326-4.html> (last visited Apr. 1, 2015) (“We will help the Iraqi people to find the benefits and assume the duties of self-government. The form of those institutions will arise from Iraq’s own culture and its own choices.”); *Interview on Doordarshan Television of India*, U.S. DEP’T ST. (Mar. 26, 2003), available at <http://2001-2009.state.gov/secretary/former/powell/remarks/2003/19075.htm> (last visited Apr. 1, 2015) (noting the aspiration of “put[ting] in place a new government that will reflect the will of all of the people”); *Deputy Secretary Wolfowitz Interview with 60 Minutes II*, U.S. DEP’T DEF. (Apr. 1, 2003), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2239> (last visited Jan. 25, 2015) (agreeing that it is critical to have “free institutions” that are a product of the culture and local people, stating that “we’re going to try to be working with the Iraqis to help them build free institutions, and these are people who understand free institutions and, under Iraq, in a way that nobody who’s not an Iraqi will ever understand,” and noting that this free and functioning government will be developed “as rapidly as possible”); *Joint Conference with Serbian Prime Minister Zivkovic*, U.S. DEP’T ST. (Apr. 2, 2003), available at <http://2001-2009.state.gov/secretary/former/powell/remarks/2003/19296.htm> (last visited Apr. 1, 2015) (Powell stating: “I can assure you that we all want to end this as soon as possible so we can go on with the task of allowing the Iraqi people to form a new government—a government that is democratic, a government that will represent all the people of Iraq, a government that will cause Iraq to live in peace with its neighbors”); *Deputy Defense Wolfowitz, General Pace on NBC’s Meet the Press*, U.S. DEP’T ST. (Apr. 6, 2003), available at <http://ipdigital.usembassy.gov/st/english/texttrans/2003/04/20030406192943attocnich0.1897852.html#axzz3C03RiEwz> (last visited Apr. 1, 2015) (Wolfowitz stating: “The goal is . . . to move as rapidly as possible after the regime is gone to a government that genuinely represents the Iraqi people”); *Prepared Statement for the Senate Armed Services Committee: The Future of NATO and Iraq* by Paul Wolfowitz, U.S. DEP’T DEF (Apr. 10, 2003), available at <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=365> (last visited Apr. 1, 2015) (Wolfowitz stating: “One of the greatest responsibilities of the coalition will be to help Iraqis create a new government, to paraphrase Abraham Lincoln, of the Iraqi people, by the Iraqi people and for the Iraqi people”).

implanting the occupier's message for society.<sup>77</sup> Top Bush Administration officials also punctuated an unequivocal theme that promised the foreign military presence in Iraq would rapidly ordain self-government and ensure that Iraqi choices would design political institutions.

For example, on March 26, 2003, one week after the war began, President Bush affirmed: "We will help the Iraqi people to find the benefits and assume the duties of self-government. The form of those institutions will arise from Iraq's own culture and its own choices."<sup>78</sup> On April 2, Secretary of State Powell promised: "I can assure you that we all want to end this as soon as possible so we can go on with the task of allowing the Iraqi people to form a new government—a government that is democratic, a government that will represent all the people of Iraq."<sup>79</sup> On April 4, National Security Advisor Rice remarked: "We will leave Iraq completely in the hands of Iraqis as quickly as possible. As the President has said, the United States intends to stay in Iraq as long as needed, but not one day longer."<sup>80</sup> On April 6, Undersecretary of Defense Wolfowitz stated: "We come as an army of liberation, and we want to see the Iraqis running their own affairs as soon as they can."<sup>81</sup> On April 13, Secretary of Defense Rumsfeld emphasized: "And

77. *White Paper: "Rapid Reaction Media Team" Concept*, U.S. DEP'T DEF. (Jan. 2003), available at [http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB219/iraq\\_media\\_01.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB219/iraq_media_01.pdf) (last visited Apr. 1, 2015) (referencing that the plan called for implementing an Iraqi "Free Media" network by "informing the Iraqi public about USG/coalition intent and operation, to stabilize Iraq, . . . and to provide Iraqis hope for their future" and deploying "hand-picked" media experts from the US and UK to control the Iraqi media outlets). The program would control the media with messages of De-Bathification, war crimes of Saddam's regime, US-sponsored versions of "history telling," justice and the rule of law, and themes of Western entertainment (e.g. Hollywood and sports). *Id.* The latter element follows the approach used by the British and US media nearly a century ago, which employed distractions to create a compliant population. GARTH S. JOWETT & VICTORIA O'DONNELL, *PROPAGANDA AND PERSUASION* 100, 103, 162 (2006).

78. *In the President's Words: The Rights and Aspirations of the Iraqi People*, WHITE HOUSE (July 8, 2004), available at <http://georgewbush-whitehouse.archives.gov/infocus/iraq/rightsandasp.html> (last visited Apr. 1, 2015) (citing *President Bush's Remarks to Troops Macdill Air Force Base, Tampa, Florida*, Mar. 26, 2003); see *id.* (providing fifty statements from assorted speeches and contending that the Bush administration endeavored to provide liberty, freedom, and swift self-government to the Iraqi people).

79. *Joint Press Conference with Colin Powell, Zoran Zivkovic*, U.S. DEP'T ST. (Apr. 2, 2003), available at <http://ipdigital.usembassy.gov/st/english/texttrans/2003/04/20030402205204rennefl0.1897852.html#axzz3C1W8b1Rz> (last visited Apr. 1, 2015).

80. *Press Briefing by National Security Advisor Dr. Condoleezza Rice*, WHITE HOUSE (Apr. 4, 2003), available at <http://ipdigital.usembassy.gov/st/english/texttrans/2003/04/20030404184631ennocmk0.1897852.html#axzz3C1W8b1Rz> (last visited Apr. 1, 2015).

81. *Deputy Defense Wolfowitz, General Pace on NBC's Meet the Press*, *supra* note 76;

the overall [governance] authority at the present time obviously is General Franks. And the task is to create an environment that is sufficiently permissive, that the Iraqi people can fashion a new government."<sup>82</sup> On April 24, General Jay Garner, the former director of the Pentagon's Office of Reconstruction and Humanitarian Assistance (forerunner to the CPA),<sup>83</sup> stated: "And nobody is going to run those ministries other than the Iraqis themselves. I think we need to be absolutely clear about that . . . . The new ruler of Iraq is going to be an Iraqi . . . I don't rule anything."<sup>84</sup> On April 28, Bush stated: "As freedom takes hold in Iraq, the Iraqi people will choose their own leaders and their own government. America has no intention of imposing our form of government or our culture. Yet, we will ensure that all Iraqis have a voice in the new government."<sup>85</sup>

The message relayed by the Bush Administration was one of liberation, expeditious self-government, and the conservation of Iraqi choices in constituting institutions and culture, which were themes of intention that would presumably be quite palatable to the international community. The Bush Administration also did not discuss unilaterally imposing legal reform (as distinguished from institutions of

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*Deputy Secretary Wolfowitz Interview with 60 Minutes II, supra note 76 (Wolfowitz remarking that one of the most important goals was "an Iraq that stands on its own feet that governs itself in freedom. . . We'd like to get to that goal as quickly as possible."); Prepared Statement for the Senate Armed Services Committee: The Future of NATO and Iraq by Paul Wolfowitz, supra note 76 (providing the "goal to leave Iraq in the hands [of the Iraqi people] as soon as possible").*

82. *Secretary Rumsfeld Interview with NBC Meet the Press, U.S. DEP'T OF DEF. (Apr. 13, 2003), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2383> (last visited Apr. 1, 2015 (also noting that "over some period of months the Iraqis will have their government selected by Iraqi people."); Transcript: Gen. Tommy Franks on Fox News Sunday, FOX NEWS (Apr. 13, 2003), available at <http://www.foxnews.com/story/2003/04/13/transcript-gen-tommy-franks-on-fox-news-sunday/> (last visited Apr. 1, 2015) (Franks remarking that Iraq would have a government that will provide the people with "freedom" and "liberty" and noting that "I think what we will see in the month and years ahead in Iraq will provide a bit of a model for how that can be done").*

83. Garner and the ORHA were replaced by Paul Bremer and the CPA in mid-May 2003. While the reason for this replacement is not clear, perhaps the outcome supplanted the perception of a strictly US-creation that the Pentagon controlled—the ORHA—and an unavailing occupation, with a new entity that had an international label and appeared to be governed by civilians (rather than the military).

84. Kathleen T. Rhem, *Iraqis Need Work, Paychecks, U.S. Administrator Says*, AM. FORCES PRESS SERVICE (Apr. 24, 2003), available at <http://www.defense.gov/news/newsarticle.aspx?id=29065> (last visited Apr. 1, 2015).

85. *President Discusses the Future of Iraq*, WHITE HOUSE (Apr. 28, 2003), available at <http://georgewebush-whitehouse.archives.gov/news/releases/2003/04/20030428-3.html> (last visited Apr. 1, 2015).

government) on the country. The correlative exigencies at the time these pledges were declared were that the former regime was displaced, infrastructure was destroyed by Pentagon bombing, societal affairs were halted, and humanitarian suffering was widespread, and the onset of these post-invasion reverberations led the U.N. Security Council to adopt Resolution 1472, one week after the invasion, to summon the international community to assist in resolving the humanitarian crisis.<sup>86</sup> In fact, President Bush anticipated that such adverse conditions would befall because he adopted National Security Presidential Directive 24 two months before the invasion in order to constitute an administrative unit called the Office of Reconstruction and Humanitarian Assistance (“ORHA”)<sup>87</sup> in order to execute administrative obligations of an occupation, control funding for humanitarian operations and reconstruction, and collaborate with the U.S. Agency for International Development (“USAID”) to implement the operations.<sup>88</sup> Despite the dearth of foreign support for the invasion and the fact that ORHA was

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86. S.C. RES. 1472, Mar. 28, 2003, U.N. Doc. S/RES/1472 (2003); S.C. RES. 1483, para. 2, U.N. Doc. S/RES/1483 (May 22, 2003); Problems perjured. S.C. RES. 1511, para. 8, U.N. Doc. S/RES/1511 (Oct. 16, 2003); (stating that additional humanitarian relief, economic reconstruction, conditions for sustainable development, and restoration of government institutions were necessary). *Al Jazeera* and a dozen other channels “provided straight news that in many ways gave their viewers a more rounded picture—from the inside—than the Anglo-American networks did. While the Anglo-American networks tended to show Allied medics treating injured Iraqi civilians tenderly while their armed colleagues handed out drinking-water cans to thirsty Iraqi POWs, the Arab media, while airing the briefings and sound bites coming from London, Washington, and Doha . . . also showed the . . . charred Iraqi bodies, [corpses, blood-soaked pavements, blown-out brains, screaming infants and wailing women] . . . grievously wounded civilians, . . . [children wounded by US cluster bombs,] dead Allied troops and injured Iraqi soldiers, hospitals choked with wounded and burnt Iraqis. Away from the battle zone, the Arab networks showed Iraqi suffering, humiliation, and panic – distraught families held up at Anglo-American military checkpoints, hooded Iraqi POWs, thousands of fleeing the capital, and civilians, deprived of food and water, driven to begging or looting.” DILIP HIRO, *SECRETS AND LIES: OPERATION IRAQI FREEDOM AND AFTER 192-94* (2004).

87. Judith Miller, *White House Assembles Officials to Review Plan to Rebuild Iraq After War*, N.Y. TIMES (Feb. 23, 2003), available at <http://www.nytimes.com/2003/02/23/world/threats-responses-looking-ahead-white-house-assembles-officials-review-plan.html> (last visited Mar. 24, 2015) (noting that Directive 24 was adopted on January 20, 2003).

88. L. Elaine Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities*, CRS REPORT FOR CONGRESS 2 (June 6, 2005), available at <http://www.au.af.mil/au/awc/awcgate/crs/r132370.pdf> (last visited Apr. 1, 2015); see Karen DeYoung & Dan Morgan, *U.S. Plan for Iraq's Future is Challenged; Pentagon Control, Secrecy Questioned*, WASH. POST, Apr. 6, 2003, at A21 (questioning the secrecy of the ORHA mission and intentions). ORHA would direct the post-invasion activities of “civilian aid, reconstruction, and civil administration or governance.” Miller, *supra* note 87 (“The Bush administration’s new office of postwar planning held a secret session this weekend to assess the government’s plans for securing and rebuilding Iraq if Saddam Hussein is overthrown, senior administration officials said today.”).

not internationally-authorized,<sup>89</sup> the Pentagon-run ORHA postulated that non-Coalition countries should deploy soldiers to stabilize Iraq<sup>90</sup> and that the U.N. should pay for the occupation.<sup>91</sup>

Jay Garner, a retired general, was the appointed head of the ORHA.<sup>92</sup> After irate Iraqis voiced widely-publicized complaints that nothing was getting accomplished, services were not being provided, and government officials had not been compensated for several weeks, Garner remarked that “[a]s soon as (the Iraqis) can identify those people to us, we’ll start paying their salaries.”<sup>93</sup> The problem is that *no one* could identify salary recipients because the invasion overthrew the previous government and eventually CPA Order Number 1, which was adopted before the Security Council Resolution 1483 authorized an occupation, legally stripped between fifteen and thirty thousand public-sector employees out of government due to association with the previous regime.<sup>94</sup> Perhaps the sensibility of such a request was more persuasive at the time because the international community was still under the impression that, due to six months of false statement by the Bush administration, it was necessary to search for the prohibited weapons that Iraq supposedly possessed, but those weapons ultimately did not exist.<sup>95</sup>

89. The entity was created concomitant with UN inspections taking place, before Colin Powell addressed the Security Council, and before the UN Security Council had even begun the most intensive debates. Bejesky, *Weapon Inspections*, *supra* note 72, at 335-52.

90. Michael R. Gordon, *The Strategy to Secure Iraq Did Not Foresee a 2<sup>nd</sup> War*, N.Y. TIMES (Oct. 19, 2004), available at [http://www.nytimes.com/2004/10/19/international/19war.html?pagewanted=1&\\_r=0](http://www.nytimes.com/2004/10/19/international/19war.html?pagewanted=1&_r=0) (last visited Apr. 1, 2015).

91. Simon Chesterman, *Bush, the United Nations and Nation-Building*, 46 SURVIVAL 101, 106 (2004).

92. Miller, *supra* note 87 (stating that the plan was announced nearly a month before the invasion). After the American media had entirely accepted the justifications for the invasion as proven for several months, it hosted former military commanders explaining potential invasion plans. Ideas of an anticipated invasion were being planted at the same time Bush administration officials explained that no such action was inevitable. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 83-84 (2011) [hereinafter Bejesky, *Politico*].

93. Rhem, *supra* note 84.

94. *Purge of Saddam loyalists*, BBC (May 16, 2003, 11:55 AM), available at [http://news.bbc.co.uk/2/hi/middle\\_east/3033919.stm](http://news.bbc.co.uk/2/hi/middle_east/3033919.stm) (last visited Apr. 1, 2015); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT’L L. 580, 614 (2006) (calling CPA Order No. 1 a much criticized order).

95. S.C. Res. 1483, at pmb., U.N. Doc. S/RES/1483 (May 22, 2003); see generally Bejesky, *Weapon Inspections*, *supra* note 72; Bejesky, *Intelligence Information*, *supra* note 73, at 875-82; Lewis & Reading-Smith, *supra* note 73 (providing a chronological chart of false statements and noting that “President George W. Bush and seven of his administration’s top officials, including Vice President Dick Cheney, National Security

*B. U.N. Authority for Occupation*

In furtherance of Resolution 1472 and to alleviate the continuing humanitarian crisis,<sup>96</sup> the Security Council passed Resolution 1483, which commissioned the occupying “Authority” to preserve public order, deliver humanitarian aid, search for weapons of mass destruction (the Bush administration’s purported reason for invasion), administrate government functions, and assist Iraqi citizens in forming new institutions of government.<sup>97</sup> Other than searching for prohibited weapons, which did not exist,<sup>98</sup> the Resolution was constituted entirely to ameliorate injurious repercussions of an invasion and war that the United Nations had not authorized. Moreover, the pre-war diplomacy within the United Nations only involved questions of whether Iraq was violating a ban on enumerated prohibited weapons, but given that there were no proscribed weapons, even the underlying reason for invasion for which the Bush Administration was so insistent on convincing the Security Council and the international community—dire urgency from dreadful security peril<sup>99</sup>—made the invasion unnecessary and premised on “false pretences.”<sup>100</sup> It also appears that the Bush and Blair

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Adviser Condoleezza Rice, and Defense Secretary Donald Rumsfeld, made at least 935 false statements in the two years following September 11, 2001, about the national security threat posed by Saddam Hussein’s Iraq. . . . On at least 532 separate occasions (in speeches, briefings, interviews, testimony, and the like), Bush and these three key officials, along with Secretary of State Colin Powell, Deputy Defense Secretary Paul Wolfowitz, and White House press secretaries Ari Fleischer and Scott McClellan, stated unequivocally that Iraq had weapons of mass destruction (or was trying to produce or obtain them), links to Al Qaeda, or both.”)

96. S.C. Res. 1472, U.N. Doc. S/RES/1472 (Mar. 28, 2003).

97. S.C. Res. 1483, at pmbl. paras. 1, 2, 4, 11, U.N. Doc. S/RES/1483 (May 22, 2003); Permanent Reps. of the U.K. & U.S. to the U.N., Letter dated May 8, 2003 from the Permanent Reps. of the United Kingdom and the United States to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003), available at [http://www.globalpolicy.org/security/issues/iraq/document/2003/0608\\_usukletter.htm](http://www.globalpolicy.org/security/issues/iraq/document/2003/0608_usukletter.htm) (last visited Apr. 1, 2015) (recognizing that these itemizations were the goals). One cited example of significant concern was that “[m]ember States shall take appropriate steps to facilitate the safe return” of archeological items from the Iraq National Museum but the resolution does not mention that the Hague Regulations of 1907 (Arts. 43 and 56) can require the US to pay for items destroyed or missing if there was a failure to secure. S.C. Res. 1483, para. 7, U.N. Doc. S/RES/1483 (May 22, 2003); Hague Convention, *supra* note 36, arts. 43, 55, 56.

98. Bejesky, *Intelligence Information*, *supra* note 73, at 875-82.

99. Bejesky, *Weapon Inspections*, *supra* note 72, at 369-75.

100. Press Release, Senate Select Comm. on Intelligence, Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), available at <http://intelligence.senate.gov/press/record.cfm?id=298775> (last visited Apr. 1, 2015) (stating that the Bush Administration led the nation to war under “false pretenses”); see also Ackerman & Hathaway, *supra* note 74, at 464.

administrations may have enthusiastically sponsored a Security Council resolution for occupation to introduce a perception of the Security Council implicitly authorizing the war *post facto*,<sup>101</sup> but this is not particularly convincing.

Resolution 1483 specified the mission and conditions for occupation, but it was the CPA's unsparingly-construed assumptions of prerogative to unilaterally restructure government and, more controversially, adopt new laws that remained in contention. Curiously, in a later released memo, dated March 26, 2003, which was before Resolution 1483 was adopted, British Attorney General Goldsmith affirmed that "a further Security Council resolution is needed to authorise imposing reform and restructuring of Iraq and its Government" because without "a further resolution, the U.K. (and the U.S.) would be bound by the provisions of international law governing belligerent occupation, notably the Fourth Geneva Convention and the 1907 Hague Regulations."<sup>102</sup> Both the U.S. and U.K. acknowledged that they were bound by the Geneva and Hague conventions when Resolution 1483 was adopted<sup>103</sup> and delivered letters to the United Nations that stated "[t]he States participating in the Coalition will strictly abide by their obligations under international law,"<sup>104</sup> and Resolution 1483 stated nothing about granting the occupation a prerogative to unilaterally impose reform. No unrestricted sanction was

101. See Achilles Skordas, *Hegemonic Intervention as Legitimate Use of Force*, 16 MINN. J. INT'L L. 407, 439 (2007) (contending that Resolution 1483 reflected "the UN's indirect, albeit unwilling, endorsement of the US intervention policies"); see *contra* Davis Brown, *Iraq and the 800-Pound Gorilla Revisited: Good and Bad Faith, and Humanitarian Intervention*, 28 HASTINGS INT'L & COMP. L. REV. 1, 22 (2004) ("Although the Security Council did not authorize the invasion, and several of its members opposed to it, the Council has nevertheless put its imprimatur of legitimacy on the presence of coalition forces in Iraq.").

102. Roberts, *supra* note 94, at 609 (referencing that Goldsmith further added that the "imposition of major structural economic reforms would not be authorized by international law").

103. Stefan Talmon, *A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq* (Univ. of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No. 25/2007, 2007), available at <http://users.ox.ac.uk/~sann2029/SSRN-id1018172%5B1%5D.pdf> (last visited Apr. 1, 2015) (citing 405. PARL. DEB. H.C. (6th ser.) (2003) 22 available at [http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030512/debtext/30512-05.htm#30512-05\\_spm1n1](http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030512/debtext/30512-05.htm#30512-05_spm1n1)) (British Foreign Secretary remarking to the House of Commons: "The United Kingdom and the United States fully accept our responsibilities under the fourth Geneva Convention and the Hague Regulations.").

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

endowed; Resolution 1483 expressly affirmed that the Geneva Conventions and the Hague Regulations restrictions applied, which limited the occupation, and merely rearticulated mandatory customary international law norms<sup>105</sup> and overtly stated that Iraqis had the power to select their own institutions.<sup>106</sup> The sequence of events with the invasion and occupation is a prime example of being granted a U.N. authority based on public promises about intentions, and being afforded an inch by the terms of the sanction and then taking a mile.

Not only was the Security Council's institutional authority for this unprecedented circumstance placed into question by some Council members and the CPA's exercise of authority inconsistent with the authority that it was actually granted,<sup>107</sup> but several Council members objected to Resolution 1483 because Britain and the US were unwilling to expressly grant the U.N. a genuine role and because members were concerned that Iraqis would be situated in a rather uncompromising and

105. See *Treaties and States Parties to Such Treaties*, ICRC available at [https://www.icrc.org/IHL#view\\_id1\\_id2\\_id250:repeat1:5:labelAnchor](https://www.icrc.org/IHL#view_id1_id2_id250:repeat1:5:labelAnchor) (last visited Jan. 25, 2015) (listing over 190 country-signatories to the Geneva Conventions); FRANÇOISE BOUCHET-SAULNIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 115 (Laura Brav & Clémentine Olivier eds., 2d ed. 2007) (noting the customary international law status); see also PETER MALANCZUK, *AKELURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 161-168 (7th ed. 1997); LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 33-36 (2d ed. 2000); S.C. Res. 1483, at pmbl. para. 5, U.N. Doc. S/RES/1483 (May 22, 2003) (citing the applicability of the Hague and Geneva Conventions); see generally Boon, *supra* note 53, at 285 (noting that the United Nations promotes the obligation of occupiers to adhere to the Hague rules of occupation).

106. S.C. Res. 1483, at pmbl. paras. 1, 4, 5, 7, 8(c)(i), 9, U.N. Doc. S/RES/1483 (May 22, 2003) (Provisions of the Hague and Geneva Conventions affirm that foreign assistance is permitted to the extent that the occupied population is allowed to choose its own institutions and preserve its own culture and Resolution 1483 precisely affirmed this structure.); see e.g. S.C. Res. 1483, at pmbl. para. 4, U.N. Doc. S/RES/1483 (May 22, 2003) (requiring the US and UK to "promote the welfare of the Iraqi people through effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future").

107. U.N. Charter art. 2(1)(7) (affirming the sovereign equality of members and states and that the UN shall not "intervene in matters which are essentially within the domestic jurisdiction of any state"); S.C. Res. 1483, at preamble, U.N. Doc. S/RES/1483 (May 22, 2003) (affirming the "sovereignty and territorial integrity of Iraq"; Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, 36 CORNELL INT'L L.J. 435, 438, 443, 445 (2004) (stating that "the legality of the Coalition's occupation of Iraq was, at best, questionable . . . [T]he occupation of Iraq was an illegal act that should be recognized by the international community"); Felicity Barringer, *U.N. Reaction to Resolution Seems Positive but Reserved*, N.Y. TIMES, (May 10, 2003), available at <http://www.nytimes.com/2003/05/10/world/aftereffects-diplomacy-un-reaction-to-resolution-seems-positive-but-reserved.html?pagewanted=print> (last visited Apr. 1, 2015) (stating that the degree of authorization under 1483 was criticized by some Security Council members as exceeding any authority that the Security Council can even grant).



overly-dependent situation as oil revenues would be controlled and distributed by the U.S. and Britain.<sup>108</sup> Given the humanitarian crisis, dissenting Security Council members voiced that they had no other viable option, but to approve Resolution 1483.<sup>109</sup> Despite objections from Security Council members, Resolution 1483 was passed pursuant to the assumption that the U.N. would provide a significant advisory role and that political authority would be transferred to an Iraqi government as quickly as possible,<sup>110</sup> but after the Resolution went into effect, the Bush Administration ensured that the U.N. played almost no role<sup>111</sup> and the CPA did whatever it desired while appointing loyalists to the occupation, calling the assemblies of chosen individuals local representative bodies, ignoring the terms of Resolution 1483, and dictating new laws and reforms without regard to the Iraqi people.

### C. CPA Dictates

#### i. *Balancing Prerogative and Restrictions*

Even if an occupation is perceived as lawful, the self-determination of the local population can be violated by the manner of occupation.<sup>112</sup> An occupying foreign military cannot alter the structure of government

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108. Gary Younge & Ian Black, *Blueprint Gives Coalition Control of Oil*, GUARDIAN (May 10, 2003), available at <http://www.theguardian.com/world/2003/may/10/iraq.oil> (last visited Apr. 1, 2015); Hmoud, *supra* note 107, at 451 (reporting that several Security Council members wanted the United Nations to administer the country); Scheffer, *supra* note 33, at 850 (stating that the White House rejected a significant UN role); Paul Blustein, *G-7 Agrees that Iraq Needs Help with Debt: Important Roles seen for IMF, World Bank*, WASH. POST (Apr. 13, 2003) (stating that the Bush administration was “balking at mandates that would give the United Nations as big a part in running postwar Iraq as many European nations want”).

109. U.N. SCOR, 58th Sess., 4671st mtg., at 11, U.N. Doc. S/PV.4761 (May 21, 2003), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.4761](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.4761) (last visited Apr. 1, 2015) (referencing a statement made by the Pakistani representative to the Security Council prior to the adoption of Resolution 1483 that captures the surrounding circumstance: “Pakistan, like several other members of the Security Council, has agreed, due to the exigencies of the circumstances, to the delegation of certain powers by the Security Council to the occupying Powers, as represented by the Authority.”). Out of expediency and the dire humanitarian need, the Security Council should be perceived as a credibility surrogate in this case.

110. See Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT’L L. 823, 825 (2003).

111. See BOB WOODWARD, PLAN OF ATTACK 357-63 (2004); Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT’L L. 721, 736-37 (2005); Grant, *supra* note 110, at 853.

112. Yael Rouen, *Illegal Occupation and Its Consequences*, 41 ISR. L. REV. 201, 218 (2008).

or institutions in the occupied country<sup>113</sup> and must ensure that the pre-occupation law remains in force,<sup>114</sup> which means that dictated frameworks, exceeding an occupier's authority, can be viewed as null and void.<sup>115</sup> Instead of heeding the lawful parameters of occupation Law, the CPA failed to conform to licit administrative responsibilities as an "occupier,"<sup>116</sup> freehandedly imposed controversial reforms from its inception,<sup>117</sup> and adopted at least thirty new laws relating to the economy over its fourteen month existence,<sup>118</sup> which were blatant transgressions that tore society apart.<sup>119</sup> Immediately prior to its disbandment, the CPA locked in the reforms for the future<sup>120</sup> under Order 100 as Transitional Administrative Law, which could only be modified with a supra-majority vote of a future legislature and with the consent of the cabinet.<sup>121</sup> The CPA also replaced "the name of new

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113. See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 124 (2009); see also Christopher C. Joyner, "The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention, 47 VA. J. INT'L L. 693, 713-14 (2007) (stating that in prosecuting a lawfully conceived humanitarian intervention, "the authority structure of the offending state should not be overthrown, nor should the domestic political process of that state be permanently altered."); Bhuta, *supra* note 51, at 824 (noting that an occupier "cannot legislate to 'implement' the population's right to self-determination through the creation of a new order.").

114. See Boon, *supra* note 53, at 322 (further stating that the occupational authorities freely accepted the conditions of the international law of occupation).

115. See Scheffer, *supra* note 33, at 842; see also Peter Galbraith, *Iraq: The Bungled Transition*, 51 N.Y. REV. BOOKS 70 (Sept. 23, 2004) (book review).

116. See Zahawi, *supra* note 38, at 2297; see also Roberts, *supra* note 94, at 614; Boon, *supra* note 53, at 324-25.

117. See J. Stephen Shi, *The Legal Status of Foreign Military and Civilian Personnel Following the Transfer of Power to the Iraqi Interim Government*, 33 GA. J. INT'L & COMP. L. 245, 246 (2004).

118. See Kristen E. Boon, "Open for Business": International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law, 39 N.Y.U. J. INT'L L. & POL. 513, 544 (2007).

119. See Zahawi, *supra* note 38, at 2301 (expressing that "blatant transgressions outside the laws of occupation exacerbated the post-war tensions, jeopardizing the security, economy, and administration of the state and safety of the people.").

120. *Id.* at 2332.

121. See Antonia Juhasz, *Bush's Economic Invasion of Iraq*, L.A. TIMES (Aug. 14, 2005), available at <http://articles.latimes.com/2005/aug/14/opinion/oe-juhasz14> (last visited Apr. 1, 2015) ("Laws governing banking, investment, patents, copyrights, business ownership, taxes, the media and trade have all been changed according to U.S. goals, with little real participation from the Iraqi people. (The TAL can be changed, but only with a two-thirds majority vote in the National Assembly, and with the approval of the prime minister, the president and both vice presidents.) The constitutional drafting committee has, in turn, left each of these laws in place"). Yet, at the time that the TAL proposals were launched, it was only intended to remain operative until nation-wide elections scheduled for January 31, 2005. See also Law of Administration for the State of Iraq for the Transitional Period (Mar. 8, 2004), available at <http://www.iraqcoalition.org/government/TAL.html> (last

Iraqi institutions and officials for those of the CPA” in order to “protect the [CPA] reforms into the future.”<sup>122</sup>

At the same time the CPA unilaterally dictated reforms and operated above the law,<sup>123</sup> President Bush was publicly representing that the institutional metamorphoses were a byproduct of Iraqi free will and self-governance, which was the same theme that top Bush Administration officials repeatedly represented as their intention for occupation starting shortly after the invasion and prior to the adoption of Resolution 1483.<sup>124</sup> The text of Resolution 1483 did bestow an occupational authority, which was akin to the Bush Administration’s pre-Resolution 1483 public promises and to the restrictive approach to occupation enumerated in the Hague and Geneva Conventions,<sup>125</sup> but the occupation repeatedly contravened occupation law.<sup>126</sup> Moreover, during the occupation, the Bush Administration relayed that there was no substantial plan for post-war operations,<sup>127</sup> but one year after the invasion, declassified documents divulged that the White House’s

visited Apr. 1, 2015). Then, in the same law, it states that the laws would “remain in force until rescinded or amended by legislation duly enacted and having the force of law.” See *id.* art. 26(C). Theories that have permitted overruling foreign occupation dictates in the past have included asserting that the laws were not consistent with international law (i.e. the doctrine of postliminy) or the occupier exceeded its authority. See ERNEST H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATIONS* 145-50 (1942); ROLAND ROBERTS FOULKE, *2 A TREATISE ON INTERNATIONAL LAW* 289-90 (1920).

122. Zahawi, *supra* note 38, at 2332.

123. See Ryan J. Liebl, *Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in the Abu Ghraib Prison Scandal, What Law Governs Whose Actions?*, 28 *HAMLIN L. REV.* 91, 131 (2005) (“Under the legal system established by the CPA in Iraq, the CPA was above the law”).

124. President Bush Addresses the United Nations General Assembly (Sept. 23, 2003) (emphasizing that “[t]he primary goal of our coalition in Iraq is self-government for people of Iraq, reached by orderly democratic process.”); see *supra* Part II (A): Bush Administration Rhetoric.

125. S.C. Res. 1483, at pmbl. paras. 1, 4, 5, 7, 8(c)(i), 9, U.N. Doc. S/RES/1483 (May 22, 2003).

126. Kristen E. Boon, *Obligations of the New Occupier: The Contours of a Jus Post Bellum*, 31 *LOY. L.A. INT’L & COMP. L. REV.* 57, 61 (2009) (noting that the core concept of conservatism in protecting existing institutions during occupation was compromised); Patterson, *supra* note 33, at 472 (emphasizing that inherent in the title “Operation Iraqi Freedom” is the implicit assumption that the Bush administration was “not planning to respect the laws of any regime that had ever existed in Iraq.”).

127. THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* 109 (2006) (quoting Lieutenant General Joseph Kelllogg, who was involved in the invasion planning, stating that “[t]here was no real plan” for postwar operations); T. CHRISTIAN MILLER, *BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ* (2006) (noting that occupation planning was amiss); see also Monroe E. Price, *Symposium: Foreward: Iraq and the Making of State Media Policy*, 25 *CARDOZO ARTS & ENT. L.J.* 5, 8-9 (2007).

*Future of Iraq Project*, constituted in early-2002 and over a year before the invasion, selected White House, State Department, CIA, and Pentagon employees, and two hundred Iraqi exiles, and adopted thirteen volumes comprising 2,000 pages of plans for government restructuring and economic reform.<sup>128</sup> Not only did the CPA ostensibly follow this blueprint and appoint similarly-situated defectors who were involved in the *Future of Iraq Project*, but the early and detailed planning suggests that the Bush White House never had any intention of respecting occupation law.

One of the most significant complications with the CPA's unilateralism is that hostilities across the population can be expected to erupt if new institutions shift resources and alter political, social, and economic power.<sup>129</sup> Reform, particularly capitalist and privatization frameworks, can generate winners, but also antagonistic losers because a democratically-elected government or even representative locals did

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128. Farrah Hassan, *New State Department Releases on the 'Future of Iraq' Project*, NAT'L SEC. ARCHIVE (Sept. 1, 2006), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/index.htm> (last visited Apr. 1, 2015); Eric Schmitt & Joel Brinkley, *State Dept. Foresaw Trouble Now Plaguing Iraq*, N.Y. TIMES (Oct. 19, 2003), available at <http://www.nytimes.com/2003/10/19/world/struggle-for-iraq-planning-state-dept-study-foresaw-trouble-now-plaguing-iraq.html> (last visited Apr. 1, 2015) (stating that the 13 volumes and over 2,000 pages of the Future of Iraq Project was not released until "several House and Senate committees" had requested them); US DEP'T ST., THE FUTURE OF IRAQ PROJECT: OIL AND ENERGY WORKING GROUP 2 (Apr. 30, 2003) (declassified in part on June 22, 2005), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/FOI%20Oil.pdf> (last visited Apr. 1, 2015) (espousing "decentralization" which literally means reducing central government control, but is apt to also result in privatization or at least significant advocacy for private sector participation). This fetish for privatization is particularly controversial when exploiting the natural resources of a territory is expressly prohibited under occupation law. Patterson, *supra* note 33, at 478; Antonio Perez, *Symposium: Markets in Transitions: Reconstruction and Development: Part One -- Reconstruction: Prescriptions for Iraq, Predictions for Russia and Performance for China: Legal Frameworks for Economic Transition in Iraq -- Occupation Under the Law of War vs. Global Governance Under the Law of Peace*, 18 TRANSNAT'L L. 53, 55, 63 (2004).

129. See Judith Kullberg and William Zimmerman, *Liberal Elites, Socialist Masses, and Problems of Russian Democracy*, 51 WORLD POL. 323, 324 (1999) (writing of polls several years into the Russian reforms and noting that elites like the system because "[s]upport for liberalism is causally related to the ability of individuals to participate in the new economic order: those who are 'locked out' of the new economy and are constrained by circumstances and context from improving their conditions will be more likely to express antiliberal values and attitudes," but only a small segment of the Russian population dramatically benefited with the fall of the socialist economy, but a majority of the Russian population has been harmed); Duncan Kennedy, *Shock and Awe Meets Market Shock*, BOSTON REV. (Oct. 1, 2003), available at <http://www.bostonreview.net/world/duncan-kennedy-shock-and-awe-meets-market-shock> (last visited Apr. 1, 2015) (listing the capitalist reforms applied to Iraq and noting that "[e]conomic development is a dynamic process in which small initial disadvantages often translate into massive permanent inequalities").

not enact the laws. Reactions may arouse immediate violence or beget delayed hostilities because of the belief that the occupation coerced unfair conditions and subsequently enforced those ultimatums with a police power. In fact, the existence of this police power to protect economic reforms into the future is found in both the secret agreement on the continuing occupation consummated by the Bush and Maliki governments in 2007 and the withdrawal agreement adopted in 2008.<sup>130</sup>

Having addressed how CPA dictates were inconsistent with occupation law and the mandate contained in Resolution 1483, the CPA was entirely reasonable to presume that it possessed significant latitude to ensure that Iraqi law comported with customary international law or *jus cogen* doctrines in the case of universal human rights standards, such as principles contained in the International Covenant on Civil and Political Rights and Universal Declaration of Human Rights,<sup>131</sup> which was an implication drawn in the typology depicted in Part II. Although, it is difficult to reconcile the occupation's right to impose compliance with human rights standards in the cases of the Pentagon's high-profile mass incarcerations and interrogation abuses at Abu Ghraib prison<sup>132</sup>

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130. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, art. 27, Nov. 17, 2008, available at <http://www.state.gov/documents/organization/122074.pdf> (last visited Apr. 1, 2015) (stating that the U.S. military would agree to protect Iraq's constitutional order in the future); White House, Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America, Nov. 26, 2007, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071126-11.html> (last visited Apr. 1, 2015) (stating that the U.S. would further support Iraq's financial and economic system and "facilitate[] and encourage[] the flow of foreign investments into Iraq").

131. Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451, 463 (2005-06). These alterations would include having an effective judiciary, having institutions that would prohibit any future Iraqi government from having the prerogative or means of perpetrating torture and discrimination, and promoting due process standards in criminal law, which were actions that the CPA did take. Coalition Provisional Authority, Order No. 7, Penal Code, §§ 3(2), 4, CPA/ORD/9 June 2003/07 (June 9, 2003), available at [http://www.iraqcoalition.org/regulations/20030610\\_CPAORD\\_7\\_Penal\\_Code.pdf](http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf) (last visited Apr. 1, 2015) (banning torture and prohibiting law enforcement officers and legal system personnel from discriminating); Coalition Provisional Authority, Order 13, The Central Criminal Court of Iraq, § 6, CPA/ORD/X 2004/13 (July 11, 2003), available at [http://www.iraqcoalition.org/regulations/20040422\\_CPAORD\\_13\\_Revised\\_Amended.pdf](http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf) (last visited Apr. 1, 2015) (establishing the court system and specifying that judges must be independent); Coalition Provisional Authority, Order 15, Establishment of the Judicial Review Committee, CPA/ORD/-- June 2003, June 23, 2003, available at [http://www.iraqcoalition.org/regulations/20030623\\_CPAORD\\_15\\_Establishment\\_of\\_the\\_Judicial\\_Review\\_Committee.pdf](http://www.iraqcoalition.org/regulations/20030623_CPAORD_15_Establishment_of_the_Judicial_Review_Committee.pdf) (last visited Apr. 1, 2015).

132. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

and with the brutality and human rights abuses of Prime Minister Maliki,<sup>133</sup> the long-term prime minister that the Bush administration effectively installed.

The design of democratic institutions was also a legitimate CPA reform that was very acceptable across Iraqi society<sup>134</sup> and engendered widespread support from the international community, but the manner in which reforms were executed and the institutional preferences that were codified proved controversial.<sup>135</sup> There is complexity for any transitional political system due to discord over what "democracy" means because of the many different models across the world,<sup>136</sup> but

or Punishment art. 14(1), *opened for signature* Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible."); Frank, *supra* note 61, at 3 n.5 (mentioning the torture scandal and noting that it arose prior to the "liberation of Iraq."). The abuses at Abu Ghraib and the interrogations ordered by the Bush administration were not consistent with norms of modern humanitarian jurisprudence. See generally Robert Bejesky, *The Abu Ghraib Convictions: A Miscarriage of Justice*, 32 BUFF. PUB. INT. L.J. 103 (2013).

133. See Dirk Adriaenssens, *Iraq: Unspoken Crimes Against Humanity Committed Against the People of Iraq*, CENTRE FOR RES. ON GLOBALIZATION (Jan. 28, 2012), available at <http://www.globalresearch.ca/iraq-unspoken-crimes-against-humanity-committed-against-the-people-of-iraq/29162> (last visited Apr. 1, 2015) (itemizing warnings about Maliki's abuses); *Letter to President Obama Regarding the Visit of Iraqi Prime Minister Nuri al-Maliki*, HUM. RTS. WATCH (Oct. 13, 2013), available at <http://www.hrw.org/news/2013/10/29/letter-president-obama-regarding-visit-iraqi-prime-minister-nuri-al-maliki> (last visited Apr. 1, 2015) (noting 5,740 deaths in areas such as Basra, Thi Qar and Baghdad, and within Diyala and Ninewa and that perpetrators are not being held accountable, and stating that this impunity has infuriated Sunnis who "see the government's failure to hold Shia-dominated security forces accountable as confirmation that policies remain rooted in sectarianism"); Maginnis, *supra* note 11 (member of the UK House of Lords writing that "Maliki has created a Mafia-like network of criminals and assassins to eliminate the voice of opposition at every level" and estimated that a thousand Sunnis have been killed every month for the past decade by these assassins); *supra* Introduction.

134. Public International Law & Policy Group and the Century Foundation, *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, 39 NEW ENG. L. REV. 53, 56 (2004); Roberts, *supra* note 94, at 621 (stating that "of all the parts 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 . . . reflecting as it does the sense that democracy and self-determination . . . constitute not only an important part of a human rights package, but also an acceptable means of hastening the end of an occupation.").

135. Note, *Democracy in Iraq: Representation Through Ratification*, 199 HARV. L. REV. 1201, 1201 (2006) [hereinafter Note]; Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97 (2002) (noting the assumption that Iraq fell into the category of a country that suffered from a democratic deficit).

136. G.A. Res. 55/96, U.N. Doc. A/RES/55/96 (Dec. 4, 2000) (articulating the very basic institutional structures that can be agreed upon); JAN TEORELL, DETERMINANTS OF

perhaps the most precarious variable regarding democratization protrudes from the fact that even the American public overwhelmingly believes that American democracy has been subject to “corporate capture”<sup>137</sup> and that the CPA was intent on subordinating public functions as part of the democratic process, which may disempower citizens.

## ii. *Constitutional Reforms*

An indication of the agitation over the broadness of reforms, how occupational dictates can bind society without commensurate local democratic will, and the dominance of U.S. influence on the Iraqi political system, is encountered in the Iraqi constitutional ratification process. In any country, a constitutional drafting process can be essential for establishing robust and abiding societal norms because the constitution endows and structures government powers,<sup>138</sup> imposes constraints on government,<sup>139</sup> formulates enduring rules, and requires all legislation and administrative regulations to comport with constitutional principles. Countries, such as the U.S., have traversed prolonged periods of “constitutional construction” in which constitutional ratification is followed the interpretation of abstract principles, vague clauses, and interacting precedent to set a trajectory of expectations

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DEMOCRATIZATION: EXPLAINING REGIME CHANGE IN THE WORLD, 1972-2006, at 30 (2010) (noting that beyond the “basic criteria” of having effective elections and political rights, “there is profound disagreement over the meaning of democracy”); CHARLES TILLY, *DEMOCRACY* 2-3 (2007) (listing a series of indicators for democracy, as derived from a Freedom House checklist); Donald L. Horowitz, *Constitutional Design: An Oxymoron?*, in *DESIGNING DEMOCRATIC INSTITUTIONS* 253, 253-54 (Ian Shapiro & Stephen Macedo eds., 2000) (“there is no agreement on the political and constitutional arrangements most likely to be conducive to peace and accommodation in a democratic context”); Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647, 676-77 (2007) (stating that notions of suitability of democracy have evolved since Plato and Aristotle theorized about democracy over two thousand years ago and assumed that it was only suitable for city-states and an ideal electorate size of 5,040).

137. *Survey: January 18-27, 2008*, WORLDPUBLICOPINION.ORG (Jan. 18-27, 2008), available at [http://www.worldpublicopinion.org/pipa/pdf/mar08/USGov\\_Mar08\\_quaire.pdf](http://www.worldpublicopinion.org/pipa/pdf/mar08/USGov_Mar08_quaire.pdf) (last visited Apr. 1, 2015) (finding that 94% of Americans believe that “leaders should pay attention to the views of the people as they make decisions” and that 80% of Americans believed that the US was “run by a few big interests” with only 19% believing that US government is “run for the benefit of the people”).

138. David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT’L L. & FOREIGN AFF. 75, 142 (2007).

139. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (“The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution”).

through rules and practices.<sup>140</sup> Whether there are stable and effective societal norms depends on whether there is a commitment to and acceptance of the values incorporated into constitutional provisions, institutions, and codes.<sup>141</sup>

In the case of Iraq's constitutional drafting procedures, the process was conducted rapidly, under the shadow of a gun,<sup>142</sup> in secrecy, with a small committee of CPA and CPA-appointed Iraqi Governing Council ("IGC") members,<sup>143</sup> and without Iraqi citizens discerning the bearing of provisions<sup>144</sup> or possessing an effective avenue for challenging the drafting process or the IGC.<sup>145</sup> Feldman and Martinez opined that the Iraqi public's rejection of the IGC and its lack of perceived democratic qualities significantly delayed the constitutional drafting process.<sup>146</sup>

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140. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1812 (2010).

141. STROMSETH, WIPPMAN & BROOKS, *supra* note 22, at 78 (stating that today's globalized world "requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes").

142. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 858 (2005) (advisor to the CPA acknowledging about the occupations of Iraq and Afghanistan that "constitutions are being drafted and adopted in the shadow of the gun").

143. See *Conference: From Autocracy to Democracy: The Effort to Establish Market Democracy in Iraq and Afghanistan: Panel 2: Building the Institutions of the Nation*, 33 GA. J. INT'L & COMP. L. 171, 175 (2004) (describing general approach as "elite pact-making"); Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 707-08 (2004); Randall T. Coyne, *Reply to Noah Feldman: Escaping Victor's Justice by the Use of Truth and Reconciliation Commissions*, 58 OKLA. L. REV. 11, 11 (2005); Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming and Constitution-Making*, 49 WM AND MARY L. REV. 1249, 1272-74 (2008).

144. Ashley S. Deeks & Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 5 (2007) (American legal advisers in Iraq remarking: "There has been considerable speculation by the press, by non-governmental organizations, and by Iraqi citizens themselves about why various provisions of the new Iraqi constitution look the way they do and about what they mean."); Bodansky, *supra* note 53, at 132; Daniel H. Cole, *From Renaissance Poland to Poland's Renaissance*, 97 MICH. L. REV. 2062, 2093 (1999) (stating that many years are required for a constitutional drafting process).

145. Article 38, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (only permitting freedom of expression, peaceful demonstration, the press, and association if they do not infringe "public order and morality"). Another restriction on the right of free speech existed due to criminalizing criticisms to the new government. Paul von Zielbauer, *Iraqi Journalists Add Laws to List of Dangers*, N.Y. TIMES (Sept. 29, 2006), available at [http://www.nytimes.com/2006/09/29/world/middleeast/29media.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2006/09/29/world/middleeast/29media.html?pagewanted=print&_r=0) (last visited Apr. 1, 2015) (This was ostensibly a draconian restriction and the Executive reasonably enforced the terms perhaps was a rule that could remove Iraq from the category of "democracy," unless a judiciary reasonably interpreted the terms).

146. Noah Feldman & Roman Martinez, *The International Migration of Constitutional*



Deeks and Burton, Legal Adviser and Deputy Legal Adviser at the US Embassy in Baghdad during the Iraqi constitution drafting process, detailed their advisory role during the drafting procedures, which included US officials writing formulations of constitutional text, submitting those drafts to CPA-appointed Iraqi leaders, and voicing concerns on behalf of the “U.S. Government” over the substance of the provisions.<sup>147</sup>

Critiques of the constitutional drafting process should actually be construed as a product of antecedent initiatives. Constitutionalism had already effectively been imposed by the CPA’s adoption of TAL provisions.<sup>148</sup> The process that traversed from the CPA’s ultimatums to the constitutional drafting procedures can be interpreted as a semblance of “precommitment,” which means “becoming committed, bound or obligated to some course of action or inaction or to some constraint on future action... to influence someone else’s choices.”<sup>149</sup> Precommitments open the prospect of path dependent behavior, which is a term in political science employed to describe how planting precursors to future action makes a desired outcome highly probable.<sup>150</sup> The CPA enacted TAL, which defined “precommitments” for the draft Constitution and the Constitution set a “precommitment” for future Iraqi governments even before an elected government took office. Indeed, the proposals for the Constitution were predominantly consistent with the CPA’s TAL mandates.<sup>151</sup> Deeks and Burton emphasize that

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*Norms in the New World Order: Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 *FORDHAM L. REV.* 883, 892-94 (2006); Still, *supra* note 143, at 697.

147. Deeks & Burton, *supra* note 144, at 2, 8, 31; Feldman & Martinez, *supra* note 146, at 919 (stating that the US role was “facilitating, not imposing, constitutional compromises”); Ashley S. Deeks, *Iraq’s Constitution and the Rule of Law*, 28 *WHITTIER L. REV.* 837, 838 (2007).

148. Feldman & Martinez, *supra* note 146, at 895.

149. THOMAS C. SCHELLING, *STRATEGIES OF COMMITMENT AND OTHER ESSAYS* 1 (2006).

150. Path dependence and critical junctures refer to decisive choices and events that prompt future trajectories, which are difficult to reverse because the progression of the political or institutional consequence involves entrenched behavior, antecedent determinations, and an elevated cost of altering course. RUTH BERINS COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA* 27-29 (2002); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 *AM. POL. SCI. REV.* 251, 251-53 (2000).

151. Deeks & Burton, *supra* note 144, at 7 (frequently referencing back to the TAL when describing the drafting and legislative history). A word search of the article retrieves 98 instances of “TAL” and 40 instances of “CPA,” often relating to Orders and Regulations, seemingly suggestive of the critical influence of the CPA on the constitutional drafting process. *Id.* A word search of another document written by constitutional advisors retrieves

constitutional language often “tracks precisely a phrase . . . of the TAL.”<sup>152</sup> In fact, the TAL had been regarded as the “supreme law of Iraq”<sup>153</sup> and the interim constitution.<sup>154</sup>

Consequently, constitutional drafting procedures consisted of Iraqi factions principally lining up in opposition to or in support of the CPA’s TAL provisions, but because TAL provisions were often the same as the final constitutional text, compromises among Iraqi groups were apparently not considered.<sup>155</sup> Even with the populace’s ambiguous understanding of the Constitution, 79% voted in support of the proposed constitution in the October 2005 national referendum vote.<sup>156</sup> However, the ratification vote may have been an expedient reception facilitated by a desire to shed the occupation more precipitously than a testament to a rational analysis of the content of the Constitution.<sup>157</sup> Iraq’s Constitution was not an autonomous product of the self-determination of the Iraqi people, but instead was a foreign transplant framework that remained alien to the society and befuddled Iraqis for years after the ratification.<sup>158</sup>

110 uses of “TAL.” Feldman & Martinez, *supra* note 146, at 883.

152. Deeks & Burton, *supra* note 144, at 43, 54, 60-61, 75 (citing examples).

153. Feisal Amin al-Istrabadi, *International and Comparative Perspectives on Defamation, Free Speech, and Privacy: Also Inside: Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law*, 50 N.Y.L. SCH. L. REV. 269, 274 (2005-06) (stating that “Article 3(C) makes the TAL the supreme law of Iraq.”).

154. Feisal Amin al-Istrabadi, Iraqi Ambassador to the UN, remarked before the Constitution was adopted: “No Iraqi wanted the American Civil Administrator to sign a document called an Iraqi constitution. Thus rather the [TAL]. . . in fact is Iraq’s interim constitution.” al-Istrabadi, *supra* note 153, at 270; Jackson, *supra* note 143, at 1273.

155. Andrew Arato, *Post-Sovereign Constitution-Making and Its Pathology in Iraq*, 51 N.Y.L. SCH. L. REV. 534, 546 (2006/07) (“the TAL, in spite of repeated violations, and in a very crude way regulated the subsequent process of transitional government formation and constitution-making”).

156. Note, *supra* note 135, at 1205.

157. Arato, *supra* note 155, at 551; Zachary Elkins, Tom Ginsburg & James Melton, *Constitution Drafting in Post-Conflict States Symposium: Baghdad, Tokyo, Kabul . . . : Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139, 1139 (2008) (“new constitutional structure has not been able to ameliorate, and may even have exacerbated, a problem of instability and political disintegration.”); Bejesky, *Politico*, *supra* note 92, at 105 (Iraqis favored a withdrawal of the occupation) (citing to a list of polls that affirmed that approximately 80 percent of Iraqis were opposed to the continuing occupation). Program on Int’l Policy Attitudes, *What the Iraqi Public Wants: A Worldopinion.org Poll*, WORLD PUBLIC OPINION 4 (Jan. 31, 2006), available at [http://www.worldpublicopinion.org/pipa/pdf/jan06/Iraq\\_Jan06\\_rpt.pdf](http://www.worldpublicopinion.org/pipa/pdf/jan06/Iraq_Jan06_rpt.pdf) (last visited Apr. 1, 2015) (In January 2006, 87% of Iraqis wanted a timeline for withdrawal, with 64% of Kurds, 90% Shia, and 94% Sunnis supporting withdrawal. . . Overall, 47% of Iraqis supported attacks on U.S. troops, with 16% of Kurds, 41% of Shia, and 88% Sunnis supporting attacks on U.S. troops).

158. Intisar A. Rabb, “*We the Jurists*”: *Islamic Constitutionalism in Iraq*, 10 U. PA. J.

Despite the pitfalls inherent in not ensuring that there was widespread domestic sentiment of ownership over the process, many constitutional provisions were soundly designed, such as those articles that promoted pluralism, federalism, and equality.<sup>159</sup> Pluralism and equality are consistent with democratization and institutions designed to bolster human rights. Federalism can respect geographical distinctions across a population that coincide with religious, linguistic, and ethnic differences; accommodate local diversity in law and policy; check the central level; and boost participation in democratic processes.<sup>160</sup> Adopting federal institutions is a prudent choice for a country with sharp divisions across geographically concentrated population with approximately 15-20% Sunnis, 15-20% Kurds, and 60-65% Shi'ites<sup>161</sup> and the CPA imposed a federal structure in Article 4 of the TAL twenty months prior to constitutional reform.<sup>162</sup> However, trade-offs in decentralizing Iraq into a dual-sovereignty system might have reduced the prospect of more exceptional nationality unity<sup>163</sup> and protracted discord on formidable choices, including on reconciling the sharing of geographically concentrated oil reserves and on determinations over

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CONST. L. 527, 528 (2008) ("More than two years after this ratification, there has been little to no headway toward detailing the mechanisms to be employed for fleshing out Iraq's constitutional skeleton."); Charles H. Norchi, *The Legal Architecture of Nation-Building: An Introduction*, 60 ME. L. REV. 281, 289 (2008) (stating that there can be disconcertment in a population if nation-building constitutionalism is imposed and informal practice is inconsistent with new institutions).

159. IRAQI CONST. at pmbl. arts. 1, 14.

160. Robinson, *supra* note 136, at 679 (noting that Federalism can check concentrated government power.) Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

161. *Iraq Poll: Note on Methodology*, ABC NEWS (Mar. 17, 2008), available at <http://abcnews.go.com/PollingUnit/story?id=4443992> (last visited Apr. 1, 2015); Joseph R. Biden, Jr. & Leslie H. Gelb, Op-Ed., *Federalism, Not Partition*, WASH. POST (Oct. 3, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/02/AR2007100201824.html> (last visited Apr. 1, 2015) (explaining that external advocates favored a decentralized system of power sharing in Iraq that would elevate sub-national power); Peter W. Gailbraith, Op-Ed., *Make Walls, Not War*, N.Y. TIMES (Oct. 23, 2007), available at <http://www.nytimes.com/2007/10/23/opinion/23galbraith.html> (last visited Apr. 1, 2015) (favoring partition).

162. Law of Administration for the State of Iraq for the Transitional Period, *supra* note 121, art. 4.

163. See Feldman & Martinez, *supra* note 146, at 898, 914; Note, *supra* note 135, at 1203; Scott Malcomson & Michael Zumot, *Iraq's Kurds: Toward an Historic Compromise?*, INT'L CRISIS GROUP (Apr. 8, 2004), available at <http://www.crisisgroup.org/en/publication-type/media-releases/2004/mena/iraqs-kurds-toward-an-historic-compromise.aspx> (last visited Apr. 1, 2015).

whether oil production decisions should be governed at the federal or local level.<sup>164</sup> With the insurgency led by ISIS, which reportedly has claimed its own Caliphate where Sunnis reside in western Iraq, and Kurdish demands for more regional autonomy in northern Iraq, there is an intensified struggle for those who seek to keep Iraq unified.<sup>165</sup>

### III. INTERPRETATIONS TO RECONCILE OCCUPATION LAW WITH CPA DIRECTIVES

#### A. Theoretical and Legal Interpretations

The restrictive view of occupation law, which is the near-universally-accepted treaty framework that has been applicable for most of this century, does not accord an occupying military with a prerogative to transmute law and state institutions, but instead requires preserving existing institutions.<sup>166</sup> Moreover, the modern international law on occupation, which includes the Hague and Geneva Conventions,<sup>167</sup> does not depend upon whether there is a belligerent or non-belligerent occupation or how the occupier classifies itself,<sup>168</sup> but

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164. Vanessa J. Jimenez, *Iraq's Constitutional Process: Challenges and the Road Ahead*, 13 HUM. RTS. BR. 21, 23 (2005) (noting that Federalism could lead to more subnational control over property rights and natural resources, and that the success of federal structure is particularly dependent on the resource allocations); Christopher Helman, *How Iraq's Kurds May be the Unlikely Losers in the ISIS Chaos*, FORBES (June 12, 2014), available at <http://www.forbes.com/sites/christopherhelman/2014/06/12/how-iraqs-kurds-may-be-the-unlikely-losers-in-the-isis-chaos/> (last visited Apr. 1, 2015) (reporting that even Kurds have had lasting disputes over the central level's monopolization of the licensing system).

165. *Two Arab Countries Fall Apart*, ECONOMIST (June 14, 2014), available at <http://www.economist.com/news/middle-east-and-africa/21604230-extreme-islamist-group-seeks-create-caliphate-and-spread-jihad-across> (last visited Apr. 1, 2015) (noting that the most contentious and extreme position of the occupation was partition into three separate countries, which was proposed to quell violence); Andrew George, *We Had to Destroy the Country to Save It: On the Use of Partition To Restore Public Order During Occupation*, 48 VA. J. INT'L L. 187, 187 (2007).

166. Scheffer, *supra* note 33, at 859 (stating that principles of self-determination and autonomy were the "crucial parts of the very phenomenon of democratic constitutionalism itself.").

167. Youngjin Jung, *In Pursuit of Reconstructing Iraq: Does Self-Determination Matter?*, 33 DENV. J. INT'L L. & POL'Y 391, 394 (2005).

168. JEFFREY DUNOFF, INTERNATIONAL LAW 590 (2d ed. 2006) (noting that the occupier may be reluctant to accept the restrictions and duties that occupation law imposes); Gregory Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 231 (2005) (stating that many occupying powers during the twentieth century refused to admit that they were "occupiers" and instead stated that they lacked "requisite control over the occupied territory.").

instead the Conventions apply to *any* partial or full foreign military occupation of another country,<sup>169</sup> which means that the restrictions on the military occupation of Iraq governed as soon as the U.S. and U.K. invaded Iraq and controlled territory.<sup>170</sup>

The Security Council provided language in Resolution 1483 that approximated a contextually-specific interpretation of the restrictive view of occupation law, an explication of the “Authority’s” obligation to preserve and protect,<sup>171</sup> and affirmed that it was imperative to address the humanitarian crisis, which unfolded due to the invasion itself. Hence, with clear international law provisions governing occupation, but with the CPA occupation disregarding rules of occupation law and assuming excessive liberty with interpreting the language of Security Council Resolution 1483, and without the Security Council or any other actor preventing or halting the CPA’s initiatives or imposing liability, scholars offered many provocative explanations to reconcile how to classify the CPA’s precedent<sup>172</sup> and the possible impact on the customary international law of occupation.

At one end of the spectrum, historical doctrines accentuate a victorious military’s unconditional prerogative during occupation.<sup>173</sup> The ancient doctrine of *debellatio* represents that a conqueror takes title to the subjugated adversary’s territory,<sup>174</sup> establishes “fundamental

169. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 973 [hereinafter Convention (IV)] (“The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of a territory . . . even if the said occupation meets with no armed resistance.”).

170. Scheffer, *supra* note 33, at 842.

171. See *infra* Part III (B).

172. Naomi Burke, *A Change in Perspective: Looking at Occupation Through the Lens of the Law of Treaties*, 41 N.Y.U. J. INT’L L. & POL. 103, 114 (2008); Jean E. Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for “Interim Occupations”*, 51 N.Y.L. SCH. L. REV. 496, 500 (2006-07).

173. Rep. of the Int’l Law Comm’n, 59th Sess., May 7-June 5, July 9-Aug. 10 2007, U.N. Doc. A/62/10 at para. 324(b)(ii) (discussing occupation following armed conflict); PAUL K. MACDONALD, *THE SOCIAL FOUNDATION OF PERIPHERAL CONQUEST IN INTERNATIONAL POLITICS 185-86* (2014) (discussing Iraq as a case of peripheral conquest, but was not similar to Britain’s quest to acquire a global empire).

174. Patterson, *supra* note 33, at 467; GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY 7* (1957)(discussing historical rule); Perez, *supra* note 128, at 60. The historic claim to property with *debellatio* meant that there was full “extermination in war of one belligerent by another through annexation of the former’s territory after conquest, the enemy forces having been annihilated.” 2 LASSA OPPENHEIM, *INTERNATIONAL LAW: DISPUTE* § 264, at 470-71 (Hersch Lauterpacht ed., 5<sup>th</sup> ed., 1963)(1905).

institutional changes to the government of an enemy nation," takes actions to alleviate the potential continuing threat posed by that country, and provides for the population.<sup>175</sup> The CPA assuredly did not seize title to conquered land,<sup>176</sup> which eliminates a key prerogative characteristic of *debellatio*, but the incidence of other factors makes the CPA's unilateral dictates approximate circumstances surrounding the period that immediately followed the downfall of colonial empires. During the early-twentieth century and pursuant to the League of Nation's territorial trusteeship system,<sup>177</sup> the military occupier possessed a "sacred trust" justification for temporary governance over a foreign population in order to assist the foreign population with self-governance.<sup>178</sup>

The CPA's actions were comparable to the "territorial trusteeship" system, but some distinctions are that the occupation of Iraq followed after a one-sided war and not colonial rule, there has been a conclusive renunciation of the appalling self-righteousness that pervaded colonialism,<sup>179</sup> a dictated occupation may not be accordant with a trusteeship,<sup>180</sup> and the Mandate and Trusteeship systems were racist concepts that classified certain people as "uncivilized" and unworthy of possessing "sovereignty."<sup>181</sup> Decolonization thoroughly repudiated this discriminatory distinction between sophisticated and simpleton

175. John Yoo, *Iraqi Reconstruction and the Law of Occupation*, 11 U.C. DAVIS J. INT'L L. & POL'Y 7, 8 (2004).

176. See U.N. Charter art. 2, para. 4 (affirming self-determination).

177. Deiwert, *supra* note 46, at 772-73.

178. League of Nations Covenant art. 22, para. 1 ("To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.").

179. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 17, U.N. Doc. A/5217 (1970); TATAH MENTAN, *THE STATE IN AFRICA* 157 (2010) (stating that "[t]here is a general consensus among Africanist historians that colonialism is morally wrong."); see generally ANTHONY ARNOVE, *IRAQ: THE LOGIC OF WITHDRAWAL* 31, 34 (2006); CHALMERS JOHNSON, *THE SORROWS OF EMPIRE* 29 (2004); *THE UNITED NATIONS AT THE MILLENNIUM: THE PRINCIPAL ORGANS* 142 (Paul Graham Taylor & A.J.R. Groom eds., 2000); UDAY SIGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (1999); Eyal Benvenisti, *The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT'L L. 677 (2004); Thomas M. Franck, *When, if Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J. L. & POL'Y 51 (2001).

180. Wilde, *supra* note 37, at 109.

181. *Id.* at 94.

populations on which the trusteeship system depended,<sup>182</sup> making the conception decidedly anachronistic in the twenty-first century.

Perhaps the most compelling interpretation that justifies significant leeway in instituting reform is one that affirms the restrictions of the Hague and Geneva Conventions, but incorporates universal human rights prescriptions as a fundamental goal of an occupation. In this sense, the history of occupation law is not as salient as reconciling the development of international convention rules governing *jus post bellum* in conjunction with the chronological introduction of modern human rights values, which is a diagnostic synthesis of codified law and subsequent custom that may still ultimately result in a transformative or “nation-building” occupation.<sup>183</sup>

Professor Feldman, who was a constitutional advisor to the Iraqi Governing Council, believed that a minimalist intrusion in domestic affairs should be followed during an occupation, but emphasized that a “government may permissibly set its goals on the basis of its own citizens’ interests *whenever those goals do not fundamentally conflict with the interests of people whom the government does not represent.*”<sup>184</sup> Offering an interpretation for applicability to the occupation, Professor Purdy notes that this philosophy is a spin on the application of the John Stuart Mill “harm principle” to international affairs, in which “one may act freely so long as one’s actions do not harm another,” but Purdy also accentuates the deficits in this interpretation, including that one “cannot have perfect knowledge” of others’ “interests” or appreciate which interests should be most authoritative.<sup>185</sup> Moreover, commentators might also disagree over whether there should be a presumed intention that the occupier aspires to fulfill a philanthropic mission or whether the international community should acquiesce to the foreign military’s disposition that occupation law restrictions would only unduly hamper the fuzzy and

182. WILLIAM BAIN, *BETWEEN ANARCHY AND SOCIETY: TRUSTEESHIP AND THE OBLIGATIONS OF POWER* 135-36 (2003).

183. DANIEL LEVY & NATAN SZNAIDER, *HUMAN RIGHTS AND MEMORY* 25-26 (2010) (emphasizing that there is a dearth of theorizing on human rights in the context of nation-building, but that “human rights are about the breakdown of boundaries”); *see also* Boon, *supra* note 126, at 57 (noting that while interventions in Iraq and Afghanistan resulted in transformative occupations, there is “no uniform legal framework regulating transitions from conflict to peace,” but that rules of *jus post bellum* fill the void); Norchi, *supra* note 158, at 281.

184. NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* 24 (2004).

185. Jedediah Purdy, *Review Essay: The Ethics of Empire, Again*, 93 CALIF. L. REV. 1773, 1779 (2005).

warmly regarded goodwill mission.<sup>186</sup> Fact-specific exigencies may not be the most favorable circumstances for establishing new customary international law norms, but this position has been raised by commentators with reference to the occupation of Iraq.<sup>187</sup>

### *B. Interpreting the Terms of Resolution 1483 in Light of Contemporary Occupation Law*

Theorization and contentions that practice may have updated custom should also include the language of Resolution 1483, which defined the occupation's authority, and appraise how scrupulously the

186. McGurk, *supra* note 131, at 452 (working lawyer for the CPA remarking that "we often encountered hard ceilings on the limits of our authority under international law" but that his experience "revealed an inexcusable gulf between what international law clearly permits and what any successful state-building operation requires."). The connotation that there is a fuzzy and warmly regarded do-gooder presence that should remain beyond reproach is a theoretical conception; MACDONALD, *supra* note 173, at 186 (noting that "states' intentions [such as if they are assumed to be noble] are largely irrelevant when assessing whether a particular act qualifies as an act of conquest"); Roberts, *supra* note 94, at 601 (remarking of the depiction of the occupant as a bastion of progress can beget a "dangerous mix of crusading, self-righteousness, and self-delusion"). Others have raised questions over what is "lawful" under international law and what is "legitimate," including by maintaining that occupation rules are outmoded because these particular actions in Iraq involved "nation-building." Harris, *supra* note 32, at 3; Cohen, *supra* note 172, at 496, 500. Others have suggested that sovereignty can fracture because it was never really *absolute*. Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT'L L. 195, 196 (2004).

187. BENVENISTI, *supra* note 42, at xi (contending that even though CPA actions in Iraq were not consistent with occupation law, the precedent may update occupation law). A "transformative occupation" may represent an evolution in occupation law since the era in which international agreements were consummated. Roberts, *supra* note 94, at 580; Nehal Bhuta, *The Antimonies of Transformative Occupation*, 16 EUR. J. INT'L L. 721, 740 (2005). Army JAG attorney Major Nicholas F. Lancaster also suggests that principles of customary international occupation law and the Hague Regulations and the Geneva Convention may have been replaced by new customary standards as a result of a "Coalition occupation and administration of Iraq." Major Nicholas F. Lancaster, *Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Conventions Still be Considered Customary International Law?*, 189 ARMY L. REV. 51, 51 (2006). Other commentators have maintained that there are other recent examples of practice modifying custom. Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 143, 144 (2001) (contending that even though Article 52(2) of the Geneva Convention strictly limits attacks to military targets and objectives, because these rules have not always been followed, violations are not indicative of a breach of international law but instead that the treaty rule "may not necessarily reflect customary international law or state practice."). A possible limitation in this contention is that breach examples, which contradict customary practice (World War I and World War II), precede the 1949 treaty provision. *Id.* at 153-62 (providing examples). However, Human rights Watch and Amnesty International have criticized bombing tactics in the former Yugoslavia during the late-1990s. *Id.* at 165-66, 176-77.



CPA adhered to the Resolution. Depending on the level of compliance, perhaps questions should not fixate on what occupation law is or how occupation law has evolved, but on why Bush administration rhetoric prior to the adoption of Resolution 1483 maintained one representation, why Bush's CPA departed from those representations,<sup>188</sup> and how the parameters of Resolution 1483 were averted without consequence. These reflections do not venture to imply that the U.N. could not permit the Security Council to impose a deep occupation authority on an unwilling target state,<sup>189</sup> but queries whether that authorization was in fact located in the text of Resolution 1483.

Resolution 1483 specifically called the U.K. and the U.S. "the Authority" and "occupying powers," referenced the applicability of the Geneva and Hague Conventions, and specified that the Authority was obliged to "recognize the specific authorities, responsibilities, and obligations under applicable international law . . . as *occupying powers*."<sup>190</sup> Not one word in Resolution 1483 refers to "the Authority" or any faction of the occupation to embark on any form of "legislating."<sup>191</sup> In the six times that the Resolution refers to "institutions" and the equivalent of law-making initiatives, the language is surrounded by affirmations that it is the Iraqi people who will determine their "own political future" and that all U.N. members, U.N. organs, and "the Authority" were required to *assist* Iraqis in establishing their own institutions.<sup>192</sup> Thus, aside from the occupying authority's right to make rule modifications or adopt certain laws as necessary to ensure public order and safety during the occupation,<sup>193</sup> uphold human rights, and assist the fruition of a representative Iraqi government that

188. See *infra* Parts II (A)(C).

189. The legitimacy of such a delegation could be more robust to the extent that the Security Council's specific mission endeavors to maintain peace and security and also weighs the respective infringement on internal governance.

190. S.C. Res. 1483, pmb1. para. 13, U.N. Doc. S/RES/1483 (May 22, 2003) (emphasis added); see Boon, *supra* note 118, at 535-36.

191. S.C. RES. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

192. *Id.* at pmb1. paras. 1, 7, 8(c), 8(e) 15; Harris, *supra* note 32, at 1 (stating that the Security Council, without reservation, affirmed that the Iraqi people were to possess sovereign control of their own choices).

193. Convention (IV), *supra* note 169, art. 64 (permitting the occupying power to "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain an orderly government of the territory, and to ensure the security of the Occupying Power."); Hague Convention, *supra* note 36, art. 43 (providing that the occupier must ensure that there is "public order and safety" and must respect the laws of the country unless absolutely prevented from doing so); Boon, *supra* note 53, at 324 (remarking that the occupier has some authority to legislate).

would make its own legal choices, there was no unilateral prerogative in Resolution 1483 that permitted the "Authority" to reform Iraq's legal system.<sup>194</sup> Resolution 1483 required the U.S. and U.K. to "promote the welfare of the Iraqi people through effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future."<sup>195</sup> It is the political future that selects the legal future. That is how democracy works.

Despite the language, some commentators have maintained that Resolution 1483 did sanction widespread reforms. For example, Bart Fisher, an attorney who founded the U.S.-Iraq Business Council in April 2002, explains that he specializes in assisting American businesspersons who want to invest in Iraq and believed that Iraq should have taken full advantage of the benefits of foreign investment and privatization, and remarked:

As far as privatizing Iraq, a regime has been established. As the occupying power, we have great discretion under the CPA. U.N. Resolution 1483 actually provides the authority to promote economic reconstruction and we have operated under this resolution. If fact, operating under the Resolution is a matter of international law. Occupying powers have broad discretion to change the laws of the country to ensure that it functions. The first pillar is to establish an investment law.<sup>196</sup>

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194. U.S. DEP'T ARMY, *supra* note 34, at preface, para. 2, 4 ("the occupant. . .continue[s] [to administer and enforce] the ordinary civil and penal laws of the occupied territories except to the extent [that] it may be authorized by Article 64 [of the Geneva Convention]. . .and Article 43 [of the Hague Regulations] to alter, suspect or repeal such laws."); Scheffer, *supra* note 33, at 845-49 (stating that Resolution 1483 did fall within occupation law and occupation law "was never designed for such transforming exercises.").

195. S.C. RES. 1483, preamble para 4, U.N. Doc. S/RES/1483 (May 22, 2003).

196. Bart S. Fisher, *Symposium: Markets in Transition: Reconstruction and Development: Part One -- Reconstruction: Prescriptions for Iraq, Predictions for Russia and Performance for China: Investing in Iraq: Legal and Political Aspects*, 18 TRANSNAT'L LAW 71, 73 (2004). (Fisher is correct in that this was the CPA's actions, but where that authority came from is a mystery. Similarly, if one reads half of Article 47, one can say that the "occupying power may introduce changes, "as the result of the occupation of a territory, into the institutions or government of the said territory." However, a complete quote of Art. 47 actually states that "protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power." Regulations Respecting the Law and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631. Reading the entire provision denotes that an occupation must meet a very high threshold before it can introduce changes to the institutions of the occupied territory because any modification is almost guaranteed to disadvantage at least one protected person. In terms of human rights protections or democratization, one can make a legitimate argument that equally respected and protected citizens are not politically disadvantaged, but to maintain that an occupation's

Fisher represented what the CPA did. Likewise, Feisal Amin al-Istrabadi, Iraqi Ambassador to the U.N., admitted that Bremer and the CPA exercised all lawmaking authority and states: "Resolution 1483 derogated this principle [that an occupier cannot change the occupied country's legal system] by giving sweeping powers to the Civil Administrator."<sup>197</sup> Resolution does affirm that the occupation was authorized to administrate the government's affairs<sup>198</sup> and to assist Iraqis in developing their own representative government institutions,<sup>199</sup> which was reasonably interpreted as an implied right to initiate the democratic reform process.<sup>200</sup> Administrate does not mean legislate. Having read Resolution 1483 several times in an attempt to specifically locate broader discretion, this author remains perplexed and continues to believe that the CPA was never given *any* special authority in Resolution 1483 to unilaterally legislate.

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economic changes will not disadvantage certain segments of the population is not compelling).

197. al-Istrabadi, *supra* note 153, at 270; Yoo, *supra* note 175, at 12-13, 16 (referencing the fact that the Geneva and Hague Conventions are binding and that Resolution 1483 is binding on the occupation and citing provisions of those conventions relating to administering and "providing public services and maintaining security").

198. Hmoud, *supra* note 107, at 449-50 (stating that, specifically, the CPA assumed responsibility over the Oil-for-Food program from the United Nations and established the Development Fund for Iraq which permitted using the funds to administrate and for reconstruction).

199. Parsons, *supra* note 39, at 32 (noting that "U.N. Security Council Resolution 1483, recognizing the state of occupation after the fact, stated that the law of occupation applied to the U.S. and Great Britain in Iraq, while at the same time allowing the transformation of Iraq into a democratic nation."); Yoo, *supra* note 175, at 7 (referencing "the authority of the United States, under domestic and international law, to make fundamental changes to the constitutional law and government institutions of Iraq.").

200. Jose E. Alvarez, *Contemporary International Law: An 'Empire of Law' or the 'Law of Empire'?*, 24 AM. U. INT'L L. REV. 811, 820, 820 n.40 (2009) ("At least during the period prior to installation of an Iraqi government, the Security Council also gave the United States and the United Kingdom, as occupying powers, implicit permission to reform Iraqi institutions to the extent necessary to bring about democratic institutions" and pointing to the preamble and paragraphs 4 and 8 of Resolution 1483); Scheffer, *supra* note 33, at 845-46 (the resolutions "invited the Authority to act beyond some of the barriers that occupation law otherwise would impose on occupying powers."); Cohen, *supra* note 172, at 500, 511 (stating that the language of Resolution 1483 seems ambiguous under occupation law as it requires promoting "economic reconstruction and the conditions for sustainable development" and for "the protection of human rights," which suggests legislating could be necessary and/or implied). This point does reference the most interpretable language of the seven-page resolution, but it refers to a UN Special Representative for Iraq" who should work with "the Authority" to "assist the people of Iraq" in promoting these missions, but it does not state that the "Authority" should take any initiative on its own or make choices for the Iraqi people or appointed puppets. S.C. Res. 1483, at 8(e) (emphasis added).

## CONCLUSION

If one maintains that there are *carte blanche* occupation prerogatives and that there is an evolution of the customary international law by occupation as a result of the occupation of Iraq, perhaps the consequence of the CPA's reforms should be considered. Violence was a hallmark of the occupation, the overwhelming majority of Iraqis opposed the occupation, Iraqis were infuriated by the CPA reforms,<sup>201</sup> and now, in mid-2014, Iraq faces another critical turning point. Divisions have intensified with Sunni insurgencies and Kurds expressing acerbity with Prime Minister Maliki, the long-term Iraqi exile and eight-year prime minister, who has presided as a brutal dictator<sup>202</sup> pursuant to the institutions initially installed by the CPA. This practical result further evinces that the most favorable interpretation of occupier powers is to adhere to the restrictions of occupation law and to not assume that there is legitimate precedent that has altered the customary international law of occupation. The people should commonly recognize that *they* formulated the trajectory for their political and legal future because that is self-determination.

While the governing treaties only permit an occupier to discharge functions necessary to administer the country and nothing more,<sup>203</sup> persuasive arguments can be made that the international law of occupation does now permit an occupier to impose institutional reform that will allow the local population to enjoy cogent human rights and representative government,<sup>204</sup> particularly when these are optimal

201. See Bejesky, *The Enigmatic Origin*, *supra* note 8 (manuscript at 279-98); see generally Robert Bejesky, *A Ripe Foundation for the Formation of ISIS: Tit-for-Tat Hostilities and Contingently Contained Violence* (Working Paper June 2015).

202. See *supra* Introduction.

203. GALLEN, *supra* note 48, at 62 (noting that the intention behind occupier administrative duties in the law of occupation was to only permit "[t]he occupier . . . to administer territory in a conservative fashion, only enforcing legal changes where necessary to maintain peace and security" and to "promote local capacity for autonomous self-government"); see also VON GLAHN, *supra* note 174, at 139-41; HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 254 (Dieter Fleck ed., 1995). Moreover, the invasion of Iraq was not approved by the Security Council and was called a violation of international law. Robert Bejesky, *A Theorization on Equity: Tracing Causal Responsibility for Missing Iraqi Antiquities and Piercing Official Immunity*, 27 PACE INT'L L. REV. (forthcoming 2015) (manuscript at 39-41). There was a progressively deepening intention for occupation involving a unilaterally conceived British and American mission, designed for disarmament of prohibited weapons. However, this then expanded into removing Saddam Hussein and his top officials from power, and then into removing tens of thousands of identifiable Baath officials from government. See Clair Dyer, *Occupation of Iraq Illegal, Blair Told*, GUARDIAN (May 22, 2003, 7:18 AM), available at <http://www.theguardian.com/politics/2003/may/22/uk.iraq2> (last visited Apr. 1, 2015).

204. See *supra* Introduction.

conditions to ensure the populace is able to freely choose its own laws. It is much more controversial to assume that an occupier can impose a large-scale economic and social restructuring to implant a capitalist free-for-all that upsets an existing socioeconomic order. One can raise a variety of novel and extemporaneous claims of vague quasi-*de jure* authority<sup>205</sup> that existed beyond the very limited prerogative in Resolution 1483 because the Hague rules do permit an occupier to act in concert with temporary governing authorities. The problem is that occupiers absolutely do not possess the sovereign authority of the regime that was ousted,<sup>206</sup> cannot obtain any authority above a temporary *de facto* administrative authority,<sup>207</sup> and cannot exercise rights of sovereignty,<sup>208</sup> and all of the temporary governance bodies were appointed by and beholden to the CPA.<sup>209</sup>

Circumstances have evolved since The Hague and Geneva Conventions were adopted, but if anything, it would appear that the era of decolonization furthered a population's right of self-determination to pursue its own interests without being paternalistically coddled by a

205. S.C. Res. 1511, para. 4, U.N. Doc. S/RES/1511 (Oct. 16, 2003) ("The Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority."). By the terms of this resolution, the appointed Governing Council was not *de jure*, but the resolution offers lip service to *de facto* authority. However, the Governing Council was not exercising *de facto* authority because the CPA was the entity with sovereign control and the Governing Council had no independent existence apart from the CPA. The Governing Council's existence was probably more similar to the functioning of presidential appointments in the US. The CPA's own mission statement identified itself as the temporary, "lawful government of Iraq." Michael A. Newton, *The Iraqi High Criminal Court: controversy and contributions*, 88 INT'L REV. RED CROSS 399, 417 (June 2006). Pursuant to Order No. 1, The CPA "vested [itself] 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." Coalition Provision Authority, Reg. No. 1, sec. 1(2), CPA/REG/16 May 2003/01, available at [http://www.iraqcoalition.org/regulations/20030516\\_CPAREG\\_1\\_The\\_Coalition\\_Provisional\\_Authority.pdf](http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority.pdf) (last visited Apr. 1, 2015). The *ruling* organizational chart depicted the Pentagon and the CPA, and the CPA directing various US and British generals and diplomats for their respective responsibilities, and the IGC was subordinate to all relevant actors. NOAM CHOMSKY, *IMPERIAL AMBITIONS* 46 (2005); see *contra* al-Istrabadi, *supra* note 153, at 270, 274 (Iraqi UN representative suggesting that the CPA had some amorphous *de jure* authority but then alternatively described that "Iraq's sovereignty was dormant for a time").

206. OPPENHEIM'S INTERNATIONAL LAW 437 (H. Lauterpacht, ed. 1952).

207. See Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1581 (1985); Boon, *supra* note 53, at 296.

208. Burke, *supra* note 172, at 109-111.

209. Bejesky, *The Enigmatic Origin*, *supra* note 8 (manuscript at 279-98).

foreign intervention or by subjecting a population to a system similar to a League of Nations' mandate. It is offensive to assume that a population does not really "understand" its own real interests and requires assistance to learn how to be "civilized," as this postulate is akin to the same strain of loathsome intermeddling that sustained colonialism, but has since been universally repudiated. As for imposing laws because Iraqis do not comprehend legitimate legal structure, an Iraqi judge opined:

We don't need you to come here and tell us about what law is. We invented law. . . . We are the people who figured law out, thousands of years ago. But now your soldiers are coming in and telling us what to do, and you're not respecting our legal traditions or legal process. The first thing the Americans did after the war was to announce that they were immune from Iraqi legal process. So, if an American commits a crime, they're completely immune, there's nothing that we can do about it. The Americans are unaccountable. How can this be the rule of law?<sup>210</sup>

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210. Bodansky, *supra* note 53, at 130.