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**The Limitations of International
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Reallocation of Iraqi Oil Resources
under the US/UK Transformative
Occupation of Iraq.**

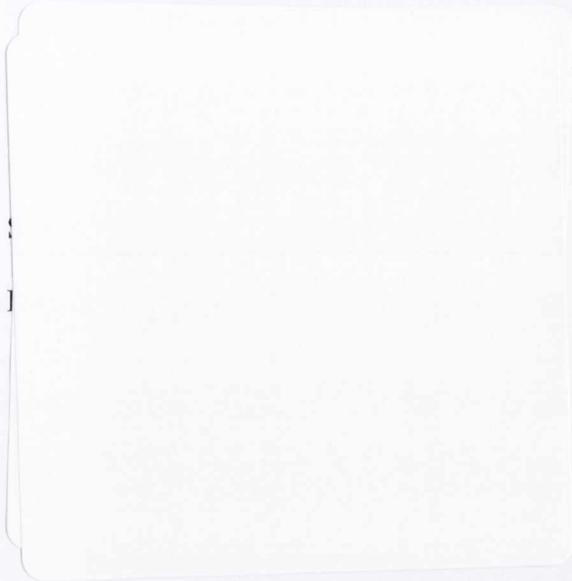
Degree of Doctor of Philosophy

2011

Susan Rose Power

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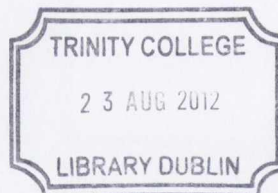
**The Limitations of International Humanitarian Law to the
Reallocation of Iraqi Oil Resources under the US/UK
Transformative Occupation of Iraq.**

Name: Susan Power

Submitted in candidacy for the Degree of Doctor of Philosophy

University of Dublin (Trinity College)

Submission Date: 30th November 2010



Thesis 9542

Dedicated to Dr. Gernot Biehler
Who gave me
the most precious gift
his time

Summary

This thesis examines the emergence of a new characterisation of belligerent occupation evidenced in Iraq (2003-2004), transformative belligerent occupation. After the institutions of government were destroyed in hostilities it was apparent that some form of state building exercise was necessary to transform the territory to restore order there. Consequently, the belligerent occupying powers were authorised by Security Council Resolution Chapter VII mandate to transform the territory and comply with their obligations under the Hague Regulations of 1907 and Geneva Conventions of 1949. The liberal mandate to reconstruct the territory conflicts substantially with the conservationist core of international humanitarian law. Subsequent economic measures implemented by the occupying powers in Iraq awarded foreign investors long term rights over public immovable property and facilitated the removal of profits from the territory. The reconstruction efforts were underpinned by the exploitative use of the Development Fund for Iraq containing monies from the sale of Iraq's oil.

This thesis examines the legality of the belligerent occupant's actions under international humanitarian law. Moreover it examines the parameters for potential state building transformational measures within the framework of international humanitarian law and whether the occupation of Iraq has contributed to an evolution in occupation law.

Chapter 1 examines the limits on the belligerent occupant's use of oil and other resources within the Development Fund for Iraq under international humanitarian law. It examines the possible formation of a new protectionist norm for the cash assets of the occupied State which would present a departure from the liberal asset use manifest in Article 53(1) of the Hague Regulations.

Chapter 2 examines the conflicting interpretations of the usufructuary rights contained in Article 55 of the Hague Regulations and extrapolates from these principles the

extent to which the belligerent occupant can use public immoveable property such as oil fields, refineries and other State property during occupation.

Chapter 3 reviews the extent to which a belligerent occupant can transform a territory from a socialist to a capitalist model under international humanitarian law. It questions whether an internationalised belligerent occupation can lend legitimacy to the reforms in Iraq and possibly be used as a model in future occupations.

Chapter 4 questions the role of the Governing Council as a representative indigenous body in Iraq. This self-determinative role is a unique feature of the occupation of Iraq and was presumed to lend legitimacy to the reforms.

The conclusion posits that the laws of occupation are moving into a tiered direction where responses to certain types of conflict necessitate a broadening of the traditional lens of international humanitarian law particularly where the rights of the occupied population trump considerations of the State. However striking a note of caution, the loosening of occupation laws, particularly the economic provisions of the Hague Regulations may lead to the planned exploitation of oil or economic resources as witnessed in Iraq.

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Introduction

In the aftermath of the illegal unilateral invasion of Iraq in 2003, it was evident that the rebuilding of Iraq's institutions of governance, judicial reform and rebuilding of Iraq's economic structure was necessary after a decade of sanctions and dictatorship rule. Post invasion Iraq approached as near to a state of *deballatio* as had been witnessed in Germany in the aftermath of World War II. Similar missions in Kosovo, Bosnia, East Timor and Eastern Slavonia witnessed a new role for the United Nations, working within transformational Chapter VII mandates to rebuild the States under a human rights legislative framework. However departing from the United Nations State building model, Security Council Resolution 1483 mandated that reforms in Iraq were to be implemented primarily under the authority of the belligerent occupant, and under the framework of international humanitarian law. Immediately, it became apparent that international humanitarian law was a vehicle ill suited to transport such transformative objectives.

The transformation of Iraq from a centrally planned socialist state to a decentralised free market capitalist model was facilitated by a series of legislative military orders introduced by the Coalition Provisional Authority, the governing structure of the belligerent occupant. The Governing Council was established as an indigenous interim administration to work with the Coalition Provisional Authority during the occupation. Security Council Resolution 1483 mandated a joint reconstruction operation by the United Nations Special Representative operating in a coordinating role with the Coalition Provisional Authority and other international organisations. However, owing to an escalation of violence and ensuing insurgency United Nations staff in Iraq were forced to retreat from the territory until the occupation was over.

Prior to the occupation, Iraq's oil industry accounted for over eighty per cent of government revenues and as the State's primary industry was the most vulnerable to the belligerent occupant's transformative measures. Consequently, Security Council Resolution 1483 established the Development Fund for Iraq and during the occupation monies from the sale of petroleum, petroleum products and gas along with assets frozen from the former regime were deposited into the fund for use in

reconstruction projects. When the occupation officially ended on 28 June 2004, commercial, foreign investment and economic laws which had buttressed Iraq's oil industry for decades were dismantled by the Coalition Provisional Authority leaving the State open to private foreign investors seeking lucrative oil contracts. Additionally most of the resources contained within the Development Fund for Iraq had been disbursed by the belligerent occupant on reconstruction contracts at inflated costs. Moreover regulations adopted during the occupation facilitated the reallocation of Development Fund for Iraq petroleum resources outside the territory.

This thesis examines the occupation of Iraq and its departure from traditional belligerent occupation towards a new internationalised model of belligerent occupation where the belligerent occupant operates in conjunction with the United Nation in occupied territory. Furthermore, the thesis examines how State building objectives during belligerent occupation offend against core humanitarian law norms which protect the natural and economic resources of the occupied State against exploitation by an invading belligerent. The thesis argues that certain transformative measures serviced the pre-war interests of the invading belligerent and were not implemented for the benefit of the occupied population. Appositely the provisions of the Hague Regulations and the Four Geneva Conventions were applicable to the occupation Iraq to prevent exploitation.

Chapter 1 examines the position of the Development Fund for Iraq and limitations on its use implicit in Security Council Resolution 1483. Petroleum and other resources in the Fund are examined in their capacity as public and private moveable assets. Moreover the Chapter examines whether the use of private liquidated assets contained in the Development Fund for Iraq are constrained by reference to Article 46 and Article 53(2) of the Hague Regulations. The Chapter examines whether considerations of "*munitions de guerre*" and "operations of war" which limit the belligerent occupants use over both public and private moveable property may be expanded to facilitate the economic reconstruction required in Iraq. Generally the belligerent occupant is entitled to seize and use all cash, funds and realisable securities belonging to the occupied state for use in military operations. This Chapter questions whether the establishment of the Development Fund for Iraq to protect

such assets signals a new development towards the protection of the economic resources of the occupied State.

Chapter 2 examines whether international humanitarian law limits the belligerent occupants use of oil refineries and crude oil in the ground as public immoveable property during belligerent occupation. In particular, the Chapter examines whether the Coalition Provisional Authority had obligations under Article 55 of the Hague Regulations to safeguard the oil pipelines against smuggling. Additionally, the Chapter highlights the practice of allocating long term licences over public immoveable property introduced under Coalition Provisional Authority Regulation Number 39 on Foreign Investment. Arguably this type of practice is limited by reference to the usufructuary provision of Article 55 of the Hague Regulations. Moreover this section argues that restrictions on the alteration of property's status contained in Article 55 circumvent the belligerent occupant from applying transformative measures to public immoveable property.

Chapter 3 reviews the transformative measures implemented during the belligerent occupation with a particular focus on the economic alteration of the territory as this substantially impacts on the operation of Iraq's oil industry. In particular the thesis argues that "creeping privatisation" measures introduced during the belligerent occupation exceeded the status quo limitations of Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention. Moreover the section establishes that the transformation was implemented by the Coalition Provisional Authority independently from the United Nations and beyond the authority of UN Security Council Resolution 1483. However this type of transformative internationalised framework marks a new direction in the laws of belligerent occupation and as such is unchartered territory.

Chapter 4 examines the role of the Governing Council for Iraq appointed as an independent indigenous administration during the belligerent occupation. The appointment of an independent administrative authority which "embodies the sovereignty of Iraq" under UN Security Council Resolution 1511 represents a marked departure from international humanitarian law where the belligerent occupant alone governs the territory. This Chapter examines how the appointment impacts on

the effective control of the belligerent occupant operating under Article 42 of the Hague Regulations. Moreover, this Chapter argues that the role of the Governing Council falls short of legitimating the transformative measures in Iraq by reference to Article 47 of the Fourth Geneva Convention.

Chapter 1

Are there limits within International Humanitarian Law to the treatment of Iraq's oil resources from the Development Fund for Iraq, by the occupying powers, when using those resources to contract with foreign companies?

Introduction

United Nations Security Council Resolution 1483, established the Development Fund for Iraq on 22 May 2003.¹ This required that the proceeds from export sales of petroleum, petroleum products and natural gas from Iraq would initially be deposited by the occupying Coalition Provisional Authority into an account to be held by the Central Bank of Iraq, with five per cent of the proceeds to be deposited into the Compensation Fund established under UNSC resolution 687 (1991).²

The Development Fund for Iraq contained money from the sale of Iraqi oil. Therefore the status of the Development Fund for Iraq assumed a central role in addressing the latitude of control exerted by the occupant over moveable and immovable oil resources under the application of International Humanitarian Law (IHL). Notably the fund contained monies from the Oil-for-Food programme which predated the occupation and also resources from the sale of oil products during the occupation.³ The status of the oil resources in the Development Fund for Iraq were complicated further by the inclusion in the fund of proceeds from Iraqi state owned property, vested funds frozen from the first Gulf war and seized monies from the former Iraqi regime.⁴ Member states in which these monies remained are obliged to deposit them

¹ S/RES/1483 (2003) paragraph 12.

² S/RES/1483 (2003) paragraph 21. The Compensation Fund was established under UNSC Resolution 687 (1991) to compensate Kuwait for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."

³ S/RES/1483 (2003) paragraph 16. The resolution closed the chapter on the crippling economic sanctions regime. Instead \$1 billion of the remaining Oil-for-Food funds were to be transferred to the Development Fund for Iraq.

⁴ S/RES/1483 (2003) paragraph 23; Audit Report, Coalition Provisional Authority Comptroller Cash Management Controls Over the Development Fund for Iraq, Office of the Inspector General, Coalition Provisional Authority, July 28, 2004, p.1

into the fund under the terms of SC resolution 1483.⁵ The Hague Regulations do not specifically address mixed public/private resources as a distinct category of property however there is a significant body of state practice in this regard. Section 1 of this chapter will assess the limits on the belligerent occupant's use in using mixed public/private property belonging to the occupied state.

Resolution 1483 outlined a non exhaustive list of limitations on the expenditure of DFI oil resources. Primarily the funds were to be used to meet humanitarian needs, economic reconstruction, the repair of Iraq's infrastructure, disarmament, the costs of the Iraqi administration and "other purposes benefiting the people of Iraq."⁶ This function was echoed in Coalition Provisional Authority Regulation Number 2.⁷ Consistent with the humanitarian objective the resources funded the Commanders Emergency Response Program (CERP) and the Rapid Regional Response Program (RRRP)⁸. Controversy arose when it became apparent that the CPA granted contracts to private corporations using DFI resources outside the humanitarian remit. Although Resolution 1483 does not expressly prohibit this kind of private contract, it is implicitly prohibited under Articles 16(b) which postpones action on contracts of 'questionable utility' concluded under the predecessor Oil for Food scheme until an internationally recognised representative government of Iraq is formed.⁹ Notably this

⁵ S/RES/1483 (2003) paragraph 23; Development Fund for Iraq, Statement of Cash Receipts and Payments, KPMG Independent Auditors Report, October 12 2004, This included deposits from assets frozen outside Iraq from eighteen member states amounting to \$1,056,096 as of June 28, 2004.

⁶ S/RES/1483 (2003) paragraph 14.

⁷ CPA/REG/10 June/2003/02, Development Fund for Iraq. (Governing Regulations of the Coalition Provisional Authority).

Committed to ensuring, consistent with paragraph 14 of Resolution 1483, that the Development Fund for Iraq shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq.

⁸ Audit Report, Coalition Provisional Authority Comptroller Cash Management Controls Over the Development Fund for Iraq, Office of the Inspector General, Coalition Provisional Authority, July 28, 2004, p.2

⁹ S/RES/1483 (2003) paragraph 16(b).

To review, in light of changed circumstances, in coordination with the Authority and the Iraqi interim administration, the relative utility of each approved and funded contract with a view to determining whether such contracts contain items required to meet the needs of the people of Iraq both now and during reconstruction, and to postpone action on those contracts determined to be of questionable utility and the respective letters of credit until an internationally recognized, representative government of Iraq is in a position to make its own determination as to whether such contracts shall be fulfilled;

comports with a reading of Article 43, 53 and 55 of the Hague Regulations reserving major transformative operations to the returning government. It can be similarly asserted that any private contract of “questionable utility” concluded outside the mandate for reconstruction under the newly constructed Development Fund for Iraq is implicitly prohibited. At the UN Security Council’s meeting on Resolution 1483, the United States representative John Negroponte assured that “the Development Fund would only be used to benefit the Iraqi people.” While French representative Jean Marc De La Sablière asserted that “Iraq would have the resources to rebuild itself.”¹⁰ In fact a sweeping economic conversion of Iraq by the CPA effectively transformed the State from a centralised socialist economy to a capitalist free market.

In addition to the massive spending of oil resources, it emerged from both internal reports and external audits, that the occupant’s controls over the DFI resources were lax.¹¹ The CPA’s Program Review Board exclusively authorised spending from the DFI. Additionally the US allocated an extra \$18.6 billion in resources for reconstruction from their domestic budget and also authorised spending from the Iraqi budget.¹² A plethora of accounting problems surfaced, including inaccurate reporting of contracts awarded, missing contracts, meetings where minutes had not been documented, missing receipts and the awarding of sole source contracts.¹³ It emerged that the Development Fund was deprived of additional export sales from the practice of oil smuggling, due to the failure of the occupant to secure metering systems on the pipeline networks. This left the Development Fund for Iraq bereft of a potential \$800

¹⁰ Security Council 4761st Meeting, (22/05/2003) Security Council Lifts Sanctions on Iraq, Approves UN Role, Calls for Appointment of Secretary-General’s Special Representative.

¹¹ Audit Report, Coalition Provisional Authority Comptroller Cash Management Controls Over the Development Fund for Iraq, Office of the Inspector General, Coalition Provisional Authority, July 28, 2004, p. 5. The audit highlighted inadequate physical safeguards over DFI resources. “Keys to the safe were kept in the disbursing officer’s unattended backpack. Also the disbursement officer left the room and lost prevue over the safe.”

¹² Office of Inspector General, Audit Report, Award of Sector Design-Build Construction Contracts, July 23, 2004, p. 7

¹³ KPMG, Development Fund for Iraq, Report of Factual Findings in connection with Disbursements, September 2004, p. 18. The occupied power’s accounting and reporting of the DFI funds were found to be below international standards in the KPMG audit on behalf of the International Advisory and Monitoring Board established under Resolution 1483. In thirty-seven cases contracting files could not be located to account for \$185,039,313 from the DFI.

million dollars.¹⁴ Moreover the practice of bartering oil with neighbouring Syria resulted in the exclusion of those resources also from the fund.¹⁵

International Humanitarian Law (IHL) in the form of the Hague Regulations, 1907, Geneva Convention IV, 1949 and the Additional Protocols, 1977 regulates the conduct of occupying powers during the occupation of enemy territory. Under public international law Iraq remains sovereign over her monetary resources even during occupation, when international humanitarian law allows the occupier limited use of those resources.¹⁶ UN SC Resolution 1483 controls the occupying forces' use of Iraq's state resources in the DFI outlining the governance of international humanitarian law but also taking the further step of providing additional safeguards over the fund. These include a monitoring mechanism under the International Advisory and Monitoring Board for the Development Fund for Iraq¹⁷ and consultation over the occupiers' expenditure of the oil resources with a representative Iraqi interim administration.¹⁸ Paradoxically, such measures go beyond traditional international humanitarian law but at the same time Resolution 1483 insists that the CPA adhere to the letter of the Hague Regulations, 1907 and the Geneva Conventions, 1949.¹⁹

This chapter will assess the limitations on the use of oil resources in the Development Fund for Iraq under the rubric of international humanitarian law. The corpus of the fund will be examined to determine whether the resources are to be classified as public or private resources which will in turn signify its treatment under occupation

¹⁴ Iraq, Oil Ministry, Office of the Inspector General, Smuggling Crude Oil and Oil Products, Second Transparency Report, par 4.4. This report is based on data from Iraq's Central Agency for Statistics and Information Technology.

¹⁵ KPMG, Development Fund for Iraq, Report of Factual Findings in connection with Export Sales, September, 2004, p.7.

¹⁶ F. A. Mann, "Money in Public International Law," *The British Yearbook of International Law*, Vol. 26, (1949), pp 259, 259.

¹⁷ S/RES/1483 (2003), par 12

¹⁸ S/RES/1483 (2003), par 14

¹⁹ International humanitarian law has traditionally regulated the occupiers use of property during occupation and this is emphasised also in Resolution 1483 which, "calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907." The significance of the role of international humanitarian law in regulating the occupation was reiterated by Pakistans representative to the Security Council in relation to the resolution, who noted that "under the Charter the powers delegated by the Security Council under this resolution are not open-ended or unqualified. They should be exercised in ways that conform with 'the principles of justice and international law' mentioned in Article 1 of the Charter, and especially in conformity with the Geneva Conventions and the Hague Regulations."

law. By placing the resources within this legal framework, the occupiers' actions in changing the economy of the territory from a centralised socialist to a privatised market, shall be examined. Furthermore the Hague Regulations shall be analysed in detail for limitations on the CPA's use of public oil resources in the DFI which may prevent the authority from using the resources to facilitate economic change. This shall be assessed by (1) determining the status of mixed public/private oil resources during belligerent occupation, (2) assessing the requirement in Resolution 1483 that resources in the Development Fund for Iraq be used for "purposes benefiting the people of Iraq" (3) assessing the status of pre-war foreign oil contracts with Saddam Hussein and the limits of Article 53(2) of the Hague Regulations.

1.1 Do the Hague Regulations limit the belligerent occupants' use of mixed public/private oil resources during belligerent occupation?

An overview of Coalition practice in administering the Development Fund for Iraq highlights both inadequate monitoring over the use of the fund and weak controls over its accounting mechanisms. The failure to implement the fund in a transparent manner resulted in the deposit of mixed oil resources into the fund. From the perspective of international humanitarian law, the proper classification of Iraq's oil resources affects the range of legal protections afforded to state natural resources, *pari passu* vitiating the occupying powers freedom in using the resources. An analysis of the distinguishing factors of the Hague Regulations' treatment of mixed public/private resources will explore (1) the historical perspective, (2) the laissez-faire ideology of the Hague Regulations (3) the position of private property under the Hague Regulations and (4) tests to determine the characterisation of property as public or private.

1.1.1 Historical Background

This section examines how the Hague Regulations limit the CPA's use of Iraqi oil resources and therefore an indepth examination of the economic provisions of the Hague Regulations will serve as a necessary prelude. A brief overview of the lineage of international humanitarian law will provide insight into the significance of the Hague Regulations as customary norms of international law. It is important to understand the history and jurisprudence of international humanitarian law in order to

gauge the impact of the Regulations on the political and economic landscape of occupied territory. An overview of the development of the customary norms of war highlights the potential for continued normative development in respect of contemporary practice. The focus will then shift to the nineteenth century laissez-faire philosophy which crafted the economic provisions of the Hague Regulations and contributed to policies which are integral to the law today.

The Hague Regulations of 1907,²⁰ Articles 42-56, codify the laws regulating the conduct of occupying forces during the occupation of hostile territory. Since the code's inception, the rules were egregiously violated by unrepentant occupying forces in both World Wars.²¹ The economic laws regulating requisitions witnessed abuse on a grand scale by the occupying German army in World War I. This was followed by blatant disregard in World War II of the humanitarian provisions on an unprecedented scale by all occupying powers. This bleak period in the history of international humanitarian law culminated in the Nuremberg Tribunals which declared the supremacy of the Hague Regulations as laws of a customary status. In particular the tribunal viewed the systematic abuse of the regulations in the world wars as lawlessness against the "dictates of humanity".²² Meron argues that "it is undeniable that the principle of humanity has had a major influence on the development of international humanitarian law and that some humanitarian constraints can be regarded as its offspring."²³ Instead it preserved the core ethics of a law and norms, which when put into context span centuries and when placed in recent context have triumphed as customary law. The fundamental humanitarian principles were recently upheld by the International Court of Justice, to be binding on all states regardless of ratification of the Hague, as they constituted 'intransgressible principles of

²⁰ Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land

²¹ A detailed examination of the Hague Conventions by the leading academic commentaries may be found in Oppenheim, *International Law A Treatise, Vol II Disputes, War and Neutrality*, (Seventh edition, H. Lauterpacht, 1952); Morris Greenspan, *The Modern Law of Land Warfare*, (University of California Press, 1959); Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II The Law of Armed Conflict*, (London, Stevens & Sons Ltd., 1968); Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 1942); Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey*, (Columbia University Press, 1949); Dieter Fleck et al., *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford University Press, 1995); Julius Stone, *Legal Controls of International Conflict*, (London, Stevens & Sons Limited, 1954).

²² International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), reprinted in 41 AM. J. INT'L L. 172, 225 (1947).

²³ Theodor Meron, "Martens Clause, Principles of Humanity and Dictates of Public Conscience" 94 American Journal of International Law, 78 (2000) P. 89.

international customary law' and in *Prosecutor v. Tadic* (1999) where the ICTY appeals chamber clarified that the 'treaty provisions which are at the very origin of the customary process'.²⁴ Accordingly, all parties engaged in the occupation and the states comprising the multinational force in Iraq are bound by these standards as customary international law.

The normative development of the law has matured over the centuries. Principles of humanitarian law have developed from ancient treaties and general accepted practice during hostilities. As early as 1280, BC Ramses II of Egypt signed a peace treaty with the Hattusili III of Anatolia ending war and outlining conditions for peace.²⁵ In India, humanitarian provisions during warfare were outlined as early as the fourth century BC in Kautilya's Arthashastra.²⁶ The Greeks and Romans also observed humanitarian principles in warfare.²⁷ The development of the norms reached a significant level in the middle ages, greatly influenced by the laws of chivalry. A mark of this progress was the documented trial in 1474 of Sir Peter of Hagenbach at Breisach, Germany for what would be described today as 'crimes against humanity.'²⁸ In his book, *De Jure Belli ac Pacis Libri Tres*, 1625, Grotius systematically collated the earlier writings into three volumes on international law and the laws of war.²⁹ This work can be seen as the plateau from which modern conceptions of international humanitarian law have sprung, particularly as Grotius stressed the need for humane practice in his writings. Certainly on the eve of the codification of humanitarian law, the provisions which had evolved from ancient times were deeply ingrained in the international psyche. Heffter argued that as an unwritten law, European international law could only be reviewed in light of historical process.³⁰ The codification of the laws of war in the Lieber Code, 1863, the Brussels Code, 1874, the Oxford Code, 1880 and the two Hague

²⁴ International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear weapons, 1996, pp. 226, 257; *Prosecutor v. Tadic*, ICTY (Appeals Chamber), Judgment of 15 July 1999, para. 290.

²⁵ Alexander Orakhelashvili, "The Idea of European International Law," *The European Journal of International Law*, Vol. 17, No. 2, (2006) pp. 315, 329.

²⁶ *Ibid* at pp. 315, 328.

²⁷ Adam Roberts, Richard Guelff, *Documents on the Laws of War*, (Oxford University Press, Third Edition, 2005) p. 3.

²⁸ Morris Greenspan, *The Modern Law of Land Warfare*, (University of California Press, 1959) p. 4.

²⁹ Adam Roberts, Richard Guelff, *Documents on the Laws of War*, (Oxford University Press, Third Edition, 2005) p. 3; Morris Greenspan, *The Modern Law of Land Warfare*, (University of California Press, 1959) p. 4.

³⁰ Alexander Orakhelashvili, "The Idea of European International Law," *The European Journal of International Law*, Vol. 17, No. 2, (2006) pp. 315, 323, citing W.A. Heffter, *Das Europaische Volkerrecht der Gegenwart*, (1844), at 1-2.

Conventions of 1899 and 1907, although significant in recent history, should therefore be viewed as the successful denouement of the normative framework of humanitarian provisions developed over millenia.

1.1.2 Laissez-faire Ideology

The codification of humanitarian law mirrored the tectonic shifts in liberal-pacifist ideology in the nineteenth century, notably the Rousseau-Portalis doctrine. The law reflected the revolution in international jurisprudence and the industrial revolution, where the philosophy of the public/private divide was promoted, distinguishing between the public function of State and the private capacity of the citizen. This was a marked departure from the medieval concept of prince states ruling in a private capacity.³¹ The Rousseau-Portalis doctrine perceived limited warfare as the preserve of professional armies which would not burden the private interests of the citizen. This division was highlighted by the Sole Arbitrator in the *Navigation on the Danube* (1921), emphasising that the policy of the Hague Regulations was “to avoid throwing the burdens of war upon private individuals.”³²

Laissez-faire, the prevailing politico-economic doctrine of the nineteenth century, limited the State’s power to administer the affairs of the private sector.³³ The ideology indoctrinated the Hague jurisprudence, placing private economic life outside the domain of the occupying power. The significance of this doctrine is twofold: first it protects private economic interests, as the exclusive preserve of the citizen but, also, it highlights the level of allowable exploitation by the occupying power over public or State resources. The concern here is that while *laissez faire* was perceived as a preservationist theory according to the economic model of the time, the influence of communism and the emergence of state owned industries, compounded with the mixing of state and private concessions, presents unforeseen anomalies for occupation law. The Hague Regulations remain somewhat stagnant, trapped in the *laissez faire* ideology which has failed to adapt to the concept of modern economic warfare. The drafters of the Geneva Conventions missed the opportunity to elaborate on the extent of the occupants’ administration over public moveable and immoveable property

³¹ Randall Lesaffer, “Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription,” *European Journal of International Law*, Vol. 16, No. 1, (2005) pp. 25, 34.

³² *Cession of Vessels and Tugs for Navigation on the Danube*, 1 R.I.A.A., p. 97 at p. 107.

³³ Julius Stone, *Legal Controls of International Conflict*, (London, Stevens & Sons Ltd., 1954) p 727.

emphasising instead the inviolability of private property only.³⁴ The Convention narrowly prohibits the destruction of public property in Article 53 and Article 147 and is silent on the administration of public moveable and immovable property during occupation.³⁵ Therefore the occupant's relationship over state and mixed private interests must be balanced against the inflexible economic provisions of the Hague Regulations.

The *laissez faire* philosophy, reflected within the Regulations' economic provisions, does somewhat repudiate the old war maxim, *la guerre nourrit la guerre* or 'war must support war'.³⁶ The policy considerations behind the regulations aim to prevent the occupying power from abstract extermination or ruination of the occupied population's economic assets.³⁷ During hostilities it is not uncommon for the belligerent to try to weaken the resistance of the enemy by destroying enemy war material on the battlefield. However this practice is heavily restrained by the Hague Regulations. In contemporary hostilities any remnants of the maxim's survival relates only to public property and even so as Wahberg notes only "under the most liberal interpretation."³⁸ As such, the war maxim involves a balance of considerations between the 'necessities of war' and the 'standard of civilisation'.³⁹ The maxim therefore attempts to prevent the occupier from placing the expenses of his war effort on the population of the occupied territory, and rather focuses on defraying the costs of the military administration of the occupied territory.

³⁴ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1948. Article 33, protects private property against pillage.

³⁵ Article 53, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1948. "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organisations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

Article 147, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1948. "Grave breaches to which the preceding Article relates shall be those involving any of the following acts...extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

³⁶ Garner, "Contributions, Requisitions, and Compulsory Service in Occupied Territory," American Journal of International Law, Vol. 11 (1917) pp. 74, 81. '*La guerre nourrit la guerre*' translated as 'War must support war'.

³⁷ Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 1942) p. 14.

³⁸ Garner, "Contributions, Requisitions, and Compulsory Service in Occupied Territory," American Journal of International Law, Vol. 11 (1917) pp. 74, 82.

³⁹ Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II The Law of Armed Conflict*, (London, Stevens & Sons Ltd., 1968) p. 244.

One major obstacle in applying the Hague Regulations to contemporary political and economic systems was the advent of socialist marxist doctrine, which for example in Russia saw the rise of socialism in the twentieth century as a distinct interclass system of law in contradistinction to the tiered aspect of the *laissez faire* model. This is also problematic for Iraq as a modern centralised socialist state. Quite apart from the advent of a new political system, the capitalistic model has outgrown its *laissez faire* origins, with the advent of the welfare state promoting increased regulation of the state in the marketplace and blurred boundaries between mixed state and privately owned enterprise.⁴⁰ The danger here is that the occupied state is more vulnerable to being the victim of economic abuse by an unscrupulous occupying power if its politico-economic system does not fall within the rubric of the Hague Regulations particularly where for example a former socialist state is in the process of transforming to a capitalist model.

1.1.3 Position of Private Property in the Development Fund for Iraq under the Hague Regulations

The Hague Regulations clearly emphasise the binary nature of property ownership prescribed under the Roussou-Portalis doctrine with property falling within its relevant public or private dichotomies. Private property enjoys a privileged status under occupation law. Article 46 specifically singles out 'private property' for protection under the regulations as property which 'must be respected' and 'can not be confiscated.'⁴¹ The inclusion of private property as a right within Article 46 alongside the right to life, family rights and religious expression elevates the protection of private property to the apex of humanitarian rights. Although not completely immune from use by the occupying forces, private property is heavily protected against appropriation with Article 52 limiting requisitions of private property to specific circumstances.⁴² Of particular significance is the inclusion of

⁴⁰ Paul Starr, "The Meaning of Privatization" Yale Law and Policy Review, Vol. 6 No. 1 (1988) pp. 6-41.

⁴¹ 1907, Hague Regulations, Article 46 "Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property can not be confiscated."

⁴² *Ibid.* Article 46 "Private property can not be confiscated." Article 52, "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country."

certain State property for protection under the private property paradigm, such as the property of municipalities and cultural property under Article 56.⁴³ In contradistinction to this, all other State owned property is categorised under Article 53 and Article 55 respectively, allowing for more extensive requisitioning and providing for the occupiers' use over real property which is 'belonging to the hostile State.'⁴⁴

Public and private property emerge as two distinct classifications under the lemma of occupation law but the regulations fail to indicate exactly how and when the occupier is to distinguish between the two. In the context of the Development Fund for Iraq the problem is twofold. Firstly this presents difficulties in applying the nuances of occupation law to determine the status of the mixed monies in the fund. Secondly the use of the monies to privatise public industries affects the alteration of property title from public to private. In particular, the title of immovable property is protected during occupation (this will be examined in depth in conjunction with the application and limitations of Article 55 to public resources). This section will focus on the quagmire inherent in both Resolution 1483 and the Coalition Provisional Authority's precept that the oil resources in the Development Fund for Iraq are wholly public in character while neglecting to assess the mixed nature of the resources and their potential classification as private property both individually and under the municipality protection of Article 56.

The nexus of the problem concerning the treatment of private property within the Development Fund for Iraq is entrenched in the categorisation of the funds as public under Resolution 1483. Public funds are channelled into the account from the sale of oil under the oil-for-food scheme inherited from Resolution 986 (1995) and from the

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied."

⁴³ 1907, Hague Regulations, Article 56 "The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."

⁴⁴ Article 53, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907. "An army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the State..." Article 55, "The occupying power shall be regarded only as administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile State..."

export sales of petroleum during the occupation period.⁴⁵ However Resolution 1483 deviates from the Hague Regulations in connection with the inviolability of private property rights, requiring that certain private resources be placed within the fund and therefore facilitating the mixing of public and private resources. Resolution 1483 par 23 (b) requires member states to freeze and transfer funds to the Development Fund for Iraq stating:

“funds or other financial assets or economic resources that have been removed from Iraq, or acquired by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, shall freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement, immediately shall cause their transfer to the Development Fund for Iraq.”⁴⁶

The Resolution instructs that the fund be used for public purposes including economic reconstruction, disarmament and ‘other purposes benefiting the people of Iraq’ despite acknowledging that the fund is mixed with private assets.⁴⁷ Moreover the decision to furnish the Compensation Fund with proceeds from Iraqi oil sales within the Development Fund, as reparations under the terms of Resolution 687 (1991) to Kuwait, is coterminous with the public direction of the fund.⁴⁸

Private Iraqi assets siezed under the direction of Resolution 1483 paragraph 23 are placed in a precarious position during the belligerent occupation as the resolution departs from the customary protections extended to private assets during occupation. The resolution vitiates any potential claims made by the individual or non-government entity during the occupation period in relation to these resources and postpones such enquiry until an “internationally recognized, representative government of Iraq” is formed.⁴⁹ This may pose a somewhat perilous dialectic for

⁴⁵ S/RES/1483 (2003) par 17 and par 20.

\$1 billion in oil sales under the Oil for Food programme belonging to the Government of Iraq were transferred under Resolution 1483 to the newly created Development Fund for Iraq.

⁴⁶ S/RES/1483 (2003) par 23 (b).

⁴⁷ S/RES/1483 (2003) par 14.

⁴⁸ S/RES/1483 (2003) par 21.

⁴⁹ S/RES/1483 (2003) par 23 (b). “Claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognised, representative government of Iraq.”

those affected considering the move towards the de-Ba'athification of Iraq under the Coalition Provisional Authority's Order No. 1 and the subsequent installation of a CPA sympathetic government post occupation.⁵⁰ The fund is assigned to the Coalition Provisional Authority to administer in consultation with the Iraqi interim administration (Iraqi Governing Council) for the duration of the occupation.⁵¹ The International Advisory and Monitoring Board reported that over eighteen States deposited \$1,056,096,000 from frozen funds and assets into the Development Fund for Iraq as of June 28, 2004.⁵² However the report does not single out these resources for separate consideration as possible private resources and it appears that the fund is collectively considered as public in status. This treatment of private property presents an antinomy between the integrity of private property in *sensu-stricto* under the Hague Regulations and the capricious administration of private property within a mixed fund under Resolution 1483. There is certainly a tension between the Resolution 1483 mandate for the occupying power's to comply with their obligations under the Geneva Conventions of 1949 and the Hague Regulations of 1907, which necessitates a determination on the status of mixed resources, and paragraph 23 in Resolution 1483, which fails to distinguish between mixed public/private resources.⁵³

1.1.4 Tests to identify private property within a mixed public/private fund

Modern warfare resonates with difficulty of classifying property of a mixed nature into its relevant category which immediately affects its status under occupation law. While the Hague Regulations limits the belligerent occupant's use of private moveable and private immoveable property, the status of mixed public/private assets is less clear. However this section will examine various tests which have emerged from tribunals and in state practice to differentiate between property of a mixed

⁵⁰ Coalition Provisional Authority Order Number 1, De-Ba'athification of Iraqi Society. At www.cpa-iraq.org/regulations.

"On April 16, 2003 the Coalition Provisional Authority disestablished the Ba'ath Party of Iraq. This order implements the declaration by eliminating the party's structures and removing its leadership from positions of authority and responsibility in Iraqi society. By this means, the Coalition Provisional Authority will ensure that representative government in Iraq is not threatened by Ba'athist elements returning to power and that those in positions of authority in the future are acceptable to the people of Iraq."

⁵¹ S/RES/1483 (2003) par 13.

⁵² Development Fund for Iraq, Statement of Cash Receipts and Payments, KPMG Independent Auditors Report, October 12 2004

⁵³ S/RES/1483 (2003) par 5. "Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."

public/private character addressing and the application of these tests to the Development Fund for Iraq.

Private property is considered to be sacrosanct in nature under international humanitarian law. This was evidenced as early as 1870 in customary law when Crown Prince Freidrich Wilhelm of Germany considered that public French coins held in the private Bank of France in Rheims were to be treated as private property for the purposes of international law.⁵⁴ Interestingly, this event preceded the Hague codification and was distinguished as customary law in the US under the Lieber code in 1863, and in parallel as a norm of general international law in Europe by 1870.

Although the issue of mixed public and private property is not addressed under the Hague Regulations, the integrity of the distinction was addressed at the Brussels Conference, 1873 when the Russian delegate Martens alluded to circumstances where public treasuries may include private and corporate funds which must be exempt from seizure.⁵⁵ Greenspan has also highlighted the fissiparous nature of the divide, where private company funds held by the enemy State, still retain their private status.⁵⁶ World War II however witnessed a departure from this norm, when private corporations in Italy were considered by the Allies to be under State control, or 'parastatal.'⁵⁷ The amount of control that the State exercised over the private Italian corporations was analogous to a public treatment of those properties for the purposes of occupation law. Although the Hague Regulations do not govern cases of mixed public and private ownership, tests have been devised by the courts *ex post facto* and state practice developed to clarify areas where the distinction has become obfuscated.

In *Standard Oil Co. Tankers v. Germany* (1926) brought before the Mixed Claims Commission, American private shareholders sought compensation for their interest in tankers that were requisitioned by Britain for the war effort and subsequently sunk by

⁵⁴ Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 1942) p. 52.

⁵⁵ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey*, (Columbia University Press, 1949) p. 170.

⁵⁶ Morris Greenspan, *The Modern Law of Land Warfare*, (University of California Press, 1959) p. 291. "Excluded from seizure, however, are funds held by the enemy state but which are in fact private property, such as funds belonging to depositors in a government savings bank, or to private individuals or companies."

⁵⁷ *Ibid* at p. 292.

Germany.⁵⁸ Under the Treaty of Berlin, US private interests in public companies were protected in the event that their interest in the property was destroyed. However the Commission found that the shareholders were not entitled to compensation as they had failed to establish their link as shareholders to the requisitioned British ship and the mixed property was designated as public property for the purposes of applying the Treaty of Berlin.⁵⁹ Similarly in *Clarke, Attorney General v. Ubersee Finanz-Korporation, A.G* (1947) the United States District Court found that a Swiss company controlled by the German industrialist Fritz von Opel constituted property of an enemy character. The court identified key factors contributing to the public designation including the fact that van Opel owned a usufructuary interest in the Swiss corporation, his peculiar acquisition of citizenship over the Principality of Lichenstein and parallel interests acquired in Hungarian companies supplying war materials.⁶⁰ Likewise, the *Resolution of Conflicting Claims to German Enemy Assets* (1947) identified criteria to determine when private corporations were directly or indirectly controlled by public German parties. It established that a corporation is considered to be publicly owned where the German enemy controls 50 per cent or more of the voting rights. This is certainly beneficial when ownership of property is complicated by concurrant legal and equitable interests.

State practice and case law has more recently evinced a trend whereby occupying powers assume that mixed public/private property is to be regarded in character as wholly public. Article 53, Hague Regulations allows the army to take possession of 'all moveable property belonging to the State which may be used for military operations.'⁶¹ Accordingly, the belligerent occupying power may be unduly eager to categorise properties as public in status, to benefit from the more liberal application of IHL. The belligerent occupants' methods of distinguishing between public and private property are by no means uniform. For example in *Collac v. Yugoslavia (1929)*, the occupier treated steamrollers and machinery of the private citizen as public

⁵⁸ *United States of America on behalf of Standard Oil Company of New York (Docket No. 5323), Sun Oil Company (Docket No. 5434), Pierce Oil Corporation (Docket No. 5469), v. Germany* (April 21, 1926). Text at Judicial Decisions Involving Questions of International Law, The American Journal of International Law, Vol. 20 No. 4 (Oct., 1926), pp. 782-789.

⁵⁹ *Ibid* at pp. 789.

⁶⁰ *Clarke, Attorney General v. Ubersee Finanz-Korporation, A.G*, 332 U.S . 480 (December 8, 1947), American Journal of International Law, Vol. 42, p. 470 (1948).

⁶¹ Article 53, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

property.⁶² Likewise in *N.V De Bataafsche Petroleum Maatschappij and Ors. v. The War Damage Commission (1956)*⁶³ the Japanese occupation forces treated the mixed oil stocks owned by private Dutch corporations in the Netherlands East Indies as public war booty.⁶⁴ This pattern challenged the application of occupation law, when a dispute arose over the control of mixed public and private oil resources, jointly owned by the Italian state oil corporation *Ente Nazionale Idocarburi* and the United Arab Republic, were treated as public during the Israeli occupation of the Sinai, 1967.⁶⁵

Once again, the trend towards the automatic public designation of mixed property assets as public in character has been evidenced by the Coalition Provisional Authority and Resolution 1483 determination of the Development Fund for Iraq resources as public property. The fundamental advantage of a liberal public property classification singularly benefits the occupying power who may use the property to advance their military objectives. Alternatively a fully public classification of mixed properties may benefit the entire occupied population should the occupant use the properties *bona fides* to administer the territory. However the ‘public good’ argument ultimately disenfranchises the private property owner, a position that the drafters of the Hague Regulations were not willing to entertain. Instead the laws of occupation provide strict limitations on the use of private property by the belligerent during occupation regardless of the form this may take.⁶⁶

The US and the UK military manuals regard property whose ownership is in doubt to be public property.⁶⁷ The UK Military of Defence, *The Manual of the Law of Armed*

⁶² Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II The Law of Armed Conflict*, (London, Stevens & Sons Ltd., 1968) p. 309.

⁶³ *N.V De Bataafsche Petroleum Maatschappij and Ors. v. The War Damage Commission*. 22 Malayan Law Journal 155 (1956).

⁶⁴ “*N.V De Bataafsche Petroleum Maatschappij and Ors. v. The War Damage Commission*,” *The American Journal of International Law*, Vol. 51, No. 4 (Oct., 1957) pp 802, 802

⁶⁵ Edward R. Cummings, “Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation,” 9 *Journal of International Law and Economics*, (1974) pp. 533, 533.

⁶⁶ Article 46, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907. “Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.”

⁶⁷ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, (Oxford University Press, 2004) par. 11.90. “Where there is any doubt about whether property found in the possession of the enemy is public or private, as may occur in the case of bank deposits and stores and supplies obtained from contractors, it must be considered to be public property unless and until its private character is clearly shown.”

Conflict, presumes that property of questionable mixed status is public property and cites bank deposits, stores and supplies from contractors as examples of where questionable ownership may occur, resulting in a public determination of property.⁶⁸ The hypothesis places the mixed property of the Development Fund in a subordinate position to that envisioned by the Hague Regulations. This position lies in stark contrast to Marten's conception that public treasuries holding private funds be exempt from seizure, during the Brussels Conference of 1873.⁶⁹ There, the stance was debated during the drafting of Article 6, Brussels Convention, 1874 which was repeated in Article 53, Hague Regulations, 1907 verbatim. Clearly there is a marked contradiction between the prohibitive stance advocated by Martens and the generous extension of the public property paradigm depicted in the UK Military of Defence manual. Furthermore, the military manual is only evidence of state practice and not to be taken as decisive in understanding the law. This view was established in *re List and Others* (1948), where the tribunal ascertained, "that army regulations are not a competent source of international law. They are neither legislative nor judicial pronouncements. They are not competent for any purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally."⁷⁰

Schwarzenberger also warns States against the presumption of public property, maintaining that if the occupying power chooses to appropriate, requisition or seize property "it acts at its own risk."⁷¹ Therefore despite the silence of the Hague Regulations in respect of mixed public and private ownership the occupying power should remain cautious of attributing public status to property indiscriminately particularly when the determination could complicate third party rights and unduly affect property *post bellum* and occupation.

⁶⁸ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, (Oxford University Press, 2004) par. 11.90. "Where there is any doubt about whether property found in the possession of the enemy is public or private, as may occur in the case of bank deposits and stores and supplies obtained from contractors, it must be considered to be public property unless and until its private character is clearly shown."

⁶⁹ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey*, (Columbia University Press, 1949) p. 170.

⁷⁰ *re List and Others* (1948), United States Military Tribunal at Nuremberg, 1948, pp 650-651. Interestingly, Dinstein has adopted a contrary position on the importance of military manuals as evidence of State practice in customary law, referring to them as "invaluable sources of genuine state practice." Yoram Dinstein "The ICRC Customary International Humanitarian Law Study" *Israel Yearbook on Human Rights*, Vol. 36 (2006) pp 1, 6.

⁷¹ Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II The Law of Armed Conflict*, (London, Stevens & Sons Ltd., 1968) p. 309.

Is there an emerging norm of public characterisation of mixed public/private property? It could be argued that there is an emerging norm in favour of extending the public property characterisation to mixed private/public property funds on the basis of the documented state practice. However whereas the United States and the United Kingdom have departed from the core Hague Regulations in their military manuals other nations have opted to maintain the dichotomy. For example Australia's Defence Force Manual (1994) states that private property cannot be confiscated and that objects confiscated under Article 53 of the Hague Regulations,

“do not become the property of, the occupying power. The seizure operates merely as a transfer of the possession of the object to the occupying power while ownership remains with the private owner. In so far as the objects seized are capable of physical restoration, they must be restored at the conclusion of peace, and in so far as they have been consumed or have been destroyed or have perished, a cash indemnity must be paid when peace is made.”⁷²

France simply incorporated Article 52 and Article 53 of the Hague Regulations on the permitted limited requisition of private property in its recent LOAC manual (2001).⁷³ Similarly Israel's Manual on the Laws of War (1998) reflects the prohibition on the confiscation of private property and lists limited circumstances of requisition providing that the military commander may seize private property to serve a 'military need'.⁷⁴ The Spanish Military Criminal Code (1985) punishes a soldier who “requisitions unduly, or unnecessarily buildings, or moveable objects in occupied territory.”⁷⁵

Despite the designation of private property in mixed funds as public property for the purposes of applying occupation law in the United States Military manual, the principle is not consistently applied in other US military documents. The Operational

⁷² Australia, Manual on the Law of Armed Conflict, Australian Defence Force Publication, Operations Series, ADFP 37 - Interim Edition, 1994, §§ 1225 – 1231.

⁷³ France, Manuel de droits des conflits armés, Ministère de la Défense, Directions des Affaires Juridiques, Sous direction du droit internationale humanitaire et du droit européen, Bureau de droit des conflits armés, 2001, pp 35-36, 109.

⁷⁴ Israel, Laws of War in the Battlefield, Manual, Military Advocate General Headquarters, Military School 1998, p. 63.

⁷⁵ Spain, Military Criminal Code, 1985, Article 74(1).

Law Handbook (2007)⁷⁶ notes that a person may not be arbitrarily deprived of their right to property. During occupation the belligerent may deprive a person of their property to the “extent that it is necessary to prevent its use by hostile forces” or “to prevent any use which is harmful to the occupying power” but following this the property must be returned immediately.⁷⁷ Outside its use in military operations comporting with a reading of the Hague Regulations, there is no indication here of an ancillary right of private property deprivation in pursuit of broader administrative duties. Similarly the military manuals of Argentina, Australia, Benin, Burkina Faso, Cameroon, Canada, Columbia, Congo, Dominican Republic, El Salvador, France, Germany, Hungary, Indonesia, Israel, Italy, Mali, Morocco, Nigeria, Peru, the Philippines, Romania, South Africa, Switzerland, Togo and Uganda do not refer to mixed public/private property as a distinct category of property representing property of a public utility.⁷⁸ Interestingly New Zealand’s Military Manual (1992) provides that property of mixed public and private ownership may be appropriated providing that the private property owner is compensated for their portion of the property where the occupying power is using the property for its own benefit stating,

“If property is of mixed ownership, that is partly owned by the State and partly owned by private persons, then if the Occupying Power appropriates the property for its own benefit, the private owners should be compensated for their portion of the property.”⁷⁹

This appears to push the permitted confiscation of private property beyond the limited requisition framework in the context of mixed assets. Under requisition the property must be used for ‘military operations’ however the New Zealand manual implies that private property in mixed property ownership may be compensated where this is used for reasons other than ‘military operations’. Despite the reclassification of public/private property as public by the US, UK and New Zealand, this falls short of crystallization into an emerging rule. Critically, the ICRC study on customary international law (2005) does not make any reference to the permitted use of private

⁷⁶ Operational Law Handbook, International and Operational Law Department, The Judge Advocate General’s Legal Centre and School, U.S Army, Charlottesville, Virginia (2007), p. 76.

⁷⁷ Operational Law Handbook, International and Operational Law Department, The Judge Advocate General’s Legal Centre and School, U.S Army, Charlottesville, Virginia (2007), p. 76.

⁷⁸ Excerpts from military manuals at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule51 (last visited 23 August 2010).

⁷⁹ New Zealand, Interim Law of Armed Conflict Manual, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992 §§ 1333.

property by the belligerent occupant outside the requisition framework.⁸⁰ Therefore taking into account the practice of states there does not appear to be an emerging norm of public characterisation of mixed public/private assets.

The United States Army Field Manual on *The Law of Land Warfare* devised an “apportionment” test and a “predominant interest” test to evaluate property of mixed public and private ownership. The ‘apportionment’ test would separate public property from private property within a mixed fund compensating the private owner accordingly.⁸¹ Provided that the compensation proposed corresponds with the requisition requirements of Article 52 and Article 53, Hague Regulations, this test is consonant with the *de jure* application of Article 46, Hague Regulations.⁸² The ‘predominant interest’ test confers a wholly public characterisation on mixed property, in cases where the State rather than the private individual or corporation is subject to greater “economic risk” and to a “substantial portion of the loss” on appropriation of the property by the belligerent occupier.⁸³ This would occur where the State holds shares in a private company alongside other private shareholders for example state investment of the public pension fund. However there is nothing in the Hague Regulations to suggest that the occupying power can assimilate private assets from a heterogeneous property merely because the loss suffered by the individual is inferior to the economic loss of the State. Feilchenfeld argues that it is “doubtful” whether “public direction is sufficient to establish public character” but may do so only where the property is “directed and supervised by the State” and where such relations are “formally fixed for a considerable period of time.”⁸⁴ Certainly the link between immediate family members of the former Iraqi regime and entities owned both directly and indirectly by them would be fairly tenuous as a basis to establish

⁸⁰ Rule 51, Public and Private Property in Occupied Territory, ICRC customary international law study (2005). At http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule51 (Last visited 23 August 2010).

⁸¹ The United States Army Field Manual, *The Law of Land Warfare* (18 July 1956) FM 27-10, par 394(b)

⁸² The only deviation allowed from the Article 46 prohibition on the confiscation of private property is for requisitions under Article 52 and Article 53, Hague Regulations. Article 52 outlines that requisitions “shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation” and must be “in proportion to the resources of the country.” The Article requires that a receipt be given and compensation made as soon as possible. Article 53 provides an exhaustive list of the war material which can be seized from the private individual providing that “compensation is fixed when peace is made.”

⁸³ The United States Army Field Manual, *The Law of Land Warfare* (18 July 1956) FM 27-10, par 394(b)

⁸⁴ Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 1942) p. 61.

sufficient State control. Foremost the Hague Regulations are concerned with protecting the private interests of the citizen, per Rousseau-Portalis doctrine from the economic aggrandisement of the belligerent occupant.

The “predominant interest” test proposed by the United States military manual is derived in part from an inaccurate interpretation of the “function” test outlined in the case, *Navigation on the Danube Arbitration* (1921).⁸⁵ The Austro-Hungarian War Ministry, whose river vessels were on hire from a private company, was seeking the immunity of Article 46, of the Hague Regulations from confiscation of these vessels by the Romanian and Allied armies, on the basis that they were privately owned. Relying on a “function” test the Arbitrator held that the property was not “private in the usual sense of the word” as it was being used for war purposes by a belligerent State.⁸⁶ Mindful of the potential to offend against the Rousseau-Portalis doctrine with regard to the rights of the private hire company involved, the Arbitrator reasoned that the onus of the financial risk under the hire contract would be on the belligerent State, not the private entity. Crucially, the ratio of the case hinged on the determination of the vessels having a “public and hostile use”⁸⁷ whereas the reference to the financial burden on the State was *obiter dicta*. This test appears somewhat diluted in the United States military manual where ostensibly private property performing any public function is impressed with a public character, rather than property used specifically by the State for war purposes. Moreover the Arbitrator was concerned with upholding the third party rights of the private company by assessing the economic risk assumed by the State and ensuring that the private entity would not suffer financial loss. Paradoxically, the “economic risk” test analogously applied under the “predominant interest” test would unduly infringe on the private property rights of those in a subordinate financial position to the State, rendering Article 46 moot.

The Permanent Court of International Justice was unwilling to stretch the application of the function test under similar circumstances in the *Lighthouses Case between France and Greece* (1956), where recourse to the test would have affected private

⁸⁵ *Cession of Vessels and Tugs for Navigation on the Danube*, (1921) 1 R.I.A.A, p. 97 at par 107.

⁸⁶ *Ibid* at p. 99 at par 105.

⁸⁷ *Ibid* at p. 108.

individual and third party rights.⁸⁸ There, a dispute arose between a private French firm Collas and Michel and the Greek government over the non-payment of lighthouse dues and the seizure of lighthouse receipts, following the renewal of a concession under the Treaty of Lausanne to maintain lighthouses on the coast of the Ottoman Empire, which was under Greek occupation. Under the terms of the concession, warships “properly so called” were exempted from paying lighthouse dues.⁸⁹ The Court refused to apply a function test to extend the definition of warships “properly so called” to incorporate ships requisitioned by the Greek occupier. Applying a test of beneficial ownership the Court found that lighthouse dues seized during the occupation were private property under the Hague Regulations and despite the succession of Greece to the Treaty of Lausanne, the property would remain protected as private property under the terms of the existing concession.⁹⁰ An alternative reading would have impacted negatively on creditors of the Ottoman government who had benefitted from the assignment of revenues from the lighthouse dues. Therefore although the *Navigation on the Danube* case and the *Lighthouses* case diverged in their application of the function test under similar circumstances, this is reconciled by the deference of the respective courts to the protection of private property rights regardless of whether the function test or beneficial ownership test is applied.

1.1.5 Does the private/public dichotomy apply to the Development Fund for Iraq?

Private funds within the Development Fund for Iraq fall under a two-tier appraisal. Firstly, the funds of private family members and corporations are seized and frozen under a Security Council Resolution 1483 in the interests of maintaining international peace and security.⁹¹ Secondly, the funds are placed under the control of the Coalition Provisional Authority, the occupying administration who are required also under the Chapter VII mandate to fully comply with their obligations under the Geneva Conventions of 1949 and the Hague Regulations of 1907.⁹² Therefore while the seizure and freezing of assets is required under international resolution, the subsequent use of the assets is limited by reference to international humanitarian law.

⁸⁸ *Lighthouses Case between France and Greece*, PCIL, Ser C., No. 74, 1956.

⁸⁹ *Ibid* at par 83-84.

⁹⁰ *Ibid*.

⁹¹ S/RES/1483 (2003) par 23.

⁹² S/RES/1483 (2003) par 5.

Resolution 1483 recognises the continued rights of private individuals and non-government entities during the belligerent occupation and makes reference to the potential for private claims to be addressed to the Government of Iraq for the return of funds after the occupation.⁹³ Therefore a distinction can be drawn between the seizure and freezing of the assets to remove them from potential belligerent control and the actual disbursement of private monies for reconstruction projects.

In 2004 when the Coalition Provisional Authority was dissolved the remaining \$6.6 billion in the Development Fund for Iraq was transferred for management purposes to the Government of Iraq and the Joint Area Support Group Central Comptroller, a US Department of Defence Organisation.⁹⁴ A United States General Accounting Office Report (2004) found that of \$1.92 billion in Iraqi assets frozen in the United States under Resolution 1483, \$1.67 billion had been disbursed from the Development Fund for Iraq.⁹⁵ In Iraq, \$926 million in assets of the former regime were frozen under Resolution 1483 and \$752 million of these monies had been disbursed from the Development Fund for Iraq. Internationally \$3.7 billion assets had been frozen under Resolution 1483 but only \$751 million had been transferred to the Development Fund for Iraq as many dualist countries had not implemented the domestic legislation necessary to give effect to the international resolution. The majority of private assets actually placed within the fund had been disbursed by 2004. This is inconsistent with permitted private property use during belligerent occupation.

Once the private character of property has been established military manuals adopt a restrictive stance on its continued use by the occupying administration. The United States Army Field Manual on *The Law of Land Warfare* outlines a test of beneficial ownership to determine the character of property in cases where it is necessary to look beyond the strict titular owner, for instance, where established private resources such as trust funds and pensions are held by the State.⁹⁶ The UK Military of Defence, *The*

⁹³ S/RES/1483 (2003) par 23.

⁹⁴ Office of the Special Inspector General for Iraq Reconstruction, *Development Fund for Iraq: Department of Defence Needs to Improve Financial and Management Controls*, SIGIR 10-020, (July 27, 2010) P.2.

⁹⁵ United States General Accounting Office, *Recovering Iraq's Assets, Preliminary Observations on US Efforts and Challenges* (March 18, 2004) p. 12.

⁹⁶ The United States Army Field Manual, *The Law of Land Warfare* (18 July 1956) FM 27-10, par 394(a)

Manual of the Law of Armed Conflict, attenuates the position stating “since the seizure of funds in the hands of banks but belonging to private individuals or corporations is not permitted, banks should not be ordered to part with funds and securities until their ownership has been determined.”⁹⁷ Therefore regardless of the Resolution 1483, paragraph 23 requirement that funds from senior officials of the former Iraqi regime and their immediate family members be transferred into the Development Fund for Iraq, the obligation under international humanitarian law to “respect” and not “confiscate” private property would suggest that the property remain protected in its private capacity within the mixed fund until the conclusion of hostilities.

In Resolution 1483 paragraph 23, private assets deposited in the Development Fund for Iraq acquire the status of a mixed property. Although the private individual may make a claim to the Iraqi government post occupation this does not prevent the displacement of private funds already transferred in the Development Fund for Iraq under the resolution. However the qualification on the occupying administration to comply with the Hague Regulations in resolution 1483 does restrict the use of private funds. The assumption in both Resolution 1483 and the occupier’s military manuals that property of uncertain mixed status be treated as public in character does not sit easily with the inviolability of private property rights under Hague Regulations, Article 46 and Article 56. Accordingly, the courts have urged caution when using military manuals as a template for humanitarian law principles. In *re Wintgen*, the Dutch Special Criminal Court stated, “if an act is forbidden by an international convention, the fact that it is permitted in a military manual does not make it a legitimate act of war.”⁹⁸ Regardless of the public characterisation assigned to mixed property of uncertain status under the US and UK military manuals, international practice has remained deferential to the integrity of private property rights outlined in the Hague Regulations. Delegates at the Brussels Conference proposed that private property within a mixed public fund remain exempt from seizure.

⁹⁷ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, (Oxford University Press, 2004) par. 11.88.

⁹⁸ *re Wintgen*, (February 11, 1949) Holland, Special Criminal Court, Amsterdam. In H. Lauterpacht, *Annual Digest and Reports of Public International Law Cases, Year 1949*, (London Butterworth & Co. Ltd., 1955), case no. 178.

Contemporary military manuals also refrain from applying public status to mixed ownership properties. The *Handbook of Humanitarian Law in Armed Conflicts*, the text of which was authoritative in the compilation of the military handbook for the Federal Republic of Germany, the *Zentraler Dienstvorschrift*, contains no reference to mixed character assets.⁹⁹ Rather, it stresses the omnipotence of private property stating, “as is clearly laid down by Article 46, paragraph 2 Hague Regulations, moveable private property is protected in the event of belligerent occupation. This rule has the character of customary law.”¹⁰⁰ This position is implicit in the jurisprudence of the international courts where the application of a function test to determine the status of property is subject to private individual and third party considerations.

Therefore although the assets within the Development Fund for Iraq fall within a mixed public/private category, the eminence of private property under international humanitarian law requires its separation for individual treatment within the Development Fund for Iraq and this protection is repeated in Resolution 1483 paragraph 23. The remaining exclusively public resources are to be treated accordingly as State property. Where public and private interests are truly inseparable the presumption should fall in favour of a wholly private classification, to protect private property as required by the Hague Regulations.

1.2 Does the requirement in Resolution 1483 that resources in the Development Fund for Iraq be used for “purposes benefiting the people of Iraq” signal a new development in the use of moveable public property during belligerent occupation?

UNSC Resolution 1483 established the Development Fund for Iraq which contained (1) the funds, financial assets and economic resources of the former Government of Iraq and (2) funds from the internationally controlled Oil-for Food programme and (3) funds from the export sales of petroleum, petroleum products and natural gas from

⁹⁹ www.icrc.org. Marco Sassoli, Book Review of ‘*The Handbook of Humanitarian Law in Armed Conflicts*’

¹⁰⁰ Dieter Fleck et al., *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford University Press, 1995), p. 261, par 558.

Iraq during the occupation. The Coalition Provisional Authority, the occupational administration was directed under UNSC Resolution 1483 to disburse the funds for the humanitarian needs of the Iraqi people, economic reconstruction, repair of infrastructure, disarmament and the costs of the civilian administration.¹⁰¹ UNSC Resolution 1483 also noted the ‘specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers’ and urged states to comply with their obligations under international humanitarian law.¹⁰²

Article 53(1) of the Hague Regulations governs the belligerent occupant’s use of public moveable property providing that the belligerent may take possession of cash, funds, realizable securities and all moveable property belonging to the state that can be used for military operations.¹⁰³ This section will assess the position of public resources contained in the Development Fund for Iraq as public moveable property under Article 53(1) of the Hague Regulations. Firstly the section will examine whether Article 53(1) limits the belligerent occupant’s use of public funds as public moveable property or are these limited by the Article 53(1) requirement that the moveable public property be ‘used for military operations’ as a literal reading of Article 53(1) would suggest? Secondly the section will examine Article 53(1) limitations on the use of petroleum, petroleum products and natural gas as moveable property belonging to the occupied state.

1.2.1 Moveable/Immoveable Property

Article 53(1) of the Hague Regulations governs the use of all moveable property belonging to the state providing:

“an army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all moveable property belonging to the State which may be used for military operations.”¹⁰⁴

Limitations on the belligerent occupants’ use of State property depend on whether the property is classified as either public moveable or public immoveable property. The

¹⁰¹ S/RES/1483 (2003) par 14.

¹⁰² S/RES/1483 (2003).

¹⁰³ Article 53(1), 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

¹⁰⁴ *Ibid.*

Lieber Code, 1863 first distinguished between moveable and immoveable property. Moveable property by its very nature is readily mobilised for use in military operations, whereas immoveable property comprising of permanent structures and real property may be used but only on a temporary basis. In the case of the Lieber code the distinction between “moveable” and “immoveable” property is borrowed from common law where the dichotomy assumed significance in contract, succession and tort law.¹⁰⁵ Certainly the classification of real property as ‘immoveable’ is evident in the maxim *cuius est solum, eius est usque ad caelum et ad inferos* (for whoever owns the soil, it is theirs up to Heaven and down to Hell) which can be traced back to Blackstone’s Commentaries on the Laws of England (1766).¹⁰⁶ However the distinction is also significant in the civil law tradition. The French term for property “*biens*” represents both goods and real property however the distinction between moveable and immoveable property is still recognised.¹⁰⁷ Historically the distinction can also be traced to Mohammedan law between A.D 565 and A.D. 740.¹⁰⁸

Article 31 of the Lieber Code outlined the right of the occupier to seize “all public moveable property” and “all the revenues of real property belonging to the hostile government”.¹⁰⁹ Initially the distinction between moveable and immoveable public property was housed within a unitary provision under the Lieber Code. However the divide assumed importance under Article 6 and Article 7 of the Brussels Code and consequently under Article 53 and 55 of the Hague Regulations where the distinction was prominently conveyed through separate articles. Public moveable property is especially mentioned in Article 53 of the Hague Regulations, allowing the occupying power to take possession of “all moveable property belonging to the State” and provides a non-exhaustive list of cash, funds and realizable securities, depots of arms, means of transport and stores and supplies as property considered usable for military

¹⁰⁵ Felix Cohen, "Dialogue on Private Property" (1954) *Rutgers LR* 357; David Scott Clarke, Tugrul Ansay, *Introduction to the law of the United States*, (Klewer, 2nd edition, 2002) 219; Alain A. Levasseur, “The Boundaries of Property Rights: La Notion de Biens” *The American Journal of Comparative Law*, Vol. 54, 145, 149.

¹⁰⁶ John G. Sprankling, *Owning the Center of the Earth*, 55 *UCLA L. Rev.* 979, 982-83 (2008).

¹⁰⁷ Joseph Story, Commentaries on the Conflicts of laws, foreign and domestic in regard to contracts, rights and remedies, and especially in regard to marriages, divorces, wills, successions and judgments, (Boston, Billiard, Gray and Co., 1834) 13.

¹⁰⁸ Sheldon Amos, *The History and Principles of the Civil Law of Rome*, an aid to the study of scientific and comparative jurisprudence, (Fred B. Rothman and Co., 1987, reprint – original London, 1883) 407 - 412

¹⁰⁹ Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, Article 31.

operations.¹¹⁰ Accordingly, funds, financial assets, economic resources and funds from the former Oil-for-Food scheme under Resolution 986 (1995) would fall under the category of ‘cash funds and realisable securities’ as moveable property under Article 53(1).

National civil codes can be examined to evaluate the substantive classification of moveable and immovable property. The French Civil Code, which influenced many modern codes, considers property to be “moveable by its nature or prescription of law.”¹¹¹ It broadly defines moveable property as an animal or thing “which can move from one place to another, whether they move by themselves, or whether they can move only as the result of an extraneous power.”¹¹² Additionally, the German Civil Code describes “accessories”, “consumable things” and “fungible things” which would include petroleum products, as moveable in character by law.¹¹³

Under the Iraqi Civil Code, property that can be moved and converted without damage to its substance is considered to be moveable.¹¹⁴ As a corollary, oil supplies, which have already been extracted from the ground, refined and are subsequently freely transposable, have the character of moveable property. Prior to the occupation stage, the belligerent has rights of seizure over moveable public property as war booty on the battlefield regardless of whether the property’s use is limited to military purposes.¹¹⁵ It is arguable whether DFI funds could be appropriated under this proviso but the context would suggest that a primary connection to the hostilities on the battlefield is warranted for seizure. Such debate is merely academic however as the DFI resources were handed *in toto* to the occupying power under the auspices of

¹¹⁰ Article 53, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

¹¹¹ The French Civil Code (1804), Chapter II – Of Moveables, Article 527. (Translated by Georges Rouhette and Anne Berton, *Mise A Jour Legifrance*, 21 February 2004). Interestingly the French Civil Code, Article 533 also lists property, which does not fall under the paradigm of moveable property, if the word moveable is used alone in a provision of law or of man without any other addition or designation. Such items include ready money, precious stones, weapons, grain, hay and other commodities to name but a few. However ‘moveable’ appears in the context of war material under Article 53 and in contrast to Article 533, specifically provides for seizure of cash and funds which are strictly the property of the State.

¹¹² The French Civil Code (1804), Chapter II – Of Moveables, Article 528. (Translated by Georges Rouhette and Anne Berton, *Mise A Jour Legifrance*, 21 February 2004).

¹¹³ The German Civil Code BGB (18 August 1896), section 91-93.

¹¹⁴ The Iraqi Civil Code (1951), Art 61(2).

¹¹⁵ Alewyn V. Freeman, “General Note on the Law of War Booty,” *The American Journal of International Law*, Vol. 40, (1946) p. 795, 796.

international law per Resolution 1483.¹¹⁶ However petroleum, petroleum products and natural gas refined and sold during the belligerent occupation are considered moveable property under Article 53(1) of the Hague Regulations.

1.2.2 Cash, Funds and Realisable Securities

To what extent can the belligerent occupant take control over the funds, financial assets and economic resources of the occupied state? Foremost the pressing question regarding the qualification contained in Article 53(1) limiting moveable property seized to that ‘used for military operations’ is whether this extends to the cash, funds and realisable securities outlined at the start of Article 53(1) and by extension to funds, financial assets and economic resources belonging to the Government of Iraq. Restricting the use of cash assets within the Development Fund for Iraq to use for military operations would significantly impinge on the occupant’s use of the resources to transform the political, legal and economic infrastructure of Iraq during the occupation tenure. Secondly does title to the cash, funds and realisable securities of the state pass to the belligerent occupant?

Does the qualification on moveable property “used for military operations” apply to ‘cash funds and realisable securities’ or do they stand autonomously within the dictates of Article 53(1)? Over 50 years ago, Stone warned that “no branch of occupation law is more important under modern conditions, and none is freer (even now) of authoritative guidance, than that concerning the control of money and currency.”¹¹⁷ The dissensus on the limits of control over the cash funds and realisable securities is evidenced both in military manuals and in academic writings. The Australian Defense Force Manual (1994) states that, in occupied areas, “confiscation is the taking of enemy public moveable property without the obligation to compensate the State to which it belongs.”¹¹⁸ Nigeria’s Manual on the Law of War determines that “moveable property in an occupied territory belonging to the enemy state may be

¹¹⁶ S/RES/1483 (2003) par 13.

¹¹⁷ Julius Stone, *Legal Controls of International Conflict, A Treatise on the Dynamics of Disputes and War Law* (London, Stevens & Sons Limited, 1954) p. 718.

¹¹⁸ Australia, *Manual on the Law of Armed Conflict, Australian Defence Force Publication, Operations Series, ADFP 37 – Interim Edition 1994*, para. 1225. Similarly the Canadian LOAC Manual (1999) states that, “Confiscation is the taking of enemy public movable property without the obligation to compensate the state to which it belongs. All enemy public movable property which may be usable for military operations may be confiscated”. Canada *The Law of Armed Conflict at Operational and Tactical Level*, Office of the Judge Advocate General (1999), p. 12-8, para. 69.

seized only if it is useful to the conduct of war.”¹¹⁹ International writers disagree on the broad application of the ‘military operations’ qualification to all moveable property including cash assets. Von Glahn proposes that the belligerent occupant may seize and use State funds for his own purposes but suggests that monies, which cannot be extrapolated from the State for war purposes, cannot be confiscated.¹²⁰ Feilchenfeld on the other hand argues that there is no express provision within the Hague rules limiting the subsequent use of property for military purposes, which suggests that the occupant may seize and use monies for non-military objectives.¹²¹

Does Article 53(1) possession of public property amount to war booty? The customary law of war booty developed after the Napoleonic wars, where the successful belligerent State captured and took title to moveable property left on the battlefield by the retreating belligerent.¹²² In the antecessor Lieber code full title to all public funds passed to the army during the occupation of enemy territory. Article 31 of the Lieber code simply states, “a victorious army appropriates all public money.”¹²³ Graber submits that the occupant under the Lieber code could take full title to public moveable property and broadly use it as he sees fit.¹²⁴ Interestingly there is no allusion to use of the State funds for operations of war. Clearly a broader use of public monies was anticipated. Greenspan similarly categorises Article 53(1) cash, funds, realisable securities, depots of arms, means of transport, and stores and supplies as ‘booty of war’, thereby altering the property title on acquisition.¹²⁵ Accordingly, cash, funds and economic resources belonging to the government of the occupied state may

¹¹⁹ Lt. Col. L. Ode PSC, Nigeria, *The Laws of War*, Nigerian Army, Lagos, paras 27-28.

¹²⁰ Von Glahn, *The Occupation of Enemy Territory; A Commentary on the Law and Practice of Belligerent Occupation*, (Minneapolis, The University of Minnesota Press, 1957) p. 180.

¹²¹ Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace, 1942) p. 53.

¹²² Myres S. McDougal, Flortino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (Martinus Nijhoff Publishers, 1994) 599.

¹²³ Article 31, Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863.

¹²⁴ Graber, *The Development of the Law of Belligerent Occupation 1863-1914* (New York, 1949), p.161.

¹²⁵ Greenspan, *The Modern Law of Land Warfare* (Berkeley: University of California Press, 1959) p. 291; Stone also maintains that Article 53 acquisition of property stems from the customary power to take war booty. Julius Stone, *Legal Controls of International Conflict, A Treatise on the Dynamics of Disputes and War Law* (London, Stevens & Sons Limited, 1954) p. 716, fn 145; President Shamgar of the Supreme Court of Israel expressed the view that property captured on the battlefield along with State moveable property usable for operations of war similarly constituted booty of war. H.C.J. 574/82 Al Nawar v. Minister of Defence et al., 39(3) PD 449, 467; J.H.W. Verzijl, *International Law in Historical Perspective Volume IX* (Sijthoff and Noordhoff, 1978) p. 181.

be mobilised permanently akin to booty of war.

Dinstein however has challenged the “booty of war” interpretation highlighting the distinction between all moveables captured on the battlefield and the limiting clause in Article 53(1) of moveable property ‘used for military operations’ in the occupation phase of hostilities.¹²⁶ Similarly Sorensen differentiates between the “operations of war” and the war booty dichotomy.¹²⁷ This understanding is succinct with the 1880 Oxford Manual which provides:

“Although the occupant replaces the enemy State in the government of the invaded territory, his power is not absolute. So long as the fate of this territory remains in suspense – that is, until peace – the occupant is not free to dispose of what still belongs to the enemy and is not of use in military operation. Hence the following rules:

Art. 50. The occupant can only take possession of cash, funds and realisable or negotiable securities which are strictly the property of the State, depots of arms, supplies, and, in general, moveable property of the State of such character as to be useful in military operations.”¹²⁸

Feilchenfeld contends that the treatment of public moveable property in state practice changed significantly during the first and second world wars. Prior to 1914, possession of Article 53(1) property, in particular cash, funds and realisable securities did not amount to a full acquisition or ownership by the belligerent state of these properties.¹²⁹ However after World War I, state practice shifted in this regard and current state practice reflects the belief that the occupying state is entitled to possess the cash, funds and realisable securities of the occupied state regardless of military operations distinctions.¹³⁰

¹²⁶ Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009) p. 218.

¹²⁷ Sorensen, *Manual of Public International Law* (New York, MacMillan, St Martin’s Press, 1968) p. 834.

¹²⁸ Article 50, *The Laws of War on Land* (Oxford, 9 September 1880), D.Schindler and J.Toman, *The Laws of Armed Conflicts*, Martinus Nihjoff Publisher, 1988, pp.36-48.

¹²⁹ Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 700 Jackson Place N.W, 1942) p. 54 par 218;

¹³⁰ New Zealand’s Military Manual provides that in occupied territory, “confiscation is the taking of enemy public moveable property without the obligation to compensate the State to which it belongs. All enemy public moveable property which may be usable for the operations of war may be confiscated.” New Zealand, *Military Manual* (1992), § 1336; Italy’s Military Manual states, “cash, funds, realisable securities, depots of arms, means of transportation, stores and in general all moveable property belonging to the enemy public administration become the property of the occupying State” Italy, *IHL Manual* (1991), Vol 1, § 42; Germany’s Military Manual states, “moveable government

Does requisition of public property for ‘military operations’ extend to the mobilisation of resources for the domestic government of the belligerent occupant outside the occupied territory, thus permanently altering the title to cash, funds and realisable securities? The United States Army Field Manual states that, “all moveable property belonging to the State susceptible of military use may be taken possession of and utilised for the benefit of the occupant’s government.”¹³¹ Supporting this the United States, Uniform Code of Military Justice (1950) requests that members of the armed forces secure enemy public property ‘for the service of the United States’.¹³² The property may be used for dual purposes for the administration of the occupied territory or for the benefit of the government of the occupying State. The Italian War Decree (1938) supports the latter function outlining that “cash, funds, realisable securities, depots of arms, means of transportation, stores and in general all moveable property belonging to the enemy public administration, which may be used for war operations, become the property of the [occupying] State”.¹³³ Likewise the Philippines Articles of War (1938) determines that confiscated public property becomes the property of the Government of the Philippines.¹³⁴ This suggests that the occupying government may take control of the cash, funds and realisable securities belonging to the occupied state.

The Article 53 stipulation that an army of occupation can only ‘*take possession of* cash, funds and realisable securities’ appears to significantly limit the occupant’s relationship with State moveable resources. The occupant needs to establish control over the moveable properties for the title to pass on actual possession. Writing after the codification of the laws of war in the Lieber Code, Halleck argued that the occupant only acquired rights after holding the property for a 24 hour period however it is unlikely that this still is the case as there is no official act required to appropriate property under Article 53(1).¹³⁵ Furthermore the 24 hour rule does not materialise in

property which may be used for military purposes shall become spoils of war...upon seizure it shall, without compensation, become the property of the occupying State.” Germany, Military Manual (1992), § 556.

¹³¹ Army Field Manual, The Law of land Warfare, 18th July 1956. Chapter 6 Occupation, Article 404.

¹³² United States, Uniform Code of Military Justice, 1950, Article 103(a).

¹³³ Italy, Law of War Decree, 1938, Article 60.

¹³⁴ Philippines, Articles of War, 1938, Article 80.

¹³⁵ H.W. Halleck, *International Law*, (San-Francisco, Bancroft, 1861), pp 447-451.

any of the court decisions on moveable property post Hague Regulations (1907).¹³⁶ The level of military urgency anticipated in Article 23(g) of the Hague Regulations where the belligerent is 'imperatively demanded by the forces of war' to seize war booty is incongruous with the 24 hour rule.¹³⁷ The occupant does not assume absolute or unfettered ownership over public moveable property. Clearly the intention of Article 53(1) is for the occupant to 'take possession' of the property as a pre-requisite to property title alteration. However the issue of 'possession' has been open to broad interpretation. In 1947, the legal advisor to the Office of Military Government for Germany determined that "a belligerent occupant does not acquire title to enemy public moveable property until he has reduced it to firm possession."¹³⁸ The US Military Manual bases the seizure of property within the occupied territory on the "intent to take such action" and a "physical act of capture or seizure".¹³⁹

There are contesting policy reasons for permitting the belligerent to possess public moveable assets for use in military operations. Some support the contention that Article 53(1) broadly places title to cash, funds and realisable securities of the occupied State permanently in the hands of the belligerent occupant.¹⁴⁰ Underscoring the maxim that war must support war, monetary resources of the occupied state are mobilised to nourish the belligerent's war operations. However, it is uncertain how far the concept of 'war operations' was intended to extend. The confiscation of State property as a military tactic in essence serves to weaken the enemy occupied State. The occupant may also confiscate State assets to prevent them being used by hostile forces to weaken the occupying army.¹⁴¹ Arguably the mobilisation of public property by the belligerent could be permitted altruistically for the benefit of the occupied population. However the object of the Hague Regulations and its predecessor Brussels

¹³⁶ Von Glahn, *The Occupation of Enemy Territory; A Commentary on the law and Practice of Belligerent Occupation*, (Minneapolis, The University of Minnesota Press, 1957) p. 181; Graber, *The Development of the Law of Belligerent Occupation 1863-1914* (New York, 1949), p.166.

¹³⁷ Article 23(g), 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. "In addition to the prohibition provided by the special Convention it is especially forbidden...To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

¹³⁸ Downey, "Captured Enemy Property: Booty of War and Seized Enemy Property," 44 *American Journal of International Law*, 1950, p. 493.

¹³⁹ Army Field Manual, *The Law of land Warfare*, 18th July 1956. Chapter 6 Occupation, Article 395.

¹⁴⁰ Von Glahn, *The Occupation of Enemy Territory; A Commentary on the law and Practice of Belligerent Occupation*, (Minneapolis, The University of Minnesota Press, 1957) p. 181; Cummings, "Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation," 9 *The Journal of International Law and Economics* 533 (1974) p. 574.

¹⁴¹ Army Field Manual, *The Law of land Warfare*, 18th July 1956. Chapter 6 Occupation, Article 399.

Convention was to limit the powers of the belligerent against the occupied State to preserve the State intact. Certainly contemporary international resolutions are framed in a protectionist human rights based narrative. For example the General Assembly Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories (1972) “affirms the principle of the sovereignty of the population of the occupied territories over their *national wealth* and resources.”¹⁴² Similarly the United Nations Economic and Social Council in its resolution on the “Economic and Social Repercussions of the Israeli Occupation on the Living Conditions of the Palestinian People in the Occupied Palestinian Territory, including Jerusalem, and the Arab Population in the Occupied Syrian Golan” (2006)

“Reaffirms the inalienable right of the Palestinian people and the Arab population of the occupied Syrian Golan to all their natural and *economic resources*, and calls upon Israel, the occupying Power, not to exploit, endanger or cause loss or depletion to those resources.”¹⁴³

Far from creating additional rights for the belligerent occupant over monetary resources in the occupied territory, the human rights based approach is conservationist in nature.

There is however some basis for concluding that the courts are willing to adopt a conservationist approach to the application of Article 53(1) to private realisable securities owed to public institutions.¹⁴⁴ Three cases that came before the courts in the Philippines in the aftermath of World War II addressed *inter alia* the issue of collection of private realisable securities owed to public institutions by the occupying administration with conflicting results. In *Hongkong & Shanghai Banking Corporations v. Luis Perez-Samanillo, Inc. & Register of Deeds of Manila* (1946), the Philippines Court of First Instance of Manila found that the belligerent occupant was not entitled to sequester a private debt owed to the public Bank of Hongkong nor issue a deed of cancellation on the defendants mortgage as security for the debt.¹⁴⁵

¹⁴² General Assembly Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories. 3005 (XXVII), 2112th plenary meeting, 15 December 1972.

¹⁴³ Economic and Social Council resolution 2005/51. E/2005/1.24/Rev.1, par 5.

¹⁴⁴ Article 53(1) of the Hague Regulations indicates that ‘an army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the State.’

¹⁴⁵ *Hongkong & Shanghai Banking Corporations v. Luis Perez-Samanillo, Inc. & Register of Deeds of Manila*, Philippines, Court of First Instance of Manila, October 14, 1946, Annual Digest and Reports of

The Japanese occupation forces had appointed the Bank of Taiwan as liquidator of all foreign banks in the occupied territory which in turn ordered the sequester of all debts due to the banking institutions. Under Article 53(1) the occupier may only take possession of public credit under “realisable securities”. The underlying problem identified in *Hongkong* was the private character of the sequestered debt, which is protected from confiscation under Article 46 of the Hague Regulations.¹⁴⁶ The defendant’s debt remained outstanding despite payments in full to the liquidator Bank of Taiwan.

In antithesis, the Philippines Supreme Court in *Haw Pia v. The China Banking Corporation*, (1948) under similar circumstances reversed this reading of Article 53(1).¹⁴⁷ There, the Court found that the Japanese military administration had the right to order liquidation of the defendant bank and in doing so it had legitimately ordered the sequestration of private enemy assets under Article 53(1) of the Hague Regulations. Distinguishing between liquidation of assets and confiscation of assets the Court determined that liquidation did not amount to confiscation of assets but mere sequester.¹⁴⁸ Therefore payments made by the plaintiff to the Japanese appointed Bank of Taiwan extinguished her obligation of debt to the China Banking Corporation. To find otherwise would have unfairly subjected the plaintiff to repayment of a debt already cleared during the occupation and set an arduous precedent. Interestingly, the Court cogently depicted a potential Article 53(1) possession of property where realisable securities owed to a public institution are collected by the occupier with the view to winding up or liquidating the business but not arrantly appropriating the assets permanently. Instead the latent policy here is to prevent the enemy from using state owned property in the furtherance of the war effort. Underlying this policy is the temporary position of the property during the confiscation. In *Haw Pia*, the Japanese Military Administration temporarily sequestered private and public assets under Article 53 of the Hague Regulations. This

Public International Law Cases Year 1946 (London, Butterworth & Co. (Publishers), Ltd. 1951) Case No. 157, p. 371.

¹⁴⁶ Article 46(2), 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. “Private property can not be confiscated.”

¹⁴⁷ *Haw Pia v. The China Banking Corporation*, Philippines, Supreme Court, April 9, 1948, International Law Reports Year 1951, (London Butterworth & Co. (Publishers), Ltd., 1957), Case No. 203, p. 642.

¹⁴⁸ *Ibid* at p. 643.

position was upheld in *Gibbs et al. v. Rodríguez et al.* (1950) where the Philippines Supreme Court held that the collection of a mortgage debt by the Japanese Military Administration did not constitute a confiscation of the plaintiff's property.¹⁴⁹ A confiscation of the asset would suggest a permanent measure whereas the significant factor is the temporary nature of the sequestration to prevent enemy use of state owned assets.

1.2.3 Application to Iraq

The occupying administration took possession of funds, financial assets and economic resources contained in the Development Fund for Iraq under the authorisation of UNSC Resolution 1483. Although the UNSC Resolution 1483 directed that the Development Fund for Iraq would be held in the Central Bank of Iraq, it was later opened in the New York Federal Reserve Bank.¹⁵⁰ Under a traditional reading of Article 53(1) of the Hague Regulations the belligerent occupant may treat cash, funds and realisable securities under Article 53(1) as war booty, thereby acquiring permanent title to the cash assets. While there is a line of argument suggesting that the occupier must possess cash, funds and realizable securities with the intent of using them for military operations the majority of discourse in this arena suggests otherwise. Article 395 of the US Military Manual comports with this understanding emphasising that, "the mere presence within occupied territory of property which is subject to appropriation under international law does not operate to vest title in the occupant."¹⁵¹ Therefore the belligerent occupant's acquired full title to the public cash and economic resources once the Development Fund for Iraq was opened in the New York Federal Reserve Bank and the Coalition Provisional Authority came into possession of the account.

UNSC Resolution 1483 embraces a shift in philosophy away from the permission enshrined in Article 53(1) for the belligerent to seize control over the cash, funds and realisable securities of the occupied state to advance his war effort. Funds, which

¹⁴⁹ *Gibbs et al. v. Rodríguez et al.*, Philippines, Supreme Court, August 3, 1949, and December 21, 1950, International Law Reports Year 1950, (London Butterworth & Co. (Publishers), Ltd., 1957) Case No. 204, p.661.

¹⁵⁰ Office of the Special Inspector General for Iraq Reconstruction, "Development Fund for Iraq, Department of Defence Needs to Improve Financial and Management Controls, SGIR 10-020 (July 27, 2010) P.2

¹⁵¹ Army Field Manual, The Law of land Warfare, 18th July 1956. Chapter 6 Occupation, Article 395.

would have been permanently seized by the occupying power during belligerent occupation now assume humanitarian features under UNSC Resolution 1483. The emphasis has shifted away from the patriarchal dominance of the invading belligerent towards the humanitarian protection of the resources of the occupied population. Section 2 of the Coalition Provisional Authority Regulation Number 2, establishes that it is the administrator of the military government in Iraq who will control the fund “for and on behalf of the Iraqi people”.¹⁵² Section 6(3) outlines that the purpose of the Fund is to

“meet the humanitarian needs of the Iraqi people and for the economic reconstruction and repair of Iraq's infrastructure; for the continued disarmament of Iraq; for the costs of Iraq's civilian administration; and for other purposes the Administrator determines to be for the benefit of the people of Iraq.”¹⁵³

Coalition Provisional Authority Regulation Number 3 reaffirmed “that the CPA is committed to ensuring that all state-owned or regime-owned cash, funds or realisable securities that have been seized by Coalition Forces in Iraq consistent with the laws and usages of war, shall be used only to assist the Iraqi people and support the reconstruction of Iraq”.¹⁵⁴ Similarly the preamble to UNSC Resolution 1483 stresses the right of the Iraqi people to freely determine their own political future and to control their own natural resources.¹⁵⁵ Therefore despite the belligerent occupant's possession of Iraqi State funds, title remained vested in the occupied State. Ostensibly the international position on State owned assets in Resolution 1483 is reverting back to the pre-World War 1 position, where possession of occupied assets are now regarded more in terms of a usufructuary privilege rather than an automatic right to war booty or the taking of large moveable cash assets for military operations.¹⁵⁶

Adopting a human rights appraisal of Article 53(1) cash and funds, which were previously considered “strictly the property of the State” during occupation are now

¹⁵² Coalition Provisional Authority Regulation Number 2, Development Fund for Iraq. CPA/REG/10 June/2003/02, Section 2, Responsibilities.

¹⁵³ *Ibid* at Section 6, Disbursements From the Fund; S/RES/1483 (2003) par. 14.

¹⁵⁴ Coalition Provisional Authority Regulation Number 3, Program Review Board, (18 June 2003)

¹⁵⁵ S/RES/1483 (2003)

¹⁵⁶ Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 700 Jackson Place N.W, 1942) p. 54 par 218; Coalition Provisional Authority Regulation Number 2 on the Development Fund for Iraq provides that the proceeds of petroleum and petroleum products will be deposited into the Development Fund for Iraq ‘until an internationally recognized, representative government of Iraq is properly constituted’ highlighting the occupants temporary control over the resources.

considered strictly the property of the people under UNSC resolution 1483 and beyond expropriation. The representatives at the Security Council's 4761st meeting that culminated in the adoption of UNSC resolution 1483 support this view. The German delegate Mr. Pleuger stated that "the Iraqis alone are the owners of their political future and their economic resources."¹⁵⁷ The French representative Mr. De La Sablière found that petroleum resources "which belong to the Iraqi people, should be used exclusively for their benefit and in the greatest possible transparency."¹⁵⁸ It is the people and not the state that feature prominently here and the people retain rights of ownership over their economic resources during belligerent occupation.

The Philippines Supreme Court successfully established a precedent for liquidating and confiscating assets belonging to the citizen in *Haw Pia* and *Gibbs*. The assets were temporarily sequestered to prevent their hostile use by the belligerent forces and were returned after occupation. Admittedly this dispossession affected interest rates on loans and mortgage repayments and disadvantaged the banking institutions. However the broader concept can easily be applied to the liquidation and sequester of oil and other natural resources belonging to the hostile State. Instead of the belligerent occupant using these resources for war operations, the resources are sequestered for the benefit of the occupied population post hostilities.

Therefore one can argue that the State is merely the custodian of certain cash resources derived from the sale of petroleum, natural gas and other by-products. A similar construction may be placed on the role of the belligerent occupant over monies from natural resources. The belligerent occupant was merely regarded as a custodian over private cash resources lodged in state-owned banks.¹⁵⁹ Accordingly the role of the belligerent occupant in contemporary hostilities has shifted to that of guardian over public oil resource monies on behalf of the private citizen. This is particularly significant because along with the growing body of UN General Assembly resolutions on the rights of the occupied population over their natural resources, UNSC Resolution 1483 is a further indicator of state practice in the

¹⁵⁷ United Nations Security Council, 4761st meeting, S/PV.4761, p. 6.

¹⁵⁸ *Ibid* at p. 4; The US delegate Mr. Negrofonte emphasised the humanitarian function of the Development Fund for Iraq stressing that "the Authority will disburse the funds only for the purposes it determines to benefit the Iraqi people." United Nations Security Council, 4761st meeting, S/PV.4761, p. 3.

¹⁵⁹ John Westlake, *International Law Part II, War* (University Press, Cambridge, 1907) 113

development of humanitarian protection of the economic resources of the occupied state.¹⁶⁰

1.2.4 Examining Article 53(1) Limits on the Belligerent Occupant's Use of Public Moveable Property after Seizure

UNSC Resolution 1483 (2003) introduced two new developments on the use of public moveable property during the occupation of Iraq. Firstly, it exceeded traditional international humanitarian law limitations by directing that public property be used for economic reconstruction.¹⁶¹ Secondly, it subjected public moveable property seized and controlled by the belligerent occupant to an international audit by independent public accountants.¹⁶²

The belligerent occupant is entitled to seize and use public moveable oil deposits such as cash, funds and realisable securities under Article 53(1) of the Hague Regulations. Distinct from cash, funds and realisable securities, the belligerent occupant may also seize moveable refined oil deposits situated in the occupied territory for use in military operations. UNSC Resolution 1483 requires that all export sales of petroleum, petroleum products and natural gas from Iraq are to be deposited into the Development Fund for Iraq until an internationally recognised government of Iraq is formed.¹⁶³ However the proceeds from all import sales of petroleum, petroleum products and natural gas are excluded from the Development Fund for Iraq and these oil resources are governed exclusively by international humanitarian law. The United States Congressional Record on International Law Regarding Iraq argued “clearly, Iraq’s oil reserves are susceptible to direct military use and thereby subject to seizure by U.S military forces under the laws of war to restore Iraq.”¹⁶⁴

1.2.5 Use of Moveable Property Beyond Military Operations

¹⁶⁰ General Assembly Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories. 3005 (XXVII), 2112th plenary meeting, 15 December 1972; Economic and Social Council resolution 2005/51. E/2005/1.24/Rev.1, par 5.

¹⁶¹ S/RES/1483 (2003) par 14.

¹⁶² *Ibid* at par 12.

¹⁶³ *Ibid* at par 20. The resolution further directs that oil resources in the Development Fund for Iraq must be used for purposes benefiting the Iraqi state and the Iraqi people. S/RES/1483 (2003) par 14.

¹⁶⁴ United States of America Congressional Record, International Law Regarding Occupied Iraq, (March 27th, 2003) p. 7747.

Article 53(1) states that the army of occupation may take possession of ‘depots of arms, means of transport, stores and supplies, and, generally, all moveable property belonging to the State which may be used for military operations.’¹⁶⁵ The occupant may appropriate items such as tin, rubber, diamonds, metal and fuel provided that they are either directly or indirectly usable in the theatre of war under Article 53(1).¹⁶⁶ Crude oil as an immovable falls for consideration under the usufructuary banner of Article 55 of the Hague Regulations. However moveable petroleum and gas deposits mined and produced prior to an invasion that remain *in situ* can be appropriated as public moveable property suitable military operations during a belligerent occupation.

It was traditionally believed that the belligerent occupant could broadly employ moveable property for uses other than for military operations after seizure however this position has since been challenged in the municipal courts after World War II. Feilchenfeld argues that the occupant’s use of moveable property after seizure is not necessarily restricted to use for military operations. He notes:

“there is no express provision under which such assets, once acquired, may not be used for other purposes. Absolute power of occupants over seized public chattels is an ancient institution. In the absence of express provisions it would seem hazardous to presume its limitations.”¹⁶⁷

Such an appreciation allows the occupier to broadly employ public moveable property beyond the constraints of use for military operations such as commercial sales. While the belligerent occupant had greater latitude over the ancient institution of war booty, the laws of war have since evolved replete with qualifications. Indeed Article 31 of the Lieber Code (1863) broadly permitted the victorious army to appropriate “all public money, seizes all public moveable property until further direction by its government.”¹⁶⁸ This was altered in the Brussels Code to include the limitation of use for military operations and later the limitations on property use were adopted in full in the Hague Regulations (1907). Interestingly, an earlier draft of the Brussels Code

¹⁶⁵ Article 53(1), 1907 Hague Convention IV and Regulations [Roberts, Guelff, *Documents on the Laws of War* (3rd edition, Oxford University Press, 2002) 82].

¹⁶⁶ Von Glahn, *The Occupation of Enemy Territory; A Commentary on the law and Practice of Belligerent Occupation*, (Minneapolis, The University of Minnesota Press, 1957) p. 181.

¹⁶⁷ Feilchenfeld, *The International Economic law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 700 Jackson Place, N.W, 1942) p. 53 par 217.

¹⁶⁸ Article 31, Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863. D.Schindler and J.Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff Publisher, 1988, pp.3-23.

prepared by the Russian delegate to the Brussels Conference had referred only to the “temporary” seizure of moveable property.¹⁶⁹

Although Article 53(1) allows the belligerent occupant to seize public moveable property for military operations, the article is silent on whether the belligerent may use the property for alternative purposes beyond military operations after seizure. Does subsequent non-military use void the legality of the original seizure? The belligerent occupant may seize and use public moveable property to compensate for damage caused during military operations under Article 53(1). In *re Leopore* (1946) the Italian Supreme Military Tribunal ruled that blankets belonging to the Italian War Department were lawfully requisitioned by the German occupying authorities as public moveable property “designed to serve the purposes of warfare.”¹⁷⁰ The belligerent occupants use of the blankets to compensate for damage caused to the household corresponded with the Article 53(1) use of public moveable property. In doing so the Court determined that “in the present case it is only necessary to determine whether, as regards third parties, the transfer, to German military authorities, of the possession of the above-mentioned objects belonging to the Italian War Department was legal.”¹⁷¹

In *Ministero Della Difesa-Esercito v. Salamone* (1950) the seizure of two horses belonging to the Italian army by the Military Government of occupied Sicily to use as compensation for two horses previously requisitioned from a private citizen by the occupying army comported with the military operations reading of Article 53(1).¹⁷² The initial seizure satisfied the primary analogue of military necessity demanded by the Hague Regulations and the consecutive use was to fulfill military objectives. Appositely, the Court considered that the articles enumerated in Article 53(1) collectively came within the category of “moveable property belonging to the

¹⁶⁹ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey* (New York, 1949) 169.

¹⁷⁰ *Re Leopore*, Italy, Supreme Military Tribunal, July 19, 1946, Annual Digest and Reports of Public International Law Cases Year 1946, (London Butterworth & Co. (Publishers), Ltd., 1951) Case No. 146, p. 354, 356.

¹⁷¹ *Ibid* at p. 356, 357.

¹⁷² *Ministero Della Difesa-Esercito v. Salamone*, Italy, Court of Cassation, February 8, 1950, International Law Reports Year 1951, (London Butterworth & Co. (Publishers), Ltd. 1957) Case No. 211, p. 686.

occupied Power which has any military utility.”¹⁷³ Critically the Court found that derivative use satisfied military necessity.

“In this case, the Italian army’s horses were not treated as articles of commerce or sale by the Allied military authorities, but were merely assigned to private citizens in place of horses previously temporarily requisitioned and not returned.”¹⁷⁴

Highlighting the importance of continued military use following the seizure of public moveable property, the Court noted that the purpose of the substitution was “occasioned exclusively by warlike operations”.¹⁷⁵ Similarly in *Mestre Hospital v. Defence Administration* (1954), the Italian Court of Cassation found that a military ambulance seized by the German troops during the occupation of Italy and given to the Hospital of Mestre in exchange for an earlier requisitioned ambulance was legitimately acquired under Article 53 of the Hague Regulations.¹⁷⁶ Elaborating on the occupying power’s liaison with public moveable property, the court conveyed “it may keep property so taken and also transfer it to other persons if such a transfer is in accordance with military needs.”¹⁷⁷ Therefore title to the property is legitimately transferred once the original seizure is in accordance with military utility and the sale transaction is for military purposes.

Can the belligerent occupant use property originally seized for use in military operations under Article 53(1) for commercial purposes? The French Court of Appeals of Orleans has advanced a liberal reading of Article 53(1) use and subsequent sale of public moveable property for economic or other purposes. In *French State v. Établissements Monmousseau* (1948), the French Court of Appeals of Orleans found that 20 metal wine vats seized by the German army of occupation from the French army supply department and sold to the defendant company fell within the purview of Article 53(1).¹⁷⁸ The original function of the wine vats was for the provisioning of the

¹⁷³ *Ibid.*, p. 687 - 688.

¹⁷⁴ *Ministero Della Difesa-Esercito v. Salamone*, Italy, Court of Cassation, February 8, 1950, *International Law Reports Year 1951*, (London Butterworth & Co. (Publishers), Ltd. 1957) Case No. 211, p. 688.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid* at p. 991.

¹⁷⁷ *Ibid.*

¹⁷⁸ *French State v. Établissements Monmousseau*, France, Court of Appeal of Orleans, April 6, 1948, *Annual Digest and Reports of Public International Law Cases 1948* (London Butterworth & Co. (Publishers), Ltd., 1953) p.596 Case. 197.

French army and therefore evinced the character of “objects used for military operations”. However, expatiating the Court found that

“the occupant becomes the owner of property of the occupied State which is moveable, susceptible to use for operations of war and thus subject to seizure. He may freely dispose of it, whether by using it for military purposes, by taking it to his own territory, or even by alienating it in order to transform it into cash which may be used for the conduct of hostilities.”¹⁷⁹

Following this reasoning, the potential military purpose of the property renders the property seizable. While the property may be converted into cash assets and even alienated after appropriation, these actions are undertaken with the continued intent of using the liquidated asset for military operations. This argument is supported by Cummings who states “even the property that is least protected under the law of belligerent occupation – property that may be appropriated under Article 53(1) of the Hague Regulations – may not be appropriated if the intention of the occupying power is to exploit that property for commercial purposes.”¹⁸⁰ The distinction is significant because the belligerent state is prohibited from seizing public property that is not suitable for military operations. Alternatively, the occupant may wish to take possession of public property to prevent its use in military operations.¹⁸¹ Even so it would appear from the ruling in *Établissements Monmousseau* that the occupants actions are governed and limited by the reference to ‘military operations’.

In *P. v. A. G. K. and P.* (1948) the Federal Tribunal in Switzerland found that restitution was granted to the Polish State, in a case where a calculating machine owned by the Polish State, was seized by the German occupier and sold to a Swiss purchaser during the normal course of trade.¹⁸² Critically it was the subsequent sale of the calculating machine for commercial purposes which the Court identified as depriving the machine of its character as State property ‘used for military operations’. The intention of the occupier to ultimately use the property beyond military

¹⁷⁹ *Ibid* at p.597

¹⁸⁰ Cummings, “Oil Resources in Occupied Arab Territories under the law of Belligerent Occupation”, (1974) 9 *Journal of International Law and Economics* 576-577.

¹⁸¹ Lassa Oppenheim, *International Law, A Treatise, Volume I*, (The Lawbook Exchange, 3rd edition, edited by Ronald F. Roxburgh, 2005) 158.

¹⁸² *P. v. A. G. K. and P.*, Switzerland, Federal Tribunal (Chamber for the Restitution of Assets Seized in Occupied Territory), June 24, 1948, Annual Digest and Reports of Public International Law Case Year 1948, (London Butterworth & Co. (Publishers), Ltd., 1953) p. 594, Case No. 196.

operations was integral to the decision to grant restitution despite military documents furnished by the defendant certifying the character of the calculating machines as usable in military operations by the German military.

Correspondingly in *Grilli v. Administration of State Railways* (1961) the Italian Court of Cassation held that the right of seizure predicated in Article 53(2) did not extend the use of public moveable property beyond military operations to trading with the occupied population.¹⁸³ There the occupying Allied military authorities sold a publicly owned railway truck seized during the occupation of Italy during World War II. Demonstrating the public property limitations manifest in Article 53(2) the court found that

“seizure was permitted for military purposes, not in order to trade with the property. Least of all was such trade permitted within the occupied territory with the citizens of the occupied State. The Allied military authority therefore had no right to sell the truck and could not transfer property in it.”¹⁸⁴

In *Ministero Difesa v. Ambriola* (1951), the Italian Court of Cassation found that the German belligerent occupant had illegally requisitioned a car belonging to the Italian Ministry of Defence.¹⁸⁵ Despite the use of the property as means of transport usable for military advantage, the further use of the vehicle for the commercial purposes was beyond an Article 53 interpretation. The Court stated:

“That Article indeed permits occupying forces to seize cash and securities, depots of arms, means of transportation, magazines and stores, and in general all moveable property of the occupied State, but only in so far as they may be of use in military operations, and not for purposes of trafficking with individuals.”¹⁸⁶

This authority suggests that public moveable property cannot be used beyond military operations for private economic purposes. It is less clear whether moveable property of a military character may be seized to engage in commercial activities for the benefit of the economy of the occupied territory and whether such considerations can

¹⁸³ *Grilli v. Administration of State Railways*, Italy, Court of Cassation (United Chambers), 25 March, 1961, International Law Reports, Volume 40, (London Butterworths, 1970) p. 429.

¹⁸⁴ *Ibid.*, at p. 430.

¹⁸⁵ *Ministero Difesa v. Ambriola*, Italy, Court of Cassation, June 15, 1951, International Law Reports Year 1951, (London Butterworth & Co. (Publishers), Ltd., 1957) Case No. 213, p. 690.

¹⁸⁶ *Ibid.*

usurp Article 53 military restrictions.

The distinction between the use of moveable property, for operations of war and the use of moveable property for commercial operations was demonstrated in *CIE. Des Chemins De Fer Du Nord v. German State* (1929).¹⁸⁷ There the Franco-German Mixed Arbitral Tribunal ruled that the seizure and operation of a railway in occupied Belgium by the German State for both military and commercial purposes was *ultra vires* the Hague Convention. Operating the railway for private economic gain constituted a private activity, which is governed by private law. Germany was responsible for the repayment of the commercial profits made outside of military operations during the occupation to the railway company.¹⁸⁸ While there are many domestic court rulings on the commercial use of military property the ruling in *CIE* is significant as it is the only international pronouncement on this issue.

The Italian Court of Venice in *Ministry of Defence v. Ergialli* (1958) took a contrasting position on the use of military property for commercial purposes. There the court found that the Italian Ministry of Defence had no grounds for seeking the return of a lorry requisitioned by the German occupying forces under Article 53(1) and sold to Ergialli for non-military purposes.¹⁸⁹ The Court delineated:

“Once ownership in seized goods has been acquired, the seizing State acquires all the rights inherent in ownership. It is entitled to use these goods in accordance with its requirements and to dispose of them, without being bound to use them only for military purposes. The suitability of the goods for those purposes is only a necessary condition of the legality of the seizure, and does not circumscribe the ultimate conduct of the captor in making use of the goods, such use being within the discretion of the new owner.”¹⁹⁰

Thus, following the seizure of property usable for military operations, there was no onus on the belligerent to sustain the military use as the title passed to the occupier on appropriation.

¹⁸⁷ *CIE. Des Chemins De Fer Du Nord v. German State*, Franco-German Mixed Arbitral Tribunal, 8 April, 1929 (Asser, Gandolphe, Froehlich), Annual Digest of Public International Law Cases, Years 1929 and 1930, (Longmans, Green and Co. London, New York, Toronto, 1935), Case 294, p. 498.

¹⁸⁸ *Ibid.*, at p. 500. “While acting under the terms of paragraph 1 of Article 53 of the Convention, Germany was not entitled to seize the proceeds of the exploitation.”

¹⁸⁹ *Ministry of Defence v. Ergialli*, Italy Court of Venice, February 5, 1958, International Law Reports Volume 26 (1958-II), (London, Butterworths, 1963), p.732.

¹⁹⁰ *Ibid* at p.734.

Similarly, certain courts have established a precedent for the unfettered seizure of “cash, funds and realisable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies” under Article 53(1).¹⁹¹ Following this line of reasoning it is only property outside this list, which is limited for use in ‘military operations’. In *Austrian Treasury (Postal Administration) v. Auer* (1947), the Austrian Supreme Court identified a motor vehicle belonging to the Austrian postal administration and seized by the Russian forces in occupied Austria as one of the objects for seizure enumerated in Article 53(1).¹⁹² Unimpeded by the qualification for the moveable property to be “used for military operations”, the Court interpreted ‘means of transport’ as broadly incorporating all means of transport regardless of military capacity. Moreover ‘the occupant was entitled to seize the property of the occupied State, and acquired ownership thereof.’¹⁹³ Interestingly, the Austrian Supreme Court found in favour of the defendant Auer, upholding as legal the

¹⁹¹ Article 53(1), 1907 Hague Convention IV Respecting the Laws and Customs of War on Land; However the Oxford Code, 1880 prepared for use as a military manual clearly divides the content of the Brussels Convention into three disparate articles. Article 50, Oxford Code lists the property that the belligerent occupant may take possession of.

The occupant can only take possession of cash, funds and realizable or negotiable securities which are strictly the property of the State, depots of arms, supplies, and, in general, movable property of the State of such character as to be useful in military operations. (Article 50, Laws of War on Land, Manual published by the Institute of International Law (Oxford Manual), Adopted by the Institute of International Law at Oxford, September 9, 1880.)

Article 51 establishes that the belligerent occupant may only temporarily use certain transport and communications belonging to the occupied State for the duration of the occupation.

Means of transportation (railways, boats, & c.), as well as land telegraphs and landing-cables, can only be appropriated to the use of the occupant. Their destruction is forbidden, unless it be demanded by military necessity. They are restored when peace is made in the condition in which they then are.¹⁹¹ (Italics added)

This would suggest that the duty implicit in Article 53(2) of the Hague Regulations for moveable property to be restored and compensation fixed after occupation extends both to public and private property listed in that article, highlighting the temporary nature of the intended use. The ruling in *Grilli v. Administration of State Railways* (1961) supports this reading. (*Grilli v. Administration of State Railways*, Italy, Court of Cassation (United Chambers), 25 March, 1961, International Law Reports, Volume 40, (London Butterworths, 1970) p. 429.) There the Italian Court of Cassation indicated that the occupier had a duty to restore and pay compensation for seized public as well as private property under Article 53(2). The requisition of a State-owned railway truck by the occupying forces was of a ‘wholly exceptional and temporary nature’ made necessary by the large-scale operations of war. (*Grilli v. Administration of State Railways*, Italy, Court of Cassation (United Chambers), 25 March, 1961, International Law Reports, Volume 40, (London Butterworths, 1970) p. 431.)

¹⁹² *Austrian Treasury (Postal Administration) v. Auer*, Austria, Supreme Court, First Division, October 1, 1947, Annual Digest and Reports of Public International Law Cases Year 1947, (London Butterworth & Co. (Publishers). Ltd., 1951) p.276 Case No. 124.

¹⁹³ *Ibid.*, at p.276.

sale of property by the Russian occupiers while the belligerent occupation of Austria by the Russians was still in force (which may suggest that the decision of the Court was influenced by the occupying administration). The Polish Supreme Court in *Koblenski and Others (Vistula Navigation Company) v. Fajans-Krater* (1933) found that a barge owned by the Russian State Treasury and appropriated by the German occupying authorities in occupied Russia was legitimately obtained under the “means of transport” clause of Article 53(1).¹⁹⁴ Again the Court found it unnecessary to link the obtained object to military operations.

Petroleum and petroleum products may be used as fuel to operate military vehicles in armed conflict. Direct appropriation of material outside war operations under Article 53(1) relates to depots of arms, means of transport, stores and supplies. It is uncertain whether the Hague Regulations framework may be expanded beyond direct means of transport to include fuel for transport as material that may be automatically seized without reference to military operations. Moreover it is unclear whether the Hague rules permit property seizure under Article 53(1) without regard to military operations despite the rulings in the *Austrian Treasury, Koblenski*. Notwithstanding, the motorcar seized in *Austrian Treasury*, and the barge seized in *Koblenski* highlight the potential also for fuel to come under the umbrella of ‘means of transport’ for direct requisition without reference to military operations.

International humanitarian law has traditionally maintained a distinction between the seizure of public and private moveable property for military operations stemming from the Rousseau Portalis doctrine. Article 52 of the Hague Regulations requires that the belligerent occupant pay for private requisitioned articles in cash and if not “a receipt shall be given”.¹⁹⁵ Similarly Article 53(2) provides that private moveable property is “restored and compensation fixed when peace is made.”¹⁹⁶ The absence of a similar requirement for public moveable property seized under Article 53(1) highlights the permanent nature of the requisition provided that the property is seized for use for military operations. It also underscores the integrity and supremacy of

¹⁹⁴ *Koblenski and Others (Vistula Navigation Company) v. Fajans-Krater*, Poland, Supreme Court, First Division, February 17, 1933, Annual Digest and Reports of Public International Law Cases Years 1933 and 1934, (London, Butterworth & Co. (Publishers), Ltd., 1940), Case No. 223, p.512.

¹⁹⁵ Article 52, 1907 Hague Convention IV and Regulations.

¹⁹⁶ Article 53(2), 1907 Hague Convention IV and Regulations.

private property in the international law of occupation. However the UNSC Resolution 1483 introduction of an international audit on public moveable property indicates that the public property and national wealth of the occupied state may potentially be accorded similar treatment to private property during occupation. This implies that the belligerent occupant may in the future be obligated to retain receipts and accounting records to specifically indicate that resources are directed to use for military operations while further reinforcing the understanding that military property may not be used for ancillary commercial purposes.

1.2.6 Application to Iraq

The key distinction between the treatment of moveable oil resources located in occupied territory under UNSC Resolution 1483 and Article 53(1) of the Hague Regulations is the request that the resources be used for the economic reconstruction of Iraq. UNSC Resolution 1483 paragraph 14 requires that moveable oil resources in the Development Fund for Iraq are used

“in a transparent manner to meet the humanitarian needs of the Iraqi people, for the *economic reconstruction* and repair of Iraq’s infrastructure, for the continued disarmament of Iraq, and the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq.”¹⁹⁷ (Italics added)

Meanwhile, the occupiers are obliged to comply with their obligations under international law including the Geneva Conventions of 1949 and the Hague Regulations of 1907.¹⁹⁸ Consequently, occupation law restricts the extent to which a belligerent occupant may use seized public moveable property in its possession. While export sales of petroleum, petroleum products and natural gas come under Resolution 1483 for deposit into the Development Fund for Iraq, sales of petroleum, petroleum products and natural gas as public moveable property destined for the internal market come independently under the control of the belligerent occupant.¹⁹⁹ Resolution 1483 does not apply to oil destined for the internal market which instead is governed directly by Article 53(1) of the Hague Regulations.

All export sales of petroleum, petroleum products and natural gas from Iraq to the

¹⁹⁷ S/RES/1483 (2003) par. 14.

¹⁹⁸ *Ibid* at par 5.

¹⁹⁹ *Ibid* at par 20.

international market were placed in the Development Fund for Iraq with other monies to 'benefit the people of Iraq' collected under Resolution 1483.²⁰⁰ Although Article 53(1) of the Hague Regulations compels the belligerent occupant to seize moveable property for military purposes, the rulings in *re Leopore*, *Ministero Della Difesa-Esercito* and *Mestre Hospital* indicate that the occupant may use seized public moveable property to restore damage caused to property and inflicted on civilians during hostilities in the occupied territory. Consequently paragraph 14 of UNSC Resolution 1483 accords with traditional humanitarian law on humanitarian needs, repair of infrastructure, disarmament and administration. However the duty to engage in economic reconstruction represents a marked departure from the general duties of the belligerent occupant during occupation and this is unique to the occupation of Iraq.

However on the basis of the cases previously discussed under Article 53(1) of the Hague Regulations the occupant may only seize public moveable property for use in military operations. Therefore can the belligerent occupant seize and use oil for commercial purposes destined for the internal market outside the bracket of Resolution 1483? Petroleum and gas deposits may be seized for direct use in military operations or directed to serve other purposes of warfare such as requisition as evidenced in *re Leopore*. However the rulings in *Établissements Monmousseau*, *Grilli*, the *P case*, *CIE Des Chemins De Fer Du Nord*, and *Ministero Difesa* suggest that the use of moveable public property commercially and for private gain is clearly beyond the scope of Article 53(1). This includes any petroleum products used in the domestic market during the occupation of Iraq.

Arguably, the rulings of the courts in *Établissements Monmousseau*, *P case*, the *CIE Des Chemins De Fer Du Nord*, *Ministero Difesa* and *Grilli* pertaining to the commercial use of seized public moveable property highlights a reluctance to extend even liquidated assets beyond military use to commercial ventures. Economic reform requires expenditure on stabilisation, liberalisation, private sector development, legal and regulatory reform. These sweeping developments fall for additional consideration under the administrative mechanism of Article 43 of the Hague Regulations, which

²⁰⁰ S/RES/1483 (2003) par 20.

conversely requires the belligerent occupant to maintain the *status quo* of the territory intact.²⁰¹ Therefore the use of public moveable property for economic reconstruction in military operations is limited by reference to the *status quo* qualification of Article 43. Conversely, the expansion of UNSC Resolution 1483 to incorporate economic reconstruction into the belligerent occupant's administrative mandate underscores the developing link in transitional occupations between forging security and maintaining economic growth. It further highlights a gap in humanitarian protection where the belligerent occupant is prevented from using liquidated public moveable resources under Article 53(1) to implement economic reform and fund commercial ventures for the benefit of the occupied population.

The adoption of auditing practices under UNSC Resolution 1483 beyond traditional occupation law further limits the use of seized public moveable property. It dispels the reasoning in *Austrian Treasury* and *Koblenski* that certain types of public property enumerated in Article 53(1) of the Hague Regulations such as 'means of transport' may be requisitioned without further reference to 'military operations'. Property seized for use in military operations must be accounted for and used in military operations such as reconstruction, administration or military hostilities. In Iraq problems arose during the occupation when monies disbursed from the Development Fund for Iraq for reconstruction projects were not accounted for. In one example of many, receipts were not provided for ten contracting actions amounting to \$96,917,662 and invoicing documents were not provided in eleven contracting actions amounting to \$89,022,592.²⁰² The International Advisory and Monitoring Board suggested that the accounting inconsistencies have been due to "submission of duplicate invoices, overpayment due to processing of invoices associated with fictitious vendors and/or overpayment due to incorrect or erroneously submitted invoices subsequently corrected."²⁰³ While difficulties have emerged even with an auditing mechanism, the accounting process has highlighted the potential for the occupant to channel public moveable assets requisitioned under Article 53(1) into private projects *ultra vires* the Hague Regulations. Although the International

²⁰¹ This will be discussed further in Chapter 3.

²⁰² KPMG, Defence Reconstruction Support Office, Follow-up Analysis on Non-competitively Awarded Contracts Funded From the Development Fund for Iraq (November 10, 2006) p. 2.

²⁰³ KPMG, Defence Reconstruction Support Office, Follow-up Analysis on Non-competitively Awarded Contracts Funded From the Development Fund for Iraq (November 10, 2006) p. 12.

Advisory and Monitoring Board is peculiar to the occupation of Iraq its experience indicates that the disbursement of public moveable resources, in particular public natural resources, is considered analogous to the disbursement of private resources under the Hague rules requiring receipts for eventual traceability.²⁰⁴

1.3 The Status of pre-war Foreign Oil Contracts negotiated with Saddam Hussein and the limits of Article 53(2) of the Hague Regulations

Despite the nationalisation of Iraq's oil between 1972 and 1974, private contracts were awarded to multinational oil companies in the late 1990's, towards the end of the sanctions regime to develop Iraq's oil. By 2001 the United Nations Sanctions Committee for Iraq established pursuant to Resolution 661 (1990), had awarded contracts to 300 Russian companies for the development of oil fields.²⁰⁵ Meanwhile Saddam Hussein had awarded private contracts over the Al-Ahdab oil field to CNPC of China, the Amara oil fields to PetroVietnam, the West Qurna oil field to LUKoil of Russia, the Rafidian field to Tatneft, Soyuzneftegaz and Stroytransgas-Oil of Russia, the Majoon and Nahr Umar fields to TotalFinaElf of France, Block 3 of the Western Desert to Pertamina of Indonesia, Block 4 of the Western Desert to the Oil and Natural Gas Corporation of India, Ratawi to Royal Dutch Shell, the Nassiriya field to Agip (Italy) and Respol (Spain) and Block 8 to ONGC of India.²⁰⁶ This section will address the limitations on the seizure and use of private moveable oil deposits under the requisition mechanisms of the Hague Regulations.

1.3.1 Requisitioning Private Oil Deposits under the Hague Regulations

Article 52 and Article 53(2) of the Hague Regulations provide mechanisms whereby

²⁰⁴ S/RES/1483 (2003) par. 12; S/RES/1546 (2004) par. 24; S/RES/1637 (2005) par 3; S/RES/1723 (2006); S/RES/1790 (2007); S/RES/1859 (2008); S/RES/1905 (2009)

²⁰⁵ S/RES/661 (1990); Sabrina Tavernise, "Oil Prize, Past and Present, Ties Russia to Iraq" New York Times (17 October 2002); David M. Shribman, "Russia, France offer gauge for Iraq policy" Boston Globe (12 March 2002).

²⁰⁶ Kenneth Katzman, "Iraq: Oil-for-Food Program, International Sanctions, and Illicit Trade" Report for Congress (16 April 2003) CRS-16; Vivian C. Jones "Iraq's Trade with the World: Data and Analysis" CRS Report for Congress (23 September 2004) CRS-15-18; David M. Shribman, "Russia, France offer gauge for Iraq policy" Boston Globe (12 March 2002); Sandra T. Vreedburgh, "The Saddam Oil Contracts and What Can Be Done" 2 DePaul Business and Commerce Law Journal 559, 563 (2003-2004); CRS Report for Congress, "Iraq's Trade with the World, Data and Analysis" (March 25, 2005) CRS-7.

the belligerent occupant can requisition private property for limited purposes. Article 52 states that “requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.”²⁰⁷

Article 53(2) provides

“All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by navel law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.”²⁰⁸

The article draws a sharp distinction between public and private moveable property used for military operations. Consonant with the private property protection of Article 46 of the Hague Regulations, which states “private property can not be confiscated” Article 53(2) again acknowledges the superior position of private property in guaranteeing its restoration and compensation in the event of seizure.²⁰⁹ This section identifies which requisition model of Article 52 or Article 53(2) the belligerent occupant should use to appropriate private oil deposits during occupation.

Although “requisition” is specifically mentioned in Article 52, the word does not feature in Article 53(2).²¹⁰ Therefore does Article 53(2) appropriation fall within the requisition paradigm? The distinction is significant because requisition as a tool of formal surrender of property may sever the legal ties of ownership on compensation from the belligerent. Interestingly the Hague Convention of 1899 included the term requisition providing “an army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the State, depots of arms, means of transport, stores and supplies, and, generally moveable property of the

²⁰⁷ Article 52, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

²⁰⁸ Article 53(2), 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

²⁰⁹ Article 46, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

²¹⁰ *Requisitions in kind and services* shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. *Such requisitions and services*, shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible. (emphasis added)

Article 52, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

State which may be used for military operations”²¹¹ (italics added). The Hague Regulations (1899) were updated at the Second Hague Peace Conference in 1907 where the reference to the term “requisition” was dropped from Article 53(1).

In *Polyxene Plessa v. Turkish Government* (1928) the Greco Turkish Mixed Arbitral Tribunal determined “requisitions are manifestations of the unilateral will of the authorities fulfilling the function of mobilising the resources of the country for the purpose of military defence.”²¹² Schwarzerger describes requisition as an “act of State, authorised on conditions laid down by international law, by which a belligerent occupant may deprive a private person or local authority of ownership in movables and possession in immoveables.”²¹³ Writing on the international economic law of belligerent occupation in 1942 Feilchenfeld used the terms of Article 52 requisition and Article 53 interchangeably. He proposed that coins, gold and other such items may be requisitioned by the belligerent forces and further noted that such items were subject to compensation citing Article 53(1) as authority.²¹⁴ The term requisition seems to be used synonymously in describing both Article 52 and Article 53 property appropriation. The synthesis is manifested in court rulings leading to some confusion on the overlap between the two articles and the establishment of a sharp periphery. In *Bataafsche* the leading case on oil exploitation, Wyatt C.J. ruling on Article 53(2) irregularities in the Hague Regulations (1907) determined that ‘the failure to give a receipt was a fatal omission and the duty to restore the unconsumed petroleum was not fulfilled.’²¹⁵ However there is no obligation on the belligerent occupier to furnish a receipt under Article 53, this being a singular feature of Article 52 requisition. The function of a receipt under Article 52 is to ensure that private property owners are compensated either during or after hostilities for requisitioned property, as this will not be returned. Article 53(2) of the Hague Regulations (1907) on the other hand

²¹¹ Article 53(1), Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land: 29 July 1899, 32 Stat. 1803, 1 Bevans 247, 26 Martens Nouveau Recueil (ser. 2) 949, 187 Consol. T.S. 429, entered into force Sept. 4, 1900.

²¹² *Polyxene Plessa v. Turkish Government*, Greco-Turkish Mixed Arbitral Tribunal, 9 February, 1928, Case No. 382, Annual Digest of Public International Law Cases Vol. 4.

²¹³ Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II The Law of Armed Conflict* (London Stevens & Sons Limited, 1968) p. 288.

²¹⁴ Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 700 Jackson Place, N.W., 1942) p. 38 par 156.

²¹⁵ *N.V. De Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, Singapore, Court of Appeal, April 13, 1956, International Law Reports 1956, (London, Butterworth & Co. (Publishers) Ltd., 1960) p. 826.

includes a safeguard that the property will be restored to the owner and compensation fixed *post bellum*.

The distinction assumes significance in respect of compensation and restoration of property. Article 53(2) of the Hague Regulations pertaining to the seizure by the occupant of “all kinds of munitions of war” provides also for compensation and restoration of the public/private property when peace is made. In *Mortier v. Lauret* the Court of Appeal of Rouen found that seizure in Article 53(2) was to be differentiated from requisition or forced sale of property, which furnished the individual property owner with the right to property restoration at the end of hostilities.²¹⁶ The distinction is further obscured by the Court’s evaluation of Article 53(1) cash, funds and moveable public property as “property liable to requisition” in *Haw Pia v. The China Banking Corporation*.²¹⁷ This suggests that the occupier has a more restricted relationship with the public property limited by the mechanism of requisition as opposed to an outright appropriation of all public moveable property. Conversely the occupier under Article 52 requisition must follow the procedures contained in the article to formally sever property title. Only the commander in the locality can demand requisitions and services, which must be paid for in cash as soon as possible and a receipt furnished.²¹⁸ The rank and authority of the commander along with a requisitioning order are critical in finding for property title severance. In *Levi v. Monte Dei Pashi Di Siena* (1947) the Italian Court of Cassation reversed a finding of the lower court that money appropriated from an Italian Jewish citizen’s bank account by the German S.S was legitimately requisitioned.²¹⁹ A general requisitioning order had not been administered and the acts were perpetrated by low ranking police officers and not by the authority of a commander of the armed forces as warranted under Article 52.²²⁰ Notably these procedures are absent from Article 53 requisition suggesting that Article 53 requisition is considered a temporary measure.

²¹⁶ *Mortier v. Lauret*, France, Court of Appeal of Rouen, May 17, 1947, Annual Digest and Reports of Public International Law Cases Year 1947, (London, Butterworth & Co. (Publishers), Ltd., 1951) p. 274-275, Case No. 123.

²¹⁷ *Haw Pia v. The China Banking Corporation*, Philippines, Supreme Court, April 9, 1948, International Law Reports Year 1951, (London Butterworth & Co. (Publishers), Ltd., 1957), Case No. 203, p. 644.

²¹⁸ Article 52, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

²¹⁹ *Levi v. Monte Dei Pashi Di Siena*, Italy Court of Cassation, December 17, 1947, Annual Digest and Reports of Public International Law Cases, Year 1948, (London Butterworth & Co. (Publishers), Ltd., 1953) Case No. 207, p. 611.

²²⁰ *Ibid* at p. 612.

Typically the order for requisition of property will come from a commander of the armed forces of occupation. Alternatively the requisition order may stem from an interim indigenous administration under the control of the belligerent occupier. Consequently requisitions carried out by puppet governments under an arrangement with the belligerent occupier will still fall under the legal controls of the Hague Regulations. In *Magnifica Comunità di Fiemme v. Soc. Import. Esport. Legnami* (1951), the Italian Court of Cassation found that requisitions made by the Italian Socialist Republic in occupied Italy were not carried out by the legitimate government but in actuality came under the control of the German army of occupation.²²¹ Although in *Soubrouillard v. Kilbourg* (1946) the French Court of Cassation ruled that the civil authorities of an occupying Power did not have the authority to requisition private property as such requisitions are not governed by military requirements.²²² Congruently, in *Bertrand, Mannés and State of Belgium v. Bontemps, Camus and Ramelot* (1951), the Belgian Court of Appeal of Liège found that an Article 53(2) requisition of private transport was unlawful as it was seized by persons acting on behalf of the respondent and not directly by the armed forces for military use.²²³ However the occupying power cannot evade Article 53 guarantees to private and public moveable property in occupied territory through the diluted control of administrative command. Requisitions, which ultimately fall under the dominion of the belligerent occupant, will be tested according to the relevant provisions of the Hague Regulations.

Article 52 limits requisitions and services in kind to the “needs of the army” of occupation and the case law in this respect clearly depicts these parameters. The question is whether “army needs” and “military operations” are inextricably linked. In the leading case on property exploitation, *re Krupp and Others*, (1949), officials from Krupp industrial enterprises were accused of employing complex legal devices such

²²¹ *Magnifica Comunità di Fiemme v. Soc. Import. Esport. Legnami*, Italian Court of Cassation, July 24, 1951, International Law Reports Year 1951 (London: Butterworth & Co. (Publishers) Ltd., 1957), p. 629, Case No. 194.

²²² *Soubrouillard v. Kilbourg*, France, Court of Cassation (Civil Division), July 6, 1948, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd, 1953) Case No. 180, p.551.

²²³ *Bertrand, Mannés and State of Belgium v. Bontemps, Camus and Ramelot*, Belgium Court of Appeal of Liège, May 17, 1951, International Law Reports Year 1951, (London Butterworth & Co. (Publishers), Ltd., 1957) Case No. 209, p. 683.

as 'trusteeship' and forced leases to remove moveable private property from France, Belgium, the Netherlands, Austria, Yugoslavia, Greece and Russia to Germany to develop the rearmament programme of the German Government.²²⁴ The United States Military Tribunal at Nuremberg made reference to both Article 52 and Article 53 as developing the general rule against private property confiscation contained in Article 46. Exploitation of private economic assets is heavily regulated under the Hague Regulations to prevent exploitation and enrichment of the occupying power.²²⁵ Therefore Article 53(2) like Article 52 together must be interpreted exiguously. Inherently it would appear that any moveable material, which falls within the 'need' tributary would also by extension fall within the category of use for military operations but not *vice versa*. In *Abbing v. State of the Netherlands*, the Court of Appeal of the Hague, underlined that a clear connection between the belligerents needs and the requisition is warranted.²²⁶ An additional private house requisitioned for the personal use of the occupant's Secretary General of the Ministry of Finance in Amsterdam during World War II was not regarded as serving military interests. The housing or quartering need was satisfied by existing arrangements and therefore the additional requisition was *ultra vires* the Hague Regulations.

The blurring between an Article 52 and Article 53 requisition is seen in two cases *Lucchesi v. Malfatti* (1945) and *Play v. Ruffin* (1946), which share similar facts with anomalous results, the former judgment centered on an Article 52 requisition while the latter is based on an Article 53 appraisal of the facts.²²⁷ In the *Lucchesi* case the German military requisitioned a private motor-car for the benefit of an Italian officer who had been injured in the war and not for the 'needs of the army of occupation' as is warranted under Article 52. The requisition was found to be invalid within the meaning of Article 52 of the Hague Regulations. Correspondingly in the *Play* case the German occupation forces in France requisitioned a motor-car providing a receipt for

²²⁴ *Re Krupp and Others*, United States Military Tribunal at Nuremberg, June 30, 1948, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd., 1953), p. 620, Case No. 214.

²²⁵ *Ibid.*, at p. 624.

²²⁶ *Abbing v. State of the Netherlands*, [Reports: N.J., 1948, No. 192; *ibid.*, 1950, No. 114.]

²²⁷ *Lucchesi v. Malfatti*, Court of First Instance of Florence, December 10, 1945, Annual Digest and Reports of public International Law Cases Year 1946, (London Butterworth & Co. (Publishers), Ltd., 1951), p. 378, Case No. 160; *Play v. Ruffin*, France, Tribunal Civil de Rouen (Summary Jurisdiction), May 13, 1946, Annual Digest and Reports of public International Law Cases Year 1946, (London Butterworth & Co. (Publishers), Ltd., 1951), p. 382, Note.

it. The requisitioned property was used instead of payment in another requisition. The Court found that the character of the property as a means of transport was enough to bring the requisition legally within Article 53. Clearly certain chattels such as private means of transport or private oil deposits may be broad enough to be interpreted as both Article 52 and Article 53 requisition.

1.3.2 Application to Iraq

Clearly private oil deposits may be requisitioned under Article 52 and Article 53(2) of the Hague Regulations. The ruling in *Krupp* establishes the potential for both articles to be considered at the same time. However the seizure of private oil resources during the occupation of Iraq fits more succinctly with Article 53(2) requisition. Article 52 requisition pertains narrowly to the needs of the army while Article 53(2) permits broader use of seized property for military operations. Although *Krupp* indicates that the mechanisms may be adopted interchangeably it is clear from the rulings of *Lucchesi* and *Play* that Article 53(2) is broader in scope. Material requisitioned under Article 53(2) for military operations may also constitute property that can be used for the “needs of the army of occupation” under Article 52. However Article 52 limits requisitions in kind and services to “matters as billets for the occupying troops and the occupation authorities, garages for their vehicles, stables for their horses, urgently needed equipment and supplies for the proper functioning of the occupation authorities, food for the army of occupation and the like.”²²⁸ Article 53(2) liberally permits the seizure of ‘all kinds of munitions of war’. Private oil seized and liquidated during the occupation of Iraq was directed for use outside the “needs of the army of occupation” to projects such as the oilfield guard expansion, media programs, NGO assistance centers, power stations and witness protection programs.²²⁹

It is unlikely that private oil seized and sold during the occupation falls under Article 52 requisition as this is narrowly demanded under the ‘authority of the commander’ of the armed forces. Appositely Article 53(1) requisition broadly refers to the ‘army of occupation’ while Article 53(2) does not limit requisition to any particular army rank.

²²⁸ United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (William S. Hein & Co., 1997) 137

²²⁹ <http://www.iraqcoalition.org/budget/PRB/PRBMinutes12-02-03.htm>;
<http://www.iraqcoalition.org/budget/PRB/PRBMinutes01-17-04.html>;
http://www.iraqcoalition.org/budget/PRB/PRB_Feb15.html (last visited 6 November 2010).

The ruling in *Magnifica Comunità di Fiemme* indicated the potential for other parties operating under the authority of the belligerent occupant such as local government to carry out requisitions. In Iraq, the Interim Governing Council representing the Iraqi people was appointed by the US/UK Coalition Provisional Authority under United Nations Security Council Resolution 1483 to operate in conjunction with the occupying power and engage in critical decisions over the use of Iraq's resources.²³⁰ A Program Review Board was established under Coalition Provisional Authority Regulation Number 3 to oversee the distribution of funds to reconstruction projects from the Development Fund for Iraq.²³¹ The Iraqi Ministry of Finance from the Interim Governing Council, served as a nonvoting member of the board with the belligerent occupants constituting the voting members on the board.²³² Therefore despite the input of indigenous Iraqis in the decision making process, ultimate authority vested in the belligerent occupant on the seizure and disbursement of monies from natural resources.

The seizure of private property including contracts by all parties operating under the authority of the belligerent occupant may be considered under the frameworks of Article 52 and Article 53(2) requisition. Both require that the private party is either compensated for the property or that the property is returned after the close of hostilities. Accordingly, failure to reimburse the private oil companies for losses incurred owing to the requisition of contracts during occupation or failure to return the parties to their former contractual positions is *ultra vires* Article 52 and Article 53(2) on property requisition.

1.3.3 Can the Belligerent Occupant Seize Oil Contracted to Private Corporations under Article 53(2) of the Hague Regulations?

During the occupation of Iraq in May 2003, Thamir Ghadhban the Iraqi Oil Minister appointed by the Coalition Provisional Authority cancelled the pre-war contracts that Saddam Hussein had negotiated with foreign oil companies between 1997 and

²³⁰ S/RES/1483 (2003) par 9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority; Coalition Provisional Authority Regulation Number 6, Governing Council of Iraq (13 July 2003)

²³¹ Coalition Provisional Authority Regulation Number 3, (18 June 2003).

²³² *Ibid* at para 4(1)(a).

2002.²³³ This section seeks to determine whether the contractual rights of private parties may be seized and terminated as private moveable property under Article 53(2) of the Hague Regulations. Furthermore this section examines whether private oil deposits are considered *munitions de guerre* under the requisition framework.

At first glance, the Article 53(2) list of public and private property, which may be seized during a belligerent occupation is limited to property that can be used as “munitions of war” and is narrower than its Article 53(1) counterpart of moveable property “used for military operations”. Smith states that “war material” consists of all moveable articles for which a modern army can find any normal use such as food, drink and tobacco but does not include luxury items.²³⁴ Dinstein argues against a broad interpretation of what constitutes “munitions of war” under Article 53(2) stating:

“some interpret this in a way which is comprehensive to the point of unreasonableness, embracing, for example, bank accounts. A narrower (and hence sounder) construction proposed is that *munitions de guerre* comprise all moveables for which a modern army can find any normal use – meaning in other words, whatever is issued from the quartermasters stores or sold by the N.A.A.F.I. organisation or its equivalents - including food or tobacco.”²³⁵

The narrower interpretation is succinct with the restrictions on the occupier who does not acquire title in the property but limited rights of use, as the property must be “restored and compensation fixed when peace is made.”²³⁶ Can moveable oil deposits seized and subsequently sold during the occupation phase of hostilities fall within the construct of “munitions of war”?

The general consensus from case law is that only property directly usable in military operations is considered as “*munitions de guerre*.” In *re Esau (1949)*, the Dutch Special Court of Cassation considered that with the exception of a short wave emitter, *munitions de guerre* could not extend to materials and apparatus such as boring

²³³ “Iraq halts Russian and Chinese oil deals”, BBC News (Monday 26 May 2003) (last visited 6 November 2010); “India’s Iraq interest in doldrums” The Financial Express (28 May 2003) (last visited 6 November 2010).

²³⁴ H.A Smith, “Booty of War”, 23 *British Yearbook of International Law* (1946), 229

²³⁵ Yoram Dinstein, “The International Law of Belligerent Occupation and Human Rights”, Israel Yearbook on Human Rights (1978) Volume 8 136

²³⁶ Lauterpacht, “The Hague Regulations and the Seizures of Munitions de Guerre” 32 *British Yearbook of International Law*, p. 221.

machines, lathes, lamps, tubes and gold, nor objects used for technical or scientific research.²³⁷ Similarly in *Bertrand, Mannés and State of Belgium v. Bontemps, Camus and Ramelot* (1951), the Belgium Court of Appeal of Liège, found that a motor-coach seized during the German occupation of Belgium was unlawful under Article 53(2) of the Hague Regulations as the property was not intended for the use of the army of occupation.²³⁸ Congruently, in *Delville v. Servais*, (1945), the Belgium Court of Appeal of Liège found that a privately owned lorry compulsorily purchased by the German occupying administration could not fall under either Article 52 or Article 53(2) requisition as requisition is permitted meticulously for the necessities of the army of occupation only.²³⁹ Regardless of the potential for the property to be used as war material, the subsequent use of the property for purposes beyond military operations is integral to Article 53(2).

The position that public/private moveable property under Article 53(2) as *munitions de guerre* be susceptible to direct military use was resolutely restated in the landmark decision *N.V De Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission* (1956).²⁴⁰ There a dispute arose between three private oil companies with concessions to produce commercial quantities of oil in Sumatra and the Japanese armed forces who during the occupation of Sumatra had seized the appellants installations and used the refineries. Applying Article 53(2) of the Hague Regulations to the belligerent occupant's use of the appellants private moveable refined oil deposits, the court found that the material must have a "sufficiently close connection with direct military use" to bring it within the ambit of Article 53(2) as munitions of war.²⁴¹ In this case, crude oil in the ground was not sufficiently connected with direct military use to bring it within the meaning of munitions de guerre in Article 53. This point has been hotly contested by some academics who argue that the 'close

²³⁷ *re Esau*, Special Court of Cassation. February 21, 1949. Case No. 177, Annual Digest and Reports of Public International Law Cases 1949, p. 483.

²³⁸ *Bertrand, Mannés and State of Belgium v. Bontemps, Camus and Ramelot, Belgium*, Court of Appeal of Liège. May 17, 1951. Case no. 209, International Law Reports 1951, p. 683.

²³⁹ *Delville v. Servais*, Belgium, Court of Appeal of Liège, October 19, 1945, Annual Digest and Reports of public International Law Cases Years 1943-1945, (London Butterworth & Co. (Publishers), Ltd., 1949) p.448, Case No. 157.

²⁴⁰ *N.V De Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, Singapore, Court of Appeal, April 13, 1956, 23 International Law Reports 1956, (London, Butterworth & Co. (Publishers) Ltd., 1960) p. 810.

²⁴¹ *N.V De Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, Singapore, Court of Appeal, April 13, 1956, 23 International Law Reports 1956, (London, Butterworth & Co. (Publishers) Ltd., 1960) p. 823.

connection' clause advocated in *Bataafsche* is irrelevant particularly in cases where the material may be desirable to use by the armed forces in the war effort.²⁴² Moreover Article 53(2) was left deliberately open to adapt to military operations. Consequently, the Court further elaborated that had the petrol been ready for use then the oil could have fallen under the category of *munitions de guerre* capable of use by the armed forces during hostilities.²⁴³ Significantly the basis for this conclusion rested on a reading of the British Manual of Military Law (1936), which limited seizure of moveable property to the property "susceptible of direct military use".²⁴⁴

The limitation of *munitions de guerre* to direct military use is evidenced in the Resolution of the Institute of International Law (1896), where the Institute in its International Regulation of Contraband of War restricted *munitions de guerre* to "articles, which to be used *directly* in war, need only be assembled or combined."²⁴⁵ Writing during the Lieber period, Hautefeuille submits that contraband affects:

"those articles only destined immediately to become in the hands of the possessors a direct means of attack and defence, that is, articles suited solely for warlike purposes, without requiring to undergo any industrial preparation or transportation to render them so and that contraband of war is limited expressly to arms, instruments and munitions of war, fashioned and fabricated exclusively to serve in war."²⁴⁶

Lauterpacht argues persuasively that the paucity of historic writings on the scope of *munitions de guerre* in the *travaux préparatoires* of the Brussels and Hague Conferences suggests that there was no real problem with the narrow interpretation that related to actual military objects such as arms and ammunition.²⁴⁷ Therefore the ruling in the *Bataafsche* case limiting the seizure of Article 53(2) property to that directly usable in military operations comports with the conceptions of moveable

²⁴² McDougal, Feliciano, *The International Law of War, Transnational Coercion and World Public Order* (Martinus Nijhoff Publishers, 1994) 818; Recent Cases, "War Belligerency – Original Owners Retain Title to Oil Resources Seized by Belligerent Occupant in Violation of Hague Regulations - *N.V De Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission* (C.A Singapore 1956)" Vol. 71, *Harvard Law Review* (1957), 570

²⁴³ *N.V De Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, Singapore, Court of Appeal, April 13, 1956, 23 *International Law Reports* 1956, (London, Butterworth & Co. (Publishers) Ltd., 1960) p. 847.

²⁴⁴ *Ibid.*, at p. 822.

²⁴⁵ Scott, *Resolutions of the Institute of International Law* (1916) p. 129.

²⁴⁶ Halleck, *International Law*, (1861) p. 570

²⁴⁷ Lauterpacht, "The Hague Regulations and the Seizure of *Munitions de Guerre*", 32 *British Yearbook of International Law*, (1955-1956) 233.

property use during the laws formative years.

1.3.4 Application to Iraq

Between 1997 and 2002, private oil companies from Russia, China, Italy, France and India entered into private contracts with Saddam Hussein to acquire exploitation rights to 40 per cent of Iraq's oil fields.²⁴⁸ Russia negotiated a five year \$40 billion "economic cooperation" trade agreement over several industry sectors including oil.²⁴⁹ UNSC Resolution 661 (1990) imposed economic sanctions on Iraq preventing member states from promoting the export of products in Iraq and prohibiting any commercial, industrial or public utility from operating with Iraq except for medical or humanitarian purposes.²⁵⁰ However the private oil contracts were expected to come into effect once the ban imposed on oil exploration in Iraq under UNSC Resolution 661 was lifted. UNSC Resolution 1483 (2003) provided:

"all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq established by resolution 661 (1990) and subsequent relevant resolutions, including resolution 778 (1992) of 2 October 1992, shall no longer apply."²⁵¹

Accordingly the pre-negotiated contacts were to take effect.

The ruling in *Bataafsche* indicates that the use of State owned oil under concession or contract to private oil companies by the belligerent occupant is considered under the requisition framework of Article 53(2) of the Hague Regulations. Although private oil deposits are subject to requisition, the rulings in *Bataafsche* and *re Esau* suggest that the property must be directly usable in military operations, a contention that is supported by Hautefeuille and Lauterpacht. Therefore while oil may be mobilised for direct use in hostilities as arms, ammunition or means of transport, the process of liquidating the oil assets for use in subsequent projects indicates an indirect use contrary to the treatment of *munitions de guerre*.²⁵² One might posit that *munitions de*

²⁴⁸ Vivian C. Jones "Iraq's Trade with the World: Data and Analysis" CRS Report for Congress (23 September 2004) CRS-18

²⁴⁹ Vivian C. Jones "Iraq's Trade with the World: Data and Analysis" CRS Report for Congress (23 September 2004) CRS-16

²⁵⁰ S/RES/661 (1991) par 3, 4.

²⁵¹ S/RES/1483 (2003) par 10.

²⁵² Interestingly, during the Persian Gulf War (1990-1991), the United States drew a distinction between the targeting of oil refining and distribution facilities and long-term oil production capability

guerre could be interpreted broadly to encompass indirect military use of requisitioned private property, however this would threaten the private property protections integral to the Hague system. Article 46 of the Hague Regulations states that “private property can not be confiscated.”²⁵³ The requisition featured in Article 52 and Article 53(2) offer a limited exception to the rule. The extension of the *munitions de guerre* paradigm from articles of war to articles of reconstruction would seriously impinge on the primacy of private property protection. Thus, while oil under private contract in Iraq may be requisitioned, it is limited to direct use in military operations.

1.3.5 Is the Belligerent Occupant Limited under International Humanitarian Law in using property for purposes other than military operations?

In Iraq, the Coalition Provisional Authority Program Review Board prioritised reconstruction projects for the disbursement of Development Fund for Iraq resources, which were authorised by the Coalition Provisional Authority Administrator Paul Bremer.²⁵⁴ Competition for contracts was limited to “sources from the United States, Iraq, Coalition Partners, and force contributing neighbours” with \$7 billion awarded to US reconstruction companies.²⁵⁵ Coalition Provisional Authority Memoranda Number 4 on Contract and Grant Procedures defined a contract as “a written agreement whereby the CPA or Coalition Forces acquire goods, services or construction from a person or entity under prescribed terms and conditions, for the purpose of assisting the Iraqi people or assisting in the recovery of Iraq.”²⁵⁶ In 2004 an audit by the Office of the Inspector General reported that the CPA had “not issued standard operating procedures or developed an effective contract review, tracking and monitoring system...contract files were missing or incomplete” and that contracting prices were sometimes unfair and unreasonable and payments were not made in

during the hostilities phase. Operation Dessert Storm targeted moveable refined oil products ready for distribution to ‘reduce Iraqi military forces’ mobility.’ Final Report to Congress, Conduct of the Persian Gulf War Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorisation and Personnel Benefits Act of 1991 (Public Law 102-25) (1992), p. 157.

²⁵³ Article 46, 1907 Hague Convention IV Regulations.

²⁵⁴ KPMG Bahrain, Development Fund for Iraq, Report of Factual Findings in connection with Disbursements for the period from 1 January to 28 June 2004, (September 2004)

²⁵⁵ Audit Report, Award of Sector Design-Build Construction Contracts, Office of the Inspector General Coalition Provisional Authority (23 July 2004) p. 3-5; United States Government Accountability Office, Report to Congressional Committees, Rebuilding Iraq, Status of Competition for Iraq Reconstruction Contracts, GAO-07-40 (October 2006)

²⁵⁶ Coalition Provisional Authority Memoranda Number 4, Contract and Grant Procedures, CPA-MEM (19 August 2003).

accordance with contract requirements.²⁵⁷ This section addresses how international humanitarian law limits the occupant in directing monies seized during occupation for economic reconstruction. Secondly the section will determine whether the occupant can channel money seized during occupation to the home territory by engaging in contracts with foreign companies. Can these contracts be considered as “disguised requisitions”? In doing so the section will draw from Article 53 and Article 55 on private and public resources.

Generally the courts have held that a requisition is valid where the initial use of the property is for military purposes. Where the continued use of the property is for military purposes, broader unsavoury arrangements such as the removal of the moveable property from the occupied territory have been permitted. After World War I, Article 297(e) of the Treaty of Versailles provided a compensatory mechanism for those who were deprived of private and public property through transfer of property outside the occupied territory and alteration of the properties title by the occupying forces.²⁵⁸ However noting that the requisition of Article 52 and Article 53 property was for war functionalities, the Anglo-German Mixed Arbitral Tribunal in *Tesdorf v. German State* (1923) ruled that 1595 bags of coffee removed from Antwerp, Belgium to Altona in Germany were for army provisions despite their illegal removal from

²⁵⁷ Audit Report, Coalition Provisional Authority’s Contracting Processes Leading up to and Including Contract Award, Office of the Inspector General Coalition Provisional Authority (July 27, 2004) p. 2.

²⁵⁸ Part X, Section IV Property Rights and Interests, Annex 3, Treaty of Versailles, 28th June 1919. Compensation for property appropriated under the Annex 3 heading included:

“In Article 297 and this Annex the expression ‘exceptional war measures’ includes measures of all kinds, legislative administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the-execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.”

occupied territory.²⁵⁹ Critical to this case was the continued military use of the seized property. Public moveable property, which is seized for military purposes and continues to be used with military intent regardless of any intervening illegalities such as moveable property title alteration, will be considered a legal requisition in the spirit of international law. Therefore property seized for military purposes and subsequently used in commercial practice will remain lawfully requisitioned and title will pass legally on condition the commercial interactions are clothed with military intent.

In Belgium, legislation was introduced during World War II to circumvent problems arising with dispossessed property *post bellum*. Article 4 of the Law of January 10, 1941 prohibited the acquisition of property through “irregular measures” by the enemy invader. The Belgium Court of Cassation in *Bonaventure v. Ureel* (1946) interpreted this domestic legislation in light of the Hague Regulations as prohibiting the re-sale of legally requisitioned articles during occupation.²⁶⁰ Notwithstanding the original valid requisition of a lorry as means of transport, the subsequent sale of the lorry as private property outside the military purpose corral of the Hague Regulations constituted an “irregular measure”.²⁶¹ Article 4 of the Law of January 10, 1941 is perspicuous evidence of State practice indicating that continued commercial exploitation and alienation of moveable public and private property beyond the original requisition is considered void.

The ruling in *Bataafsche* offers a concrete example of where private moveable property seized for both military and non-military commercial use exceeds the Article 53(2) requirements for the property to represent “munitions de guerre”.²⁶² In an attempt to perpetuate the war effort, Japanese occupying forces in Sumatra protractedly used private oil deposits seized from private oil companies during the

²⁵⁹ *Tesdorf v. German State*, Anglo-German Mixed Arbitral Tribunal, 8 November, 1922 and 25 April, 1923, (Borel, Vaughan, Williams, Zacharias), Annual Digest of Public International Law Cases, Years 1923 to 1924, (Longmans, Green and Co., London, New York, Toronto, 1933) Case No. 339, p. 475.

²⁶⁰ *Bonaventure v. Ureel*, Belgium, Court of Cassation, May 20, 1946, Annual Digest and Reports of Public International Law Cases Year 1946, (London Butterworth & Co. (Publishers), Ltd., 1951), Case No. 161, p. 378.

²⁶¹ *Bonaventure v. Ureel*, Belgium, Court of Cassation, May 20, 1946, Annual Digest and Reports of Public International Law Cases Year 1946, (London Butterworth & Co. (Publishers), Ltd., 1951), Case No. 161, p. 379.

²⁶² *N.V. De Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, Singapore, Court of Appeal, April 13, 1956, International Law Reports 1956, (London, Butterworth & Co. (Publishers) Ltd., 1960) p. 810.

occupation to meet the military and civilian needs of consumers outside the occupied territory. This use of moveable property to inflate the broader war effort both militarily and commercially outside of direct military need in hostilities within the occupied territory exceeded the limits of Article 53(2). Significantly Whitton J. surmised that Article 53(2) seizure “never transfers title, and in the case of an expendable product the occupier is under a duty to return to the owner at the end of the hostilities the unexpended portion.”²⁶³ Consequently title to the oil did not pass on its distribution for private consumption despite the intent of the Japanese occupation forces to use the proceeds for broader military plans outside the occupied region.²⁶⁴

Analogously, public moveable property seized by the occupant for the sole purpose of commercial speculation exceeds Article 53 limitations. In *Ministry of War v. Colorni and Fattori* (1948), the Court of Appeal of Rome found that a motor car belonging to the Italian army, was illegally seized by the German occupying forces for the purpose of private resale.²⁶⁵ The German authorities had used their powers under the article to engage in commercial practices however the court concluded that the motor car fell within the “means of transport” category of Article 53(1) requiring the properties exclusive use “for military operations.”²⁶⁶ Extricating the public and private employment of the public or private moveable property by the belligerent occupant brings the property usage in line with the Rousseau-Portalis doctrine on the public/private divide in armed conflict. The public operations of war are the preserve of the State and remain segregated from the private sector including private industry. Establishing the private use of seized public or private property brings it outside the realm of public international law. The commercial direction of moveable property can be indicative of private function but this may not always be the case for example, private commercial arms manufacturing.

It is uncertain whether the duty enshrined in Article 43 of the Hague Regulations for

²⁶³ *Ibid.*, at p. 847-848.

²⁶⁴ *ibid.*, at p. 821.

²⁶⁵ *Ministry of War v. Colorni and Fattori*, Italy, Court of Appeal of Rome, March 16, 1948, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd, 1953) Case No. 182, p. 553.

²⁶⁶ *Ministry of War v. Colorni and Fattori*, Italy, Court of Appeal of Rome, March 16, 1948, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd, 1953) Case No. 182, p. 555.

the occupant to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety” permits the occupier to exceed the requisition of public and private property permitted under Article 53.²⁶⁷ In the case of Iraq, does the need for the belligerent to regulate the economic life of an economically devastated society post-invasion allow for the usurpation of Article 53 military limitations on requisition of public and private properties? Cassese submits that a restrictive interpretation of actual military use is favoured in respect of Article 53(1) stating “reading Article 53 in the context of the other provisions to which reference has already been made, it seems clear to me that such *potential* military use is not sufficient to justify a taking under that Article.”²⁶⁸ This would rule out the seizure and use of public property for any use other than military operations. The Hague Regulations offer alternative mechanisms to generate income to support the administration of the occupied state and maintain the army of occupation. These are framed in Articles 48 to 52 of the Hague Regulations, providing for the collection of taxes, dues, tolls, money contributions, requisitions in kind and services whereas the language of Article 53 is specifically directed towards military operations. Article 48 permits the collection of taxes to “defray the expenses of the administration”, Article 49 allows contributions to be collected “for the needs of the army or of the administration of the territory in question” and Article 52 requisitions are demanded for the “needs of the army.”²⁶⁹ Therefore it is highly unlikely that Article 53 requisitions are intended to sustain the administration of the occupied territory as the other articles are specifically dedicated to this.

To date the courts have been unwilling to permit that extension where private property rights are threatened. In *Soubrouillard v. Kilbourg* (1946) the French Court of Cassation ruled that the seizure of a privately owned horse by the German occupying administration in compliance with an occupation ordinance for the improvement of agricultural production, did not authorise the occupier to effect the

²⁶⁷ Article 43, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

²⁶⁸ Antonio Cassese, “Powers and Duties of an Occupant in Relation to Land and Natural Resources” in Emma Playfair, *International Law and the Administration of Occupied Territories* (Clarendon Press Oxford, 1992) 428.

²⁶⁹ Article 48, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land (1907); Article 49, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land (1907); Article 52, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land (1907).

law on requisitions.²⁷⁰ In particular

“It does not grant civil authorities of the enemy the right to transfer to private individuals ownership in goods obtained by levy on other private persons, even in return for the payment of compensation. It is immaterial that the transaction was accomplished in this case ‘for the purpose of regulating economic life in general and agricultural production in particular.’”²⁷¹

The emphasis here is on private property protection, however interestingly the court is unwilling to extend the belligerent’s control over property regardless of the pressing need to reform agricultural practices. This suggests that the concept of “military operations” in Article 53 is narrow and closely knit with ongoing hostilities rather than of broader transformative administrative application. Analogously, in *Delville v. Servais* (1945), the Belgium Court of Appeal of Liège dismissed an argument by the defendant that a privately owned lorry, requisitioned by the German occupying authority and immediately resold to him for use in his coal business, was permitted owing to an Article 43 duty to maintain social order.²⁷² Although the private moveable property was to be used in essential coal services benefiting the broader occupied population, the character and overall function of the property was for use in a private coal business. The Court intrinsically demonstrated that “the stipulations of Article 43 do not permit any infringement of the particular provisions of Articles 52 and 53” of the Hague Regulations.²⁷³ Clearly the Article 43 considerations of maintaining public order and safety are central to the requisition framework.

Article 43 will supersede private and public moveable property guarantees where a compelling need exists for the occupier to address escalating humanitarian concerns. The Fourth Geneva Convention, 1949 extensively addresses the nature of humanitarian duties towards the occupied population that the belligerent occupant is obliged to fulfill. Article 55 of the Fourth Geneva Convention sets out a duty to

²⁷⁰ *Soubrouillard v. Kilbourg*, France, Court of Cassation (Civil Division), July 6, 1948, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd, 1953) Case No. 180, p.551.

²⁷¹ *Ibid.*, at p.551-552.

²⁷² *Delville v. Servais*, Belgium, Court of Appeal of Liège, October 19, 1945, Annual Digest and Reports of public International Law Cases Years 1943-1945, (London Butterworth & Co. (Publishers), Ltd., 1949) p.448, Case No. 157.

²⁷³ *Delville v. Servais*, Belgium, Court of Appeal of Liège, October 19, 1945, Annual Digest and Reports of public International Law Cases Years 1943-1945, (London Butterworth & Co. (Publishers), Ltd., 1949) p.449, Case No. 157.

ensure that the necessary foodstuffs are available to the occupied population, Article 59 provides for free passage of medical and foodstuffs into the occupied territory, Article 62 exempts relief consignments from being taxed by the occupying administration.²⁷⁴ The application of Article 43 provides for marginal alteration of the laws in force in the occupied territory subject to pressing public order and safety concerns. The occupant may inexorably alter laws in force in the territory to meet humanitarian demands regardless of threats to public and private moveable property protection. In *L v. N (Olive Oil Case)*, 1948 the Italian occupying administration in Greece published Proclamation No. 7 of 1942 to centralise the distribution of private olive oil stocks to combat food shortages and resulting inflated black market prices in the occupied Greek island of Samos.²⁷⁵ Moreover privately owned olive oil stocks were requisitioned for the benefit of the occupied population rather than for the direct military operations of the occupying army. The Greek Aegean Court of Appeal ruled

²⁷⁴ Article 55, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950. "To the fullest extent of the means available to it the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods. The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements."

Article 59, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950. "If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing. All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection. A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power."

Article 62, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950. "Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them."

²⁷⁵ *L v. N (Olive Oil Case)*, Greece, Aegean Court of Appeal, Judgement No. 41 of 1948, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd., 1953), Case No. 186, p. 563.

that the occupier had an Article 43 duty to override private property rights of the olive oil merchants as emergency measures “which were indispensable to the normal exercise of public life on the island of Samos.”²⁷⁶ This was an immediate and temporary measure to displace private property guarantees and comports with contemporary international law. Interestingly the proceedings were conducted prior to the Geneva Conventions, which place humanitarian needs on a stronger footing.

Measures introduced during the allied occupation of Germany impinged detrimentally on private moveable property but these laws were perceived by the victorious powers as extraordinary measures *necessitas non habet leges* operating outside the context of the Hague Regulations. In *Dalldorf and Others v. Director of Prosecutions* (1949), Dalldorf argued that the plant and equipment of the firm Blohm & Voss were not used in military operations by the British Military Government and therefore illegally requisitioned under the Hague Regulations.²⁷⁷ The Control Commission Court of Appeal held that the occupation of Germany was not subject to the Hague Regulations and therefore the measures enacted were pertinent. Laws introduced by the victorious allied forces superseded the limits of Article 43 and Article 53 of the Hague Regulations. In particular Military Government Ordinance No. 1 introduced by the occupying administration provided that “destruction, concealment, unauthorised possession or disposition of, or interference with, any ship, installation, plant, equipment or other economic asset, or plans or records with respect thereto, required by the Military Government” is a punishable offence.²⁷⁸ Appropriation of private moveable property stemmed from a transformative agenda to the remit of the Hague Conventions, to overthrow Nazi rule and dismantle institutions rather than pursuit of military operations. Typically manoeuvres directed at dismantling private or public enterprises and assimilating any moveable property therein for use in commercial profiteering or broader political objectives by the occupier will fall outside the narrow military operations permitted in Article 53.

The terminology of Article 6 of the Brussels Convention (1874) offers an insight into

²⁷⁶ *Ibid.*, at p. 565.

²⁷⁷ *Dalldorf and Others v. Director of Prosecutions*, British Zone of Germany, Control Commission Court of Appeal, December 31, 1949, Annual Digest and Reports of public International Law Cases Year 1949, (London Butterworth & Co. (Publishers), Ltd., 1955) Case No. 159, p. 435.

²⁷⁸ Section 32, Article 1, Military Government Ordinance No. 1.

the need for the belligerent occupant to seize both privately and publicly owned property for security reasons. Article 6(2) provides:

“Railway plant, land telegraphs, steamers and other ships, apart from cases governed by maritime law, as well as depots of arms and, generally, *all kinds of war material, even if belonging to companies or to private persons, are likewise material which may serve for military operations and which cannot be left by the army of occupation at the disposal of the enemy.* Railway plant, land telegraphs, as well as steamers and other ships above mentioned shall be restored and compensation fixed when peace is made.”²⁷⁹ (italics added)

Significantly, Article 6 of the Brussels code alongside Article 53 of the Hague Regulations, provides the belligerent occupant with a mechanism of property requisition which may be used in hostilities where to do otherwise would threaten the safety of the army of occupation.²⁸⁰ Selling war material back to the occupied population defies the very protective policy, which Brussels seeks to employ. The function of the article is to remove a threat to the occupation administration and not to engage in forcing property sales for a fraction of the properties value to recoup profits at inflated sales prices later.

In *re Falck* 1927, the French Court of Cassation considered whether the occupant exceeded Article 55 by contracting a company to fell trees used for commercial purposes and not the needs of the army of occupation.²⁸¹ Excess tree felling had caused considerable damage to French municipal forests during the occupation by Germany. The lower Court of Nancy ruled that the notion of usufruct must be construed in a broad manner to give rights of disposition and appropriation of war material to immobilised armies.²⁸² Disagreeing, the Court of Cassation found that contracts for the exploitation of the forest could not be upheld. Notably the Court did not rule out the application of military necessity under the Article 55 paradigm. This suggests that if “needs of the army” can be considered under the rubric of military necessity under Article 55, then a restrictive reading applies, facilitating appropriation

²⁷⁹ Article 6(2) Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, 65 BRIT. FOREIGN & ST. PAPERS 1005 (1873-74).

²⁸⁰ Article 6(2) Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, 65 BRIT. FOREIGN & ST. PAPERS 1005 (1873-74). “Which cannot be left by the army of occupation at the disposal of the enemy”.

²⁸¹ *Administration of Waters and Forests v. Falck* (11 February, 1927) French Court of Cassation, Criminal Chamber.

²⁸² *Re Falck*, (3 March, 1926) Court of Nancy, Fourth Chamber.

of property for the needs of the army during hostilities rather than conducting premeditated engagements of a contractual nature.

There is formidable precedent to suggest that certain contractual arrangements conceived during belligerent occupation between the belligerent State and the occupied population are in fact “disguised requisitions”. In *Hospices Civils De Colmar v. Kommissar Des Reichs-Finanzministeriums* (1929) a lease for buildings concluded between the applicant and the belligerent occupant was considered by the Franco-German Mixed Arbitral Tribunal to be an exceptional war measure under the Treaty of Versailles, as improper use was made of the premises by the occupying forces outside of the original agreement when the occupier established a hospital there.²⁸³ The tribunal held that “the reading of the contract entered into gives the clear impression of a disguised requisition though the form and even character of a contract of lease have been preserved.” The intentional use of the property for military purposes outside of the civil contractual arrangements by the occupant denoted the requisition. In *Beekman v. Van Der Ploeg* (1946) the Dutch District Court, Leeuwarden found that a spurious ‘hire’ arrangement between the German occupying army and the defendant for the use of the defendant’s car was in fact a requisition under the Hague Regulations under the basis of hire.²⁸⁴ The defendant did not receive payment for the use of the vehicle, which transpired to be a hoax arrangement on the part of the military. Private companies with economic and political links to the occupying administration do not have the authority under the Hague Regulations to requisition property directly or indirectly in the occupied territory even where the ultimate property use is related to operations of war, as this right is reserved for the army of occupation to satisfy military needs only.

Can the belligerent occupant use public resources to benefit the home economy? International opinion on the issue suggests it cannot. In the wake of World War I, the legal implications of the German practice of tearing up railway tracks as war material

²⁸³ *Hospices Civils De Colmar v. Kommissar Des Reichs-Finanzministeriums*, Franco-German Mixed Arbitral Tribunal, (Botella, Fortin, Hoene) 31 July, 1929, Annual Digest of Public International Law Cases Years 1929 and 1930, (Longmans, Green and Co, London, New York, Toronto, 1935), Case No. 297, p. 505.

²⁸⁴ *Beekman v. Van Der Ploeg*, Holland, District Court, Leeuwarden (President in Summary Procedure), July 11, 1946, Annual Digest and Reports of Public International Law Cases Year 1946, (London Butterworth & Co. (Publishers), Ltd., 1951), Case No. 162, p.379.

and their removal to the home territory of the belligerent occupant for the needs of the army was assessed by Garner under the Article 55 prescription. Even if the material was to be used for the “needs of the army” in the home territory of the occupying power, Garner argues that this would still conflict with the administrative duties manifest in Article 55.²⁸⁵ Tignino asserts that the occupier may not requisition public water resources from the occupied territory under the military need clause for use by its home population.²⁸⁶ Requisitions for the needs of the army of occupation are “substantively limited to the needs of the army occupying the given territory, and cannot be made to supply the occupant’s general needs either at home or to supply troops occupying other territories.”²⁸⁷ This restriction to limit the “military need” clause to the occupied territory applies broadly to people and property in the occupied zone and deportations of labour outside the territory by extension of the principle was similarly considered unlawful.²⁸⁸

Likewise, in a memorandum published by the U.S Department of State concerning the belligerent occupation of Israel in the Sinai and the Gulf of Suez and Israel’s attempted development of oil fields in the occupied territory, the subjection of Article 55 immovable property to “*munitions de guerre*” under the rubric of military necessity was examined. The memorandum concluded that, “it appears doubtful at best, that in the present stage of the Israeli-Egyptian conflict, the taking of any significant amounts of property out of occupied territory, even “*munitions de guerre*”, could be justified by the requirements of any relevant military operations.”²⁸⁹ The impact of this is twofold, firstly it is indicative of state practice in the area and secondly the weight of this as a source of American jurisprudence on the position of property transfers outside the occupied territory is significant in assessing the status of

²⁸⁵ James W. Garner, “Contributions, Requisitions, and Compulsory Service in Occupied Territory,” 11 *American Journal of International Law* 74 (1917) p. 96.

²⁸⁶ Mara Tignino, “Water in Times of Armed Conflict” in Permanent Court of Arbitration International Bureau, *Resolution of International Water Disputes: Papers Emanating from the Sixth PCA International Law Seminar* (Kluwer Law International, 2003) 338.

²⁸⁷ Iain Scobbie, “Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty”, in Stephen Bowen, *Human Rights, Self Determination and Political Change in the Occupied Palestinian Territories* (Martinus Nijhoff Publishers, 1997) 230

²⁸⁸ Raphael Lemkin, Samantha Power (introduction), *Axis Rule in Occupied Europe* (The Lawbook Exchange, 2005) 72.

²⁸⁹ Monroe Leigh, “United States: Department of State Memorandum of Law on Israel’s Right to Develop New Oil Fields in Sinai and the Gulf of Suez,” 16 *International Law Materials* (1973) 733, 745.

Iraqi assets *venire contra factum proprium*.²⁹⁰ Moreover this implies that the necessity consideration relates only to the needs of the army in the territory of occupation as opposed to supplying forces stationed outside the domain or to furnish the home economy of the belligerent occupant.²⁹¹

An examination of the limitations of the “needs of the army” of occupation within Article 52 case law illustrates similar limitations within the Article 55 paradigm. The Anglo German Mixed Arbitral Tribunal in the aftermath of World War I considered whether requisitions demanded for the “needs of the army” of occupation under Article 52 of the Hague Regulations could extend outside the occupied territory to supply the “needs of the army” in the home territory of the occupying power. In *Tesdorpf and Co. v. German State (1923-1924)*, bags of coffee seized for the needs of the army in occupied Belgium under the premise of Article 52 and subsequently moved outside the territory to Altona in Germany to accommodate the needs of German troops in that region were found by the Tribunal to be a misuse of the right of requisition.²⁹² Although the Tribunal declared that the requisition was not void under international law, it specified that Article 52 requisitions of property for the needs of the army were to be confined to the needs of the army in the occupied territory. Analogously, the Anglo German Mixed Arbitral Tribunal in *Ralli Brothers v. German Government (1923)* ruled that the seizure of cotton in Belgium and its subsequent removal to Germany was *ultra vires* Article 52 of the Hague Regulations and contrary to international law.²⁹³ The Tribunal was not satisfied that the seizure was for the needs of the German Army in the occupied territory.

In 1943, a resolution adopted by the International Law Conference clarified the position of the occupier in relation to the disposal of public immovable property outside the occupied territory *inter alia* stating:

²⁹⁰ No one may set himself in contradiction to his own previous conduct.

²⁹¹ The US Army Field Manual 27-19 §402 (1956) states

Real property of the enemy State which is essentially of a non-military nature, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged or destroyed unless such destruction is rendered absolutely necessary by military operations ... The occupant does not have the right of sale or unqualified use of such property. As administrator, or usufructuary, he should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value. He may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. The term of a lease or contract should not extend beyond the conclusion of the war

²⁹² *Tesdorpf and Co. v. German State*, Annual Digest, 1923-1924, Case No. 340

²⁹³ *Ralli Brothers v. German Government (1923)*, Annual Digest 1923-1924, Case No. 244

“the occupant is not, in international law, vested with any power to transfer a title which will be valid outside that territory to any property, rights or interests which he purports to acquire or create or dispose of; this applies whether such property, rights or interests are those of the State or of private persons or bodies.”²⁹⁴

Within the dynamic of military necessity, the international tone is certainly prohibitive regarding the transfer of property even within the consideration of “needs of the army”. Furthermore the International Law Conference narrowly construed the occupant’s use of acquired property limiting its purpose to the “maintenance of public order and safety in the occupied territory.”²⁹⁵ This is significant when assessing the legality surrounding the removal and investment of funds from the Development Fund for Iraq into private foreign investments. The policy implications of this are clearly to prevent the occupying power from perpetuating a war effort with resources seized from the occupied territory by funnelling these into the home treasury.

1.3.6 Application to Iraq

The cases indicate that property requisitioned under Article 53 of the Hague Regulations is limited to military use and cannot be directed to economic reconstruction. The courts have clearly drawn a line between property seized under requisition for the needs of the army and the duty to administer the territory. The Coalition Provisional Authority used mixed assets in the Development Fund for Iraq to finance the reconstruction projects. However the rulings in the *Olive Oil Case*, *Dalldorf* and *Bataafsche* indicate that the belligerent occupant cannot use requisitioned private property for commercial ventures and the ruling in *Soubrouillard* suggests that this is the case even if the property is intended to regulate the economic life of the State. Therefore one can conclude that even the greater consideration of “the public good” is not sufficient to override the private property principles of requisition.

²⁹⁴ London International Law Conference, July 12, 1943 para 3. Text reprinted in Gerhard Von Glahn, *The Occupation of Enemy Territory; A Commentary on the Law and Practice of Belligerent Occupation*, (The University of Minnesota Press, 1957) p.194 and also in Bisschop, “London International Law Conference, 1943,” 38 *American Journal of International Law*, 1944, pp. 291-293.

²⁹⁵ *Ibid* at p.194.

To claim that full-scale hostilities necessitated the removal of State assets from Iraq would be onerous to establish. This aspect of military necessity has been firmly attached to the needs of the army of occupation and military operations.²⁹⁶ Furthermore international jurisprudence has limited the application of “needs of the army” to the troops stationed inside the occupied territory. In *re Falck*, the needs of the army were narrowly construed and assessed in terms of shelter, food and rations. Similarly, had the Coalition forces appropriated DFI oil resources for basic military needs, these would likewise have fallen to be assessed under the lens of proportionality to determine if the military need was a measured response to the military exigency. Obviously it is in the interests of the belligerent State to attempt to benefit the home economy by transferring resources from the occupied territory to help a beleaguered war effort, a practice ruthlessly engaged in by occupying powers in both world wars and in contemporary hostilities. However this practice has been condemned as inconsistent with the “needs of the army” as marginally applied and may only be considered in the context of the occupied territory.²⁹⁷

Resolution 1483 called for the establishment of the Development Fund for Iraq, which would contain amongst other monies, resources from the sale of Iraq’s oil during the occupation to be held by the Central Bank of Iraq.²⁹⁸ Instead the funds were placed in the Federal Reserve Bank of New York, a move that could be seen as a harbinger of further Coalition attempts to distance Iraqi resources from the occupied territory.²⁹⁹ Contrary to supplying moveable oil resources to combat military need, the oil resources were sold and further invested in private corporations abroad, severing the resources completely from the objective to supply the “needs of the army” within the territory and removing any possibility of relying on an argument of military necessity for the needs of the army of occupation within the broader consideration of international humanitarian law.

²⁹⁶ Jean Marie Henckaerts, Louise Doswald Beck, Customary International Humanitarian Law, Volume 1 Rules, (Cambridge University Press, 2005) 181; Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, (2nd edition, Kluwer Law International 1999) 306

²⁹⁷ Stephen Bowen, Human Rights, Self Determination and Political Change in the Occupied Palestinian Territories, (Martinus Nijhoff Publishers, 1997), 239; United States Military Tribunal at Nuremberg, Krupp Case, Judgement 30 June 1948. Officials of the Krupp industries were charged with removing industrial machinery from the occupied territory.

²⁹⁸ S/RES/1483 (2003) par 12

²⁹⁹ Report of the International Advisory and Monitoring Board of the Development Fund for Iraq, p. 9, par 1 “Since its establishment, the DFI has been held on the books of the Central Bank of Iraq, and the corpus of the DFI has been held in an account with the Federal Reserve Bank of New York.”

In Iraq it became evident that resources from the Development Fund for Iraq were used for purposes other than economic reconstruction and that contracts were awarded for sums in excess of the value of the reconstruction projects.³⁰⁰ Resolution 1483 radically introduced a monitoring mechanism under the auspices of the International Advisory and Monitoring Board, however this was not backed by an accompanying enforcement mechanism.³⁰¹ From the cases *Hospices Civils De Colmar* and *Beekman* suspect leases and contractual arrangements may take on the form of “disguised requisitions” and the law on requisitions will apply where the contract is in effect an exceptional war measure. This humanitarian law mechanism plugs the gap in accountability between the international resolution and the resulting exploitation measure. The auditing mechanism is paralysed by the failure in Resolution 1483 to establish a procedure for accountability where the Development Fund for Iraq is breached. Although not directly actionable, domestic courts can take into consideration the established principles from international humanitarian law in considering private law cases.

Conclusion

United Nations Security Council Resolution 1483 (2003) radicalised the treatment of private property assets, introducing the liquidation of private resources by an international organisation during belligerent occupation. This followed a trend towards the liquidation of enemy assets witnessed by the decisions in United Nations Security Council Resolution 1373 (2001) to prevent the use of funds, financial assets or economic resources in terrorist acts and in Resolution 1267 (1999) to freeze the funds and financial resources held directly or indirectly by the Taliban.³⁰² While the

³⁰⁰ Audit Report, Coalition Provisional Authority’s Contracting Processes Leading up to and Including Contract Award, Office of the Inspector General, Coalition Provisional Authority (27 July 2004) p. 2.

³⁰¹ S/RES/1483 (2003) par 12.

³⁰² S/RES/1373 (2001) par 1(c),

Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities. S/RES/1267 (1999) par 4(c).

discourse revolved around the difficulty of identifying terrorist persons in Resolution 1373, the similar provision in Resolution 1483 highlights the difficulty with conflicting norms of private property protection in customary law and Security Council resolutions. The intrusion into the private life of the citizen is more questionable in Resolution 1483 as it includes freezing the funds of the immediate family members of Saddam Hussein and other senior officials in the Iraqi regime.³⁰³

As an intergovernmental mandate requiring under Article 23(b) the alteration of property title, Resolution 1483 may be viewed as a harbinger of CPA property alteration during the occupation. Article 23(b) of Resolution 1483 demanded that both public and private property acquired by Saddam Hussein or his family members during the former Iraqi regime be deposited into the Development Fund for Iraq. Private property is placed within a mixed fund of public and private resources and served for distribution under the terms outlined in paragraph 14 “to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq’s infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq.”³⁰⁴ This sees private property converted to public capital for the reconstruction of Iraq. Although the UN is not constrained by the Hague Regulations,³⁰⁵ the CPA is limited by the Regulations in designating how private monies in the Development Fund for Iraq are to be spent where the expenditure conflicts with humanitarian law obligations not to confiscate private property.³⁰⁶ Article 46 states that private property cannot be

Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.

³⁰³ S/RES/1438 (2003) par 23(b).

³⁰⁴ S/RES/1483 (2003) para 14.

³⁰⁵ United Nations peace keeping operations while not bound by the Hague Regulations will respect the ‘principles and spirit’ of the law; Legal Opinion of the Secretariat of the United Nations, “Questions of the Possible Accession of Intergovernmental Organisations to the Geneva Conventions for the Protection of War Victims”, *United Nations Juridical Yearbook* 153-54 (1972). The Security Council has argued that it is not bound by the Geneva Conventions as it does not exercise the requisite administrative and judicial powers required by the convention obligations; Legal Opinion of the Secretariat of the United Nations, “Questions of the Possible Accession of Intergovernmental Organisations to the Geneva Conventions for the Protection of War Victims”, *United Nations Juridical Yearbook* 153 (1972).

³⁰⁶ S/RES/1483 (2003) par 5.

confiscated. Article 52 permits the requisition of private property for the needs of the army of occupation while Article 53(1) provides that private property considered as “*munitions de guerre*” can be requisitioned but must be compensated or returned after hostilities. Therefore despite the placement of potential private immovable property resources into the DFI under Security Council Resolution 1483, the actual further misallocation of these resources is prevented by the occupants’ limitations under the property provisions of the Hague Regulations. It is the further “use” of the property within this fund by the belligerent occupant that is problematic.

Humanitarian law treaties only bind the parties in a conflict who are parties to the treaties.³⁰⁷ However the United Nations Security Council, as an organ of an intergovernmental organisation is not a party to the treaties. In Article 24 of the United Nations Charter, the members confer competence on the Security Council “to act on their behalf” and by extension to act in accordance with core humanitarian standards to which they have subscribed.³⁰⁸ While the United Nations Security Council is not constrained by the Hague Regulations as treaty obligations, within the context of peace keeping operations the United Nations has resolved to respect the “principles and spirit” of the law.³⁰⁹ The Hague Regulations as customary rules, together with the customary rules that form part of the Geneva Conventions, are binding on States as a matter of general international law.³¹⁰ To what extent then does this impact on obligations imposed by the Security Council on members? Article 103 of the United Nations Charter provides:

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”³¹¹

³⁰⁷ Accordingly Article 2 of the Hague Convention IV (1907) states “the provisions contained in the Regulations referred to in Article 1 as well as in the present Convention, do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.” However the Hague Regulations are now considered customary international law.

³⁰⁸ Article 24, Charter of the United Nations

³⁰⁹ Legal Opinion of the Secretariat of the United Nations, “Questions of the Possible Accession of Intergovernmental Organisations to the Geneva Conventions for the Protection of War Victims”, *United Nations Juridical Yearbook* 153-54 (1972).

³¹⁰ International Military Tribunal., p. 65; International Military Tribunal (Tokoyo) 15 *War Crimes Trials* p. 13; *Krupp and Others*, 10 *War Crimes Trials*, p. 133; D. W Bowett, G. P. Barton, *United Nations Forces: A Legal Study* (The Lawbook Exchange Limited, 1964).

³¹¹ Article 103, Charter of the United Nations

Seemingly this would apply to conflicts between treaty obligations and the obligations of the United Nations under the Charter however the relationship between customary law and the United Nations is less succinct. Clearly any customary rules are binding on United Nations forces during hostilities but is an organ of an intergovernmental organisation such as the Security Council bound by Hague customary rules when adopting Chapter VII resolutions? The Security Council has argued for example that it is not bound by the Geneva Conventions as it does not exercise the requisite administrative and judicial powers required by the convention to implement the Geneva obligations.³¹² While this is true, the nature of international humanitarian norms as customary law suggests that the Security Council may not direct states to “deviate from the core norms of humanitarian law”.³¹³ United Nations humanitarian occupations in Kosovo, Eastern Slavonia, East Timor and Bosnia were not constrained by the laws of occupation as customary law because the nature of the international occupations as state building exercises was transformative. By extension it would appear that the Security Council can override the customary public and private property protections under the Hague Regulations by Chapter VII resolution in the interests of maintaining international peace and security.

The legislation of States in national law to give effect to Security Council resolutions on the freezing and seizure of private assets has been challenged indirectly by private parties in the domestic courts. In *Hay v. HM Treasury and Secretary of State for Foreign Affairs* 2009, an Egyptian asylum seeker had his assets frozen under the Al Quaida Order pursuant to Security Council Resolution 1267 (1999).³¹⁴ The order was quashed in the High Court on the grounds that it deprived the applicant of his fundamental right of access to the courts. In *HM Treasury v. Mohammed Jabar Ahmed and ors (FC); HM Treasury v. Mohammed al-Ghabra (FC); R (on the application of Hani El Sayed Sabaei Youssef) v. HM Treasury* 2010³¹⁵ the three applicants received letters from the Treasury of the United Kingdom prohibiting them

³¹² Legal Opinion of the Secretariat of the United Nations, “Questions of the Possible Accession of Intergovernmental Organisations to the Geneva Conventions for the Protection of War Victims”, *United Nations Juridical Yearbook* 153 (1972).

³¹³ Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004) 210.

³¹⁴ *Hay v. HM Treasury and Secretary of State for Foreign Affairs* [2009] EWHC 1677

³¹⁵ *HM Treasury v. Mohammed Jabar Ahmed and ors (FC); HM Treasury v. Mohammed al-Ghabra (FC); R (on the application of Hani El Sayed Sabaei Youssef) v. HM Treasury* [2010] UKSC 2

from dealing with their funds and economic resources and preventing anyone notified of the freeze from making funds, economic resources or financial services available to them or for their benefit. The freezing of assets was required under United Nations Security Council Resolution 1267. The House of Lords found that the implementing legislation violated the applicants right to an effective remedy effectively overriding the sanctions feature of Article 103 of the UN Charter.

Similarly in *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada* 2009, Mr. Abousfian, a citizen of Canada but living in the Canadian embassy in Sudan was made subject of a global asset freeze, arms embargo and travel ban in Canada under the targeted sanctions in United Nations Security Council Resolution 1267.³¹⁶ The Canadian Federal Court found that the ban violated the applicant's constitutional right to enter Canada and required the lifting of the ban. The European Court of Justice visited the issue of freezing of private assets in *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and the Commission of the European Union* 2005.³¹⁷ The European Court found that it could judicially review decisions of the Court of First Instance freezing of assets under a European regulation giving effect to a United Nations Security Council resolution. The accounts of Kadi, a citizen of Saudia Arabia living in Sweden were frozen when he was placed on the list of suspected terrorists. The Court of First Instance had found that international treaty law prevailed over European law and therefore it lacked jurisdiction to review the validity of the European regulation. The European Court of Justice overruled the decision on the basis that it was entitled to review the lawfulness of community measures regardless of the international agreement at issue.

The European Court of Human Rights is currently considering another sanctions case, which may have implications for the UNSC sanctions regime. In *Nada v. Switzerland* 2010 an Italian citizen was placed on the sanctions list by the United Nations Committee for the freezing of assets and restriction of travel under Security Council

³¹⁶ *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada* 2009 FC 580

³¹⁷ *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and the Commission of the European Union* [2005], Joined Cases C-402/05 P and C-415/05 P

Resolution 1267.³¹⁸ The applicant lived in an Italian enclave in the Swiss Canton of Tessin and petitioned the European Court of Human Rights when Switzerland denied his entry into the country. The applicant argues that the measures violate his right to liberty and security, his right to respect and family life and his right to an effective remedy under the Convention.

The position of the national and regional courts in examining the implementing legislation of Security Council resolutions illustrates that the measures may be effectively struck down for incompatibility with constitutionally protected and internationally recognised rights. This is certainly problematic where the trend in the domestic sphere is towards examining the human rights of the accused against draconian Security Council measures. Obviously during hostilities the individual is seriously disadvantaged in petitioning the tribunals of the belligerent governing authority. However, where the Hague Regulations provides a system of rules for the State to apply during belligerent occupation, these may be directly actionable by the individual in a court of law in monist states and where legislation has been implemented in dualist states. Nonetheless the Coalition Provisional Authority had an obligation to retain the \$1.67 billion of seized Iraqi assets in the Development Fund for Iraq until an internationally recognised government of Iraq was formed. Its failure to do so was a direct violation of Security Council Resolution 1483.

The failure to protect private seized assets within the Development Fund for Iraq highlights the lack of clarity in international law on the issue of mixed public and private funds. This is particularly evident from the United States and United Kingdom military manuals which encourage the adoption of a public characterisation of funds of a mixed public and private nature. While the Hague Regulations is silent on the status of mixed property funds, it is emphatically prohibitive on the confiscation of the private assets of the occupied population.³¹⁹

Resolution 1483 prohibited the belligerent occupant from expropriating public cash, funds and realisable securities which is usually permitted under Article 53(1) of the Hague Regulations. Although this was an *ad hoc* measure particular to the occupation

³¹⁸ *Nada v. Switzerland* [2010], European Court of Human Rights (application no. 10593/08)

³¹⁹ Article 46, Hague Convention IV and Regulations, 1907.

of Iraq, it signals a new direction in the treatment of the property of occupied peoples during belligerent occupation and their right to retain ownership over their economic resources. Article 73 (a) of the United Nations Charter requires members of the United Nations who assume responsibilities for the administration of territories who have not yet attained a measure of self-government “to ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment, and their protection against abuses.”³²⁰ However this is stymied by the word “yet” indicating that it might not apply to populations who have already acquired self-government but have lost it again through invasion and occupation. Similarly the Declaration on the Granting of Independence to Colonial Territories and Peoples General Assembly Resolution 1514 (xv) refers to the right of colonial dominated people to self-determination but this is not expanded to include the rights of those under belligerent occupation.³²¹ The laws of occupation were framed in the 1860’s and are devoid of considerations of the right of self-determination.

Article 1(2) of the International Covenant on Economic, Social and Cultural Rights states that:

“all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”³²²

This places the economic resources of a population on a stronger footing; during belligerent occupation international humanitarian law generally operates as the *lex specialis* to human rights law.³²³ Marco Sassoli notes that international law may not necessarily supersede human rights law under this mechanism but that the more

³²⁰ Article 73(a), Charter of the United Nations.

³²¹ Declaration on the Granting of Independence to Colonial Territories and Peoples General Assembly Resolution 1514 (xv), 14 December 1960, UN Doc A/4684 (1960), GAOR 15th Session, Supp 16, p. 66.

³²² Common Article 1, International Covenant on Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights 1966,

³²³ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, ICJ Reports (9 July 2004), at § 106.

relevant rule applies.³²⁴ Accordingly, the new restraints on the belligerent occupant's use of cash, funds and realisable securities during the occupation of Iraq highlight the evolving relationship between international humanitarian law and international human rights law towards a principle of complementarity.

The central feature of the belligerent occupation of Iraq has been the sweeping economic reconstruction requested under United Nations Security Council resolution 1483. This saw the seizure of monies and moveable public property that would formally have come under Article 53 of the Hague Regulations liquidated and used for reconstruction purposes. An auditing body the International Advisory and Monitoring Board was established to monitor disbursements from the Development Funds for Iraq. While the introduction of an auditing body to oversee the disbursement of the economic resources of the occupied State is a new development during belligerent occupation, its mandate was limitative in nature and it failed to prevent the worse excesses of exploitation. The idea is novel and welcome in the arena of belligerent occupation, although it would benefit from an additional enforcement mechanism potentially drawing on the principles of Article 53 of the Hague Regulations such as reconstruction on the basis of necessity and prevention of the removal of monetary assets from the occupied territory.

³²⁴Marco Sassoli and Laura Loson, "The Legal Relationship between international humanitarian law and human rights law where it matters: admissible killing and internment of fighters in non international armed conflict" *International Review of the Red Cross*, Vol. 870, September 2008.

Chapter 2

The Limits of Article 55 of the Hague Regulations to Public Immoveable Property used during the occupation of Iraq

Introduction

During the occupation of Iraq a litany of problems surfaced with the operation of oil plants. The KPMG report on the Development Fund for Iraq noted that insufficient control systems over the Iraqi oil industry by the Coalition Provisional Authority lead to oil smuggling during the occupation of Iraq.³²⁵ Due to the absence of a metering system the Coalition Provisional Authority was unable to estimate the amounts of oil destined for the Development Fund for Iraq which instead were illegally exported out of Iraq. Crude oil siphoned from refineries and pipelines amounts to estimated losses of \$3 billion US dollars annually.³²⁶ A report from the Office of the Inspector General for Iraq Reconstruction identified problems with the company Foster Wheeler, contracted to provide programme management services in the oil sector.³²⁷ The company would shut down oil plants for long periods of time for refurbishment during the occupation thus depriving the Development Fund for Iraq of potential oil revenues. Section 1 of this chapter will assess the belligerent occupant's duty under Article 55 of the Hague Regulations to safeguard the capital of public immoveable property.

It became apparent early in the occupation that the Coalition Provisional Authority, in an unprecedented move, planned to contract out many functions of Iraq's reconstruction to private corporations using DFI resources. The CPA Program Management Office suggested that contractors would "provide more continuity than government personnel because contracting personnel would turn over less frequently than government personnel."³²⁸ In April 2004, two months prior to the official end of

³²⁵ KPMG Bahrain, Development Fund for Iraq, Report of Factual Findings in connection with the Oil Proceeds Receipts Account (for the period from 1 January 2004 to 28 June 2004) 1.2.7.

³²⁶ Revenue Watch Institute, Managing Iraq's Petroleum (April, 2006) 10.

³²⁷ Office of the Inspector General for Iraq Reconstruction, Review of the Use of Contractors in Managing Iraq Relief and Reconstruction Projects, SIGIR-08-003 (29 October 2007) p. 9.

³²⁸ *Ibid.*, at p. 1

the occupation an audit revealed that 1,982 contracts at an estimated \$847 million had been awarded to private corporations from the Development Fund for Iraq.³²⁹ Critically the majority of these multimillion dollar contracts spanning oil to telecommunications reconstruction were awarded to US and UK companies with a mere 2% of contracts valued above \$5 million being awarded to Iraqi firms, which in effect saw the transfer of public Iraqi oil resources to private foreign corporations with any profits therein, being allocated outside Iraq.³³⁰

The relative ease of the contracting process for private foreign corporations was heralded by the CPA's introduction into Iraqi law of Foreign Investment Order 39.³³¹ Removing the constraints on foreign investors from the former regime, the Order ameliorated the occupiers' position and facilitated a transformation of Iraq's centralised economy to a market economy. It allowed foreign contractors to create long term commitments in Iraq, regulating economic life beyond the term of occupation.³³² The International Advisory and Monitoring Board reported that on the eve of the official end of the occupation, \$3 billion dollars worth of contracts had been authorised by the CPA's Program Contracting Officer, disbursing DFI funds "to ongoing projects whose completion dates fall after June 28, 2004."³³³

The occupation of Iraq witnessed a marked economic shift towards privatisation. Channelling public monies into private commitments altered the balance of power within Iraq's State owned industries. Contractors brought in to reconstruct what previously had been public sectors such as electricity and oil, assumed a level of private control over those industries. One such example was the CPA's attempt to

³²⁹ Office of the Inspector General, Coalition Provisional Authority, Audit Report, Coalition Provisional Authority's Contracting Processes Leading up to and Including Contract Award, July 27, 2004, p. I; Report of the International Advisory and Monitoring Board of the Development Fund for Iraq, p.6, \$812 million of these funds were awarded in sole source contracts.

³³⁰ Revenue Watch, Disorder, Negligence and Mismanagement: How the CPA Handled Iraq Reconstruction Funds, Report No. 7, September 2004, p. 2. U.S and U.K companies received 85% of contracts to the value of over \$5 million, with Iraqi firms receiving 2% of the value contracts for over \$5 million from the Development Fund for Iraq; Development Fund for Iraq, Report of Factual Findings in connection with Disbursements, KPMG Independent Auditors Report, October 12 2004, p.2 The Program Review Board was responsible for recommending expenditure of resources from the Development Fund for Iraq to the Coalition Provisional Authority.

³³¹ Coalition Provisional Authority, Foreign Investment Order 39, 20 December, 2003. At <http://www.iraqcoalition.org/regulations/index.html#Regulations>

³³² *Ibid at*, Section 8(2).

³³³ Report of the International Advisory and Monitoring Board of the Development Fund for Iraq, p.13.

illegally privatise Iraqi Airways, a State owned industry.³³⁴ This met with international criticism and was halted. However a more nuanced approach by the CPA, instead saw the award of substantial contracts to foreign corporations to manage the sector and redressed the balance of economic power within the industry.³³⁵ By restructuring the management of the sector in favour of private foreign contractors it remained public merely in title. This shift in control introduced by the spending of public monies on private ventures weighed the balance in favour of foreign investors at the expense of Iraqi citizens.

By placing the resources within this legal framework, the occupiers' actions in changing the economy of the territory from a centralised socialist to a privatised market, shall be examined. Furthermore the Hague Regulations shall be analysed in detail for limitations on the CPA's use of public oil resources in the DFI which may prevent the authority from using the resources to facilitate economic change. This shall be assessed by (1) determining whether the belligerent occupant's administration of crude oil resources is limited by reference to Article 55 of the Hague Regulations and (2) whether Article 55 of the Hague Regulations prevents the belligerent occupant from altering the status of public immovable property to private immovable property.

2.1 Is the Belligerent Occupant's administration of crude oil resources limited by reference to Article 55 of the Hague Regulations?

Crude oil, as an appurtenant to the land is regulated by Article 55 of the Hague Regulations. Article 55 states:

“the occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the

³³⁴ Revenue Watch, Controlling Iraq's Skies: The Secret Sell-off of Iraq's Air Industry, Report No. 4, 2004, p.1.

³³⁵ *Ibid.* “IRW has discovered, however, that behind closed doors a contract has already been signed, selling off 75 percent of Iraq's air transport sector to a single family without competitive bidding or public notice.” at p.3 “Skyline Air and Logistic Support, a Washington-based company, was awarded a \$17.5 million contract from the U.S Agency for International Development (USAID) to manage the airports.”

capital of these properties, and administer them in accordance with the rules of usufruct.”³³⁶

Central to Article 55 is the position of the belligerent occupant as administrator of public immovable property under the auspices of the rules of usufruct. The Roman term ‘usufruct’ is a legal term embodying a plethora of restrictions on the ‘use’ of property, more commonly found in civil law codes although the concept is reflected in the common law preserve of life estate in land law.³³⁷ Bouvier's Law dictionary defines usufruct as:

"The right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing."³³⁸

The duty to “safeguard the properties capital” inherent in the rules of usufruct is highlighted for special mention in Article 55. “Safeguarding the capital” obligates the belligerent occupant to maintain the corpus of the property intact and denotes a prohibition against exploitation of the public resource, for example excess tree felling is proscribed, or profuse mining that would impair the resource is forbidden, as this would impact negatively on the owner’s enjoyment of the property on termination of the usufruct.³³⁹

Crude oil as an appurtenant to the land was classified as immovable property in the leading case *N.V de Bataafsche Petroleum Maatschappij v. The War Damage Commission* (1956).³⁴⁰ The public status of oil as a national resource is constitutionally recognised by Article 13 of the Iraq Interim Constitution, 1990, where it states, “national resources and basic means of production are owned by the

³³⁶ Article 55, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

³³⁷ Yutaka Arai-Takahashi, *The Law of Occupation of International Humanitarian Law, and its interaction with International Human Rights Law*, (Martinus Nijhoff Publishers, 2009) 213;

³³⁸ Bouvier's Law Dictionary, cited in University of Tulsa Law Professor R. Dobie Langenkamp, *What Happens to the Oil: International Law and the Occupation of Iraq*, January 2003. http://www.beg.utexas.edu/energyecon/documents/behind_the_gas_pump/Langenkamp_FullPaper.pdf (Last visited 28 November 2010).

³³⁹ Oppenheim warns that the usufructuary is “prohibited from exercising his right in a wasteful or negligent way so as to decrease the value of the stock and plant.” L. Oppenheim, *International Law Volume II Disputes, War and Neutrality*, (Longmans, seventh edition) p. 398; Greenspan adds that the usufructuary must not “impair” the value of the property. Morris Greenspan, *The Modern Law of Land Warfare*, (University of California Press, 1959) p. 288.

³⁴⁰ *N.V de Bataafsche Petroleum Maatschappij v. The War Damage Commission* (1956), Singapore Court of Appeal, 13 April 1956, 23 ILR 810, at 821.

People.”³⁴¹ Therefore crude oil in Iraq is characterised as public immovable property and is regulated by Article 55 of the Hague Regulations during belligerent occupation. The obligation on the belligerent occupant to prevent oil smuggling and install a metering system is examined in this section.

2.1.1 *Municipal Law v. Roman Law Usufruct*

The initial problem with applying the doctrine of usufruct stems from the two differing conceptions of usufruct. Roman law usufruct consists of a list of general principles on the nature of usufruct while the civil codes contain a list of specific rules. Arguably these are not mutually exclusive and therefore this section will address the application of both in reference to the failure to prevent the illicit trade of immovable crude oil deposits.

Article 55 requires the belligerent occupant to administer the resources “in accordance with the rules of usufruct” but the article fails to establish whether the rules are to be understood within the framework of civil law codifications or more broadly from the ancient Roman law patrimony.³⁴² Interestingly, the use of private municipal law as a source of general principles of international law such as usufruct, has caused antagonism between positivists who reject such an approach and other international lawyers who advocate an examination of municipal law as a source for such principles. The positivist school of thought contends that the Roman lineage should be neglected as redundant in assessing the contemporaneous position of usufruct within international law, as it has become distorted with interpolations and changes throughout the generations rendering its influence for interpretation negligible.³⁴³ Lauterpacht, going against the grain of 1920’s positivist thought favoured drawing upon principles derived from private municipal law including Roman law.³⁴⁴ Schwarzenberger also follows this line of reasoning and in his analysis of Article 55

³⁴¹ Iraq Interim Constitution, 1990, Article 13, “National resources and basic means of production are owned by the People. They are directly invested by the Central Authority in the Iraqi Republic, according to exigencies of the general planning of the national economy.”

³⁴² Article 55, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

³⁴³ Lauterpacht, *Private Law Sources and Analogies of International Law* (Archon Books, 1970).

³⁴⁴ Randall Lesaffer, “Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription,” *European Journal of International Law* (2005), Vol. 16 No. 1, p. 25, 31. Lauterpacht was the chief proponent of this view drawing deeply on it in his doctoral thesis *Private Law Sources and Analogies of International Law* (1927).

of the Hague Regulations on the position of usufructuary, refers singularly to the Roman law origins of usufruct to the neglect of civil law codes.³⁴⁵

Indeed the *Vienna Convention on the Law of Treaties*, 1969 as a general rule of treaty interpretation clarifies the position somewhat stating “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³⁴⁶ Generally the literal terms of a treaty are assessed in isolation and it is only when there is implicit reference to municipal law concepts that the literal interpretation is deviated from. Thus in the ICJ advisory opinion on *The International Status of South West Africa*, 1950 a case where Liberia and Ethiopia argued that South West Africa had violated the terms of a mandate by allowing the practice of apartheid in administering the territory, an examination of the context of the term ‘mandate’ within the confines of municipal law was necessary. Judge McNair found that regard may be had to “features or terminology which are reminiscent of the rules and institutions of private law as an indication of policies and principles rather than as directly importing these rules and institutions.”³⁴⁷

The acceptance of municipal law principles in guiding the interpretation of international law is verified in Article 38 (1)(c) of *The Statute of the International Court of Justice*, where the Court can apply to international law disputes “the general principles of law recognised by civilised nations.”³⁴⁸ This is consistent with the normative development of the law of occupation from which critical concepts such as “effective control” emanated from sixteenth century conceptions of possession of territory developed from feudal law.³⁴⁹ Moreover the notion of occupation stemmed

³⁴⁵ Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals Vol II*, (Stevens & Sons Limited, 1968) p. 248, at fn 29 Schwarzenberger references two textbooks on Roman Law, W.W. Buckland, *A Textbook of Roman Law* (1950) and W.W. Buckland and Lord McNair, *Roman Law and Common Law* (1965) to explain the limits of usufruct.

³⁴⁶ Vienna Convention on the Law of Treaties (1969), United Nations, Treaty Series, vol. 1155, p.331. Part III. Observance, Application and Interpretation of Treaties, Article 31.

³⁴⁷ *International Status of South West Africa*, Advisory Opinion, [1950] I.C.J. Report. 128, 148. Also for comment see “South West Africa Cases: Preliminary Objections,” *Duke Law Journal*, Vol. 1963 pp 310-314.

³⁴⁸ The Statute of the International Court of Justice, Chapter II, Article 38.

³⁴⁹ Dr. Friedrich August Freiherr von der Heydte, “Discovery, Symbolic Annexation and Virtual Effectiveness in International Law,” *The American Journal of International Law*, Vol. 29, No. 3. (Jul., 1935), pp. 448-471. In feudal times territory was acquired merely by swearing allegiance to the lord.

from early Roman times and therefore it is appropriate to consider the usufruct from the substratum of classical Roman law origins. In light of inconsistencies manifest within the relevant civil law codifications on usufruct, the Roman law material on usufruct may prove useful in clarifying certain anomalies which persist in the law and bridge any remaining lacunae in the jurisprudence.

Incidentally the Lieber Code 1863 did not contain any references to the rules of usufruct when regulating the use of public property of an immoveable character in Article 31.³⁵⁰ It was not until the Brussels Code, 1874 that controls tightened over the belligerent occupant's use of public property and the rules of usufruct embodied in Article 7 became the *modus vivendi* for regulating such use. The shift towards increased regulation over armed forces in occupied territory as a matter of public policy stemmed from a growing concern that the conduct of the self-interested occupant could cause irreparable damage to the resources in the occupied territory. Furthermore the civil law concept of usufruct was familiar to the majority of delegates attending the Brussels Conference, 1873 who had European civil law origins as opposed to the American Lieber system which emanated from a common law system.³⁵¹ The French Civil Code, 1804 for example, treats the usufruct of immoveable things under Article 526 and predates the Brussels Conference by sixty nine years. Therefore it would appear that the "rules of usufruct" referred to in Article 55 relate to the European tradition of usufruct contained in national codes.³⁵² However recourse may also be had to the broader principles contained within the European codes which stem from Roman law origins. The earlier material provides an invaluable source to conduct an examination of the underlying philosophy of usufruct of public immoveable property.

However in the middle ages possession was key to acquiring territory, the title of which was legally recognized by the Papal Bull.

³⁵⁰ Article 31, Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863. "A victorious army appropriates all public money, seizes all public moveable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete."

³⁵¹ Countries represented at the Brussels Conference included, Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Greece, Italy, the Netherlands, Norway, Portugal, Russia, Spain, Sweden, Switzerland and Turkey.

³⁵² American Society of International Law, *Proceedings of the 71st Annual Meeting* (American Society of International Law, 1977) p. 126

2.1.2 The Nature of Usufruct

The nature of usufruct shall be primarily considered under the rubric of Roman law to provide a platform from which to further investigate the limitations of Article 55 of the Hague Regulations. Central to Article 55 is the issue of property ownership which is inextricably linked to sovereignty. These areas of (1) property ownership, (2) the parameters of usufruct as a legal right and (3) the assessment of usufruct as a series of obligations, will be considered in order to provide a preliminary framework from which to conduct a deeper investigation into the constraints on the usufructuary particularly in connection with the alteration of title of public immoveable property.

Usufruct of property during belligerent occupation does not confer rights of ownership on the occupying power, it is merely a right to use the property and its fruits. It is therefore illegal for the occupier to attempt to alienate the property as this right is reserved for the sovereign. The belligerent's right to property in immoveable objects such as land would intrude on the sovereignty of the occupied country which is merely suspended and not quenched.³⁵³ As such the policy is a vestige of the prohibition against annexation manifest in traditional international law. Considered in terms of "possession" the temporary nature of usufruct contrasts with the ownership of property which connotes permanent rights attached to the immoveable object. Similar to Article 42 of the Hague Regulations' formulation of effective control pivoting on 'possession' and 'substitution of authority,' Article 55 mirrors the ephemeral composition of limited rights of possession allowing the belligerent occupant to "possess" only objects of an immoveable character.³⁵⁴

The occupied State retains its territorial sovereignty during the period of occupation. Ownership rights over public immoveable resources as a function of sovereignty are temporarily suspended for the duration of the occupation. It is widely accepted that

³⁵³ This protection of immoveable state property in one respect runs parallel with the prohibition on forced transfers of population under Article 49 of Geneva Convention IV in relation to settlements. Permanent settlements on public owned immoveable property would offend against the temporary nature of usufruct.

³⁵⁴ Article 42, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." To determine whether territory is occupied under Article 42, the courts have recourse to the test of effective control, which considers if there is "possession" and "substitution of power."

the rights of the belligerent occupant over immovable property are inferior to the rights of the suspended sovereign. Accordingly, Wheaton maintains that the rights of the occupant “cannot be coextensive with those of sovereignty.”³⁵⁵ In the realm of modern economic warfare this policy position protects the occupied population from attempts by the belligerent occupant to create long term economic dependency on the occupant. The reverence for immovable property, in particular real property was evidenced in the writings of humanist Andreas Alciatus (1492-1550), who wrote that Roman law did not permit the assimilation of land under occupation as the law considered that all land belonged to somebody.³⁵⁶ This philosophy is intrinsic to the rule against expropriation by the usufructuary of public immovable property.

There is evidence that usufruct was viewed as a temporary *pars dominii* during the pre-classical period despite the vociferous rejection of this position by Roman law scholars.³⁵⁷ There is a disparity between the pre-classical and contemporary texts on whether ownership is part of the nature of usufructus; for instance Gaius believed that in ancient Roman law usufruct was a part of ownership perceiving it as a *res incorporalis* similar in nature to inheritance.³⁵⁸ However as part of modern occupation law ownership is vested in the sovereign.³⁵⁹ Pre-classical Roman law did not see the usufructus as a legal right attached to the immovable but rather considered it to be an integral part of the ownership. In occupation law the usufruct cannot be regarded as a *pars dominii* because the immovable in question is not subjected to a position of usufructus in the absence of a belligerent occupation. The usufruct is not conditional upon the subject. It is the *de facto* occupation that instigates the usufruct on the object. Conversely, during the pre-classical period the usufruct was generally considered in the context of a life estate which was often perpetuated through generations (as in

³⁵⁵ H.B. Wheaton, *International Law, Vol II*, (7th edition by A.B. Keith, Stevens & Son, London 1944), p. 233.

³⁵⁶ Randall Lesaffer, “Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription,” *European Journal of International Law*, (2005), Vol. 16 No. 1, pp. 25, 43

³⁵⁷ M. Bretone, *La Nozione Romana Di Usufrutto: I. Dalle Origini A Diocleziano*, (Pubblicazioni della Facolta Giuridica dell' Universita di Napoli, 1962) pp. xvi, 266. Bretone rejects the position that usufruct was considered a part of ownership claiming instead that it was regarded only as a ‘right of enjoyment.’ Kopel Kagan, “The Nature of Servitudes and the Association of Usufruct With Them,” 22 *Tulane Law Review* 94 (1947-1948) p. 96. “In Justinian’s time usufruct was a part of ownership and not a servitude.” The Egyptian counterpart *chrisis* for usufructus was considered to be a type of ownership at the turn of the first century. Giovanni Pugliese, “On Roman Usufruct,” 40 *Tulane Law Review* 523 (1965-1966) p. 524.

³⁵⁸ Kopel Kagan, “The Nature of Usufructus,” 9 *Cambridge Law Journal* (1945-1947) pp. 159, 162

³⁵⁹ McDougal, Feliciano, *The International Law of War, Transnational Coercion and World Public Order* (Martinus Nijhoff Publishers, 1994) p. 778.

common law), so from this perspective the conception of usufruct was consistent with a temporary *pars dominii*. However during a belligerent occupation the object is not synonymous with the usufruct as the usufruct can be extinguished at the close of hostilities. The distinction is important as regards the latitude of control the belligerent has over immoveable property.

Usufruct has also been expressed as a legal right or *ius* attached to the property user, or a free standing *ius* independent of both. Writers on the subject likened the nature of usufructus to servitude and therefore found that usufruct was tantamount to a legal right over property.³⁶⁰ Professor Buckland proposed that usufruct as a "*merum ius*" could neither exist in suspension on its own nor could it be attached to the object as this would confer a function akin to ownership on it, instead he concluded that usufruct must be considered as a right attached to the person. Kagan argues that usufruct is a question of fact and to be viewed in terms of "possession" only and in this respect the usufruct over an object does not confer a legal right although the "possession" of the object does attach to the usufructuary.³⁶¹ However Labeo, a classical jurist recognised usufruct as an independent free standing right.³⁶² From this standpoint the usufruct is divorced from the object and when considered as a free standing right, the question arises whether the usufruct is freely alienable as distinct from the actual object. This would appear to be the position of the French Civil Code where it states in Article 595 that "the usufructuary may enjoy in his own person, let on lease to another, or even sell or transfer, his right by gratuitous title."³⁶³ Usufruct acting as an independent right would confer a right of alienability considered unique to ownership, rendering the usufruct of the property indistinguishable from the ownership. Therefore usufruct according to the prevailing view is perceived as a legal right attached to the occupying power.

In terms of occupation law usufruct protects the population from the vested self

³⁶⁰ Kopel Kagan, "The Nature of Usufructus," 9 Cambridge Law Journal (1945-1947) pp. 159, 161

³⁶¹ *Ibid.* Kagan argues that there is no instance in the Digest of usufruct being considered as a legal right.

³⁶² M. Bretone, *La Nozione Romana Di Usufrutto: I. Dalle Origini A Diocleziano*, (Pubblicazioni della Facolta Giuridica dell' Universita di Napoli, 1962) pp. 266. Labeo recognised usufruct as an independent legal right distinct from ownership (Digest 33.2.31).

³⁶³ Article 595, French Civil Code, Book II. Of Property and the Different Modifications of Property, 1804, (London, Published by William Benning, 1827). Translated by George Spence.

interest of the hostile belligerent. This necessarily places usufruct within the etiolated dynamic for consideration as both a legal right and a legal obligation over the immovable property. Article 55 imposes restrictions on the occupant as well as rights of use over the property. The gap between right and obligation has been chartered by international lawyers with equivocal results. Oppenheim, laconically but stringently, notes that the belligerent as usufructuary may only “appropriate” the produce of the immovable property.³⁶⁴ Conversely, Austin notes that ancient usufruct conferred liberal rights on the occupant reflecting that “ususfructus imparting to the party entitled an indefinite power of user” over the property.³⁶⁵ This stance is reminiscent of the Roman law understanding of usufruct as an archipelago of rights attaching to the usufructuary. However usufruct under belligerent occupation is necessarily stymied by the prohibition on annexation and deference to sovereign equality throughout the course of hostilities.

Application to Iraq

The Roman law of usufruct is viewed as a temporary *pars dominii* and therefore the rights of the occupant over public immovable oil deposits are secondary to those of the occupied State. The supremacy of this position was reflected in the preamble of UN Security Council Resolution 1483 which reaffirmed “the sovereignty and territorial integrity of Iraq,” as an intransgressible norm of international law, whilst recognising the right of the Iraqi people to “control their own natural resources.”³⁶⁶ This confirmation by the UN of Iraq’s retained sovereignty suppresses any suspicions that Iraq had become a failed State for the purposes of the doctrine of *debellatio*, following the US/UK conquest in 2003.³⁶⁷ Consequently, title to the immovable

³⁶⁴ Oppenheim, *International Law A Treatise, Vol. II Disputes, War and Neutrality*, (Seventh edition edited by H. Lauterpacht, Longmans), p.397; Greenspan similarly pursues this line of reasoning outlining the occupant’s use of the fruits of the property but heavily emphasising limitations inherent in the occupant’s obligations towards the occupied territory to “preserve the property and not exercise his rights in a wasteful or negligent manner.” Morris Greenspan, *The Modern Law of Land Warfare*, (University of California Press, 1959) p. 288.

³⁶⁵ Kopel Kagan, “The Nature of Usufructus,” 9 *Cambridge Law Journal* (1945-1947) pp. 159, 160; Gerson insists that the occupying power has a wide latitude over the immovable property of the occupied territory falling short of full ownership rights. Allan Gerson, “Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute,” *The American Journal of International Law*, Vol. 71, No. 4. (Oct., 1977) pp. 725, 729.

³⁶⁶ S/RES/1483 (2003) preamble

³⁶⁷ Wheaton notes that the usufructuary is not “entitled to exercise the rights of sovereignty until the occupied territory has been duly annexed; he may appropriate only the produce.” However the practice of annexation of territory by the belligerent has since been surpassed by the advent of the UN Charter

property remains vested in Iraq and the occupying power is therefore not at liberty to alienate the title of the property, as a central axiom of law outlined in the maxim, *nemo dat quod non habet*.

Clearly the rights and obligations attached to the belligerent occupant differ significantly from the the rights of the sovereign, the sovereign may alter the property's status and alienate the property whereas the usufructuary is limited to rights of use only. During the period of United Nations imposed economic sanctions, Saddam Hussein earned \$6.6 billion in illicit revenue from oil smuggled through neighbouring states in violation of UNSC Resolution 661 (1990).³⁶⁸ Similar to the smuggling encountered during the occupation, the illicit routes included an oil pipeline to Syria, truck routes to Turkey, Syria and Jordan and shipping in the Persian Gulf.³⁶⁹ The failure of the former regime to introduce metering devices to prevent smuggling domestically was more a matter of internal sovereignty and policy. However the obligation on the belligerent occupant as a temporary *pars dominii* is less flexible than the sovereign and the occupier as the holder of a usufructuary right acquires rights short of full sovereignty. Where the property owner may abuse the substance of the property the usufructuary is not accorded the same rights. In Roman law the usufructuary acquired rights of use over land, slaves, houses, beasts of burden and other commodities.³⁷⁰ The usufructuary could let the land and cede his rights over it. Correspondingly, the usufructuary had an obligation to repair and replace damaged or broken property and was obliged to guard against waste. The usufructuary may not use fruits and products beyond what is necessary for his daily needs.³⁷¹

The usufructuary may devolve responsibility by alienating the rights to other parties under Roman law. Similarly in the French Civil Code usufructuary rights may be alienated. In terms of the CPA's use of Iraq's natural resources, the isolation and alienability of the usufructus as opposed to the oil resources raises significant

and the drive towards international promotion of self determination of peoples. H.B. Wheaton, *International Law, Vol II*, (7th edition by A.B. Keith, Stevens & Son London 1944), p. 258.

³⁶⁸ Kenneth Katzman, Iraq: Oil-for-Food, International Sanctions, and Illicit Trade, Report for Congress, Foreign Affairs, Defence and Trade Division (16 April 2003) CRS-12.

³⁶⁹ Iraq Oil Ministry, Office of the Inspector General, Smuggling Crude Oil and Oil Products, Second Transparency Report (2005); Vivian C. Jones, Iraq's Trade with the world: Data and Analysis, CRS Report for Congress (23 September 2004).

³⁷⁰ Thomas MacKenzie, *Studies in Roman Law* (William Blackwood and Sons, MDCCCLXV) p. 182.

³⁷¹ *Ibid*.

questions regarding the latitude of the CPA to dispose of or contract out the usufructus independently. Oppenheim for instance argues that a “belligerent may not sell or otherwise alienate public enemy land and buildings”.³⁷² During the occupation of Iraq the Office of the Inspector General appointed by the United States Secretary of Defence to monitor the Coalition Provisional Authority in Iraq, indicated that the reconstruction company Foster Wheeler was responsible for the poor management of the oil sector.³⁷³ The occupant cannot sever its responsibility over the crude oil resources by contracting out the management of the pipeline to the reconstruction company Foster Wheeler.

Civil Law Usufruct

This section will examine the extent to which the rules of usufruct contained in the civil codes apply to crude oil resources during belligerent occupation. An initial overview of municipal law practice suggests that the usufructuary is entitled to keep the profits from the immovable property as a source of income.³⁷⁴ However the legal parameters of subsequent use of profits from the legally exploited oil resources during belligerent occupation are less defined. For example the municipal law position is outlined in the Egyptian Civil Code, Article 987 where the fruits of the property are allowed to “revert to the usufructuary.”³⁷⁵ The French Civil Code promotes the use of the property in a similar fashion to that of the owner. The usufructuary has “the right to use all kinds of fruits, either natural or cultural, or revenues, which the thing of which he has the usufruct can produce.”³⁷⁶ In the same manner which the usufructuary can accrue rental income it would appear that he may also enjoy the income from the natural fruits of the property. More specifically the code stipulates that the usufructuary may enjoy mines and quarries in the same condition as the

³⁷² Oppenheim, *International Law, A Treatise Volume II* (Longmans, 1952) p. 175

³⁷³ Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004 (Enrolled as Agreed to or Passed by Both House and Senate); Office of the Inspector General for Iraq Reconstruction, Review and the Use of Contractors in Managing Iraq Relief and Reconstruction Projects, SGIR-08-003 (29 October 2007) p. p.

³⁷⁴ Fruits of the property are described in the German Civil Code, Bürgerliches Gesetzbuch [BGB] Section 99. (Übersetzung der Bücher 1 und 2 des Bürgerlichen Gesetzbuches durch ein Übersetzer-Team des Langenscheidt Übersetzungsservice.) (1) Fruits of a thing are the products of the thing and the other yield obtained from the thing in accordance with its intended use. (2) Fruits of a right are the proceeds that the right produces in accordance with its intended use, in particular, in the case of a right to extract component parts of the soil, the parts extracted. (3) Fruits are also the proceeds supplied by a thing or a right by virtue of a legal relationship.

³⁷⁵ Article 987, قس ارد ضرع - قينون اقل اتاس اردل [1949] (Civil Code of the Arab Republic of Egypt).

³⁷⁶ Article 582, The French Civil Code, [1804].

owner did at the start of the period of usufruct.³⁷⁷ The German Civil Code also follows in the same vein providing that the usufructuary may use and enjoy the object of usufruct in the manner that it is “deemed to be income under the rules of proper management.”³⁷⁸ From the perspective of the civil codifications it appears the object of the usufruct is considered in similar terms to an estate that can generate income from both its civil and natural fruits. The usufructuary in place of the owner is entitled to the use and enjoyment of these fruits including any income generated from them.

The restriction to preserve the substance of the property is pivotal in regulating the actions of the usufructuary in civil codifications. Unlike the limited warning embedded in Article 55 of the Hague Regulations “to safeguard the capital of these properties”, the national civil codes devote ample and detailed attention to limiting the usufructuary’s relationship with the property. Common to the codes is the stipulation that agreed terms of use will be conducted between the owner and the usufructuary, the violation of which may culminate in proceedings against the usufructuary of the property. The Egyptian Code demands that the usufructuary use the property “according to the object for which it was intended.”³⁷⁹ The owner of the property may object and proceed to the courts if the use of the property exceeds the terms of agreement, by affecting the nature of the property or encroaching on the owner’s property rights.³⁸⁰ Furthermore, the usufructuary is obliged to notify the owner if the property perishes, deteriorates or requires major repairs.³⁸¹ Analogously, the French Civil Code highlights the contractual nature of the relationship between the property owner and the usufructuary. As a pre-requisite to the term of usufruct, an inventory of the property and a statement of the immoveables, subject to the usufruct must be drawn up before the usufruct is effective.³⁸² The owner of the immovable property is further protected by the obligation on the usufructuary to give security for the property.³⁸³ In the absence of a security, the property is granted on lease or otherwise sequestered.³⁸⁴ The German Civil Code devotes a section to outlining the contractual

³⁷⁷ Article 598, The French Civil Code, [1804].

³⁷⁸ Article 581, Bürgerliches Gesetzbuch (BGB), [1896].

³⁷⁹ Article 988, قانون اقلات اساس اردل [1949] (Civil Code of the Arab Republic of Egypt).

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*, at 991

³⁸² Article 600, The French Civil Code, [1804].

³⁸³ *Ibid.*, at 601

³⁸⁴ *ibid.*, at 602

duties contained in the usufructuary lease. The usufructuary is obliged to maintain the inventory of the property in accordance with the standards of “proper management”.³⁸⁵ Again, an inventory of the property is conducted and agreed between the two parties prior to the commencement of the term of usufruct and this is integral to regulating the relationship between the owner and usufructuary. At the termination of the period of usufruct, recourse is had to the initial inventory of the property and the owner may seek compensation if there is any difference between the original inventory and the estimated closing value.³⁸⁶

Article 55 of the Hague Regulations imposes an obligation on the belligerent to administer public immoveable property ‘in accordance with the rules of usufruct.’³⁸⁷ However it is evident from the civil law codifications that the protective tools to safeguard the capital of the property such as the contractual lease required by the German Civil Code or detailed inventory required by the French Civil Code are entirely unsuited to the purpose of protecting public immoveable property during a belligerent occupation.³⁸⁸ Moreover under municipal law the property owner may institute proceedings at any stage in the civil courts against the usufructuary during the usufruct period. The belligerent occupant “is not subject to the courts or to the laws of the occupied enemy State, and indigenous courts do not have jurisdiction over members of occupying forces.”³⁸⁹ Understandably the deposed sovereign does not have recourse to the courts to challenge the occupant’s use of property during a belligerent occupation. Therefore the implication abounds that a stricter reading of usufruct is required in order to provide the protection outlined in Article 55 ‘to safeguard the capital of these properties.’³⁹⁰

2.1.3 Application to Iraq

Distinct from the Roman law application of usufruct, the civil codes permit the usufructuary to enjoy the mines and quarries in the same manner as the owner did

³⁸⁵ Article 582 (2), Bürgerliches Gesetzbuch (BGB), [1896].

³⁸⁶ *Ibid.*, at Article 582 (3)

³⁸⁷ Article 55, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

³⁸⁸ Article 600, The French Civil Code, [1804]; Article 582 (2), Bürgerliches Gesetzbuch (BGB), [1896].

³⁸⁹ Von Glahn, *The Occupation of Enemy Territory*, (University of Minnesota Press, 1957) p. 112.

³⁹⁰ Article 55, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

prior to the period of usufruct.³⁹¹ Correspondingly the belligerent may use oil refineries and deposits in the same manner as the occupied State. The rights enshrined in the civil codes are less specific than the Roman law principles of temporary *pars dominii* and may be subject to broad interpretation. Consequently, the usufructuary may continue to use and abuse the property in the same manner as the owner, provided this does not violate the terms of contract between the parties. Under the civil law usufructuary rules the CPA would be entitled to continue operating the oil refineries without metering devices to prevent the siphoning of crude oil, in the same manner as the former regime.

Usufruct in the civil codes is presented in the form of contractual rights where the rules of proper management are negotiated between the parties and an inventory of the property is drawn up. UNSC Resolution 1483 (2003) established the Development Fund for Iraq.³⁹² Coalition Provisional Authority Regulation Number 2 outlined that the role of the International Advisory and Monitoring Board (IAMB) in Iraq would approve independent public accountants responsible for auditing the Fund the Oil Proceeds Receipts Account, and would audit export sales of petroleum, petroleum products, and natural gas from Iraq.³⁹³ In its report on the Development Fund for Iraq, the IAMB identified “the absence of metering for crude oil extraction and sales, the use of barter transactions for certain oil sales and the use of non-competitive bidding procedures” as areas of concern.³⁹⁴ While this marked a new development in the monitoring and oversight of public immovable oil resources it falls short of fulfilling the contractual obligations required under civil law usufruct. Firstly the arrangement is concluded between the international community and the occupying administration rather than the deposed sovereign and the belligerent. Secondly, the auditing process exclusively pertains to oil resources in Iraq as immovable property and does not extend to other public immovable property such as forests and quarries. The special treatment for oil is inherited from the Oil-for-Food scheme established during the previous regime to trade oil in exchange for humanitarian goods.

³⁹¹ Article 598, The French Civil Code [1804]

³⁹² S/RES/1483 (2003) par. 12.

³⁹³ Coalition Provisional Authority Regulation Number 2, Development Fund for Iraq (10 June 2003) par. 5.

³⁹⁴ Report of the International Advisory and Monitoring Board of the Development Fund for Iraq (Covering the period from the establishment of the DFI on May 22, 2003 until the dissolution of the CPA on June 28, 2004).

During a belligerent occupation the disbanded government of the occupied population is not in a position to challenge the use of public property by the belligerent occupant and members of the occupying forces in the civil courts. In the absence of an agreed inventory which the usufructuary or property user must adhere to, the occupying power must revert back and use the property for the original purpose for which it was intended prior to the occupation.³⁹⁵ Therefore, rather than conferring additional rights of use over the property, any municipal law measures that cannot be executed effectively under international law should be disregarded as superfluous.

2.1.4 Safeguarding the Capital of the Property

A critical dissection of the duty implicit in Article 55 of the Hague Regulations to “safeguard the capital of these properties” raises the question of whether this obligation was intended to be viewed as a free standing obligation within Article 55 as distinct from the inextricable duty of the usufructuary to preserve the substance of the property under the rules of usufruct. Article 55 states:

“The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile State, and situated in the occupied country. It must *safeguard the capital of these properties*, and administer them in accordance with the *rules of usufruct*.”³⁹⁶ (emphasis added).

It would appear from the structure of Article 55 that the duty to “safeguard the capital of these properties” is to be executed in conjunction with the obligation to abide by the “rules of usufruct”. The location of the word “and” in linking the two conditions to ‘safeguard the capital of these properties, *and* administer them in accordance with the rules of usufruct’ suggests that they are considered to be mutually exclusive within the context of Article 55. Clagett and Johnson argue that this separate treatment still requires that the intention to “safeguard the capital of the properties” is to be considered within the traditional ambit of the usufructuary’s duty to “preserve

³⁹⁵ Article 988, *قواعد ضرع - عينيون اقل تا اس اردل* [1949]. “The usufructuary must use the property in the state in which he has received it and according to the object for which it was intended; he must observe the rules of good management.”

³⁹⁶ Article 55, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

the substance of the property”.³⁹⁷ However this conception of the obligation to safeguard the capital of the property rooted within the rules of usufruct stymies the protection that the obligation awards in isolation. As an independent duty, the Article 55 obligation to “safeguard the capital of the properties” would encompass the property in its entirety, both as an immoveable entity and its resulting fruits and products. From the perspective of oil exploitation the obligation would extend to the crude oil in its immoveable form.

Further indications that the obligation to “safeguard the capital of these properties” is to be considered as a free standing duty may be inferred from the Oxford Code. Interestingly the Oxford Code, drafted by the Institute of International Law for incorporation into military manuals, omits any reference to the rules of usufruct yet retains the obligation to safeguard the capital of the property. Article 52 of the Oxford Code, 1880 provides that the belligerent occupant must “safeguard the capital of these properties and see to their maintenance.”³⁹⁸ The Article is cloaked with protective language leaving no room for ambiguity regarding an usufructuary’s rights over immoveable property. Taking over the administration of the property in a temporary capacity within the Oxford Code paradigm, the belligerent occupant is heavily restricted by the duty to “safeguard the capital of these properties” which extends to every aspect of the properties’ governance. In this regard the Code represents a stricter interpretation of a belligerent’s rights over public immoveable property and the duty to “safeguard the capital of these properties” constitutes a free standing obligation independent of the less exacting rules of usufruct.

Within the sphere of usufruct there are Roman law and civil law indications that the usufructuary may improve the property to maximise the potential use and enjoyment of the property. In Roman law, the Digest of Ulpianus outlined that “an usufructuary

³⁹⁷ Brice M. Clagett; O, Thomas Johnson, Jr., “May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?” *The American Journal of International Law*, Vol. 72, No. 3 (Jul., 1978), p558, 574.

³⁹⁸ Article 52, *The Laws of War on Land*, Manual published by the Institute of International Law (Oxford Manual), Adopted by the Institute of International Law at Oxford, September 9, 1880. “The occupant can only act in the capacity of provisional administrator in respect to real property, such as buildings, forests, agricultural establishments, belonging to the enemy State (Article 6). It must safeguard the capital of these properties and see to their maintenance.”

cannot make the condition of the property worse, but he can improve it.”³⁹⁹ The French Civil Code similarly states that “the usufructuary may not claim any compensation for the *improvements* which he asserts to have made, even though the value of the thing has been increased thereby.”⁴⁰⁰ Thus an examination of the obligation to preserve the substance of the property unique to usufruct highlights the potential of the usufructuary to make improvements to the property while at the same time protecting the property from deteriorating from its original condition. The onus is on the usufructuary to preserve the economic destination of the property.

During a belligerent occupation, the generation of income from public immovable property is administered by the occupant but ultimately belongs to the occupied State. A report by the United Nations Secretary-General to the General Assembly on the permanent sovereignty over natural resources in the occupied Palestinian territories noted that public lands may be used during belligerent occupation but that “the proceeds must then be used in connection with the occupation.”⁴⁰¹ For example, the occupant may raise money contributions and revenue but only narrowly for the needs of the army of occupation and for the administration of the occupied territory.⁴⁰² The belligerent occupant is permitted to use public immovable property “for a time without damaging or diminishing it.”⁴⁰³ However the occupant’s use of the property is limited, he may not acquire debt on behalf of the occupied State nor can he alienate immovable property by converting it into tradable securitisations.⁴⁰⁴

Critically this clarifies the occupying powers’ duty over public immovable property, which clearly controverts the traditional concept of usufruct as temporarily benefitting the army of occupation. In contemporary international law the terms “usufruct” and “administration” of property in Article 55 of the Hague Regulations, simply serves to regulate the occupiers’ responsibilities when managing the property. Ultimately the

³⁹⁹ Digest 7.1.13.4-6 Ulpianus. Giovanni Pugliese, “On Roman Usufruct,” 40 *Tulane Law Review* 523 1965-1966, p. 540.

⁴⁰⁰ Article 599, The French Civil Code, [1804].

⁴⁰¹ Economic and Social Council, Report of the Secretary-General prepared in pursuance of General Assembly decision 39/442, A/40/381 (17 June 1985).

⁴⁰² Gamal Abouali, “Continued Control: Israel, Palestinian Water and the Interim Agreement”, in *Académie de Droit Internationale*, Anis F. Kassim, *The Palestinian Yearbook of International Law 1996-1997 Volume 9*. (Kluwer Law International, the Netherlands, 1998) P. 87.

⁴⁰³ *Black’s Law Dictionary*, 1542 (7th edition, 1999).

⁴⁰⁴ Anupam Chander, “Odious Securitization” 53 *Emory Law Journal* 923, 925 (2004)

duty to “safeguard the capital of these properties” requires that the occupier respect the sovereignty of the occupied population over their immovable natural resources including any resulting fruits and products thereof.

2.1.5 Application to Iraq

Relating this to the occupation of Iraq, oil as public immovable property under Article 55 may be used by the army of occupation and administered according to the primary rules of usufruct in accordance with pre-war levels of exploitation. This use falls short of licence to sell public property and reap profits or alternatively abuse property and lose profits such actions may potentially result in the institution of claims by the returning sovereign for the restitution of profits.⁴⁰⁵ The difficulty in Iraq was the failure of the engineering and reconstruction company Foster Wheeler to mobilise enough staff to administer the oil sector. Additionally the company shut down oil plants for extended periods of time contravening the Iraqi industry practice of setting up “work-arounds” to service the plants and maintain oil production.⁴⁰⁶ The practice left the Development Fund for Iraq bereft of millions of dollars. The resounding duty of the Coalition Provisional Authority is to “safeguard the capital of these properties”, which in addition to preserving the substance of the property under usufruct such as the oil plants, extends to the resulting fruits and products such as the crude oil and money from oil sales.

2.1.6 Can the belligerent occupant derogate from the duty to safeguard the capital of the property on the grounds of military necessity?

Military necessity lies at the heart of international humanitarian law, in particular Article 23(g) of the Hague Regulations providing a permissive rule of derogation from the central norms regulating conduct in hostilities. Article 55 of the Hague Regulations is silent on the issue of military necessity and therefore it is necessary to establish the limitations in relation to the occupant’s obligations towards public immovable property inherent in Article 55. Accordingly this section will establish whether military necessity applies to Article 55. If so, is the qualification limited to the destruction of property? Does Article 23(g) of the Hague Regulations on military

⁴⁰⁵ Allan Gerson, *Israel, the West Bank and International Law* Volume 8 (Frank Cass and Company Limited, 1978) p. 220.

⁴⁰⁶ Office of the Inspector General for Iraq Reconstruction, *Review of the Use of Contractors in Managing Iraq Relief and Reconstruction Projects*, SIGIR-08-003 (29 October 2007).

necessity apply during belligerent occupation? Is military necessity tacitly integral to Article 55 or is it implied from peripheral articles on hostilities and belligerent occupation? What are the limitations of military necessity?

The doctrine of military necessity holds a dual role in the framework of international law. Applied *jus ad bellum*, the doctrine limits the circumstances under which states employ the use of force while its application *jus in bello* governs the use of force levelled against the individual in hostilities.⁴⁰⁷ The doctrine, derived from the German doctrine of *Kriegsraison*, is based on the premise that the rules of international law may be departed from in extreme cases of military necessity. Fenrick describes the military necessity doctrine as:

“A concept whereby a belligerent is justified in applying compulsion and force of any kind to the extent necessary for the realisation of the purpose of war, that is, the complete submission of the enemy at the earliest possible moment with the least possible expenditure of men, resources and money.”⁴⁰⁸

By logical extension a narrow interpretation of the doctrine of military necessity would render the laws of war redundant, a deduction that prompted General Dwight Eisenhower to comment “nothing can stand against the argument of military necessity.”⁴⁰⁹ However modern conceptions of the military necessity doctrine have advanced somewhat and Detter argues that only in “clear cases” of military necessity will the laws of war be suspended.⁴¹⁰ Similarly the Military Tribunal at Nuremberg illustrated the restrictive nature of the military necessity doctrine in its application to the destruction of property in the *List* case stating:

“The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of

⁴⁰⁷ Dr Craig Forrest, “The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts”, *Californian Western International Law Journal* Vol. 37 No. 2 (Spring 2007) 177, 180.

⁴⁰⁸ W.J. Fenrick, “New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict” in Charles B. Bourne, *Canadian Yearbook of International Law*, Volume 19 (Morris Printing Company Ltd., 1982) 230

⁴⁰⁹ Percy Bordwell, *The Law of War Between Belligerents: A History and Commentary* 5 (1908); General Dwight Eisenhower, Order of the Day, December 24, 1943, in Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* 74 (1996).

⁴¹⁰ Ingrid Detter Delupis, *Law of War*, (2nd edition, Cambridge University Press, 2000) 337; A.P.V. Rogers, *Law on the Battlefield* (Manchester University Press, 1996) p. 4

property and the overcoming of the enemy forces...we do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules. International law is prohibitive law.”⁴¹¹

Interestingly, the United States military manual rejects the contention that the doctrine of military necessity can be relied upon as a defence for acts forbidden under customary and conventional law.⁴¹² A reliance on the military necessity doctrine depends on a reasonable assessment of the tactical situation by the military commander supported by the impending pressure on the armed forces and the importance of the property in question.⁴¹³

International writers on the subject support the existence of military necessity integral to Article 55. However consensus on the application of military necessity within this lemma has been more difficult to ascertain, the balance resting precariously between the use of immovable property for the “needs of the army” and “destruction of property”. Von Glahn has asserted that unless there is specific mention of military necessity within the text of a regulation then the “prohibition contained in that article is absolute.”⁴¹⁴ However in contrast to this, support for an imbedded measure of military necessity within the constraints of Article 55 may be inferred from the status of Article 56, which also regulates the use of public immovable property of cultural status.⁴¹⁵ Similar to the text of Article 55, Article 56 contains no mention of military necessity. However an examination of the preparatory text from the Brussels Conference underlines support for the necessity principle within Article 56 for the seizure and use of the property for the needs of the army on the same terms as private property, despite this article containing a clear prohibitory clause against “seizure of,

⁴¹¹ United States v. List (Hostages Case), Case No. 7 (Feb. 19th, 1948) 1253-56. Reprinted in 11 *Trials of War Criminals Before the Military Nuremberg Tribunals Under Control Council Law No. 10* (1950).

⁴¹² Par 3a, Field Manual 27-10

⁴¹³ Myres Smith McDougal, Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (Martinus Nijhoff Publishers, London, 1994) 678-679.

⁴¹⁴ Gerhard Von Glahn, *The Occupation of Enemy Territory; A Commentary on the Law and Practice of Belligerent Occupation*, (The University of Minnesota Press, 1957) p.224; Also Morris Greenspan, *The Modern Law of Land Warfare*, (University of California Press, 1959) p. 288 “In circumstances not governed by absolute military necessity, the general rule for the treatment of state real property, military or nonmilitary, is states by Article 55 of the Hague Regulations, 1907.

⁴¹⁵ Article 56, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949. “The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.”

destruction or wilful damage” to cultural property.⁴¹⁶ By analogy there are certainly indications that military necessity may also pervade Article 55 of the Hague Regulations. Stone suggests that the measure of the occupant’s power over the State’s realty of a military character is his belligerent needs.⁴¹⁷ Within these vague parameters, the occupant is at liberty to generously use the property beyond the rules of usufruct under the condition of military necessity as hostilities dictate. A clear example of property use beyond usufruct but necessitated by hostilities is the destruction of strategic enemy property. Article 147 of the Fourth Geneva Convention provides that outside the military necessity consideration grave breaches are committed against persons or property protected by the Convention where extensive destruction and appropriation of property is “not justified by military necessity and carried out unlawfully and unwantonly.”⁴¹⁸

Feilchenfeld, offers an alternative reading of the necessity principle within Article 55, rejecting the distortion and extension of the terms of usufruct to suit military needs.⁴¹⁹ A more limited application of military necessity is projected where public immoveable property may be damaged or destroyed during military operations. This elevates the concept of military necessity from general use beyond the terms of usufruct, to a more restricted function within the consideration of military objectives. Article 53 of the Fourth Geneva Convention also reflects this position stating that “any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organisations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”⁴²⁰ Pictet suggests that absolute necessity reflects “imperative military requirements”. As such the reservation of “absolute necessity” contained in Article 53 emphasises the final

⁴¹⁶ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey*, (Oxford University Press, 1949), p. 174.

⁴¹⁷ Julius Stone, *Legal Controls of International Conflict, A Treatise on the Dynamics of Disputes and War Law*, (London Stevens & Sons Ltd, 1954) p.714; Fauchille also supports the use of immoveable property for military purposes beyond the rules of usufruct to the extent required by military necessity. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 1942), p. 55.

⁴¹⁸ Article 147, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

⁴¹⁹ Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 1942), p. 55-56.

⁴²⁰ Article 53, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

recourse to alternative measures encapsulated in the doctrine of military necessity. Central to this provision is the bridging of the legislative gap in the protection of property from destruction between Article 23(g) of the Hague Regulations in section II of the Hague Regulations and section III on belligerent occupation. Nevertheless, the protection of property from destruction within the parameters of military necessity during occupation had already assumed a customary status, negating any earlier arguments suggesting that military necessity within Article 55 facilitates the proliferation of usufruct.⁴²¹

The military manuals provide some clarity on the position of States in contemplation of military necessity within Article 55. Surprisingly the UK military manual, indicative of state practice in this arena, limits the scope of military necessity within the purview of Article 55 to damage and destruction “imperatively necessitated by military operations” as opposed to encompassing the extension of military necessity to cover use of the property beyond usufruct as necessities dictate.⁴²² This is quite significant, as the scope of military necessity is perceived in the military manual to be more restrictive within the context of public immovable property than the military necessity application in the context of private immovable property, which may be used “temporarily for the needs of the occupying power”.⁴²³ Interestingly, the manual cites Oppenheim but fails to note that Oppenheim also supported the extension of military necessity within the Article 55 paradigm to facilitate the needs of the army of occupation.⁴²⁴ Correspondingly, the US military manual considers that enemy real property may not be damaged or destroyed unless “such destruction is rendered absolutely necessary by military operations”.⁴²⁵ Similarly mention of seizure or additional use is absent from this provision. However, the manual curiously introduces the section on the treatment of enemy property during belligerent occupation by stating the general prohibition relayed in Article 23 (g) of the Hague

⁴²¹ Beth Feilchenfeld and Le Fur writing before the advent of the Fourth Geneva Convention opined that the belligerent occupant could destroy public immovable property in the interests of military necessity. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 1942), p. 56; Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey*, (Oxford University Press, 1949), p. 180.

⁴²² UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) par 11.86

⁴²³ *Ibid.*, at 11.78

⁴²⁴ Oppenheim, *International Law A Treatise, Vol II Disputes, War and Neutrality*, (Seventh edition, H. Lauterpacht, 1952) p.397-398.

⁴²⁵ US Army Field Manual, FM 27-10, *The Law of Land Warfare*, 18 July 1956, par 402.

Regulations, which governs conduct during hostilities.⁴²⁶ By introducing this regulation in the section on belligerent occupation, US practice suggests that this article transcends both section II and section III of the Hague Regulations facilitating the destruction and seizure of property demanded by the necessities of war, in hostilities and belligerent occupation of territory, supporting a broader reading of military necessity.

Article 23(g) in section II of the Hague Regulations prohibits the destruction and seizure of enemy property “unless such destruction or seizure be imperatively demanded by the necessities of war”.⁴²⁷ This article presents a dialectic in determining if the ‘necessities of war’ exception within section II regulating hostilities extends to activities regulated in section III on belligerent occupation or whether these two sections must be regarded as mutually exclusive. Correspondingly, it raises the question of whether the Article 23(g) ‘necessities of war’ analogue can be broadened to justify the Coalition’s seizure and subsequent use of Iraq’s oil resources? Tensions have arisen in international practice on the potential breadth of Article 23(g) and whether it includes the occupation tenure.

Schwarzenberger is the key proponent of the view that Article 23(g) can be legitimately extended “by analogy” to occupied territories if sporadic hostilities erupt.⁴²⁸ More recently Professor Dugard, reporting for the UN in the Palestinian territories, also acknowledged the protraction of military necessity under Article 23(g) allowing for the seizure of private immovable property during belligerent occupation.⁴²⁹ The Israeli High Court of Justice in *Beit Sourik Village Council v. The Government of the State of Israel, Commander of the IDF in the West Bank* 2004 also

⁴²⁶ US Army Field Manual, FM 27-10, The Law of Land Warfare, 18 July 1956, par 393.

⁴²⁷ Article 23(g), Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

⁴²⁸ Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II The Law of Armed Conflict*, (London Stevens & Sons Ltd, 1968) p. 253. Also at p. 257 “Destruction of individual property in occupied territory for purposes of restoring or maintaining public order is permissible. A fortiori, this must be so when, as for instance in the case of a local rebellion or in operations against partisans, military operations in occupied territories become necessary. It is also possible to arrive at the same conclusion by the analogous application of Article 23(g) of the Hague Regulations.”

⁴²⁹ David Kretzmer, “The Advisory Opinion: The Light Treatment of International Humanitarian Law” *The American Journal of International Law*, Vol. 98, No. 1, January 2005, p. 95.

adopted this position.⁴³⁰ There the court addressed whether the seizure of privately owned immovable property in occupied territory for use in the construction of a security fence by the military commander could be justified by ‘military necessity.’ The Court held that in addition to Articles 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention, private immovable property could be seized during a belligerent occupation under Article 23(g).⁴³¹ Addressing the position of Article 23(g) within the confines of belligerent occupation the Court emphasised that “these provisions create a single tapestry of norms.”⁴³² Assuming that this position is accurate, the power of the occupier to “seize” and subsequently use immovable property under the condition of military necessity is substantially enhanced under Article 23(g) as the analogous provision of Article 53 of the Fourth Geneva Convention relates to destruction of property only.

In contrast to the position of Article 23(g) expansion espoused by Schwarzenberger, Julius Stone outlines that only destruction resulting from military necessity can encroach upon property rights enjoying Article 55 protection, placing the conception of permitted military necessity outside the confines of Section II, Article 23 (g) on combined destruction and seizure and firmly within the ambit of belligerent occupation regulated under Article 53 of the Fourth Geneva Convention, which anticipates limited destruction rendered necessary by military operations.⁴³³ The International Court of Justice in its advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 addressed the purview of military necessity during a belligerent occupation.⁴³⁴ There the International Court of Justice considered the legal consequences arising from the erection of a security fence by the Israeli military for the security of Israeli settlements in Palestine and whether this action was justified by consideration of

⁴³⁰ Beit Sourik Village Council v. The Government of the State of Israel, Commander of the IDF in the West Bank, ILDC 16 (IL 2004)

⁴³¹ *Ibid.*

⁴³² *ibid.*, at par 35.

⁴³³ Julius Stone, *Legal Controls of International Conflict, A Treatise on the Dynamics of Disputes and War Law*, (London Stevens & Sons Ltd., 1954) p. 714.

Article 53, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949. “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”

⁴³⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (Int’l Ct. Justice July 9, 2004).

military necessity. By placing Article 23 (g) firmly within Section II of the Hague Regulations relating to hostilities the ICJ pointed out that Article 53 of the Fourth Geneva Convention could be evoked during a belligerent occupation “in certain circumstances of military exigencies.”⁴³⁵ The ICJ was reticent to permit a liberal reading of military necessity, which would facilitate seizure of property in the advent of hostilities during belligerent occupation. International Court of Justice rulings usually provide a constructive insight into the substantive law thereby clarifying areas of uncertainty. However the decision would have benefited from a contextual analysis of military necessity from a factual position rather than detached semantics. The Court also failed to address the broader implications of a *de facto* belligerent occupation and whether once established on the facts, the factual situation may modulate between Section II hostilities and Section III occupation during the occupation continuum.⁴³⁶ Nevertheless an opinion of the ICJ on point is highly persuasive authority.

2.1.7 Application to Iraq

In March 2003, the United States Department of Defence outlined its commitment to protecting Iraqi oil fields against damage. It stated:

“U.S. plans are first to prevent the destruction of Iraq's oil fields and second, if unable to prevent the destruction, to control and mitigate the damage quickly. The department has crafted strategies that will allow U.S. forces to secure and protect the oil fields as rapidly as possible in order to preserve them prior to destruction. U.S. military forces would be responsible for securing and protecting the oil sites, and under appropriate contractual arrangements, private sector companies would extinguish any fires and assess damage to oil facilities.”⁴³⁷

Despite the additional security provided by the US military the reconstruction company Foster Wheeler cited security concerns as the primary reason for shutting down oil production in the plants. Can the grounds of “military necessity” be raised by the occupying administration in defence of its failure to secure metering and

⁴³⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (Int'l Ct. Justice July 9, 2004). Para 123-137.

⁴³⁶ Interestingly, the ICJ preferred not to investigate the possibility of hostilities arising on a *de facto* basis in the territory, noting instead that Article 53 of the Fourth Geneva Convention was among certain provisions of IHL which applied after the general close of military operations.

⁴³⁷ U.S Department of Defence, U.S plans to preserve Iraq's oil for Iraqi people (6 March 2003). At <http://www.defense.gov/releases/release.aspx?releaseid=3646> (last visited 10 November 2010)

continue production in the oil refineries as required under Article 55 of the Hague Regulations?

There is very strong support for the potential of the occupant to rely on “military necessity” under acute circumstances to relax the Article 55 duty to “safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”⁴³⁸ However the permitted deviations are firmly linked to the narrow grounds of the “needs of the army” and “military operations”. Despite Article 53 of the Fourth Geneva Convention facilitating the destruction of property rendered necessary by military operations, this serves merely to highlight the “military necessity” potential within Article 55 of the Hague Regulations and whether this concept may be elevated within normative considerations to facilitate “seizure” and “use” of property beyond the occupant’s duty to “safeguard the capital of these properties” is doubtful. The key to establishing if Article 55 sustains the doctrine of necessity is in identifying the source of the norm. Two plausible sources have emerged, namely Article 23(g) of the Hague Regulations and the customary impression of military necessity exuded from the preamble of the Hague Regulations.

International opinion on the status of Article 23(g) within the dynamic of belligerent occupation is divided and the application of this regulation on the destruction and seizure of property is equivocal. However, should Article 23(g) be extended to regulate property during a belligerent occupation the central tenet of this regulation remains anchored in the existence of hostilities and a state of war.⁴³⁹ Accordingly, should the qualification apply to Article 55 the belligerent occupant may use

⁴³⁸ *Administration of Waters and Forests v. Falck* (11 February, 1927) French Court of Cassation, Criminal Chamber; L. Oppenheim, *International Law A Treatise, Vol II Disputes, War and Neutrality*, (Seventh edition, edited by H. Lauterpacht, Longmans) p. 398; Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, 1942), p. 55; National Unity Party v. TRNC Assembly of the Republic ILDC 499 (TCC 2006)

⁴³⁹ ICRC, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (Jean S. Pictet, 1958) p. 301, “It will be remembered that Article 23(g) of the Hague Regulations forbids the unnecessary destruction of enemy property; since that rule is placed in the section entitled ‘hostilities’, it covers all property in the territory involved in a war; its scope is therefore much wider than that of the provision under discussion (Article 53 GCIV), which is only concerned with property situated in occupied territory.”; This would not be a difficult claim to postulate considering that at the brink of the belligerent occupation in Iraq, the country was in such a state of defeat that international writers were discussing a potential state of *debellatio*. Eyal Benvenisti, “Water Conflicts During the Occupation of Iraq, *The American Journal of International Law*”, Vol 97, (2003) 860, 862; David J. Scheffer, “Beyond Occupation Law” *The American Journal of International Law*, Vol. 97, No. 4 (Oct 2003) pp 842, 848.

immoveable property for use in cases of military necessity. Alternatively the occupant may not be able to fulfil their usufructuary obligations under Article 55 to safeguard the property. However the international court of justice ruling in the *Wall* case is persuasive evidence that this is not the case.

2.2 Does Article 55 limit the use of public immoveable property extending beyond the period of occupation?

Coalition Provisional Authority Order Number 9 on the Management and Use of Iraqi Public Property issued one day before the end of the occupation on the 27th June 2004 applied to “public property that is temporarily made available to private individuals or organisations, including commercial or other enterprises that provide services to, or at the request of, CPA.”⁴⁴⁰ Paragraph 5 of the regulation outlined that the entities may continue to occupy public immoveable properties beyond the term of the occupation until “such time as a decision is made by the government of Iraq”.⁴⁴¹ Paragraph 9 of the regulation provided that the CPA and other entities occupying public immoveable properties would not be liable for the properties during the term of occupancy.⁴⁴² Similarly Coalition Provisional Authority, Foreign Investment Order 39 paragraph 8 provided for the issuance of licenses to foreign investors and business entities to use public real property for 40 year periods and which could be renewed for an additional 40 years.⁴⁴³ Article 55 of the Hague Regulations governs the belligerent occupant’s use of public immoveable property during occupation stating that:

“The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.”⁴⁴⁴

This section shall examine whether Article 55 limits the belligerent occupant’s long-term commitments over the grant of public immoveable property.

⁴⁴⁰ Coalition Provisional Authority Order Number 9, Management and Use of Iraqi Public Property (27 June 2004)

⁴⁴¹ *Ibid.*, at par. 5.

⁴⁴² *Ibid.*, at par. 9.

⁴⁴³ Coalition Provisional Authority Order 39, Foreign Investment (19 September 2003) par 8(2).

⁴⁴⁴ Article 55, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

Integral to Article 55 is the temporary nature of the belligerent occupant's control over public immoveable property. Rather than engaging in a permanent relationship with the property, the occupant is "regarded only as administrator and usufructuary."⁴⁴⁵ The conception of belligerent occupation as a temporary state of affairs is initially established in Article 43 of the Hague Regulations, whereby the occupant is compelled to restore public order and safety in the territory while respecting the laws of the dispossessed sovereign.⁴⁴⁶ The occupant is prevented from making permanent changes to the laws in the occupied territory and this combined with the *de facto* authority is illustrative of the occupant's temporary presence on the territory. Further indications of the occupant's temporary control over immoveable State resources is traced to the Lieber and Oxford codifications of conduct during hostilities. Moreover the temporary condition of the belligerent occupant's "use" is echoed in the relationship of usufructuary under Article 55 of the Hague Regulations, highlighting the protection of public immoveable property against permanent changes.

The Lieber and Oxford codes emphatically establish the transitory nature of the occupant's rights over enemy immoveable property. Whereas in Article 55 of the Hague Regulations the ephemeral substance of the occupant's rights over public immoveable property is rooted in the relationship of the occupant as usufructuary, the text of the earlier codes established more coherently the character of the rights *pro tempore*. Article 31 of the Lieber Code, 1863 provided that the title to immoveable property "remains in abeyance during military occupation, and until the conquest is made complete" and Article 52 of the Oxford Code, 1880 conveyed that the occupant "may only provisionally administer the immoveables."⁴⁴⁷ Certainly the transient character of public immoveable property rights had been deeply engrained in customary humanitarian law and this also lies at the heart of Article 55 with the

⁴⁴⁵ *Ibid.*

⁴⁴⁶ Article 43, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907. "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

⁴⁴⁷ Article 31, Instructions for the Government of Armies of the United States in the Field, Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863. Article 52, The Laws of War on Land, Manual published by the Institute of International Law (Oxford Manual), Adopted by the Institute of International Law at Oxford, September 9, 1880.

additional limitations of administration and usufruct being a corollary to the temporal disposition. Within the context of Iraq's oil resources, three areas deserve further examination cognisant of the temporary right of use over public immoveable property.

The temporary use of public immoveable property survives not only as a norm of international humanitarian law but also as an integral part of the relationship of usufructuary within Article 55 of the Hague Regulations. The basis for the transitory nature of usufruct derives from the early Roman law conception of *dominium*, or property ownership. Integral to this was the emphasis that the early Roman lawyers placed on the indivisibility of *dominium*. Therefore the owner of the property could not weaken or divide the actual ownership rights but could grant temporary rights of use over the property, leaving the corpus of the property's *dominium* intact. This was distinct from the ancient Greek law of life estate that revolved around the relationship of the current but temporary owner (*chrisis*) and the rights of the future owner (*ktisis*).⁴⁴⁸ Unlike the Greek model, which presented the concept of temporary ownership of property, the Roman model of usufructus offered temporary rights of use over the property only but more importantly the original property owner could interrupt this "use" at any time. Correspondingly, contemporary civil law codifications regulating the relationship of usufructuary over property, facilitate the termination of usufruct once the specified conditions of usufruct have been broken, highlighting the transient quality of usufructus. Furthermore the right of usufruct may be extinguished entirely if the usufructuary fails to exercise these rights of use contrasting with a permanent ownership of property where such rights cannot be quenched. Surfacing in early Roman law, the non-use of property by the usufructuary could result in the reversion of property to the original owner if the property remained unused for a period of approximately two years.⁴⁴⁹

In modern codes, the period of non-use is more relaxed with the French Civil Code providing that a 30 year period of non-use extinguishes the usufruct of property.⁴⁵⁰ In

⁴⁴⁸ Giovanni Pugliese, "On Roman Usufruct," 40 *Tulane Law Review* 523 (1965-1966) 528

⁴⁴⁹ *Ibid.*, at 530.

⁴⁵⁰ Article 617, The French Civil Code, [1804]. Repeated throughout contemporary codes with varying degrees of absence, the Egyptian civil code sets the period of non-use at fifteen years, Article 995, قانون ارض - قانون ارض - قانون ارض [1949].

addition to the termination of usufruct owing to the non-use of property, the usufruct of property, which is not specifically granted to private individuals, may be substantially limited thus highlighting the transitory character of usufructus. The French Civil Code limits the ungranted right of usufruct to a thirty-year period.⁴⁵¹ Although the code does stipulate that this period limits the relationship of the private usufructuary, as distinct from the public relationship of the belligerent occupant's usufruct rights, it does narrow the temporal scope of the usufruct application. Similarly where there are no fixed times agreed between the usufructuary and the property owner, the Egyptian code determines that the usufruct be "created for the lifetime of the usufructuary" and to cease on their death.⁴⁵² Again this relates generally to the mortal life of the private individual, however the German Civil Code is less generous limiting the notice of termination on an unspecified usufructuary lease to one year.⁴⁵³ Taken together with the French civil code the temporal scope of un-granted usufruct rights are limited anywhere from one year to a lifetime. At the very least, an extension of the term of usufruct by an occupier would appear to be inconsistent with traditional usufruct. Immediately the terms of Foreign Investment Order 39 providing foreign investors with licences to use public real property during the occupation of Iraq for 40 year periods and subject to renewal "for further such periods" appear excessive in light of the civil law restraints limiting ungranted usufruct for the larger terms of thirty years to life.⁴⁵⁴ Furthermore the order is more generally inconsistent with the temporary nature of usufruct and the correspondingly limited power the concept bestows.

The occupier is restricted in using public immovable property in a manner that would effect permanent changes in the occupied territory. The International Court of Justice in its Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, warned against surreptitious moves by the occupier in constructing a "defence wall" on Palestinian territory that could become

⁴⁵¹ Article 619, The French Civil Code, [1804]. A usufruct which is not granted to private individuals may last only thirty years.

⁴⁵² Article 993, *قانون اقلية تاسار دلا*, [1949].

⁴⁵³ Article 584, Bürgerliches Gesetzbuch (BGB), [1896].

⁴⁵⁴ Section 8(2), Coalition Provisional Authority Order Number 39, Foreign Investment, CPA/ORD/19 September 2003/39.

permanent and therefore change the demographic composition of the territory.⁴⁵⁵ The underlying predicament implicit in the opinion and common to other occupations lies in defining what the term “permanent use” of property is. “Temporary” and “permanent” property use, are elusive concepts and rooted in subjectivity. Certainly any measures which the occupier directs beyond the term of occupation, are considered to be permanent. The ICJ struggled to establish that the defence wall was conceived as a permanent fixture encroaching on Palestinian territorial sovereignty, instead leaving the opinion vulnerable to accusations of politicisation.

International discourse has been more pronounced on the insistence of linking projects of dubious length by the occupier on occupied territory with the “needs of the army” of occupation. In the UN General Assembly Resolution on *Israel’s Decision to Build a Canal Linking the Mediterranean Sea to the Dead Sea*, the primary concern raised was the use of occupied public land in the Palestinian territories for the installation of a permanent hydro-electric scheme channelling water resources from the occupied territory to the home territory of the belligerent occupant.⁴⁵⁶ This offended against the permanency principle on two grounds, firstly in that the occupant contemplated erecting a physical structure on the occupied territory thereby altering public immovable property permanently and, secondly, that this structure would survive the transition beyond occupation by facilitating the permanent alienation of Palestinian water resources. Highlighting the occupant’s expedient objectives in benefiting the home economy, the UN Secretary General’s 1982 report emphasised the importance of linking any change to public immovable property to the “needs of the army” of occupation.⁴⁵⁷ Conversely, in the context of the Israeli settlements on private land in the occupied Palestinian territories, Gasser noted that real property enjoyed a special protection under the Hague Regulations regardless of its private or public characterisation. Moreover *permanent* designs on land in the form of settlements should be “rejected as excessive” and could not be justified on the basis of

⁴⁵⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (Int’l Ct. Justice July 9, 2004). Paragraph 121. The Court noted that formal characterization of the Wall would be tantamount to a de facto annexation.

⁴⁵⁶ United Nations General Assembly, *Israel’s Decision to Build a Canal Linking the Mediterranean Sea to the Dead Sea*, A/RES/37/122, 16 December 1982.

⁴⁵⁷ UN Chronicle, *Proposed Dead Sea Canal*, (January 1984) at http://findarticles.com/p/articles/mi_m1309/is_v21/ai_3073317/print

military interests.⁴⁵⁸ Accordingly, land as immoveable public property enjoys a higher threshold of protection than other immoveable property due to the prohibition of annexation of territory by the belligerent. Only in exceptional circumstances could long term alterations to realty in the occupied territory be considered to be within the lemma of “needs of the army” of occupation and not indulging the self-interest of the belligerent occupant.

International law condones the practice of the belligerent occupant granting contractual rights in the form of leases, concessions and licences to third parties over Article 55 public immoveable property, provided that this practice is consonant with the restrictions manifest in Article 55.⁴⁵⁹ The rationale for this is the duty on the occupant to maintain the functioning of the property during occupation. Accordingly the armed forces may personally administer the property or the property may be administered on their behalf by a third party in keeping with Article 55. Appositely, the temporal conditions outlined in such contractual arrangements must not extend beyond the termination of military exigencies. In accordance with the salient principles of administration and usufruct outlined in Article 55, the occupant may administer licences granting permissions for private contractors to use public immoveable property under the terms of usufruct. The third party may use the property in accordance with pre-war standards of use, taking measures against deterioration of the property value.

In *Administration of Waters and Forests v. Falck* (1927), the French Court of

⁴⁵⁸ Dieter Fleck et al, *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford University Press, 1995) p. 262

⁴⁵⁹ Morris Greenspan, *The Modern Law of Land Warfare*, (University of California Press, 1959) p. 288. “The occupant may lease State property, although leases and contracts in relation to public property should not extend beyond the duration of the occupation.” Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, Monograph Series No. 6, 1942) p.55 “A lease or contract should not extend beyond the conclusion of war.” *Administration of Waters and Forests v. Falck* (11 February 1927) French Court of Cassation, Criminal Chamber, Annual Digest Case No. 383, p. 563. There the Court stated that contracts for the use of public immoveable property could be concluded between the occupant and private individual providing that the rules of usufruct were observed. *Lighthouses Case between France and Greece*, PCIJ, Ser. A./B., No. 62, 1934 (par 52). There the Court considered whether the dispossessed sovereign could still retain the right to grant concessions in favour of third parties during an occupation. The PCIJ found that only the occupant as administrator and usufructuary of public property could grant concessions over public immoveable property during a belligerent occupation otherwise Article 55 of the Hague Regulations “would simply have created an insoluble contradiction between the rights and powers of the occupying State and those of the Occupied State.”

Cassation ruled that a private contractor could not invoke contracts made with the military authorities in defence of exploitation of public immovable resources beyond the remit of Article 55 usufruct.⁴⁶⁰ In *French Claims Against Peru, 1901* (the Guano case), the Franco Chilean Arbitration Tribunal established *inter alia* that the relationship of the belligerent occupant over public immovable property was temporary.⁴⁶¹ There an issue arose over a contract between the Peruvian government and Dreyfus Brothers and Company, a private firm contracted to sell on Peruvian immovable guano deposits to the European market. Concluded 10 years prior to the outbreak of hostilities, the Tribunal considered whether performance of the contract and the legal status of the guano were affected by the Chilean occupation of Peru. The Tribunal found that Chile's rights as occupant over the guano were temporary and only extended to rights of appropriation. The hostilities between Peru and Chile of 1879 predated both the Hague Regulations and the Brussels Code and therefore the Tribunal's finding was significant as it underlined the existence of customary norms of international law which highlight the limited rights of use over public immovable property.⁴⁶²

In *Procurator-General of the Republic v. Godlewski* (1925) the Supreme Court of Poland ruled on the validity of a Polish law introduced in the aftermath of the German occupation of Russian Poland, invalidating all agreements concluded by the occupying authorities involving State property. Upholding the newly introduced law, the Court found that all agreements concerning State property could be annulled highlighting in particular the invalidity of leases that exceed the limits of usufruct.⁴⁶³ Correspondingly, in *Lighthouses Case between France and Greece* (1934), a case concerning the validity of a contract concluded by a private firm and the Ottoman Government as deposed sovereign during the occupation of the Ottoman territories, the Permanent Court of International Justice reasoned that the belligerent occupant

⁴⁶⁰ *Administration of Waters and Forests v. Falck* (11 February 1927) French Court of Cassation, Criminal Chamber, Annual Digest Case No. 383, p. 563 (get year again)

⁴⁶¹ *Award in the Matter of the French Claims Against Peru*, 15 U.N.R.I.A.A. 125 (1901). More at *Award in the Matter of the "French Claims Against Peru,"* *The American Journal of International Law*, Vol. 16, No. 3, (July 1922) pp.480-484; Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals, Vol II The Law of Armed Conflict*, (London, Stevens & Sons Limited, 1968) pp. 311-313.

⁴⁶² Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals, Vol II The Law of Armed Conflict*, (London, Stevens & Sons Limited, 1968) pp. 312.

⁴⁶³ *Procurator-General of the Republic v. Godlewski*, Supreme Court of Poland, Zb.O.S.N.I., 1925/I, No. 3; O.S.P.V. No. 204.

could only grant concessions over public immoveable property to third parties during occupation providing that the revenues from the immoveable property “must be devoted solely to the needs of that territory itself.”⁴⁶⁴ This comports with an international resolution adopted at the London International Law Conference of 1943 which limited the occupant’s use of public property for “the maintenance of public order and safety” in the occupied territory.⁴⁶⁵

Certainly the occupant may engage in contracts with private entities within the limits of usufruct as a form of conventional subrogation. However both the belligerent State and the private contractor may incur liability to the occupied State for any activities ancillary to Article 55 usufruct notably for contracts concluded exceeding the term of occupation.

The Supreme Court of Estonia in *Constitutional Judgement III-4/A-10/94* ruled that an “Act Invalidating Transactions Involving Land, Buildings and Structures on the Territory of the Republic of Estonia, Which Had Been and Are in the Possession or Use of the Former Soviet Union Armed Forces” was constitutional. The complainants, Fonan and Baltic Group International, argued unsuccessfully that they had lawfully acquired non-military property, which no longer belonged to the Estonian State. The Republic of Estonia was illegally occupied and incorporated into the Soviet Union in 1940. However the Supreme Court found that immoveable property used by the Soviet Union had been and still was the property of the Estonian State. Moreover it concluded:

“Actual possession, use and disposal of the property became possible gradually, beginning with the decision of restoration of the Republic on 30 March 1990. It follows from international law and the continuity of the

⁴⁶⁴ *Lighthouses Case between France and Greece*, PCIJ, Ser. A./B., No. 62, 1934 (par 53)

⁴⁶⁵ Article 3, Resolution of the London International Law Conference, July 12th 1943. Reprinted in Bisschop, “London International Law Conference, 1943,” 38 AJIL, 1944, pp. 291-293; Gerhard Von Glahn, *The Occupation of Enemy Territory; A Commentary on the Law and Practice of Belligerent Occupation*, (The University of Minnesota Press, 1957) pp. 194-196. (The resolution was the result of a special study into aspects of war and warlike operations after World War II by prominent international jurists and presented to governments gathered in Great Britain as indicative of a correct statement of public international law). (W.R Bisschop, “London International Law Conference 1943,” 38 American Journal of International Law (1944), 290.) However while the reports of the International Law Commission to the General Assembly do not have binding force they may be evidence of a developing custom of international law. (Ian Brownlie, *Principles of public International Law* (Oxford University Press, 6th edition, 2003) p. 6.) Furthermore, such practice would encroach on the sovereignty of the occupied State.

Republic of Estonia that neither the armed forces of the Soviet Union nor its structural entities were lawful subjects of transactions involving land, buildings or objects located on the territory of the Republic of Estonia.”⁴⁶⁶

Julius Stone notes that the belligerent occupant’s rights over immoveable property “is a mere incident of his status as the governing authority *pro tempore*. As such his power is measured not by his own needs but by the duty to maintain integrity of the corpus.”⁴⁶⁷ In this respect the occupant’s use of the property maintains the *status quo ante* preserving the integrity of the resource until the end of hostilities.

2.2.1 Application to Iraq

The introduction of 40 year lease arrangements in Foreign Investment Order 39 and the extension of public property use to private entities after the belligerent occupation in Coalition Provisional Authority Order Number 9 raised the question of the extent to which the belligerent occupant can contract out rights over the immoveable property of the occupied State. Looking specifically at the temporal issue, the tension arises from competing notions of Roman law and civil law usufructus in Article 55 of the Hague Regulations. Can the belligerent occupant “borrow” from civil law codes, in which case timespans of 30 years to life are acceptable terms of usufruct, or is the belligerent occupant guided by the soft principles of Roman law usufruct? In Roman law the property owner can intervene and terminate the usufruct of property at any time while civil law codifications permit the negotiation of periods of usufruct in contractual agreements. Evidently the laws of belligerent occupation are impotent to terminate the period of usufruct and the absence of a termination mechanism suggests that the usufruct ends with the occupation.⁴⁶⁸

Clearly from the law of usufruct, the *dominium* of the property cannot be split during the usufructus and therefore the relationship must necessarily be of a temporary nature. This conception of usufruct is consonant with occupation law. Although periods of between 30 years to life have been advanced as acceptable temporary terms

⁴⁶⁶ *Judgment of the Constitutional Review Chamber of the Supreme Court* (21 December 1994), Constitutional Judgement III-4/A-10/94 At <http://www.nc.ee/?id=477> (English translation, last visited 31 August 2010)

⁴⁶⁷ Julius Stone, *Legal Controls of International Conflict*, (London, Stevens & Sons Limited, 1954) p. 714.

⁴⁶⁸ Hensel, *The Legitimate Use of Military Force, The Just War Tradition and the Customary law of Armed Conflict* (Ashgate Publishing, 2008) p. 265.

for usufruct under the municipal codes, similar pre-ordained usufructuary periods established during a belligerent occupation would conflict with the *de facto* basis of occupation law. Notably, within contemporary occupation law there have been instances of prolonged occupations in excess of 40 years, notably the Israeli occupation of the Palestinian territories and the Turkish occupation of Northern Cyprus. However these occupations are more the exception than the rule and have been subject to regional and international criticism.⁴⁶⁹ Furthermore UN Security Council resolutions on Iraq and the UN Secretary General's Report on Iraq at the cusp of the belligerent occupation predicted a swift exchange of control into the hands of the Iraqi population. Negroponte, the US representative to the UN meeting on Resolution 1483 declared that the resolution "affirms our commitment to the development of an internationally recognised representative Government of Iraq."⁴⁷⁰ Similarly the British representative Jeremy Greenstock, noted the importance of working with the United Nations Special Representative to "ensure the early establishment of an internationally recognised representative Government by the people of Iraq."⁴⁷¹ Moreover, the UN Secretary General urged for movement towards the establishment of an Iraqi provisional government early in the occupation.⁴⁷²

Problems surfaced during the occupation of Iraq when the Coalition Provisional Authority introduced a series of measures designed to facilitate the removal of profits from the territory and commit foreign investors to long-term projects in Iraq under Foreign Investment Order 39 while submitting that such "reforms" were aimed at promoting a market economy.⁴⁷³ Can 40 year licences that commit the occupier to change the economic structure of the occupied territory permanently, ever be regarded as a temporary measures? The quagmire abounds in assessing the lucidity of the occupier's conception of "permanent" use of immoveable property. For instance, if

⁴⁶⁹ General Assembly Resolution on permanent sovereignty over natural resources, 3171 (XXVIII), of December 17th, 1973; General Assembly Resolution on permanent sovereignty over natural resources in the occupied Arab territories, 3175 (XXVIII) (1973) and General Assembly Resolution on permanent sovereignty over national resources in occupied Arab territories, 3336 (XXIX) 17th December 1974. There the General Assembly criticised Israel's delay in reaching a peaceful to the conflict. The Turkish occupation of Northern Cyprus was subject to criticism by the European Court of Human Rights in *Loizidou v. Turkey* [1996] 108 ILR 433 (merits) para 16-17.

⁴⁷⁰ United Nations Security Council, 4761st Meeting, Thursday 22 May 2003. S/PV.4761

⁴⁷¹ *Ibid.*

⁴⁷² Report of the Secretary-General pursuant to paragraph 24 of Security Council Resolution 1483 (2003), S/2003/715, 17th July 2003. Par 18.

⁴⁷³ Coalition Provisional Authority Order 39, Foreign Investment (19 September 2003).

the occupation of the territory endured over a 40 year period, as did the Israeli occupation of the Palestinian territories, then this term may be considered temporary on the basis of the *de facto* belligerent occupation. Indeed as a war objective, plans to occupy a territory for a forty year period would not violate occupation law *per se* as law regulating conduct during hostilities *jus in bello* but would come within the ambit of law justifying the use of armed force *jus ad bellum*. The crux is that in establishing when an action concerning Article 55 immovable property has a veneer of permanency this is a significant indicator of plans to operate *ultra vires* Article 55.⁴⁷⁴ Similarly short term economic structural changes which invariably have long term permanent effects may also be considered *ultra vires* Article 55. Therefore intent becomes an important consideration in assessing whether the belligerent occupant has permanent designs on the occupied territory.

Coalition Provisional Authority Order Number 9 on the Management and Use of Iraqi Public Property indicated that private individuals and entities using public Iraqi property after the occupation would not be liable for the properties under Iraqi law highlighting the permanency of the belligerent administrations arrangements. However Foreign Investment Order 39 provided that “licenses may be reviewed by the internationally recognised, representative government established by the people of Iraq upon its assumption of the responsibilities of the CPA.” Certainly while the license exceeds the term of occupation, the measure is not in itself a permanent arrangement. The rulings in *French Claims Against Peru* and *Lighthouses Case between France and Greece* illustrate that the belligerent occupant is at liberty to contract out rights over public immovable property to private parties but this is limited to temporary use for the duration of the occupation.

The long term effects of Foreign Investment Order 39 creating long term licensing arrangements over public immovable property are difficult to reconcile with the temporary usufructuary rights acquired under Article 55 of the Hague Regulations. Although the belligerent occupant is at liberty to enter into contractual agreements with third parties these terms must not exceed Article 55 limitations.

⁴⁷⁴ United Nations Legal Report, “Sovereignty over Water Resources in the West Bank and Gaza Strip” *The Palestine Yearbook of International Law* (1989) Vol. 5 p. 382

2.2.2 *European Court of Human Rights rulings on Temporary Use of Property*

Coalition Provisional Authority Order Number 6 on the Eviction of Persons Illegally Occupying Public Buildings authorised the commander of the armed forces to evict “any individual or groups determined to be in illegal occupation of such public property” and placed control of public property in the hands of the CPA.⁴⁷⁵ The removal of individuals from public property followed a sweeping disestablishment of Saddam Hussein’s Ba’ath party in what became known as the de-Ba’athification of Iraq.⁴⁷⁶ Coalition Provisional Authority Regulation Number 9 assigned occupancy, use and management of public immovable property to military, private organisations and commercial entities without giving rise to liability on the part of the CPA.⁴⁷⁷ This section examines the application of European Court of Human Rights (ECtHR) rulings on immovable property during belligerent occupation with a particular focus on the divergence between ECtHR rulings and international law on temporary use.

The European Commission of Human Rights considered the issue of appropriation of private immovable property under the framework of the European Convention of Human Rights in *Weidlich and Others v. Germany* (1996).⁴⁷⁸ The applicants argued that private immovable property in Germany illegally expropriated and altered to public immovable property by the Soviet occupants between 1945-1949 and subsequently legalised in the Unification Treaty, 1990, amounted to a violation of their right to the peaceful enjoyment of their possessions under Article 1 of Protocol No. 1 of the European Convention of Human Rights.⁴⁷⁹ That provision governs the protection of property in the following terms:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure

⁴⁷⁵ Coalition Provisional Authority Order Number 6, Eviction of Persons Illegally Occupying Public Buildings (8 June 2003) par 1.

⁴⁷⁶ Coalition Provisional Authority Order Number 1, De Ba’athification of Iraqi Society, (16 May 2003).

⁴⁷⁷ Coalition Provisional Authority Order Number 9, Management and Use of Iraqi Public Property (27 June 2004).

⁴⁷⁸ *Weidlich and Others v. Germany* applications 19048/91, 19049/91, 19342/92, 19549/92 and 18890/91. (4 March 1996)

⁴⁷⁹ *Ibid.*

the payment of taxes or other contributions or penalties.”⁴⁸⁰

The case hinged on whether the applicants’ rights over the expropriated immovable property, fell within the Article 1 meaning of property “possession”. Critically, the Commission viewed the original expropriation of the property by the Soviet occupants as an “instantaneous act” that did not constitute a “a continuing situation of ‘deprivation of right.’”⁴⁸¹ Further elaborating on the question of “possession” of property, the Commission considered that under Article 1 Protocol I, the property must represent either “‘existing possessions’ or valuable assets, including claims in respect of which the applicant can argue that he has at least a “legitimate expectation” that they will realise.”⁴⁸² Only the owners of existing property rights may petition the commission under Article 1 Protocol 1. Seemingly, the property holder who has been forcibly removed and consequently unable to assert dominion over his or her immovable property will be prevented from establishing his or her title under Article 1 due to the inability to demonstrate that the property is an “existing possession”.

In *Weidlich*, the Commission noted that prolonged absence from the enjoyment of the property will terminate any existing rights over the property. Identifying prolonged disuse of property as central to the loss of possessory rights the Commission stated:

“The hope of recognition of the survival of a former property right which has not been susceptible of effective exercise for a long period or a conditional claim which has lapsed as a result of the non-fulfillment of the condition are not to be considered as ‘possessions’ within the meaning of Article 1 of Protocol No 1.”⁴⁸³

This reasoning adopts a limitative approach to the interpretation of property possession and limits the application of the ECHR to property illegally requisitioned and seized during belligerent occupation. The Hague Regulations limit the occupant’s rights to private immovable property to rights of use only unless an Article 52 requisition is warranted for the needs of the army of occupation. Beyond this there is no provision for alteration by the belligerent occupant. Indeed, Article 46 of the

⁴⁸⁰ Article 1, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, (1952).

⁴⁸¹ *Weidlich and Others v. Germany* applications 19048/91, 19049/91, 19342/92, 19549/92 and 18890/91. The Law sect 1(b). (4 March 1996).

⁴⁸² *Ibid.*, at The Law sect 1(c).

⁴⁸³ *Ibid.*

Hague Regulations expressly stipulates that “private property can not be confiscated.”⁴⁸⁴

Judge Loukis G. Loucaides sitting on the Commission in *Weidlich* found the decision difficult to reconcile with the principles of international law stating that, “as a member of the Commission at that time, I disagreed with this decision because I considered that the acts of confiscation were contrary to international law. Other members of the Commission also disagreed.”⁴⁸⁵ As the returning sovereign in the wake of the Soviet occupation of the German Democratic Republic, the German Government had the authority to revoke any dubious legislation implemented by the occupying forces. Fractiously, the German Government chose to not to do so and the resulting case before the European Commission of Human Rights appears fraught with political implications.⁴⁸⁶

The Commission cited the earlier case *Van der Musselle v. Belgium* (1983) as precedent for what the European Court of Human Rights regarded as “existing possessions” under the ECHR.⁴⁸⁷ There, a Belgian lawyer sought compensation from the Belgian government for legal aid services provided, arguing that a Belgian law requiring that *avocats* provide free legal aid services without remuneration or reimbursement of their expenses violated his right to “peaceful enjoyment of his possessions” under Article 1, Protocol 1. The Court ruled that the “absence of remuneration” did not amount to a violation of Article 1 as this applied only to “existing possessions” and the applicant had never enjoyed the right to remuneration in this regard.⁴⁸⁸ This situation can be distinguished from the *Weidlich* case where the applicants had legally established title to their private immovable property both prior to and during the Soviet occupation of Germany but which was illegally confiscated

⁴⁸⁴ Article 46, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

⁴⁸⁵ Loukis G. Loucaides, “The Protection of the Right to Property in Occupied Territories,” ICLQ vol 53, July 2004, pp. 677, 688.

⁴⁸⁶ Politicisation of this subject was also evident in the East German Expropriation Case before the German Federal Constitutional Court. There the court concluded that private property seized during the Soviet occupation was legitimately extinguished as the applicants did not continuously exercise their property right. Moreover the court concluded that the legality of the occupation *jus ad bellum* formally severed the link between the applicants and their property. This ruling is questionable as firstly, the occupant could not exercise their rights because of the occupation and secondly the laws *jus in bello* operate distinct from the laws *jus ad bellum*. *East German Expropriation Case*, Joint Constitutional Complaint, (26th October 2004), BVerfG, 2 BvR 955/00, 1038/01; ILDC 66 (DE 2004) par. 74.

⁴⁸⁷ *Van der Musselle v. Belgium*, 23 November 1983, Application No. 8919/80

⁴⁸⁸ *Ibid.*, at par 48.

during the occupation in breach of both Article 43 and article 46 of the Hague Regulations. The Court has also found in *Marckx v. Belgium* (1979) that the concept of Article 1 possessions “applies only to a person’s existing possessions and that it does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions.”⁴⁸⁹ Again these cases involve circumstances where original title to the property had never vested in the applicant and therefore the parallels drawn with *Weidlich* are less than succinct.

In *X., Y. and Z. v. the Federal Republic of Germany* (1977) the Commission discussed the subject of “prolonged absence from property”. The case involved the alteration of private immovable German property in the Soviet Occupation Zone to public immovable Polish property by virtue of the signing by the Federal Republic of Germany of the treaties of Moscow and Warsaw, 1970 effectively altering the status of the properties in question and thus depriving the applicants of their rights under Article 1, Protocol 1, of the European Convention of Human Rights.⁴⁹⁰ Although the Commission noted the 30 year time period of property deprivation, this was referred to in the arguments of the applicants but did not comprise the ratio of the case. Significantly, the Commission determined that the applicants had not established that a direct and sufficient causative relationship existed between the ratification of the treaties of Warsaw and Moscow and the deprivation of the private immovable possessions.⁴⁹¹ Crucially, the ruling hinged on the establishment of “sufficient causative relationship” rather than the specific condition of “prolonged absence from property.”

In *Jahn and Others v. Germany* (2004), the European Court of Human Rights ruled in favour of granting compensation to third parties assigned the altered immovable property belonging to the occupied population under the Soviet agrarian reforms under Article 1, Protocol 1.⁴⁹² The Court connoted that the applicants had “legally acquired full ownership of the land by virtue of a law passed by the GDR’s parliament

⁴⁸⁹ *Marckx v. Belgium*, 13 June 1979, Application No. 6833/74. Series A, No. 31, p. 23 par 50.

⁴⁹⁰ *X., Y., and Z. v. the Federal Republic of Germany*, Applications No’s 7655/76, 7656/76, 7657/76, Decision of 4 October 1977 on the admissibility of the applications.

⁴⁹¹ *Ibid.*, at p. 129

⁴⁹² *Jahn and Others v. Germany*, European Court of Human Rights, Applications nos. 46720/99, 72203/01 and 72552/01 (22 January 2004).

before the first free elections in 1990.”⁴⁹³ However prior to the Unification Treaty, the German Democratic Republic was still considered to be under belligerent occupation and case law from that jurisdiction espousing the application of the Hague Regulations in the occupied territory is significant in this regard.⁴⁹⁴

2.2.3 Extraterritorial Applicability of the European Convention on Human Rights

Article 1 of the European Convention on Human Rights provides the general rule on territorial limitation stating that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”⁴⁹⁵ Extraterritoriality is at best an exception to the general rule. Firstly the central question is whether the European Convention on Human Rights applies to Iraq. Pertinently three recent cases before the United Kingdom courts have seen the extraterritorial application of the ECHR to conduct in Iraq. In *Al-Skeini* (2005), the House of Lords considered the cases of a man tortured and killed in a British run detention centre in Iraq and five other Iraqi citizens who were killed in the crossfire by British forces during hostilities in Iraq and whether their families could seek a remedy in the UK courts on the basis that their right to life in the European Convention on Human Rights was violated.⁴⁹⁶ The Lords found that the UK as an occupying power in Iraq did not have the requisite effective control over Iraqi territory for the ECHR to apply to the five citizens killed in the crossfire on the streets and in private houses. However the Lords found that the UK forces did have personal jurisdiction over the death in custody. The effective control exercised during the occupation did not amount to full control over territory such as to justify the extension of jurisdiction.

In *Al-Jedda* (2007), an Iraqi citizen who was granted asylum in the UK was arrested

⁴⁹³ *Jahn and Others v. Germany*, European Court of Human Rights, Applications nos. 46720/99, 72203/01 and 72552/01 (22 January 2004), para 67.

⁴⁹⁴ Gernot Biehler, *Die Bodenkonfiskationen in der Sowjetischen Besatzungszone Deutschlands 1945 nach Weiderherstellung der gesamtdeutschen Rechtsordnung 1990*, (Duncker & Humblot, Berlin, 1994) p. 100-101 at fn. 73. “Vgl. das Leiturteil des OG Zürich, in: Schweizer Juristenzeitung 1946, 89; Württembergisch-badischer VGH, in: AöR, 1948, 370; OGH (britische Zone), in: DV 1949, 359; OLG Braunschweig, in: SJZ 1948, 759; OLG Frankfurt, in: SJZ 1948, 760; OLG Hamburg, in: NDR 1948, 253; OLG Hamm, in: SJZ 1948, 761; implizit in der Sache zwingend, wenn auch nicht ausdrücklich OLG Dresden, in DV 1949, 216.”

⁴⁹⁵ Article 1, *European Convention on Human Rights*, Council of Europe, Rome (4 November 1950).

⁴⁹⁶ *R. (al Skeini) v. Secretary of State for Defence* [2007] UKHL 26.

and detained without charge by British forces in Iraq on security grounds.⁴⁹⁷ He argued that his detention breached Article 5 of the European Convention on Human Rights. Lord Bingham considering the issue of effective control stated:

“The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But...it is one thing to receive reports, another to exercise effective command and control.”⁴⁹⁸

Interestingly the House of Lords did not rule out the possibility of the extraterritorial application of Article 5 of the ECHR to the Iraqi citizen. However in this case the Lords found that the UK did not have effective control over the detention centre as the UK was operating in its capacity as part of the multinational force under Security Council 1546. As such the matter came under the responsibility of the international organisation.

More recently, the United Kingdom Divisional Court and the Court of Appeal denied the application of two Iraqi citizens to hear a case grounded on European Convention of Human Rights.⁴⁹⁹ The applicants petitioned the European Court of Human Rights in *Al-Saadoon and Mufdhi* (2009).⁵⁰⁰ They were held in a British detention centre in Iraq and sought to prevent their transfer by the British government to face trial before the Iraqi High Tribunal where they faced a death sentence on the grounds that it violated their right of *non-refoulement* in the Convention. In 2008 the European Court of Human Rights issued an order prohibiting the transfer. However the UK breached the order arguing that it had no alternative but to transfer the individuals to the Iraqi authorities. Subsequently the European Court of Human Rights found:

“During the first months of the applicants’ detention, the United Kingdom was an occupying power in Iraq. The two British-run detention facilities in which the applicants were held were established on Iraqi territory through the exercise of military force. The United Kingdom exercised control and authority over the individuals detained in them initially solely as a result of the use or threat of military force. Subsequently, the United Kingdom’s *de facto control* over these

⁴⁹⁷ *R. (Al Jedda) v Secretary of State for Defence* [2007] UKHL

⁴⁹⁸ *Ibid.*, at par 105.

⁴⁹⁹ *R. (Al-Saadoon and Mufdhi) v. Secretary of State for Defence* [2008] EWHC 3098 (Divisional Court); [2009] EWCA Civ 7 (Court of Appeal)

⁵⁰⁰ *Al-Saadoon and Mufdhi v. United Kingdom*, Application No. 61498/08, Decision as to Admissibility, 30 June 2009.

premises was reflected in law. In particular, on 24 June 2004, CPA Order No. 17 (Revised) (see paragraph 13 above) provided that all premises currently used by the MNF should be inviolable and subject to the exclusive control and authority of the MNF. This provision remained in force until midnight on 31 December 2008.”⁵⁰¹

Interestingly the European Court of Human Rights found that the UK had *de facto* control over the detention centre and that Coalition Provisional Authority Order Number 17 placed the control on a *de jure* basis extending the authority and immunities of the multinational force in Iraq beyond 28th June 2004, the end of the occupation. Clearly this territorial control marks a departure from the personal control espoused in the earlier cases before the British courts which were considered during a period of full military occupation of the territory between 2003 and 2004.

2.2.4 Application to Iraq

The European Court of Human Rights jurisprudence on point highlights tensions that may arise between the application of human rights law and international humanitarian law during a belligerent occupation.⁵⁰² Ultimately the Commission lacked competence *ratione personae* and *ratione temporis* to hold the German authorities responsible for acts committed before the entry into force of the Convention, 3 September 1953. Worryingly, an appraisal of property rights during occupation under the framework of the European Convention of Human Rights, Article 1, Protocol 1, may give rise to an alteration of property title which an application of humanitarian law would circumvent.

Article 1, Protocol 1 guarantees the peaceful enjoyment of possessions of which no one shall be deprived except “in the public interest and subject to the conditions provided for by law and by the general principles of international law.”⁵⁰³ Here

⁵⁰¹ *Al-Saadoon and Mufdhi v. United Kingdom*, App. No. 61498/08 Par. 87

⁵⁰² Advisory Opinion, *Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict*, 1996 (I) I.C.J. REP. 226, para. 25 (July 8). “The protection of the International Covenant of Civil and Political Rights does not cease in times of war.” Concluding Observations of the Human Rights Committee: Israel, 5 August 2003, para. 11, UN Doc CCPR/CO/78/ISR (2003). “The applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant”. Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J (July 9, 2004), 43 ILM 1009 (2004), para 111. “The International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”

⁵⁰³ Article 1, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, (1952).

reference to the ‘general principles of international law’ relates to the States treatment of non-nationals in relation to their private possessions. In *Lithgow and Others v United Kingdom* (1986) the Court indicated that the reference to the general principles of international law in Article 1 of Protocol related to the protection of the property rights of non nationals by the State, as governed by international law principles, as opposed to any additional guarantees provided to the nationals of the State.⁵⁰⁴ In this respect, the provision does not require that the norms of belligerent occupation prevail over the Protocol, where it is applied in occupied territory.

However, it must be stressed that during a belligerent occupation international humanitarian law is the *lex specialis* with human rights law being ancillary to this.⁵⁰⁵ Furthermore human rights law is intended to complement rather than detract from the corpus of humanitarian law bridging any existing gaps in rights protection.⁵⁰⁶ Advocating this position, Orna Ben-Naftali and Yuval Shany argue that “in its supplementary role, any deficiencies associated with international human rights law would not detract from the continued application of international humanitarian law, and the former regime would add to, rather than detract from, the protection afforded to potential victims.”⁵⁰⁷ Supporting this stance, Michael J. Dennis suggests “the best reading of the interrelationship between the ICCPR and international humanitarian law is the more traditional view that international humanitarian law should be applied as the *lex specialis* in determining what a State’s obligations are during armed conflict or military occupation.”⁵⁰⁸ Therefore should conflict arise during a belligerent

⁵⁰⁴ *Lithgow and Others v. The United Kingdom* (Application Number 9006/80; 9262/81; 9263/81; 9405/81) Judgment Strasbourg (8 July 1986) Paragraph 115

⁵⁰⁵ I.C.J., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Report. 1996, 226 at 240, para. 25; *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 177-178 paras. 104-106; *Case Concerning Armed Activity on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment of 19th December 2005, paras 216-220. Jan Romer, *Killing in a Grey Area Between Humanitarian Law and Human Rights: How Can the National Police of Columbia Overcome the Uncertainty of Which Branch of International Law to Apply* (Springer, 2010) 34; Olivier de Schutter, *International Human Rights Law* (Cambridge University Press, 2010) 4.

⁵⁰⁶ Daniel Thurer, “Minorities Their Protection in General International Law and International Humanitarian Law” in Helen Durham, Timothy L.H McCormack, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Kluwer Law International, 1999) 60; Council of Europe, *Guantánamo: Violation of Human Rights and International Law* (Council of Europe Publishing, 2007) 97.

⁵⁰⁷ Orna Ben-Naftali and Yuval Shany, “Living In Denial: The Application of Human Rights in the Occupied Territories,” 37 *Israel Law Review* 17, 50.

⁵⁰⁸ Michael J. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation,” 99 *American journal of International Law* 119 (2005) 139.

occupation between the competing sets of norms, the occupier may not use human right instruments to impinge on the minimal property protections of the Hague Regulations prohibiting the alteration of property title.

However there is a possibility particularly stemming from the recent ruling in *Al-Saadoon and Mufdhi* on the extraterritorial jurisdiction of the European Convention on Human Rights that applicants may benefit from the range of convention norms such as Article 1 Protocol 1 on property deprivation. Coalition Provisional Authority Regulation Number 9 on the Management and Use of Iraq Public Property extends control over State owned property to military, individuals and business entities beyond the occupation, similar to the control and immunities identified by the European Court of Human Rights in Coalition Provisional Authority Order Number 17, which reflected the continuance of *de jure* control. Therefore due to recent developments in the jurisdiction of the European Court of Human Rights there may be a new avenue for Iraqi citizens to petition the court on the basis of terminated property rights during and after occupation.

In Germany immovable property permanently alienated was influenced in part by the Unification Treaty in 1990 and by the German government, which legitimated the occupant's actions. This can be distinguished from issues in Iraq where basis for control stemmed from orders introduced by the occupying authorities at the close of hostilities and not the sovereign government. However the difficulty with the European Court of Human Rights approach was evident in *Jahn* where third parties that were allocated the property of German citizens during the period of Soviet agrarian reform were regarded as acquiring rights superior to those of the dispossessed citizens. Such an interpretation is at variance with international humanitarian norms. A comparative analysis would place the rights of commercial entities and individuals in control of Iraqi public immovable property beyond the occupation tenure in a superior position to the Iraqi state.

2.3 Does Article 55 of the Hague Regulations prevent the belligerent occupant from altering the status of public immoveable property to private immoveable property?

The Coalition Provisional Authority appointed Ibrahim Bahr al-Uloum as the Oil Minister under the Interim Governing Council. Prior to the invasion and occupation of Iraq in 2002, Ibrahim Bahr al-Uloum, was selected amongst other leading international consultants and Iraqi exiles by the US State Department to attend the 'Future of Iraq Project' where he engaged in the "Oil and Energy" working group.⁵⁰⁹ During the occupation, al-Uloum suggested that the Iraqi oil sector needed privatisation.⁵¹⁰ Moreover he supported developing the oil industry through production-sharing contracts with priority given to US and European oil companies.⁵¹¹ Meanwhile at a meeting in Dubai of the Institute of International Finance the Minister of Finance on the Iraqi Governing Council, Kamel al Gailani, announced plans to privatise Iraqi industries to build a free and open market economy.⁵¹² The Advisory Board to the Iraq Ministry of Oil was headed by Philip Carroll, the CEO of the Fluor Corporation, a reconstruction company primarily engaged in the emerging petroleum industry. In May 2003, Carroll suggested that Iraq may break away from the OPEC system proposing:

"They (Iraq) have from time to time, because of compelling national interest elected to opt out of the quota system and pursue their own path...they may elect to do that same thing. To me it's a very important national question."⁵¹³

After September 2003, Rob McKee, a chairman of Halliburton Corporation and former executive vice president of ConocoPhillips replaced Philip Carroll.⁵¹⁴ It became clear that foreign oil interests were driving the privatisation agenda in Iraq.

⁵⁰⁹ Mr. Kucinich, Question of Personal Privilege, Congressional Record – House (23 May 2007) H5642; Newsletter 34, "Big Contracts for Big Oil", Corpwatch. At <http://www.corpwatch.org/?lid=2912> (last visited 24 May 2010).

⁵¹⁰ "Corporate Carve Up: UK Companies in Iraq" Corpwatch. At <http://www.corpwatch.org/?lid=2479> (last visited 24 May 2010).

⁵¹¹ Mr. Kucinich, Question of Personal Privilege, Congressional Record – House (23 May 2007) H5642

⁵¹² Rohan Pearce, "US invaders plunder Iraq" Green Left Weekly (15 October 2003); Greg Mutitt, *Crude Designs: The Rip-off of Iraq's Oil Wealth*, Platform, (November 2005) p. 17.

⁵¹³ Dr. Mustafa Bazergan, "Will Iraq dictate world oil affairs?" Iraq-InfoSearch, At <http://www.iraq-infosearch.com/Publications.htm> (last visited May 24 2010).

⁵¹⁴ David Ivanovich, "Houston Exec Gets Top Iraq Energy Post" *Houston Chronicle*, 23 September 2003.

This section seeks to address the compatibility of the privatisation process introduced during the belligerent occupation with international humanitarian law. In particular this section will examine if entities established by the belligerent occupant can alter the status of public immovable properties from public to private control during occupation under Article 55 of the Hague Regulations.

Article 55 of the Hague Regulations prohibits the occupant from altering the status of public immovable property. Article 55 states:

“The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”⁵¹⁵

Fundamentally, the deposed sovereign retains the right of ownership over public immovable property and consequently during a belligerent occupation the title of property does not transfer to the occupant but remains in abeyance.⁵¹⁶ As a result, the occupant does not have the authority to alienate the property or alter the property’s title, as this would usurp the ownership rights of the government of the occupied State. Article 55 illustrates this titular restriction by limiting the rights of the occupant over “public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country” to that of administrator and usufructuary.⁵¹⁷ This right to an extent complements the ancient policy of the occupant using public immovable property to “deprive his adversary of all sources of strength” by providing for the needs of the army when necessary while maintaining a balance between military need and the prohibition against annexation.⁵¹⁸

Deliberate permutation of public immovable property is anathema to the titular protection embodied in Article 55 of the Hague Regulations and is redolent of the intricate methods of economic manipulation undertaken in contemporary hostilities in

⁵¹⁵ Article 55, Hague Convention IV and Regulations, 1907.

⁵¹⁶ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey*, (New York, 1949) p. 179.

⁵¹⁷ Article 55, 1907 Hague Convention IV and Regulations.

⁵¹⁸ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey*, (New York, 1949) p. 187.

exploiting an occupied territory for its immovable resources. Feliciano and McDougal have commented that “more subtle and less visible modes of taking and utilising resources than seizures, requisitions and contributions” have been possible in occupied territory by “the very complexity of the economic and financial organisation of modern states.”⁵¹⁹ The transformation by the CPA of public assets into private investments shall be analysed with reference to Article 55 and particular focus placed on the added layers of complexity such as the involvement of third party investors and the use of CPA regulations to implement the measures.

Under the law of usufruct, the usufructuary has no right to alienate immovable property, as this is a right reserved to the owner.⁵²⁰ However there is some support for the proposition that the usufructuary may alienate the *usufructus* as a collection of rights. The French civil code states that a usufructuary may “give on lease to another, even sell or transfer his right gratuitously.”⁵²¹ However, the Egyptian civil code contains reservations about the usufructuary’s right to transfer the usufruct of the property maintaining that the right “may only be transferred to third parties by virtue of a formal provision to that effect or for serious reasons.”⁵²² The inclusion of a formal provision to this effect requires the consent of the property owner when outlining the conditions of usufruct with the usufructuary prior to its commencement. Alienation of the usufructus of the property within the codes allows the usufructuary to sell on the usufruct as a collection of rights only. It stops short of providing the usufructuary with a mechanism of conveying the title to the property, as this right is coterminous with property ownership in *sensu-strictu*.

In fact, the French military manual initially criticised the Brussels code conception of usufruct for not comporting with traditional usufructuary powers to conclude contracts with respect to property that would remain valid after the term of usufruct and therefore after the conclusion of hostilities.⁵²³ However, such an approach would

⁵¹⁹ McDougal and Feliciano, *The International Law of War: Transnational Coercion and World Public Order*, (Martinus Nijhoff Publishers, 1994) p. 824.

⁵²⁰ Giovanni Pugliese, “On Roman Usufruct,” 40 *Tulane Law Review*, 533 (1965-1966) p. 533. “At no moment would naked ownership and usufruct have come together in the same hands.”

⁵²¹ Article 595, French Civil Code, [1804].

⁵²² Article 997, *قانون اقل تا اس اردل* [1949]

⁵²³ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey*, (New York, 1949) p. 179. *Manuel de Droit International à l’Usage des Officiers de l’Armée de Terre*, 3rd edition, 1893 pp. 114-115.

place the immovable property of the occupied territory in a perilous position as the domestic legal remedies manifest in the usufructuary lease and the subsequent court access available to the civil law property owner are absent in occupied territory under military control. Appositely, Article 595 of the French Civil Code is itself testament to the delicate position of immovable property under usufruct by preventing the usufructuary from granting a lease on “an immovable intended for commercial, industrial or craft use” without the assistance of the property owner.⁵²⁴ Moreover, by failing to obtain the consent of the property owner, “a usufructuary may be authorised by a Court to do that transaction alone.”⁵²⁵ By analogy, this particularly casts doubt over the position of the Coalition Provisional Authority in granting licences to foreign investors to use public immovable Iraqi realty for commercial purposes. During a belligerent occupation the occupying power may as a *modus vivendi* lease or contract out the usufructuary rights over public immovable property to a third party. The third party will remain bound by the original limitations inherent in the role of the Article 55 usufructus.

Can the belligerent occupant transfer title to immovable property for the duration of the occupation only? Academic opinion tends towards the conclusion that it cannot, however there has been some measure of uncertainty. Wheaton suggests for example that the title to public immovable property acquired in war can only be considered as valid under a peace treaty stating:

“This rule becomes practically important in questions arising out of alienations of real property, belonging to the government, made by the opposite belligerent while in military occupation of the country. Such title must be expressly confirmed by the treaty of peace, or by the general operation of the cession of territory made by the enemy in such treaty. Until such confirmation, it continues liable to be divested by the *jus postliminii*.”⁵²⁶

From this vantage, the acquisition of immovable property title is considered a possibility, raising the question of whether immovable property can be alienated

⁵²⁴ Article 595, French Civil Code, [1804].

⁵²⁵ *Ibid.* Moreover Article 583(a), Bürgerliches Gesetzbuch (BGB), [1896], also provides for stricter regulation of the right of usufruct relating over business interests. It states that, “terms of the contract that oblige the usufructuary lessee of a business not to dispose of inventory items or not to dispose of them without prior consent by the lessor or to dispose of inventory items to the lessor are only effective if the lessor agrees to acquire the inventory at its estimated value upon termination of the lease.”

⁵²⁶ H.B. Wheaton, *International Law*, London, 1944 (7th English ed., by A.B. Keith), Vol. II, pp. 258-259.

merely for the duration of the occupation as a military manoeuvre. Certainly there appeared to be disparity among the earlier writers on the subject with Birkheimer suggesting that the title of the property passes to the occupant immediately on the commencement of occupation.⁵²⁷ However, during a belligerent occupation this should be regarded as a *de facto* possession of property rather than a *de jure* assumption of property entitlement. The distinction is significant as due to the nature of hostilities the occupant only acquires rights over property on the factual basis of military presence and substitution of authority as opposed to the acquisition of property rights derived from law. Once the conditions for occupation of military presence and substitution of authority are no longer present, the occupant's rights to use the property end.⁵²⁸

Attempts to alter the title of public immoveable property in military occupied territory have been generally masked by vertiginous legislative acts by the occupant. In the aftermath of World War II, the occupation of Manchuria by the Soviet forces saw the attempt of the Soviet Government to remove property of Japanese enterprises that had been situated there during the previous occupation of Manchuria by Japan.⁵²⁹ Interestingly the Soviet Government circumscribed as public in status both seized public and private immoveable property, in line with socialist doctrine. Clearly any

⁵²⁷ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey*, (New York, 1949) p. 179.

⁵²⁸ Contemporary writers espouse the elective position whereby the occupant's rights over property are limited to possessory rights. Schwarzenberger argues that the occupant "may not sell or destroy such property or alter its character, but must administer it in accordance with the rules of usufruct." Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: Volume II The Law of Armed Conflict*, (London Stevens & Sons Limited, 1968, p. 248. Gerson suggests that one of the most important qualifications on the belligerent occupant's use of public immoveable property is that the occupant "does not acquire title to the real property of the ousted sovereign." Allan Gerson, "Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute," *The American Journal of International Law*, Vol. 71, No. 4. (October 1977) pp. 725, 729. Graber contends that "title to immoveable property does not pass to the occupant but that the occupant may use the property during occupation." Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey*, (New York, 1949) p. 164. Oppenheim more specifically determines that the belligerent occupant may not alienate or sell "public enemy land and buildings." L. Oppenheim, *International Law, A Treatise Vol. II Disputes, War and Neutrality*, (Seventh Edition, Longmans, 1952) p. 397. Stone argues that the Hague Regulations serves "to prevent dealings with *iura in re aliena*, such as the interests of the enemy State as mortgagee of the land, which the occupant has no power to cancel or to transfer." Julius Stone, *Legal Controls of International Conflict, A Treatise on the Dynamics of Disputes and War Law*, (London, Stevens & Sons Limited, 1954) p.715. The common understanding of the status of immoveable property title amongst international writers is consonant with the ephemeral limitations of usufruct where the occupant enjoys restricted rights of use over the property whose title remains vested with the owner.

⁵²⁹ Daniel H. Lew, "Manchurian Booty and International Law," 40 *American Journal of International Law*, 584 (1946) pp. 584-591.

claim to the Manchurian public immoveable property was vested in China whose sovereignty over the territory was undisputed.⁵³⁰ However, in a move idiosyncratic of occupying forces, the Soviet Government argued that the property had been awarded as reparations to them under agreement reached at the Potsdam conference.⁵³¹ Incidentally, the Potsdam Declaration contained no such reference.⁵³² This nebulous assertion is but one example of an occupant's recourse to the law in an attempt to surreptitiously confer title over immoveable property that remains vested in the name of the deposed sovereign. Another such instance occurred during the German occupation of the Netherlands in World War II, when the Reich Commissioner issued a decree, deliberately altering domestic Dutch law to provide the Ministry of Finance with additional powers to alienate public immoveable property. This facilitated the sale of Dutch public real estate to German citizens and local sympathisers of the Dutch occupation.⁵³³ Where the Soviets failed to persuade the international community of the validity of their actions in attempting to transfer to Manchurian public immoveable property from the territory as reparations, the German occupiers provided a veneer of legitimacy by adjusting Dutch domestic law to achieve the same end. This resulted in the German occupiers alienating title that the occupation had not vested in them.

During the occupation of Northern Cyprus, Turkey as the belligerent occupant effecting control over the newly formed Turkish Republic of Northern Cyprus, introduced a constitutional measure to alter the title of immoveable property of displaced Greek Cypriots from private immoveable to state owned property. According to Article 159 of the Constitution of the Turkish Republic of Northern Cyprus:

⁵³⁰ At a League of Nations Resolution, on September 30th 1931, a representative from the Chinese government assured the safety of property belonging to Japanese nationals on Manchurian territory during the period of troop withdrawal from the territory. "League of Nations Assembly Report on the Sino-Japanese Dispute," *The American Journal of International Law*, Vol. 27, No. 3, Supplement Official Documents, (Jul., 1933), pp. 119, 123.

⁵³¹ Daniel H. Lew, "Manchurian Booty and International Law," *40 American Journal of International Law*, 584 (1946) pp. 588.

⁵³² In fact, the Union of Soviet Socialist Republics was not even a party to the treaty concluded between the United States, the National Government of the Republic of China, Great Britain and Japan. Moreover contrary to Soviet claims of title to Japanese property as war booty, the Potsdam Declaration provided that "Japan maintain such industries as will sustain her economy and permit the exaction of just reparations in kind, but not those that would enable her to re-arm for war." Proclamation Defining Terms for Japanese Surrender, Issued at Potsdam, July 26, 1945.

⁵³³ Gerhard Von Glahn, *The Occupation of Enemy Territory; A Commentary on the Law and Practice of Belligerent Occupation*, (The University of Minnesota Press, 1957) p. 178.

“All immoveable properties, buildings and installations which were found abandoned on 13th February, 1975 when the Turkish Federated State of Cyprus was proclaimed or which were considered by law as abandoned or not being owned after the abovementioned date, or which should have been in the possession or control of the public even though their ownership had not been determined...shall be the property of the Turkish Republic of Northern Cyprus notwithstanding the fact that they are not so registered in the records of the Land Registry Office records shall be amended accordingly.”⁵³⁴

As a constitutional provision, Article 159 offended against the inviolability of private property and the protections afforded to property of this character during a belligerent occupation under international humanitarian law. The alteration of the property’s title accelerated the impingement of the rights of the displaced occupied population. In *National Unity Party v. TRNC Assembly of the Republic* (2006), a question arose over the constitutionality of a new Law on Compensation, Exchange and Return of Immoveable Properties (2005) introduced by the TRNC as a mechanism of redress for the displaced Greek Cypriots, dispossessed of private immoveable property, in line with previous ECtHR rulings.⁵³⁵ The main opposition party argued that this new compensatory mechanism conflicted with Article 159 of the TRNC Constitution which provided for the assimilation of properties into the public portfolio.

In a radical and laudable landmark decision, the TRNC Constitutional Court held that private immoveable property cannot be appropriated by the invading belligerent and although there is support for the proposition that property may be temporarily used by the belligerent during hostilities for public purposes, this does not permit the occupant to “change the legal tie between absentees and their properties.”⁵³⁶ In arriving at this decision the Court relied on Article 46 of the Hague Regulations, which expressly states that “private property may not be confiscated”. The decision was also influenced by the academic writings of Oppenheim on the temporary use of private property and the writings of Eyal Benvenisti and Eyal Zamir on the non-alteration of property status during occupation.⁵³⁷ On one hand, this national judgement provided a

⁵³⁴ *National Unity Party (Ulusal Birlik Partisi) v. TRNC Assembly of the Republic* (KKTC Cumhuriyet Meclisi) ILDC 499 (TCC 2006) par F1.

⁵³⁵ *Ibid.*,

⁵³⁶ *ibid.*,

⁵³⁷ *ibid.*, at par 32. Eyal Benvenisti & Eyal Zamir, “Private Claims to Property Rights in the Future Israeli-Palestinian Settlement,” *American Journal of International Law*, (1995) Vol. 89, p. 295. “International law recognises the power of the occupant to take possession of, and to administer, the

refreshing example of how international law principles can succinctly delineate with local legislative considerations. However, despite the constitutionality of the domestic legislative provision being struck down for incompatibility with international law as *lex superior*, the TRNC Constitutional Court disappointingly defended the merit of Article 159 of the TRNC Constitution on the grounds that dispossessed Greek Cypriots had voluntarily moved from their properties. Moreover, the court noted that paragraph (4) of that article offered compensation to the displaced citizens whose title to immovable property was affected.⁵³⁸ It is commendable that the case complements the Hague Regulations on the alteration of properties' status as regards local legislative provisions; however the court's insistence on the integrity of the original constitutional measure is less than felicitous. A constitutional provision implemented by the belligerent occupant cannot be relied on under international law to alter the title of property belonging to an occupied population. The reasons submitted for the properties' abandonment is of no consequence as this does not impact upon the occupant's rights of temporary use and administration of property during the period of occupation. Regardless of how the occupant comes to be in possession of abandoned property, the title to the property never passes from the true owner and therefore the occupant cannot alter a title over which they do not exert legal control.

In the same manner that legislation may be manipulated in practice to alter property title during a belligerent occupation, the occupier may also resort to allocating rights over the property to foreign parties through contractual relationships that are synonymous with manipulation of the property's title. In the *Gulf of Suez Dispute*, (1977) the United States raised concerns over the Israeli grant of oil concessions to develop and exploit the Abu Rhodeis oil fields during her occupation of the Sinai. Previously, Egypt in her capacity as ruling sovereign had awarded production concessions over the disputed fields to private companies Amoca and the Egyptian General Petroleum Corporation.⁵³⁹ Under Egyptian law the granting of concessions

private property of absent individuals...the administration of the property does not sever the legal tie between absentees and their property. Thus the occupant cannot sell real property belonging to absentees."

⁵³⁸ *National Unity Party (Ulusal Birlik Partisi) v. TRNC Assembly of the Republic* (KKTC Cumhuriyet Meclisi) ILDC 499 (TCC 2006) par 68.

⁵³⁹ Brice M. Clagett; Thomas Johnson Jr. "May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?" *The American Journal of International Law*, Vol. 72, No.3. (Jul., 1978) pp. 558, 578.

over immovable state property required a legislative act.⁵⁴⁰ In a Department of State Memorandum, the United States argued that as a corollary, concessions awarded by Israel over the occupied oil resources must be facilitated by legislative change and as a result the concessions exceeded both the legislative restrictions of Article 43 and the usufructuary limitations of Article 55 of the Hague Regulations. Furthermore, Israel's grant of concessions undermined the specific prohibition over the occupant's right to grant concessions under occupation law, this being a function of sovereignty.⁵⁴¹

However, the US appraisal of the law on granting concessions appears to be somewhat inaccurate. The Memorandum states: "an occupant is not entitled to grant a commercial concession to exploit oil fields".⁵⁴² Clearly from the lineage of international jurisprudence, the occupant is at liberty to grant a plethora of legal rights to third parties over public immovable property including leases, licences and concessions. In *re Falck* the contract acquired to fell trees was engaged in with a private contractor and the belligerent occupant. In the *Lighthouse Case between France and Greece*, Judge Seferiadese illuminated the status of concessions made during a belligerent occupation when he eruditely stated:

"in my view, and in accordance with the generally accepted rules of international law which are confirmed by Article 55 of the Hague Convention, the occupying State, which has the administration and usufruct of public property in occupied territory, alone has the power to grant concessions capable of application whilst the occupation continues."⁵⁴³

Consequently, Judge Seferiadese surmised that restrictions placed on the belligerent occupant in granting concessions to third parties to administer immovable property in occupied territory would lead to the equivocal predicament where "article 55 would

⁵⁴⁰ Monroe Leigh, "United States: Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez," 16 *International Legal Materials*, (1977) p. 733, 747.

⁵⁴¹ Monroe Leigh, "United States: Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez," 16 *International Legal Materials*, (1977) p. 733, 747. Citing Von Glahn, the memorandum states "This reasoning appears to underlie the statement of one leading authority that "normally only the legitimate sovereign would seem to have the power to grant concessions.""

⁵⁴² Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez, 16 *International Legal Materials* (1977) 746-747.

⁵⁴³ *Lighthouses Case between France and Greece*, Permanent Court of International Justice, Ser. A./B., No. 62, 1934 at par 53.

have to be considered as laying down rules which flatly contradict one another.”⁵⁴⁴

Unsurprisingly Israel, in its responding memorandum to the US, was emphatic about the right of the belligerent occupant to grant concessions over public immoveable property.⁵⁴⁵ Certainly the occupant may grant concessions over immoveable property providing that these are consistent with the provisions of usufruct contained in Article 55 and that they exist only for the duration of the occupation. However it does not follow that all concessions should be considered consistent with Article 55. A concession is usually granted by a government to permit a private business to operate by contract on the property of another. In the *Lighthouses Case*, for example the terms of the concession provided that the company Collas & Michel maintain, manage and develop the system of lights on the coast of the Ottoman Empire. The company was mandated to collect lighthouse dues from which they received remuneration also reserved 50 per cent of the payments for the Ottoman Government.⁵⁴⁶ From the perspective of belligerent occupation, this complemented the nature of Article 55 by stipulating that the company maintain the property in place of the belligerent, whilst the belligerent occupant has symbiotically secured through the third party their duty to maintain the corpus of the property intact. Furthermore, profits from the immoveable property were secured back to the government for the benefit of the occupied population. Receipts used to improve the function of the lighthouses are consonant with the proviso in usufruct for the usufructuary to make improvements to the property.

In a contemporary setting however, the purpose of the concessions awarded by the Israeli government over oil fields in Sinai and the Gulf of Suez stands in marked contrast to this. Concessions to exploit immoveable oil resources from new oil fields were granted for commercial purposes, from which the profits reverted to the home economy of the Israeli government. Besides the egregious exploitation of oil resources substantially exceeding pre-war rates, the central deviation involves the misdirection of oil resource profits by the belligerent. Distinct from the *Lighthouse*

⁵⁴⁴ *Ibid.*, at par 52.

⁵⁴⁵ Israel: Ministry of Foreign Affairs Memorandum of Law on the Right to Develop New Oil Fields in Sinai and the Gulf of Suez, 17 *International Law Materials* 432 1978 437.

⁵⁴⁶ *Lighthouses Case between France and Greece*, Permanent Court of International Justice, Ser. A./B., No. 62, 1934 at par 8.

case, profits from the Sinai oil resources furnished the occupant's home economy at the expense of the occupied territory.⁵⁴⁷ Furthermore the occupant's undertaking to grant concessions to foreign corporations assisted the alteration of public immovable oil resources to private capital thereby affecting the status of the property's title, a measure beyond the comprehension of occupation law. By granting a concession over public immovable property to a private company that exceeds the terms of Article 55, the occupant is abusing the tool of concession to accelerate a shift in the property's title from a public to private characterisation.

2.3.1 Application to Iraq

The belligerent occupant has limited temporary rights of use over public immovable property such as real estate and public buildings under Article 55 of the Hague Regulations. Accordingly the belligerent occupant is restricted under the Hague Regulations from alienating immovable property seized during occupation and altering its status, for example from private to public property or vice versa. In past occupations belligerent occupants have attempted to alter the status of immovable property in the territory through alienation or through the introduction of a sweeping policy of agrarian reform such as the Soviets in Manchuria and Turkey in Northern Cyprus.

During the occupation of Iraq, many of the state owned enterprises were consolidated and new corporate entities were created. Coalition Provisional Authority Order Number 76 on the Consolidations of State Owned Enterprises provided that "upon the date that the completion certificate is submitted to the Governing Council and the Administrator, (or the Council of Ministers or its successor, as appropriate) the state-owned enterprise shall no longer have a separate legal identity and shall cease to exist."⁵⁴⁸ The consolidations were accompanied by a transformative policy to privatise state owned companies. The Coalition Provisional Authority appointed Minister of Oil and Minister of Finance of the Interim Governing Council supported the privatisation measures.

⁵⁴⁷ The oil wells supplied the Israeli home economy with half of their oil needs. *International Petroleum Encyclopedia* 84 (1970).

⁵⁴⁸ Coalition Provisional Authority Order Number 76 on the Consolidations of State Owned Enterprises, CPA/ORD/20 May 2004/76, section 4.

Foreign Investment Order 39 outlined the privatisation objectives of the occupying administration:

“*Acting* in a manner consistent with the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterised by sustainable economic growth through the *establishment of a dynamic private sector*, and the need to enact institutional and legal reforms to give it effect.”⁵⁴⁹

Although the Coalition Provisional Authority set the privatisation of state owned companies in motion, it stopped short of alienating public real property.⁵⁵⁰ Therefore is the phased implementation of a policy of alteration sufficient to be considered property alteration in violation of Article 55 of the Hague Regulations?

The United States in the international dispute with Israel over the allocation of concessions in the Gulf of Suez argued that the grant of oil concessions constituted an alteration of property title. Clearly there was no actual alienation of property or transfer of title deeds and the property remained Egyptian in all but name. However the practice provides an example of a creeping alteration of status where property is removed from the control of the occupied state in all but title. Of course the only difference between the legitimate award of concession over immoveable property by a belligerent to maintain the functioning of the property as required under the laws of usufruct and an award of concession to exploit the property and retain long term possession is the intent of the occupier.

The occupier cannot introduce legislation to alter the title of the property of the occupied population. This is evident from the remarkable ruling of the TRNC Constitutional Court in *National Unity Party*.⁵⁵¹ Can the belligerent occupant alter the title of one public Iraqi ministry by merging it with another public ministry? It is clear that the occupier cannot alter public to private property and vice versa. Moreover the occupier is prohibited from alienating the private property of one citizen to another

⁵⁴⁹ Coalition Provisional Authority Order Number 39, CPA/ORD/19 September 2003/39

⁵⁵⁰ Coalition Provisional Authority Order Number 76 on the Consolidations of State Owned Enterprises, CPA/ORD/20 May 2004/76, section 3. The gaining minister may, with the written approval of the Minister of Planning (or his delegee), and as provided by law, sell or otherwise dispose of any surplus assets, except real property and cultural property.

⁵⁵¹ *National Unity Party (Ulusal Birlik Partisi) v. TRNC Assembly of the Republic (KKTC Cumhuriyet Meclisi)* ILDC 499 (TCC 2006).

private citizen.⁵⁵² The difficulty in Iraq is the public designation of all commercial property and the alteration of property title from one public entity to another in preparation for privatisation. However drawing on the principles of usufruct and the duty to safeguard the capital of the property intact manifest in Article 55 of the Hague Regulations it is unlikely that the belligerent occupant can alter the status of public entities through conglomeration.

2.3.2 Soviet Expropriation of German Immoveable Property

During the occupation of the German Democratic Republic by the Soviet Military Administration in the aftermath of World War II, the Soviets orchestrated a sweeping alteration of private immoveable real property title to public nationalised property with the motivation of agrarian reform. Between 1945 and 1949, the Democratic Land Reform legislation provided for expropriation without compensation of private holdings exceeding one hundred hectares, which were then distributed amongst landless farmers, labourers, refugees and migrants in smaller units of five or less hectares. In total 7,112 estates exceeding one hundred hectares and a further 4,728 enterprises below one hundred hectares belonging to suspected war criminals and nationalist sympathisers were expropriated.⁵⁵³ In October 1949, the occupants confirmed the legal effectiveness of the land reform measures in Article 24 of the Constitution of the German Democratic Republic. This legal situation remained in place for over 40 years until the reunification of Germany in 1990. During the unification process, the German Democratic Republic and the Federal Republic of Germany addressed the outstanding property issues in a Joint Declaration on June 15th, 1990. The governments declared:

“Expropriations carried out on the basis of occupation law or the authority resulting from the occupational power (1945 until 1949) shall not be reversed. The Governments of the Soviet Union and the Democratic Republic see no possibility of reviewing the measures taken at that time.”⁵⁵⁴

The Joint Declaration was subsequently incorporated into the Unification Treaty and

⁵⁵² Scobbie, “Natural Resources and Belligerent Occupation, Mutation through Permanent Sovereignty”, in Bowen ed., *Human Rights, Self Determination and Political Change in the Occupied Palestinian Territory*, (The Hague, 1997) pp. 229-230.

⁵⁵³ *East German Expropriation Case*, Joint Constitutional Complaint, (26th October 2004), BverfG, 2 BvR 955/00, 1038/01; ILDC 66 (DE 2004) par. 13.

⁵⁵⁴ *Weidlich and Others v. Germany* applications 19048/91, 19049/91, 19342/92, 19549/92 and 18890/91. Section B, The Relevant Legal Texts.

the agreed retention of the property's public status obtained binding legal force. The Compensation Act, 1994 and the Equalisation Act, 1994 provided for compensation to those affected by the property expropriations in limited circumstances. In the German Federal Constitutional Court and subsequently the European Commission of Human Rights, heirs of the original property owners sought restitution of the property, on the grounds that changes to the Basic Law resulting from the Unification Treaty legalised the position of the expropriations.⁵⁵⁵ This they argued was illegal under international law and thus incompatible with the precedence of public international law over Basic Law in the German legal system. Although the cases centred on the status of property after the occupation when laws governing the properties status were implemented by Germany in her sovereign capacity, it is the courts assessment of title manipulated during occupation that is instructive.

In *East German Expropriation Case* (2004) the German Federal Constitutional Court assessed whether Germany had a duty to return immovable private property seized by the Soviets and altered to public immovable property during the occupation of the German Democratic Republic. The Court concluded that prolonged loss of possession can lead to the termination of the *de jure* property rights of the occupied population. Also distinguishing between the case of an unlawful occupation and a lawful occupation, the Court analysed instances where property title may be extinguished and subsequently altered. Firstly, assessing the case of prolonged loss of possession over immovable property the Court clarified:

“The right of ownership, in addition to the institutional guarantee, has an aspect directed to actual exercise of freedom in a period of time. A person who is excluded by a sovereign foreign power from disposing over his or her property in the long term, where this exclusion is legitimate under public international law, loses his or her legal position as owner. If the use of the property is excluded for a long period as the result of measures relating to it by a state power that is foreign but that has territorial jurisdiction, there is no connecting factor giving rise to the fundamental right to property in Article 14 of the Basic Law.”⁵⁵⁶

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *East German Expropriation Case*, Joint Constitutional Complaint, (26th October 2004), BverfG, 2 BvR 955/00, 1038/01; ILDC 66 (DE 2004) par. 74.

The Court distinctly insisted that the possession of property title is dependent on the continuous possession of property over a period of time. An excessive interruption of property rights owing to the existence on the ground of a prolonged belligerent occupation may permanently extinguish any original titular claims by the occupied population under domestic law.

Within the context of the Hague Regulations, there are no temporal limitations on the application of the articles. Article 42 of the Hague Regulations establishes the criteria for a belligerent occupation on the *de facto* basis of military presence and substitution of power.⁵⁵⁷ Although when the framers initially negotiated the terms of the Hague Regulations, short term occupations were the norm, the language of the Hague Regulations does not limit the application of occupation law when considering occupations of a longer duration. Besides offending against the private property protections housed in article 23(g) and article 46(2) of the Hague Regulations, sanctioned alteration of property title during prolonged occupation provides an incentive for the occupier to extend military activities to satisfy exploitative aims.⁵⁵⁸ Not only is an orchestrated prolonged belligerent occupation in contravention of the UN Charter mandate to maintain international peace and security, it also constricts the rights of the occupied population to self determination.⁵⁵⁹ In particular, a policy of

⁵⁵⁷ Article 42, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

⁵⁵⁸ Article 23(g), 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. "In addition to the prohibitions provided by special Conventions, it is especially forbidden....to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

Article 46(2), 1907 Hague Convention IV Respecting the Laws and Customs of War on Land. "Private property can not be confiscated."

⁵⁵⁹ Article 1, Charter of the United Nations. "The purposes of the United Nations are

- (1) to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
- (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

Iain Scobbie, "Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty" in Stephen Bower, Human Rights, *Self-Determination and Political Change in the Occupied Palestinian Territories* (Martinus Nijhoff Publishers, 1997) 250; Roberta Arnold, Noëlle N. R. Quéniévet, *International Humanitarian Law and Human Rights Law* (Martinus Nijhoff Publishers, 2008) 191.

indefinite prolonged occupation for the purpose of territorial aggrandisement may be more succinctly described as contemporary colonisation in occupation clothing. Furthermore the allocation of property to third parties in the intervening time frame may provide a myriad of inextricable problems at the end of occupation and, in addition, where immovable real property is concerned may amount to attempted annexation, where the third parties involved comprise nationals of the occupying State.⁵⁶⁰ Certainly on an equitable basis the long term disuse of property and corresponding extinction of property rights under belligerent occupation is to be distinguished from alternative legislative measures such as adverse possession during peacetime for reallocation of property rights. The former addresses a situation where the property owner is forcibly removed from his/her property by a hostile State and prevented from returning to enjoy the peaceful exercise of his/her property rights.⁵⁶¹ In addition to this, the opportunity to seek legal redress in the courts of the occupational authority are slim. This can be distinguished from long term non-use of property during peacetime where adverse possession operates as policy within the common law statute of limitations, to prevent claims arising over property during a long period of time when documentary evidence of title to the property may be lost.⁵⁶² More importantly, under these circumstances the property owner has recourse to the courts to defend their title to the property. Therefore dispossession of property rights during a belligerent occupation should be considered within the context of occupation law and in parallel with domestic provisions where appropriate.

Secondly, the court elaborated on a *jus ad bellum* difference that arises between the treatment of title during a legal and an illegal belligerent occupation. The Court stated:

“If a legal system such as the Soviet occupation regime, which comes into existence lawfully under public international law, breaks the connection between the owner and the property owned, then, independently of the

⁵⁶⁰ This has been a chief concern with the Israeli settlements in the Palestinian occupied territories.

⁵⁶¹ *East German Expropriation Case*, Joint Constitutional Complaint, (26th October 2004), BverfG, 2 BvR 955/00, 1038/01; ILDC 66 (DE 2004) par. 14. “The expropriated landowners were normally expelled from the district in which their land was situated. Frequently they had to leave their farms within a period of a few hours and were permitted to take only essential belongings with them. There were no judicial means of legal protection against the measures. Classification as a war criminal or active Nationalist Socialist was also subject to no judicial supervision.”

⁵⁶² J.C.W Wylie, *Irish Land Law*, (Third edition, LexisNexis Butterworths, 2004), p. 1079

question of the legality of the expropriation, the formal legal position of the owner ends when the expropriation occurs.”⁵⁶³

Notably the Court did not support this conclusion by reference to any authorities. However assuming *arguendo* that this is the case, then the belligerent occupant who lawfully assumes that position is at liberty to dispose of appropriated property, as the occupant acquires the untainted title of the dispossessed property holder. The courts reliance on the *jus ad bellum* argument and the permitted alteration of immoveable private property title is questionable when analysed under the rubric of occupation law. Appositely, the argument of “legal occupation” relied on to illustrate that the Soviet occupant was solely responsible for the alteration of property title during the occupation rather than the German government, inadvertently dismisses the *de facto* application of the Hague Regulations, which renders the dichotomy of legal and illegal occupations negligible. Ironically, it is usually the position of the illegal belligerent occupant to contend that they are not bound by the Hague Regulations. Benvenisti notes that “the law of occupation, like the law of war, applies equally to lawful and unlawful armies.”⁵⁶⁴ Similarly Feilchenfeld elaborating on controversies centred around the existence of an international war states, “it was never denied that Articles 42-56 applied if the existence of international war was admitted.”⁵⁶⁵

Consequently, the Court stated that the Hague Regulations did not apply to the Soviet occupation of Germany however it did not provide a rationale for this basis.⁵⁶⁶ Certainly in the wake of World War II it was comfortably accepted in Western circles that the Hague Regulations did not apply to the post war occupations.⁵⁶⁷ However this

⁵⁶³ *East German Expropriation Case*, Joint Constitutional Complaint, (26th October 2004), BverfG, 2 BvR 955/00, 1038/01; ILDC 66 (DE 2004) par. 75.

⁵⁶⁴ Eyal Benvenisti, *The International Law of Occupation*, (Princeton University Press, Second Printing, 2004), p. 69.

⁵⁶⁵ Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Monograph Series of the Carnegie Endowment for International Peace Division of International Law No. 6, 1942) p. 5. Likewise Stone adds that the “justness or morality of war in general or of the particular belligerent’s resort to war out of which the occupation arises, in particular, are irrelevant to the main objectives to which the law of which belligerent occupation is directed.” Julius Stone, *Legal Controls of International Conflict A Treatise on the Dynamics of Disputes and War Law*, (London Stevens & Sons Limited, 1954) p. 695.

⁵⁶⁶ *East German Expropriation Case*, Joint Constitutional Complaint, (26th October 2004), BverfG, 2 BvR 955/00, 1038/01; ILDC 66 (DE 2004) par. 64.

⁵⁶⁷ Kunz insisted that the occupation of Germany was “not a belligerent occupation in the sense of the Fourth Hague Convention” as it did had no precedent in modern history. Josef L. Kunz, “The Status of Occupied Germany under International Law: A Legal Dilemma,” *The Western Political Quarterly*, Vol. 3, No. 4, (Dec., 1950) pp. 538, 539; Eyal Benvenisti, *The International Law of Occupation*, (Princeton University Press, Second Printing, 2004), pp. 91-96; However Luan argued that the

was a dubious assertion stemming from the wealth of international literature written from the victors' perspective and it is surprising that the German Constitutional Court accepted this position without further analysis. Occupation under the Hague Regulations is a question of fact centering around the fulfillment of two main criteria: military presence and substitution of authority. Both conditions were satisfied in Soviet Occupied Germany and it is misleading to address the situation as otherwise. The rules of *jus in bello* operate independently of the criteria of *jus ad bellum*, the consideration of which singularly colours the occupant's treatment of property title during belligerent occupation. It is under this lens alone that questions of title must be assessed; it does not follow that a lawful occupation *jus ad bellum* will quash a legal title *jus in bello*.

Within the parameters of occupation law, the Soviet occupation authority could only requisition private immovable property under Article 52 of the Hague Regulations. Article 52 provides:

“Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.”⁵⁶⁸

However the forced removal of individuals from their immovable property to implement a policy of organised nationalisation is clearly beyond the narrow remit of requisition for ‘the needs of the army of occupation.’ Although Article 52 provides a mechanism for the requisition of private immovable property, there is consensus amongst international writers that the requisition is restricted to possessory rights only and does not extend to permitted alteration of title.⁵⁶⁹ Schwarzenberger argues, “of

application of the Fourth Hague Convention derived from a question of fact and was not dependent on the type of occupation and therefore the Hague Regulations did apply to the German occupation. Dr. Kurt V. Luan, “The Legal Status of Germany,” 45 *American Journal of International Law*, 267 (1951) p. 274.

⁵⁶⁸ Article 52(2), 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

⁵⁶⁹ Yoram Dinstein, “The International Law of Belligerent Occupation and Human Rights” *Israel Yearbook on Human Rights*, Volume 8, 1978, 134; Hans Kelsen, *Principles of Public International Law* (Holt, Rinehart and Winston, edited Robert W. Tucker, 1966) 143. Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff Publishers, 2009) 218-220; Jean Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law Volume 1, Rules* (Cambridge University Press, ICRC, 2007) 179-181.

immoveable property, a change in title would mean going too far. All that the Occupying Power really needs is possession.”⁵⁷⁰

2.3.3 Application to Iraq

The recent ruling in *East German Expropriation Case* highlights some interesting issues in relation to the alteration of property status such as the retention of the occupiers changes *post bellum*. Under the doctrine of *jus postliminium* the laws of the former sovereign are automatically revived at the end of occupation.⁵⁷¹ The principle is comprehensively detailed in relation to property in the Frederician Code (1761) where it states:

“The things which the enemy shall take from our subjects in time of war shall not be lost to them, if by negotiations, or the laws of war, they fall again into our power; for as it is supposed that they were unjustly taken by the enemy, those to whom they belonged must necessarily be entitled to redemand them by right of recovery or reprisal (*jure postliminii*).”⁵⁷²

By extension, property reverts back to its former status after the occupation and the immoveable property of the Iraqi State returns to its former status. Restitution under the doctrine of *postliminium* has the status of customary international law and applies to all States emerging from belligerent occupation.⁵⁷³ An obvious tension arises with the concept of transformative occupations and the doctrine of *postliminium* where

⁵⁷⁰ Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Volume II The Law of Armed Conflict*, (London, Stevens & Sons Limited, 1968) p. 276. Oppenheim concordantly states that “immoveable private enemy property may under no circumstances or conditions be appropriated by an invading belligerent. Should he confiscate and sell private land or buildings, the buyer would acquire no right whatever to the property.” L. Oppenheim, *International Law, A Treatise, Vol. II Disputes, War and Neutrality*, (Seventh edition, edited by H. Lauterpacht, Longmans, 1952) p.403. Within the remit of occupation law the only remaining avenue for the occupant to appropriate private immoveable property would be under the existing domestic legislative provisions of the occupied State, providing that Article 43 restrictions are observed. For example where domestic legislation might necessitate the public purchase of private property for the benefit of the public, such as the need to extend a school or build a public hospital. Von Glahn maintains that even within the Article 43 paradigm, “in no case may the occupant dispose of such immoveable property, even if the proceeds of a sale are to be handed over to the owners at the conclusion of the war.” Von Glahn, Gerhard, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, (The University of Minnesota Press, 1957) p. 186. Conversely, Jessup alludes to the possibility of expropriation under emergency domestic legislation providing that the occupant acts for the benefit of the community and not for his own enrichment. Philip C. Jessup, “A Belligerent Occupant’s Power over Property,” *The American Journal of International Law*, Vol. 38, No. 3. (Jul., 1944) pp. 457, 461.

⁵⁷¹ Ricardo Lazo, *Philippine Governance and the 1987 Constitution* (Rex, 2006) 220

⁵⁷² Prussia (Kingdom), Jean-Henri-Samuel Formey, Alexandre Auguste de Compagne, *The Frederician Code: A Body of law for the dominions of the King of Prussia, (founded on reason and the constitutions of the country) Volume I* (Edinburgh, Printed by A. Donaldson, J. Reid, MDCCLX1) p. 467, § 35

⁵⁷³ Ben Atkinson Wortley, *Expropriation in Public International Law* (University Press, 1959) p. 169.

permanent measures are enacted which cannot be revoked at the end of the occupation. The German Federal Constitutional Court found that there was no obligation to return private immovable property to its former owners in the *East German Expropriation Case* and in Iraq, although the conglomeration of commercial entities impacts on the public property of the State, other claims may arise in the form of employment related claims, pension benefits of employees and other commercial claims against the former entities after occupation.

The German Federal Court indicated incorrectly that the legality of an occupation *ius ad bellum* operates to justify independently the expropriation of property during occupation. However the US Military Tribunal at Nuremberg in *United States v List* [1948] illustrated the irrelevance of the legality of war for the purposes of applying occupation law:

“International law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in occupied territory...Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.”⁵⁷⁴

While there is some contention about the applicability of the laws of war to the occupation of Germany after World War II, there is no doubt about the application of the Hague and Geneva Conventions to the occupation of Iraq. Security Council Resolutions 1483 and 1511 bind the occupiers to their international humanitarian law obligations.⁵⁷⁵ Despite the transformative privatisation agenda of the Coalition Provisional Authority and the Interim Governing Council to open Iraq’s oil industry to foreign investors, the belligerent occupant is duly required to preserve the status of immovable public property intact under Article 55 of the Hague Regulations.

⁵⁷⁴ US Military Tribunal, Nuremberg, *In re List and Others (Hostages Trial)*, 19 February 1948, 15 AD 632, at 637.

⁵⁷⁵ S/RES/1483 (2003) par 5 and S/RES/1511 (2003) par 1.

Conclusion

This chapter highlighted some of the limitations facing the belligerent occupier in Iraq with regards to the oil production facilities in Iraq as public immoveable property and their treatment under Article 55 of the Hague Regulations.

The duty contained in Article 55 of the Hague Regulations presents an immediate tension in how to interpret the term usufruct which offers a competing set of rules in Roman and civil law. Roman law usufruct from the pre-classical period is considered a temporary *par dominii* and provides the occupier with broad rights of use over the immoveable property short of altering its character. The user could take the fruits and use the property but *praedial servitudes* ensured that the property owner's rights were upheld and the substance of the property was maintained intact.⁵⁷⁶ As such, in Roman law the rights of the usufructuary are ancillary to the property owner. Where Roman law provides for general rules of use it is preferable to the more nuanced application replete with contractual duties in the civil codes.

Under the Vienna Convention on the Law of Treaties 1969, the ordinary meaning is given to the terms of a treaty in accordance with its object and purpose.⁵⁷⁷ Fitzmaurice proposes that the general purpose, atmosphere and circumstances of the treaty may be taken into account when interpreting the object and purpose of the treaty.⁵⁷⁸ Consequently, the tenor of the Hague Regulations is prohibitory, placing restrictions on the belligerent occupant's authority during hostilities. The general construction of Roman law usufruct restricting the rights of the property user fits more succinctly with the Hague Regulations. Moreover the variety of civil codes to choose from would literally provide the belligerent occupant with a *carte blanche* in administering immoveable property.

Resolution 1483 required that the sale of petroleum and petroleum products be deposited into the Development Fund for Iraq but it did not account for the possibility

⁵⁷⁶ Herbert Felix Jolowicz, Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge University Press, 3rd edition, 1932) 269.

⁵⁷⁷ Article 31, Vienna Convention on the Law of Treaties 1969.

⁵⁷⁸ G. Fitzmaurice, "The Law and Procedure of the International Court of Justice Treaty Interpretation and Certain Other Treaty Points" (1951) 28 BYIL 1.

that billions of dollars in potential oil revenues would be siphoned from the oil reservoirs and smuggled from the territory. The International Advisory and Monitoring Board as an auditing body merely highlights the disparity in the audits but there is no inherent duty for the belligerent to safeguard the property under Security Council Resolution 1483. However the general rules of Roman law usufruct incorporated into Article 55 of the Hague Regulations provide a duty to safeguard the immovable property including the crude oil deposits of the occupied state. At the end of the occupation the corpus of the property must be restored to the owner and if the property has deteriorated through negligence the user must pay compensation.⁵⁷⁹

Appositely, there is no reference to privatisation in any of the United Nations Security Council resolutions pertaining to the conflict in Iraq. Moreover there is no licence to alter the status of public immovable property during occupation in the resolutions. Alternatively Resolution 1511 affirms the right of the Iraqi people to determine their own political future.⁵⁸⁰ The Coalition Provisional Authority Foreign Investment Order 39 cited the Secretary General's report where he indicated the need to develop Iraq from a centrally planned economy to a market economy through the "establishment of a dynamic private sector" as the basis for the creeping privatisation undertaken during the occupation.⁵⁸¹

In his report, the Secretary General indicated that the reforms under Resolution 1483 would be carried out by the UN "Special Representative, working in coordination with the Authority".⁵⁸² This did not include the possibility of reforms undertaken exclusively by the Coalition Provisional Authority but reforms based on collaboration between the Special Representative and the Coalition Provisional Authority. Furthermore he outlined that "a comprehensive policy enacting institutional and legal reforms will be necessary" but that the transformation "must be inclusive and command broad-based Iraqi political support."⁵⁸³ Although the Secretary General may interpret the resolutions of the Security Council it must be emphasised that the

⁵⁷⁹ James Crawford Ledlie, Rudolf Sohm, *The Institutes of Roman Law* (1923) 374-376

⁵⁸⁰ S/RES/1511 (2003)

⁵⁸¹ Coalition Provisional Authority Order Number 39, CPA/ORD/19 September 2003/39

⁵⁸² S/2003/715 par 83.

⁵⁸³ S/2003/715 par 90.

Secretary General has no independent law making authority.⁵⁸⁴

In its Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (2010), the International Court of Justice considered the legality of Kosovo's unilateral declaration of independence. Similar to Iraq, Resolution 1244 (1999) established an interim political framework agreement providing for a transformational self-government for Kosovo. However, Kosovo can be differentiated from Iraq in that Iraq constituted a belligerent occupation whereas Kosovo constituted a humanitarian international occupation operating under a broader mandate. However the ICJ, taking into consideration the "object and purpose" of Resolution 1244, determined that the resolution established an interim regime which "cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo".⁵⁸⁵ Moreover the object and purpose of the resolution was the implementation of an interim international territorial administration for humanitarian purposes and the re-establishment of public order as the Security Council had "expressed grave concern at the humanitarian crisis in and around Kosovo."⁵⁸⁶

The object and purpose of Resolution 1483 is the creation of an environment in which the Iraqi people can control their own political future and where the United Nations assumes a "vital role".⁵⁸⁷ Accordingly a Special Representative for Iraq was established who would have a coordinating role in organising the humanitarian and reconstruction activities in Iraq and who would coordinate with the Authority in assisting the Iraqi people.⁵⁸⁸ It is difficult to envisage how the consolidation of a functional oil industry comports with the objective to create an environment for the Iraqi people to determine their political future. Although the Coalition Provisional Authority consolidated public immovable property, the practice stopped short of alienation. In this regard the occupation of Iraq featured a "creeping privatisation".

⁵⁸⁴ Oscar Schachter, Christopher C. Joyner, *United Nations Legal Order, Volume 1*, (American Society of International Law, 1995) 249

⁵⁸⁵ International Court of Justice, Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (22 July 2010) p. 36 par. 99

⁵⁸⁶ International Court of Justice, Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (22 July 2010) p. 36 par. 98.

⁵⁸⁷ S/RES/1483 (2003) preamble.

⁵⁸⁸ S/RES/1483 (2003) par 8.

However it is evident from Article 55 of the Hague Regulations that permanent measures designed to alter the status of public immovable property are prohibited during belligerent occupations. The duty enshrined in Article 55 requires the belligerent occupant to maintain the functioning of the property as before occupation and limits rights to temporary use. The Coalition Provisional Authority Order Number 76 on the Consolidations of State Owned Enterprises operated to alter the status of public entities in Iraq the most prominent being the oil industry, an action which is prohibited under Article 55.⁵⁸⁹

The sweeping policy to privatise the Iraqi oil industry and other public entities for the benefit of the Iraq population during occupation is suspect as Iraqi law already provides for limited property alteration. Law Number 3 of 1960, Law of Granting Ownership of Governmental Lands and Buildings, outlines rules for the government to adhere to when distributing land to foreign governments, charities and communities.⁵⁹⁰ This illustrates the potential of the returning succeeding government to operate within the existing legislation and further questions the necessity of a sweeping policy of privatisation during a short-term occupation. Law Number 53 of 1976, Consolidation of State Land Categories, provides a mechanism to part share the ownership of farms *tapu* and *lazmah* tenures between private citizens and the State.⁵⁹¹ Under this framework, the private owner can freely alienate the allocated property. Law 87 of 1979, The Law of Real Estate Renting, charges rent at an estimated percentage of the property value set by government officials. Once set, the rate is fixed and does not take account of market values in line with socialist values.⁵⁹²

It is surprising that the capitalist free market model of economic reconstruction and privatisation was heralded as the solution to the transition of Iraq after the collapse of the Saddam regime as socialism does not in itself present a threat to international peace and security. Tunkin submits that socialist states promote the principles of self-determination, equality of nations and peaceful co-existence with other States.⁵⁹³ Contemporary theorists of socialist doctrine have emphasised the primacy of the

⁵⁸⁹ Gernot Biehler, *International Law in Practice: An Irish Perspective* (Thomson Roundhall, 2005) 10-48

⁵⁹⁰ Law Number 3 of 1960, Law of Granting Ownership of Governmental Lands and Buildings

⁵⁹¹ Law Number 53 of 1976, Consolidation of State Land Categories.

⁵⁹² Law 87 of 1979, The Law of Real Estate Renting.

⁵⁹³ Tunkin, *Theory of International Law* (London, 1974) p. 4.

international legal system stating:

“Contemporary international law is neither bourgeois nor socialist; it is a common human, general democratic normative system based on a common humanity. Its rules and standards based on the principles of the UN Charter express the balance of interests between individual states and the international community as a whole. It legalises many common human values.”⁵⁹⁴

These values strike a fundamental balance within public international law and which somewhat ironically for Iraq, place additional emphasis on the sovereignty of the state.⁵⁹⁵

⁵⁹⁴ Vereschetin and Mullerson, ‘The Primacy of International Law in World Politics’ in A. Carter and G Danilenko eds. *Perestroika and International Law* (1990) 7.

⁵⁹⁵ Shaw, *International Law* (Cambridge, 5th edition 2003) 35.

Chapter 3

Are there limitations within Article 43 of the Hague Regulations to Limit Permanent Changes by the Occupier to the Economic Structure of the Occupied State?

Introduction

The key transformative aspect of the occupation of Iraq directly affecting the future governance of oil resources and impacting oil policy was the shift towards privatisation in the economic model. This was a policy not only negotiated by the occupier with exiled Iraqis before the invasion of Iraq but was also a model incrementally supported by the international community during the Saddam era.⁵⁹⁶ In December 2003, the UK Foreign and Commonwealth Office forecasting international trends over a ten year period considered that political ideologies would cease to be divisive and destructive forces and determined that liberal democracy and the free market economic ideology would continue to spread.⁵⁹⁷ The economic free market model which promoted an influx of foreign investors to inject capital into Iraq's war torn economy would significantly impact on the oil sector as Iraq's primary resource and ripple across the satellite industries buttressing the oil sector, such as telecommunications, energy and banking.

The difficulty with planting the framework for this economic model during belligerent occupation is that the fledgling transitional and subsequent sovereign Iraqi governments are shackled to this new framework. Apart from the lack of experience that government officials have in steering a liberalised economy, there are very serious questions confronting the new Iraqi State about the suitability of contracting foreign workers into the oil sector where high levels of unemployment continue to affect the Iraqi population and where there is a wealth of educated Iraqis with experience of working in the hydrocarbon sector both inside and outside the

⁵⁹⁶ Subcommittee on Oil Policy, Oil and Energy Working Group, Future of Iraq Project, Draft for Consultation, Department of State, United States of America (15 February 2003). Unclassified Date/Case ID 22 Jun 2005 200304121, p. 6.

⁵⁹⁷ Foreign and Commonwealth Office, *UK International Priorities, A Strategy for the FCO* (December 2003) p. 14.

territory.⁵⁹⁸ Furthermore the scramble to negotiate contracts with foreign parties at the infant stage of the transitional process is open to both exploitation by powerful multinational oil corporations and corruption.

The United Nations Secretary General identified the economic deterioration during the Saddam regime coupled with the catastrophic effect of the invasion as the harbinger for transitioning Iraq from a centrally planned economy to a free market economy.⁵⁹⁹ His report highlighted the creation of a private sector as integral to the promotion of sustainable growth. The Secretary General submitted:

“A comprehensive policy enacting institutional and legal reforms will be necessary to establish a market-oriented environment that promotes integration with the global marketplace. Sustainable economic growth in Iraq will be feasible only through the establishment of a dynamic private sector, a real challenge for an economy dominated by the public sector and State-owned enterprises. Such a profound transformation of the economy will have far-reaching social implications; for the transition process to be successful, its goals and methods must be inclusive and command broad-based Iraqi political support.”⁶⁰⁰

This was a considered response to the UN Security Council Resolution 1483 request that the Special Representative in co-ordination with the CPA promote economic reconstruction and the conditions for sustainable development. The quixotic intent of the Secretary General to siphon Iraqi political support for the transformative measures was dramatically curtailed when the UN was forced to retreat from Iraqi territory owing to a violent explosion of hostilities. Notwithstanding, the economic transformation to privatisation was negotiated singularly by the belligerent occupant during renewed hostilities. By May 2004, the CPA had allocated \$4.8 billion from the Development Fund for Iraq for relief and reconstruction projects.⁶⁰¹ As the oil industry accounts for over 80 per cent of government revenues, it is the oil industry

⁵⁹⁸ Stuart W, Bowen, *Hard Lessons: The Iraq Reconstruction Experience*, Office of the Inspector General, (2009) 108

⁵⁹⁹ Report of the Secretary-General pursuant to paragraph 24 of the Security Council resolution 1483 (2003), S/2003/715, p. 16.

⁶⁰⁰ Report of the Secretary-General pursuant to paragraph 24 of the Security Council resolution 1483 (2003), S/2003/715, p. 18.

⁶⁰¹ United States General Accounting Office, Report to Congressional Committees, *Rebuilding Iraq, Resource, Security, Governance, Essential Services, and Oversight Issues*, GAO-04-902R (June 2004) p. 29.

that stood to be affected most by the privatisation model.⁶⁰² Dynamic private sector growth in reality pertained to dynamic growth in oil production with accelerated development set to increase to 6 million barrels per day (bbl/d) by 2017, twice the production capacity enjoyed in the 1970's when oil production peaked at 3.5 million bbl/d.⁶⁰³ Privatising the oil sector would improve performance and efficiency and result in increased oil production and revenues. However, the impact of lost revenue from public sector employees who feed their wages back into the local economy is incalculable and should be a critical factor in determining the suitability of privatising the natural resource industry. Certainly this is the underlying tenet when considering economic reform for the occupied population.

This section seeks to examine the legitimacy of the reforms and their compatibility with Article 43 of the Hague Regulations. Accordingly the section will examine (1) the temporary nature of Article 43, (2) limitations to altering the administrative structure, (3) maintaining the *status quo ante*, (4) institutional alteration, (5) legislation for the benefit of the occupied population and (6) benefitting the home economy.

3.1 Article 43 Limitations on Governance

Article 43 of the Hague Regulations regulates the administrative control of the belligerent occupant over the occupied territory. It provides:

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁶⁰⁴

Unfortunately the precise meaning of the English text was lost in translation from the original and authoritative French version. The French text provides:

“L’*autorité* du pouvoir légal ayant passé de fait entre les mains de l’occupant,

⁶⁰² Energy Information Administration, Country Analysis Briefs, Iraq. At www.eia.doe.gov (last visited 18 May 2010).

⁶⁰³ Energy Information Administration, Country Analysis Briefs, Iraq. At www.eia.doe.gov (last visited 18 May 2010); Lawrence Kumins, *Iraq Oil: Reserves, Production, and Potential Revenues*, CRS Report for Congress, Order Code RS21626 (April 24, 2006), CRS-5.

⁶⁰⁴ Article 43, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, *l'ordre et la vie publics* en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.”⁶⁰⁵ (italics added)

Foremost, it appears from the English translation that a narrow construction of Article 43 is warranted from the embedded duty to restore and ensure “public order and safety” while respecting unless absolutely prevented the laws in force in the country. The narrow construction of Article 43 would maintain as far as possible the existing administration in force. However a closer examination of the authoritative French text provides a broader navigation of the belligerent occupant’s administrative duties suggesting that the occupant has greater powers to alter the laws in force in the occupied State. There the corresponding duty to legislate for “*l'ordre*” in fact refers to the general security in the occupied territory while “*la vie publics*” translates to a more liberal duty to legislate for the civil life of the State including the social functions and ordinary transactions.⁶⁰⁶ This guarantee was motivated by the concerns of weaker States to the Hague Convention who feared that disdain and lack of administrative involvement by the larger belligerent States during occupation would impact negatively on the functioning of the occupied State.⁶⁰⁷ Seemingly, the English version had translated the security provision twice and omitted the more important duty to administer civil affairs. The exponential Article 43 duty to “restore” and “ensure” public order and civil life are mutually exclusive. Evidently the pellucid duty to “restore” the civil and public life of the occupied State is characterised by immediate reversion to the pre-war administrative mechanism, while the duty to “ensure” is a less quantifiable guarantee.⁶⁰⁸ Consequently where the occupant finds himself in the *rara avis* position of being unable to “restore” the administration of the territory he will be equally obliged to “ensure” as far as military necessity dictates, the public order and civil life in the occupied State.

⁶⁰⁵ Convention Concernant les Lois et Coutumes de la Guerre sur Terre, 1907, 205 Consolidated Treaty Series 277, 295 (C. Parry ed., 1980).

⁶⁰⁶ Doris Appel Graber, *The Development of the law of Belligerent Occupation 1863-1914, A Historical Survey* (New York, 1949) p. 123; Yoram Dinstein, *The International law of Belligerent Occupation* (Cambridge University Press, 2009) p. 91; Edmund H. Schwenk, “Legislative Power of the Military Occupant under Article 43, Hague Regulations” 54 Yale L.J. 393 1944-1945, p. 398; Marco Sassóli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers, EJIL (2005), Vol. 16 No. 4, 661-694, p. 663.

⁶⁰⁷ Eyal Benvenisti, *The International law of Occupation* (Princeton University Press, 2nd edition 2004) p. 10.

⁶⁰⁸ Edmund H. Schwenk, “Legislative Power of the Military Occupant under Article 43, Hague Regulations” 54 Yale L.J. 393 1944-1945, p. 398.

Today the article has been hijacked by the powerful belligerents it was designed to protect against and has been used as a catalyst to introduce wide ranging reforms in occupied territory that fall short of actual annexation.⁶⁰⁹ The most contentious facet is the extent to which an occupant can justify extensive institutional change on the grounds of humanitarianism, public order and military necessity.⁶¹⁰ This section seeks to define the extent to which the occupier can legitimately alter the laws of occupied territory, in particular the economic laws and system of the occupied State.

3.1.1 The Temporary Nature of Article 43 of the Hague Regulations

The temporary nature of Article 43 is consummate in the occupier's duty to 'respect the laws in force in the country' where the laws of the territory remain in force subject to limited alteration for the return of the deposed or exiled government. Article 43 of the Hague Regulations follows on from the established *de facto* occupational status of territory in Article 42 where "the authority of the legitimate power" passes in fact into the hands of the occupying power, suggesting that the administrative obligation on the invading army is limited to the duration of time that the authority is 'established and can be exercised'.⁶¹¹ Interestingly, an early version of Article 3 of the Brussels Code (1874), submitted by the Russian delegate Jomini, contended that the belligerent occupant "maintain the laws which were in force in the country in peace time, and should not modify or suspend them except when absolutely necessary and only for the *duration of the occupation*"⁶¹² (emphasis added). During the negotiations, the direct reference to the temporary nature of the administration was abandoned. However in *Republic v. Ralski* (1922) the Polish Supreme Court determined that the occupant may temporarily exercise *de facto* power and exercise public power in the occupied

⁶⁰⁹ Allan Gerson, *Israel, the West Bank and International Law*, (Frank Cass and Co. Ltd., 1978) p. 7; Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press, 1993) p. 46.

⁶¹⁰ Allan Gerson, "War Conquered Territory, and Military Occupation in the Contemporary Legal System" 18 *Harv. Int'l. L. J.* 525 1977, p. 535.

⁶¹¹ Article 42, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

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

⁶¹² Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863 – 1914, A Historical Survey* (New York, 1949) p. 121.

territory on the basis of Article 42 and Article 43 of the Hague Regulations.⁶¹³ Accordingly, occupational ordinances as security measures are valid for the duration of the occupation only. However it is up to the discretion of the returning sovereign whether the laws promulgated by the occupying administration are to remain in place. Generally, the returning sovereign respects only laws that accord with international law and positive measures implemented for the benefit of the occupied population.⁶¹⁴ For example in *Litsenburg v. Rogowska* (1953), the District Court of the Hague ruled that marriage legislation implemented by the German Occupation Authorities in Poland was invalid after the occupation as this was *ultra vires* an international convention on conflicts of law concerning marriage.⁶¹⁵ There is support for the contention that only the measures of a legitimate *jus ad bellum* occupational administration will be given legal effect after the war by the returning sovereign provided that the measures conform with international law *jus in bello*.⁶¹⁶ However the underlying illegality of the *causus belli* conflates the fundamental tenets of Article 42 and Article 43 of the Hague rules which stress the *de facto* relationship between the occupier and the occupied territory.

Ordinances legitimately introduced to ameliorate security concerns by the belligerent occupant may give rise to private rights but these are extinguished on the conclusion of the occupation.⁶¹⁷ Notably the prevailing case law is idiosyncratic of penal laws with case law on the effect of transition on economic laws being paltry. In *re A* (1945), the Greek Criminal Court of Heraklion found that an amnesty granted to fugitives in occupied Greece for security purposes by the German administration gave rise to a temporary right of immunity for the fugitives but was extinguished on the cessation of occupation. Interestingly, the United States Court of Appeals, as an organ of occupation in occupied Germany, ruled that convictions by an American Military

⁶¹³ *Republic v. Ralski*, Poland, Supreme Court, Second Division, (16 May, 1922), Case No. 322, p. 457. Annual Digest of Public International Law Cases Years 1919 to 1922, (Longmans, Green & Co., London, New York, Toronto, 1932).

⁶¹⁴ *In re G. Greece*, Criminal Court of Heraklion (Crete) Judgment No. 107 of 1945, Case No. 151, p. 440. Annual Digest and Reports of Public International Law Cases Years 1943-1945 (London, Butterworth & Co. (Publishers), Ltd, 1949).

⁶¹⁵ *Litsenburg v. Rogowska*, Holland, District Court of the Hague, June 30, 1953, p. 654, International Law Reports, Year 1953, (London Butterworth & Co. (Publishers) Ltd., 1957)

⁶¹⁶ *Fattor v. Ministero Finanze*, Italy, Council of State, July 13, 1952, Case No. 134, p. 611-613, International Law Reports Year 1952, (London Butterworth & Co. (Publishers), Ltd. 1957)

⁶¹⁷ Nisuke Ando, *Surrender, Occupation and Private Property in International Law, An Evaluation of US Practice in Japan* (Clarendon Press, Oxford, 1991) 36.

Tribunal were not convictions obtained “in Germany” *per se* and thus the accused could be tried in German courts as a first time offender.⁶¹⁸ In Greece the ordinances of the German occupation authorities automatically became invalid after the recovery of sovereignty and the execution of penal sentences ceased to operate.⁶¹⁹

Fundamentally, within the framework of occupation laws there is a divergence between the permanent domestic laws in force in the territory and the supplementary penal, economic and social temporary measures enacted during occupation. From a policy perspective it is ultimately the sovereign who determines how resources are to be used in administering the territory.⁶²⁰ Therefore any expenditure mandated by the occupational authorities can be suspended on the sovereign’s resumption of power *post bellum* highlighting the temporary intention of the military orders.

The belligerent occupant may permanently alter certain legislation provided that this is done with the best interests of the occupied population in mind. In *Procurator v. X (Incest Case)* (1944), the German occupation authorities in Holland created a new Article in the Dutch Criminal Code to punish incest.⁶²¹ The District Court of Almelo found that the decree was valid as an ‘extension of the penal provisions against infractions of public morals.’⁶²² As a corollary, supplemental legislation introduced into occupied territory that does not alter the existing laws of the State and is introduced for the public good may have a permanent effect. In the *X Case*, the legislation was a justifiable response to a lacuna in the criminal law of the occupied State. Elaborating on the legislative role of the occupant, the Court of Appeal of Thrace adopted a facile reading of Article 43 outlining that the occupant “is not only entitled but also compelled to abrogate the laws in force in the country and replace

⁶¹⁸ *United States High Commissioner for Germany v. Migo and Another*, Germany (United States Zone of Occupation), United States Court of Appeals, (October 23, 1951), Case 187, International Law Reports, Year 1951, (London, Butterworth & Co. (Publishers), Ltd. 1957)

⁶¹⁹ *Criminal Files (Greece) Case*, Greece, Tribunal of First Instance of Thebes, 1951, Case No. 195, p. 629, International Law Reports, Year 1951, (London Butterworth & Co. (Publishers), Ltd. 1957)

⁶²⁰ *Centrale Onderlinge Insurance Company v. State of the Netherlands*, Holland, District Court of the Hague, April 2, 1952, International Law Reports Year 1952, London Butterworth & Co. (Publishers), Ltd. 1957, Case 129, p. 600 – 601.

⁶²¹ *Procurator v. X (Incest Case)*, Holland, District Court, Almelo, December 5, 1944, Case No. 154 p. 366 Annual Digest and Reports of Public International Law Cases Year 1946, (London Butterworth & Co. (Publishers), Ltd., 1951)

⁶²² *Ibid.*, at p. 154.

them by new laws promulgated by his competent organs” to ensure public order.⁶²³ The returning sovereign must respect new laws in conformity with public international law principles passed during belligerent occupation.⁶²⁴

However excessive reforming and implementation of new legislative measures would result in the parlous consequence of instituting of an entirely new and regenerated legal system. In *B. v. T.* (1949), the Polish Supreme Court addressed the legality of immovable property transfers made in occupied Poland without the formal legal notarial requirement.⁶²⁵ While holding such contracts to be valid to protect citizens’ acquisition of property, the Supreme Court noted that the Hague Regulations did not permit the German Reich to introduce its own or a new legal system into the occupied territory.⁶²⁶ In *re Will of Józef K.* (1949) a similar case involving the validity of a will executed without a notary, the Polish Supreme Court restated the illegality of introducing a new legal system into occupied territory and noted that the ordinances “intruded deeply into the private domain of the individual”.⁶²⁷

The belligerent occupant cannot substitute its legal system in place of the legal system of the occupied State as this would amount to *de facto* annexation. In this respect, aside from the extent of the licence to legislate, the temporary nature of the ordinance measure is paramount. In *re Policeman Vollema* (1947) the Dutch Special Court of Cassation found that a German ordinance introduced in occupied Holland, which subordinated the Netherlands police to the German police, exceeded the limits of international humanitarian law.⁶²⁸ Analogously during the occupation of Greece, the Bulgarian administration introduced their civil, commercial and penal legislation into the region, abolished the Greek courts and replaced them with Bulgarian courts that

⁶²³ *L. v. N. (Bulgarian Occupation of Greece)*, Greece, Court of Appeal of Thrace, Judgement No. 21 of 1947, Case No. 110, p. 242, Annual Digest and Reports of Public International Law Cases Year 1947, (London Butterworth & Co. (Publishers), Ltd., 1951)

⁶²⁴ *Ibid.*, at p. 243.

⁶²⁵ *B. v. T.* (March 19, 1949) Poland Supreme Court, International Law Reports 1957, London Butterworths 1961, p. 962.

⁶²⁶ *Ibid.*, at p. 964.

⁶²⁷ In *re Will of Józef K.* (May 21, 1949) Poland Supreme Court, International Law Reports 1957, London Butterworths 1961, pp. 967-968.

⁶²⁸ In *re Policeman Vollema* (January 20, 1947), Holland, Special Court of Cassation, Case No. 116, Annual Digest and Reports of Public International Law Cases Year 1947 (London Butterworth & Co. (Publishers), Ltd., 1951) p. 258

applied Bulgarian legal procedure and substantive law.⁶²⁹ In *re P. (Komotini)* (1948), the Greek Court of First Instance indicated that the provisional administration of justice during the Belgian occupation of Greece should have been executed according to Greek law and not Bulgarian law.⁶³⁰ In *Attorney-General for Israel v. Sylvester* (1948), the Supreme Court of Israel observed that the laws in force in occupied Jerusalem remained valid and Israeli law was supplementary. Lamentably, the court did not expand on the dubious content of Ordinance No. 29 of 1948 providing that “the law of the State of Israel shall be applicable in the occupied territory.”⁶³¹ The customary international law duty to ‘respect unless absolutely prevented the laws in force in the territory’ and the apportioning of Israeli law to the occupied territory is *reductio ad absurdum*, amounting to the annexation of territory as distinct from temporary occupation. Correspondingly, during the German occupation of Alsace-Lorraine, the German occupying authorities established tribunals applying German law. In *Z. v. K.* (1951), the French Court of Appeal found that a divorce pronounced during the occupation under German civil law, although “not perfect in law” had brought the marriage to an end.⁶³²

3.1.2 *Application to Iraq*

The authority granted under Article 43 of the Hague Regulations is *de facto* authority and is established when the Article 42 conditions of military presence and substitution of authority are fulfilled.⁶³³ Security Council Resolution 1472 (2003) identified the forces in Iraq as occupying powers and directed them to comply with their obligations under the Fourth Geneva Convention:

“Noting that under the provisions of Article 55 of the Fourth Geneva Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949), to the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical

⁶²⁹ In *re P. (Komotini Case)* (Judgement No. 67 of 1948), Greece, Court of First Instance of Rhodope, Case No. 187, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd., 1953) p. 566.

⁶³⁰ *Ibid.*, at p. 566.

⁶³¹ *Attorney-General for Israel v. Sylvester* (February 8, 1949), Israel District of Jerusalem (September 8, 1948), Supreme Court, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd., 1953) Case No. 190, p. 573

⁶³² *Z. v. K.* (June 12, 1951) France Court of Appeal of Colmar, Case No. 183, International Law Reports Year 1951, (London, Butterworth & Co. (Publishers), Ltd., 1957) p. 608.

⁶³³ Article 42, Hague Convention IV and Regulations 1907. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.”⁶³⁴

The reference to Article 55 of the Fourth Geneva Convention put to rest questions about the status of the forces as ‘liberators’ operating outside the confines of occupation law during the early stages of the hostilities.⁶³⁵ Article 55 comes within the bracket of Section III of the Fourth Geneva Convention that pertains to the protection of persons in occupied territory. Security Council Resolution 1483 confirmed the position of the Coalition Provisional Authority as the *de facto* occupying administration in Iraq. Resolution 1483 states:

“Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognising the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the Authority)”.⁶³⁶

The letter from the Coalition to the Security Council predates the resolution by two weeks indicating firstly that the occupation by the Coalition forces was merely confirmed by Security Council Resolution 1483 and secondly that the CPA already controlled Iraq and was subject therefore to the Hague Regulations on the *de facto* basis of that control. The letter addressed to the Security Council from the United States, United Kingdom and the Coalition partners supports this position and finds that the Coalition will “exercise powers of government temporarily” in line with “their obligations under international law” although there is no specific mention of the word “occupation” in the letter.⁶³⁷

The temporary nature of the occupation is evident from the letter to the Security Council and the recognition by Resolution 1483 of the Coalition Provisional Authority as “occupying powers”.⁶³⁸ It is further evidenced in Coalition Provisional

⁶³⁴ S/RES/1472 (2003)

⁶³⁵ Eddie Holt, When the Saints go Marching In, *The Irish Times* (1 March 2003)

⁶³⁶ S/RES/1483 (2003)

⁶³⁷ S/2003/538. Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council.

⁶³⁸ S/RES/1483 (2003).

Authority Regulation Number 1 outlining the powers allocated to the CPA:

- 1) “*The CPA shall exercise powers of government temporarily* in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.” (emphasis added).⁶³⁹

Part 2 of the Regulation finds that the CPA is vested with authority under UN Security Council Resolutions and the laws of war:

- 2) “The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.”⁶⁴⁰

However Security Council Resolutions 1472 and 1483 merely acknowledge the existence of an already operational occupying force under the laws of occupation and does not specifically grant additional authority. Consequently, the authority of the CPA and other actors in Iraq is seriously curtailed by the requirement under Resolution 1472 and 1483 that all states concerned comply with their obligations under the Geneva Conventions of 1949 and the Hague Regulations of 1907.⁶⁴¹

The letter to the Security Council from the United States and the United Kingdom stated that in providing security for the “provisional administration of Iraq” the Coalition would be committed to:

“assuming immediate control of Iraqi institutions responsible for military and security matters and providing, as appropriate, for the demilitarisation, demobilisation, control, command, reformation, disestablishment, or reorganisation of those institutions so that they no longer pose a threat to the Iraqi people or international peace and security but will be capable of defending Iraq’s sovereignty and territorial integrity.”⁶⁴²

⁶³⁹ Coalition Provisional Authority Regulation Number 1, CPA/REG/16 May 2003.

⁶⁴⁰ *Ibid.*

⁶⁴¹ S/RES/1472 (2003) par 8, S/RES/1483 (2003) par 5.

⁶⁴² S/2003/538

There is an immediate tension in the letter between the acknowledgement that the government is temporary and the obvious intent to permanently reorganise Iraq's institutions. While the belligerent occupant may abrogate penal laws in force in the occupied state, for example providing amnesty to fugitives on the grounds of military necessity, intrusions into the civil laws of the State are less feasible. The introduction of an ordinance during occupation requiring a notary for property transfers is one such example of measures falling outside Article 43.

3.1.3 Prolonged Occupation

Where the occupied population is disenfranchised for a period of time spanning decades, there is academic consensus that some measure of territorial transformation is permissible but only for the benefit of the occupied population.⁶⁴³ Prolonged occupations are a modern phenomenon stemming from the Cold War era. After World War II, Soviet forces occupied eastern Germany until the fall of the Berlin Wall in 1989. Consonantly, Turkish forces have occupied Northern Cyprus for over 30 years, the Palestinian territories occupied by the Israeli military for over 40 years while Moroccan troops have occupied the Western Sahara for almost 40 years. These generational occupations have made no meaningful inroads towards pragmatic reconciliation and the international community remains in political deadlock in some cases and political apathy in others. However, the extent of territorial transformation and the legitimacy of transformation of prolonged occupied territories is debatable. Article 43 of the Hague Regulations does not discriminate between types of occupations holding the administrative restrictions relative to the *de facto* authority of the occupying army.

When the Hague Regulations were written short term occupations were the norm, with de Watteville magniloquently expressing his dissatisfaction in 1921 with an occupation of a civilised country spanning more than four years, highlighting in particular the detrimental impact on the economy of the occupied territory.⁶⁴⁴

⁶⁴³ Doris Appel Graber, *The Development of the Law of Belligerent Occupation, 1863-1914 A Historical Survey* (New York, 1949) p. 113.

⁶⁴⁴ H. de Watteville, "The Military Administration of Occupied Territory in Time of War" *Transactions of the Grotius Society*, Vol 7, Problems of Peace and War, Papers Read before the Society in the Year 1921, (1921) 133, 134, 146.

Notwithstanding, law as a “living organism” must respond to contemporaneous societal conditions especially in light of the Fourth Geneva Convention.⁶⁴⁵ Prior to the UN Charter, prolonged occupation of territory, particularly in the case of *deballatio* would give way to and be more meaningfully characterised as territorial annexation quelling the legal limbo of contemporary inveterate occupations.⁶⁴⁶ Instead long-term occupations today offend against the principle of sovereignty implicit in the UN Charter.

Writing in 1872, Leoning proposed that the length of the occupation influenced the level of authority the occupant exerted over the occupied territory.⁶⁴⁷ In longer occupations, the occupier would look beyond military needs and account for the needs of the occupied population. Accordingly the *Manuel de Droit International à l’Usage des Officiers de l’Armée de Terre* (1893) recommended that the occupant establish new courts in cases of prolonged occupation where the domestic courts of the occupied territory were not operating.⁶⁴⁸ Westlake suggests that the “sternest interpretation of the licence given by necessity” operates to draw operations to a swift close.⁶⁴⁹ By the same margins, those importunate and protracted operations must deviate from the strict adherence to the military necessity principle to corporeal humanitarian principles. The idea that prolonged occupations may give additional legislative powers to the occupant for the benefit of the population garnered support after the World War I occupations. Commenting on the German occupation of Belgium in World War 1, Leurquin proposed:

“When the occupation is prolonged and when owing to the war the economic and social position of the occupied country underscores profound changes, it is perfectly evident that new legislative measures are essential sooner or later.”⁶⁵⁰

⁶⁴⁵ Yoram Dinstein, “Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding” HPCR Occasional Paper Series (Fall 2004) p. 8. Article at <http://www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf>

⁶⁴⁶ Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press, 1993) 92.

⁶⁴⁷ Doris Appel Graber, *The Development of the Law of Belligerent Occupation, 1863-1914 A Historical Survey* (New York, 1949) p. 113.

⁶⁴⁸ *Ibid.*, at p. 140.

⁶⁴⁹ John Westlake, *Chapters on the Principles of International Law* (Cambridge University Press, 1894) p. 266.

⁶⁵⁰ Shwenk Edmund H., “Legislative Power of the Military Occupant under Article 43 Hague Regulations,” *Yale Law Journal* 54, 2 (1944-1945) 393-416, p. 399

Underpinning Leurquin's proposed transformation is the manifestly altered social and economic position of the occupied territory. In this respect, *summa jus saepe summa injuria* and to protect the day to day functioning of the occupied State the occupier is forced to respond with transformative measures.⁶⁵¹ By analogy it is also perfectly reasonable to deduce that during a short-term occupation where the returning sovereign is in sight of resuming authority, transformative measures beyond maintenance of civil life and security are *ultra vires* Article 43. However if in the exceptional event that social and economic circumstances alter drastically during a shorter occupation, the belligerent would have a duty to maintain the effective functioning of the territory be it by extraneous transformative measures, for example in the event of a flood destroying the agricultural produce of an occupied territory where agriculture is the primary export. Accordingly this may include a need to make permanent changes in the occupied State for the verdure of the economy or government.⁶⁵²

In *A. v. Oslo Sparebank (The Crown Intervening)* (1956), the Norwegian Supreme Court questioned the compatibility with Article 43 of an occupation decree which provided for the payment of maintenance to illegitimate children of "Aryan" stock, where the decree was ancillary to domestic law and not issued for security purposes.⁶⁵³ Gundersen J. found that instances may occur during "a long-drawn-out occupation" that may require the occupying power to spend resources outside the framework of the peacetime budget, to protect public order and civil life. This collateral expenditure was predicated on, and necessitated by, the extended nature of the occupation and therefore was in accordance with Article 43, subject to the proviso that the laws in the country were, as far as possible, respected. Interestingly the argument was rejected by the minority opinion of Kruse-Jensen J. who rigidly stuck to the substratum of Article 43 in his reasoning that where national legislation already existed the occupant could not effect any alteration without coming into conflict with international law.

⁶⁵¹ The strictest law often makes for the greatest injustice.

⁶⁵² Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967" *The American Journal of International Law*, Vol 84, No. 1 (Jan., 1990) 44, p. 53.

⁶⁵³ *A. v. Oslo Sparebank (The Crown Intervening)*, (January 14, 1956) Norway Supreme Court, *International Law Reports Year 1956*, (London Butterworth & Co. (Publishers) Ltd. 1960) p. 791.

In *Christian Society for the Holy Places v. Minister of Defence* (1972), the Israeli High Court of Justice found that an amendment to the Jordanian Labour Act of 1960 where it was necessary to appoint an arbitration council to bridge a lacuna in the legislation, was imperative where the local law did not enable the military government to fulfil its duties to the local inhabitants.⁶⁵⁴ The occupier had amended the text to give effect to the Act so that workers and employees could appoint their own representatives in the event of an industrial dispute and if not the military officer could appoint representatives in their place. Deputy President Sussman commented *obiter dictum*, “life does not stand still, and no Government, whether of an Occupant or anyone else, fulfils its duty to the population as it should if it freezes the legislative situation and refrains from adapting it to the needs of time.”⁶⁵⁵ Considering the position of the occupied State anachronistically the weight of Article 43 must balance on whether the occupying power was motivated by self-interest or in the interests of the occupied population, a principle which is undoubtedly open to abuse.⁶⁵⁶

3.1.4 Application to Iraq

There is a growing consensus that the laws of belligerent occupation may be somewhat modified to serve the interests of the occupied population during prolonged terms of occupation. However if as Leoning suggests, the length of the occupation influences the level of authority the occupant enjoys, then the converse holds true for Iraq and legislative change should be marginal. The case for permitting legislative alteration beyond the *status quo* limitations of the Hague Regulations even during prolonged occupation is contentious and the policy in favour of this does not easily transport to justify occupations of shorter duration. In long term occupations, such as the Israeli occupation of the Palestinian territories, the occupied population have recourse to the courts and judicial review to challenge transformative measures. Under this framework the courts can identify if the measure is necessarily due to the freezing of the legislative situation over a period of years as in *Christian Society for Holy Places* or an arbitrary measure offending against the Hague Regulations.

⁶⁵⁴ *Christian Society for the Holy Places v. Minister of Defence and Others*, (14 March 1972) Israel Supreme Court sitting as the High Court of Justice, International Law Reports, Volume 52, (Cambridge Grotius Publications Limited, 1979) p.512

⁶⁵⁵ *Ibid.*, at p.515

⁶⁵⁶ *ibid.*

A feature of prolonged occupations is the accompanying political deadlock between the belligerent occupant and the occupied population concerning the return of sovereignty to the occupied population as evidenced by Israel and the Palestinian Authority. However, it was clear from the beginning of the hostilities in 2003 that the occupation of Iraq would be short-lived. In their letter to the Security Council the United States and the United Kingdom underscored the urgency in facilitating a transition of authority back to the Iraqi people.

“The United States, the United Kingdom and Coalition partners recognise the urgent need to create an environment in which the Iraqi people may freely determine their own political future. To this end, the United States, the United Kingdom and Coalition partners are facilitating the efforts of the Iraqi people to take the first steps towards forming a representative government, based on the rule of law.”⁶⁵⁷

Furthermore Security Council Resolution 1511 (2003) provided for a quick return of authority to the Iraq people:

“*Underscoring* that the sovereignty of Iraq resides in the State of Iraq, *reaffirming* the right of the Iraqi people freely to determine their own political future and control their own natural resources, *reiterating* its resolve that the day when Iraqis govern themselves must come quickly.”⁶⁵⁸

The features of prolonged occupations that in some cases require the occupier to exceed the *status quo ante* limitations of Article 43 for the benefit of the occupied population are not present in the occupation of Iraq and it is difficult to justify alterations on this basis.

3.2 Is the Belligerent Occupant Prevented from Using Economic Resources to Alter the Administrative Structure of the Territory?

The transitional phase of Iraq *post bellum* saw the adoption of a new Constitution of Iraq, which radically altered the territorial composition of Iraq from a centrally planned socialist State to a new federal republic. Article 1, section 1 of the Constitution of Iraq (2005) states:

⁶⁵⁷ S/2003/538.

⁶⁵⁸ S/RES/1511 (2003).

“The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq.”⁶⁵⁹

The State is divided up into regions and governorates with each exercising a degree of autonomy. To date Kurdistan is the only region operating independently of the central government with the Basra region failing to gather the requisite signatures to carry a referendum in 2009.⁶⁶⁰ Notwithstanding, political tensions have flared over the control and governance of Kurdistan’s vast oil reserves and the equitable distribution of those oil revenues to the Iraqi population *per capita* since 2005. However prior to the adoption of the new Constitution, a series of measures by the US and UK-led occupying administration buttressed the dominance of the Kurdistan region and provided for the independence of complicit Kurdistan officials from the central government in Iraq. In the Management Letter on Internal Controls, the Project and Contracting office to the KMPG, responsible for auditing expenditure from the Development Fund for Iraq (DFI), contended that the \$1.4 billion dollar disbursement to the Kurdish Regional Government (KRG) towards the end of the belligerent occupation was for “critical KRG projects of the kind previously financed pursuant to the Oil for Food program.”⁶⁶¹ In Erbil, the KPMG auditors for the DFI were denied access by the KRG to their accounting records, leaving \$1.4 billion dollars of transferred money in June 2004 unaccounted for.⁶⁶² Despite indications from the KRG that no money was disbursed from the \$1.4 billion dollars as of June 28th 2004 (the last day of the belligerent occupation) there were no documents to verify that the funds remained unspent.⁶⁶³

The KRG entered a power sharing agreement with Norwegian oil company DNO at the end of June 2004. The contract was originally dated 25th June 2004 and on June

⁶⁵⁹ Article 1, Section 1, Constitution of Iraq (2005). The Constitution was approved by a referendum of the Iraqi people on 15 October 2005.

⁶⁶⁰ Al Arabiya News Channel, Basra autonomy referendum petition fails (Wednesday 21 January 2009) <http://www.alarabiya.net/articles/2009/01/21/64687.html>; United Nations Assistance Mission for Iraq, Basrah Referendum, <http://www.uniraq.org/electoral/Basrah.asp>

⁶⁶¹ Management Letter on Internal Controls for the period from 1 January 2004 to 28 June 2004, Development Fund for Iraq, KPMG (September 2004) p. 3

⁶⁶² Development Fund for Iraq, Report of Factual Findings in connection with Disbursements for the period 1 January 2004 to 28 June 2004, KPMG Bahrain (September 2004) par 2.2.5, p. 5

⁶⁶³ *Ibid* at p. 13.

29th 2004, DNO notified the Oslo Stock Exchange about the contract.⁶⁶⁴ The allocation of the money highlights two concerns, firstly that the KRG was awarded DFI resources to engage in foreign oil contracts prior to the resumption of administration by the lawful sovereign indicating that the money was allocated with the intent of creating competition over oil resources between the Iraq government and the region of Kurdistan *post bellum*. The second question is whether these diaphanous divisions disrupting oil distribution and revenue allocation are of a magnitude to rupture Iraqi infrastructure and are thereby restricted under Article 43 of the Hague Regulations. This section seeks to highlight the Article 43 restrictions on dividing an occupied territory along political and sectarian lines during belligerent occupation.

3.2.1 Article 43 and Alteration of Territorial Status

During the world wars and in occupations since, belligerent occupiers have attempted to create new dispensations, reordering territories along new boundary lines. Article 43 regulates the extent to which territory can be reconstituted during occupation. Clearly any impetus towards redefining territorial structure must be motivated by the exigency of impending hostilities balanced by the need to protect the occupied population. Von Glahn notes that:

“an occupant may lawfully create new and temporary administrative boundaries in an occupied territory if it can be demonstrated that the change is for the true benefit of the native inhabitants and for the facilitation of the occupant’s lawful control over the area.”⁶⁶⁵

In some cases the belligerent may alter the composition of the territory for administrative purposes, specifically by withdrawing the boundaries of city and county councils and boroughs. In *Sosnowiecka Fabryka Rur Zelaznych S.A v. Ministry of the Interior* (1926) the German occupant had declared that the Polish village of Zawiercie was considered a borough.⁶⁶⁶ After the war the complainant

⁶⁶⁴ Reidar Visser, Iraq and Gulf Analysis, Bremer speaks on DNO and Galbraith, 25 November 2009. <http://gulfanalysis.wordpress.com/2009/11/25/bremer-speaks-on-dno-and-galbraith/>
Munir Chalabi, Views on the Prospects of Iraq’s oil and gas Resources, Global Policy Forum, March 21st, 2009. <http://www.globalpolicy.org/component/content/article/185/40717.html>

⁶⁶⁵ Von Glahn, *The Occupation of Enemy Territory; A Commentary on the Law and Practice of Belligerent Occupation*, (Minneapolis: The University of Minnesota Press, 1957) p. 96.

⁶⁶⁶ *Sosnowiecka Fabryka Rur Zelaznych S.A (Sosnowiec Iron Pipes Factory, Limited) v. Ministry of the Interior*, Supreme Administrative Court of Poland, (6 December, 1926) Case No. 363 p. 475, Annual Digest of Public International Law Cases Years 1925 and 1926 (Longmans, Green and Co. London, New York, Toronto, 1929).

company argued that a law pertaining to boroughs did not apply to Zawiercie as it was established contrary to Article 43 of the Hague Regulations during the belligerent occupation. The Supreme Administrative Court of Poland found that the creation of the borough was “an exercise of ordinary administration” taken by the occupying authorities and therefore the measure was validly retained by the legitimate sovereign.

However during occupation the annexationist aims of the invading belligerent *jus ad bellum* may precipitate the phenomenon of territorial restructuring. McNair warns that such exercises would be contrary to the Hague provisions, “if the enemy were to introduce a new system of landholding, for instance, to divide up an estate amongst the tenants and purport to make them freeholders, or a new system of local government...such measures would not be respected.”⁶⁶⁷ In *Fattor v. Ministero Finanze* (1952) the Italian Council of State ruled that all acts and decrees implemented by the Government of the Italian Socialist Republic in German occupied Italy were deprived of all legal effect.⁶⁶⁸ This extended to instrumentalities and organs “operating on the basis of a system of administration and administrative rules antagonistic to that established for the whole country by the legitimate Government upon the collapse of the Fascist system.”⁶⁶⁹ Here the Court highlighted the original illegality of the invading enemy force, which tainted the resulting administrative reorganisation of the territory.⁶⁷⁰

In *Société au Grand Marché v. Ville de Metz* (1954) the German occupation authorities sold immoveable private property from the French town of Metz to a newly created municipality of ‘Gross-Metz’.⁶⁷¹ The court found that the town of Metz was identical to the municipality of Gross-Metz and was therefore required to return the property. The court noted that the occupier had appointed the administrative organs in an “illegal and irregular” manner suggesting that even for administrative purposes the occupier could not internally transform the organisation of the

⁶⁶⁷ McNair, *Legal Effects of War*, (2nd edition, Cambridge University Press, 1945) pp. 338-339

⁶⁶⁸ *Fattor v. Ministero Finanze* (July 13, 1952), Italy Council of State, Case No. 134, pp. 611-613, *International Law Reports*, Year 1952, (London, Butterworth & Co. (Publishers), Ltd. 1957).

⁶⁶⁹ *Ibid.*, at pp. 612.

⁶⁷⁰ *ibid.*

⁶⁷¹ *Société au Grand Marché v. Ville de Metz*, France Court of Appeal of Nancy, February 10, 1954, p. 484, *International Law Reports Year 1954*, (London, Butterworth & Co. (Publishers) Ltd, 1957)

territory.⁶⁷² Although the position conflicts with Von Glahn's liberal reading of administrative powers under Article 43, the narrower view is more likely the correct statement of the law. Posed abstractly, the restructuring of the local administration and surrounding territories is only a last resort in response to exacerbated security concerns or in an attempt to secure the efficient administration of the territory. Similarly in *Municipality of Kiecle v. Stefan D. and Others* (1947) the Polish Supreme Court ruled that "the occupant was not empowered to change the organisation of local government in an occupied country, nor had he the right to make payments out of the treasury of a municipality."⁶⁷³ Although the occupier had altered the administrative structure of the territory, the Municipality of Kiecle continued to exist as a public law entity post occupation.

Can the occupier alter the structure of the territory to increase administrative efficiency? For example could the belligerent occupant shut down the operations of a county council in one area of the territory and merge it with a neighbouring council to increase efficiency? The problem here is a blurring of boundaries between the annexationist tendencies of the invading belligerent and the intent to reconfigure the structure of the occupied territory for purposes benefiting the occupied population. Martens, writing after the Oxford Code, solecistically advanced the argument that the belligerent occupant could fundamentally change the constitution and institutions of the occupied State where the *jus ad bellum* reason for entering the war was for transformative purposes or intended annexation.⁶⁷⁴ While this argument certainly offends against the temporary designation of Article 43, it highlights the ambiguity of the rule when premised on the subjective intent of the belligerent commander. For example the separation of Flanders from Belgium by the German occupation authorities during World War II and the subsequent transformation of the University of Ghent into a Flemish institution under the Hague Regulations was considered manifestly illegal by some international law writers, where the intention was to

⁶⁷² *Société au Grand Marché v. Ville de Metz*, France Court of Appeal of Nancy, February 10, 1954, p. 485, International Law Reports Year 1954, (London, Butterworth & Co. (Publishers) Ltd, 1957)

⁶⁷³ *Municipality of Kiecle v. Stefan D. and Others*, Poland Supreme Court, May 29, 1947, p. 718, International Law Reports, Volume 25, (London Butterworths, 1963).

⁶⁷⁴ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey* (New York, 1949) p. 134.

manipulate new boundary lines.⁶⁷⁵ While the division of Belgium met with harsh criticism after World War I, the fragmentation of Libya by the British occupying Power during World War II was barely acknowledged.⁶⁷⁶

During the British occupation of Libya, the territory was divided into two administrative regions, Cyrenaica in the east and Tripolitania in the west. The division stemmed from the necessity to resolve the disparate conditions where the structures of governance existed in Tripolitania from the previous Italian administration but Cyrenaica represented an administrative void.⁶⁷⁷ In *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) the Democratic Republic of the Congo referred to the Ugandan occupier's creation of the new Kibali-Ituri province within its territory by merging the districts of Ituri and Haut-Uélé together and detaching them from the Orientale province.⁶⁷⁸ Uganda argued that the creation of the Ituri region was motivated by the need to restore order in the territory in the interests of the occupied population.⁶⁷⁹ Interestingly the International Court of Justice referred only to the creation of the new district in terms of evaluating the requisite control for belligerent occupation under Article 42 and not in cognisance of altering territorial structure beyond the intent of Article 43 of the Hague Regulations. It would appear ostensibly that the reordering of territory for administrative purposes is coterminous with international humanitarian law.

The problem with reordering the territory during a period of occupation remains an issue even if the intention is to implement a peace process initiative. During a belligerent occupation these initiatives will be reframed and the territorial composition restructured ultimately providing a permanent formalistic constraint that is near to impossible to remove after occupation. When the war aim of the invading

⁶⁷⁵ Von Glahn, Gerhard, *The Occupation of Enemy Territory; A Commentary on the law and Practice of Belligerent Occupation* (Minneapolis, The University of Minnesota Press, 1957) p. 96.

⁶⁷⁶ Eyal Benvenisti, "The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective" *IDF L. R.* 1(2003) 19, 25; L. Oppenheim, *International Law A Treatise*, Vol II Disputes, War and Neutrality (Longmans, seventh edition edited by Lauterpacht, 1952) p. 437.

⁶⁷⁷ Tracey Watts, "The British Military Occupation of Cyrenaica 1942-1949" *Transactions of the Grotius Society*, Vol 37, Problems of Public and Private International Law, Transactions for the Year 1951 (1951), 69, 73.

⁶⁷⁸ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice (19 December 2005) I.C.J Reports 2005, p.168, para 168, p. 57.

⁶⁷⁹ *ibid.*, para 171, p. 58.

belligerent is transformation of the political and legal structures of State, the indefatigable zeal of the belligerent occupant's corresponding legislative measures will not be thwarted during occupation. Goodman suggests that the best that can be hoped for is that the belligerent will postpone transformative agendas until the conclusion of hostilities.⁶⁸⁰

3.2.2 *Application to Iraq*

The disbursement of \$1.4 billion from the Development Fund for Iraq to the Kurdish Regional Government was the single largest authorised disbursement of funds during the occupation and was issued without any supporting documentation such as certified vouchers and invoices.⁶⁸¹ Potentially the disparate economic support of a regional entity to the detriment of central government could alter the balance of power in the occupied territory. In the aftermath of the occupation, the division between the Federal Government of Iraq and the Kurdish Regional Government became one of the greatest threats to the stability of the Iraqi state. This was compounded by contracts negotiated between the KRG and oil companies during the course of occupation. The U.S Department of Defense, in its 2009 report on "Measuring Stability and Security in Iraq" found that "fundamental differences remain over federal and regional authorities in contracting and management of the oil and gas sector" and posited these differences as the central reason for continued instability in the territory.⁶⁸²

Can economic manipulation by the belligerent occupant be considered under the umbrella of alteration of territorial status and therefore subject to the limitations of the Hague Regulations? There is some divergence in State practice on the legality of deliberate territorial alteration during belligerent occupation. In *Sosnowiecka Fabryka Rur Zelaznych S.A* the alteration was considered part of the ordinary administrative duties of the occupying administration whereas under similar circumstances in *Société au Grand Marché* and *Municipality of Kiecle*, the courts were not persuaded that the irregular actions of the occupiers comported with Article 43. Similarly international criticisms of the administrative division of Flanders and Walloon by Germany

⁶⁸⁰ Davis P. Goodman, "The Need for Fundamental Change in the Law of Belligerent Occupation" *Stanford Law Review*, Vol. 37, No. 6 (Jul., 1985), 1573, 1590.

⁶⁸¹ CRS Report for Congress, *Defence Contracting in Iraq: Issues and Options for Congress* (18 June 2008) p. ii.

⁶⁸² U.S Department of Defense, *Measuring Stability and Security in Iraq*, June 2009, p.4.

during World War II highlight States' objections to the practice of administrative alteration of territory. Accordingly the distinction between the intent of the occupant to administer the territory and the intent of the occupant to alter the political balance of power is critical.

The use of the resources from Development Fund for Iraq to economically strengthen a regional entity to the detriment of the weak central government heralds a new development in economic exploitation. It highlights the potential for a belligerent occupant to use massive resources at their disposal to alter the balance of power. However does this type of economic activity come within the radar of Article 43? The cases of *Sosnowiecka Fabryka Rur Zelaznych*, *Société au Grand Marché* and *Case Concerning Armed Activities on the Territory of the Congo* concern the physical creation of new territorial units. In Iraq, in contrast, Kurdistan's actual borders were never physically re-arranged but the allocation of resources nevertheless created an imbalance between federal and regional entities.

The authorities suggest that where alteration was permitted under Article 43 of the Hague Regulations, this was done for the purposes of effective administration and the public interest. It would be difficult to contend that the disbursement of vast resources from the Development Fund for Iraq to the Kurdish Regional Government on the eve of the termination of occupation was in the interests of the occupied population, particularly where those funds were due to be returned to the Central Government of Iraq. Potentially there is scope for this type of behaviour to be limited by reference to Article 43 of the Hague Regulations.

3.3 Is the Coalition Provisional Authority prohibited from introducing sweeping legislative reforms under Article 43 of the Hague Regulations?

During the occupation of Iraq, the Coalition Provisional Authority introduced a series of invasive legislative reforms which repealed many of the Iraq's corporate and economic laws. Coalition Provisional Authority Order Number 12 on Trade Liberalisation Policy removed tariffs and restrictions on goods entering Iraq.⁶⁸³

⁶⁸³ Coalition Provisional Authority Order Number 12, CPA/ORD/7 June 2003/12.

Coalition Provisional Authority Order Number 39 on Foreign Investment replaced all existing foreign investment law.⁶⁸⁴ Coalition Provisional Authority Order Number 64 on Amendment to the Company Law No. 21 of 1997 noted that some of the “rules concerning company formation and investment under the prior regime no longer serve a relevant social or economic purpose, and that such rules hinder economic growth”.⁶⁸⁵ This repealed many provisions of Iraq’s Company Law. Coalition Provisional Authority Order Number 74, the Interim Law on Securities Markets, provided for the liquidation of the Baghdad Stock Exchange and established a new entity the Iraq Stock Exchange in its place.⁶⁸⁶ Coalition Provisional Authority Order Number 80 amended the Trademarks and Descriptions Law No. 21 of 1957.⁶⁸⁷ Coalition Provisional Authority Order Number 81 on Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law amended the Iraqi Patent and Industrial Design Law.⁶⁸⁸ While Coalition Provisional Authority Order Number 83 on Amendment to Copyright Law provided:

“the purpose of this Order is to amend Copyright Law No. 3 of 1971 to ensure that Iraqi copyright law meets current internationally-recognised standards of protection, and to incorporate the modern standards of the World Trade Organisation into Iraqi law.”⁶⁸⁹

This section will examine the compatibility of these legislative changes with the conservationist policy of Article 43 of the Hague Regulations to preserve the *status quo ante* of the laws in force in the occupied territory.

3.3.1 *Maintaining the Status Quo Ante*

In contrast to the Hague Regulations, the administrative duties of the belligerent occupant in the Oxford Code and the Brussels Code were framed in two separate articles. Article 43 of the Oxford Code (1880) provides that “the occupant shall take all measures in his power to re-establish and assure public order and safety”.⁶⁹⁰ Article 44 of the Oxford code required that “the occupant shall maintain the laws

⁶⁸⁴ Coalition Provisional Authority Order Number 39, CPA/ORD/19 September 2003/39

⁶⁸⁵ Coalition Provisional Authority Order Number 64, CPA/ORD/29 February 2004/64

⁶⁸⁶ Coalition Provisional Authority Order Number 74, CPA/ORD/18 April 2004/74

⁶⁸⁷ *ibid.*

⁶⁸⁸ Coalition Provisional Authority Order Number 81, CPA/ORD/26/ April 2004/81

⁶⁸⁹ *ibid.*

⁶⁹⁰ Article 43, The Laws of War on Land, Manual published by the Institute of International Law (Oxford Manual), Adopted by the Institute of International Law at Oxford, September 9, 1880.

which were in force in the country in peace time, and shall not modify, suspend, or replace them unless necessary.”⁶⁹¹ Similarly the Brussels Code (1874) delineates the public order obligations of the occupant into two separate articles. Article 2 of the Brussels Code provides:

“The authority of the legitimate power being suspended and having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, public order and safety.”⁶⁹²

Article 3 of the Brussels Code further requires of the occupant:

“With this object he shall maintain the laws which were in force in the country in time of peace and shall not modify, suspend or replace them unless necessary.”⁶⁹³

Therefore we can safely categorise the Article 43 mandate of occupational governance into two distinct parts, firstly the duty to restore and resume the administration of the war torn territory and while so doing the additional duty to “respect, unless absolutely prevented, the laws in force in the country.”⁶⁹⁴ Although the language of the final Hague Regulation is cloaked in prohibitive terms requiring the occupier to respect unless *absolutely prevented* the laws in the country, in comparison to the more benign wording of the Brussels and Oxford Codes to refrain from legislative modification *unless necessary*, the general consensus is that the latter less restrictive formulation applies.⁶⁹⁵ Absent from the Oxford, Brussels and Hague

⁶⁹¹ Article 44, The Laws of War on Land, Manual published by the Institute of International Law (Oxford Manual), Adopted by the Institute of International Law at Oxford, September 9, 1880.

⁶⁹² Article 2, Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, 65 BRIT. FOREIGN & ST. PAPERS 1005 (1873-74).

⁶⁹³ Article 3, Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, 65 BRIT. FOREIGN & ST. PAPERS 1005 (1873-74).

⁶⁹⁴ Article 43, Hague Convention IV - Laws and Customs of War on Land: 18 October 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, *entered into force* Jan. 26, 1910.

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

⁶⁹⁵ David Kretzmer, *The Occupation of Justice, The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002) p. 58; Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press, 2nd edition, 2004) p. 13; Eyal Benvenisti, “The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective” 1 IDF Law Review 19 2003, p. 24; Allan Gerson, “War, Conquered Territory, and Military Occupation in the Contemporary Legal System” 18 Harv. Int’l. L. J. 525 1977, p. 535; Julius Stone, *Legal Controls of*

Codes is the stipulation of precisely what laws of the occupied territory the occupant may abrogate and replace when necessary. The predecessor Lieber Code comes some distance in explaining the aetiology of the contemplated legislative reform. Article 3 of the Lieber Code (1863) provides the invading belligerent with the option of suspending the criminal, civil law, domestic government and administration of the occupied territory and substituting this for absolute military rule. Where the military commander chooses to retain the broader functions of the hostile State, Article 6 of the Lieber Code provides:

“All civil and penal law shall continue to take its usual course in the enemy’s places and territories under martial law, unless interrupted or stopped by order of the occupying military power; but all functions of the hostile government – legislative, executive, or administrative – whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or if deemed necessary, the participation of the occupier or invader.”⁶⁹⁶

Although the Lieber code formulated a radical overhaul of the occupied State extending to the potential reform and replacement of all laws, this expansive reading is curtailed by the later Oxford, Brussels and Hague rules. Indeed an outright displacement of the domestic laws of the occupied State by the occupant would violate Article 43.⁶⁹⁷ Accordingly the duty to retain the existing legislation in particular civil and penal law comports with a reading of Article 6 of the Lieber Code.

An epistemological insight into the earlier writings on the military codes reveals a tacit understanding that the occupant was prevented from manipulating the civil and penal laws of the occupied territory and to a lesser extent the political laws. Moyniers version of Article 3 submitted for the Brussels code provided that the civil and criminal laws of the occupied territory remain in force, a stance supported by the Italian delegate Count Lanza.⁶⁹⁸ However Hall and Boyd, writing after the Brussels

International Conflict, A Treatise on the Dynamics of Disputes and War Law (London: Stevens & Sons Limited, 1954) p. 698; Yoram Dinstein, “Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding” *HPCR Occasional Paper Series* (Fall 2004). Article at <http://www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf>;

⁶⁹⁶ Article 6, Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863. D.Schindler and J.Toman, *The Laws of Armed Conflicts*, Martinus Nihjoff Publisher, 1988, pp.3-23.

⁶⁹⁷ Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace, Monograph Series No. 6, 1942) p. 89.

⁶⁹⁸ Doris Appel Graber, *The Development of the law of Belligerent Occupation 1863-1914, A Historical Survey* (New York, 1949) p. 121-122.

code, contend that the occupant can enforce whatever legislation and administration deemed necessary for military purposes.⁶⁹⁹ Dinstein notes that the French term “les lois” refers only to promulgated laws and as such excludes common law, domestic customary law and tribal laws.⁷⁰⁰ However it is not clear from the discussions of the framers of Article 43 if the term “les lois” extends only to *jus scriptum*. McDougal and Feliciano submit that the duty to ensure ‘la vie publique’ refers to the financial and economic processes indicating a broader conception of the occupant’s administrative duties.⁷⁰¹ An alternative draft to the final Brussels Code, provided by a member of the Institute of International Law, proposed that the domestic law of the occupied territory “ought as far as possible, to be left unaltered during the occupation”.⁷⁰² This position was echoed in the landmark case *Ho Tung and Co. v. The United States* (1928) where it was held that the occupant had a duty to ‘respect and assist in enforcing’ the municipal laws in the occupied State unless the necessities of war required alteration by military order.⁷⁰³ Therefore it is widely accepted that the occupant must respect the civil and penal laws in force in the occupied State as far as military necessity dictates while public law provisions may be altered more liberally.⁷⁰⁴

Article 64 of the Fourth Geneva Convention, cloaked in permissive language, supplements Article 43 of the Hague Regulations. The occupant is obliged to enact legislation to maintain an orderly government, to ensure its own security and the security of the occupying forces.⁷⁰⁵ Article 64 provides:

“The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the

⁶⁹⁹ *Ibid* at p. 134.

⁷⁰⁰ Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009) p. 108.

⁷⁰¹ Myres S. McDougal, Florentino P. Feliciano, *The International Law of War, Transnational Coercion and World Public Order* (Martinus Nijhoff Publishers, 1994) p. 825.

⁷⁰² Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey* (New York, 1949) p. 123.

⁷⁰³ *Ho Tung and Co. v. The United States*, 42 Ct. Cls. 213, 227-228 (1928)

⁷⁰⁴ Philip C. Jessup, “A Belligerent Occupant’s Power over Property” *The American Journal of International Law*, Vol. 38, No. 3. (Jul. 1944) 457, 460; David J. Scheffer, “Beyond Occupation Law” *The American Journal of International Law*, Vol. 97, No. 4. (Oct., 2003), 842, 848; Edmund H. Schwenk, “Legislative Power of the Military Occupant Under Article 43, Hague Regulations” 54 *Yale L. J.* 393 1944-1945, 406.

⁷⁰⁵ *R (on application of Al-Skeini and Others) v Secretary of State for Defence* [2004] EWHC 2911 (Admin), [2004] All ER (D) 197 (Dec), 2004 WL 2810920, par 106.

application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.”

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.⁷⁰⁶

Although Article 64 (1) of the Fourth Geneva Convention pertains to penal legislation, this is believed to merely emphasise penal law while applying to the continuity of the legal system as a whole.⁷⁰⁷ Therefore a correct reading of Article 64(1) is that the legal system, including the penal laws of the occupied territory shall remain in force. Notwithstanding this, the second paragraph relates to the entire spectrum of law in the occupied State. Rather than limiting the occupant to the laws prior to occupation, the occupant is obliged to repeal and replace laws of any designation, which fall below the Geneva Convention guarantees.

There remains some contention as to the scope of Article 64 and to what extent this tacitly permits in-depth reforms beyond the letter of the Hague Regulations, a debate which centres closely around the extension of the ‘penal law’ provision from Article 64(1) to Article 64(2). Article 64(2) of the Fourth Geneva Convention provides:

“The Occupying Power may, however subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.”⁷⁰⁸

⁷⁰⁶ Article 64, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950

⁷⁰⁷ Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilians in Time of War* (Geneva International Committee of the Red Cross, 1958) p. 335.

⁷⁰⁸ Article 64(2), Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950

Pictet submits that the supplementary provision is limitative in scope.⁷⁰⁹ In contradistinction, Benvenisti points out that Article 64(1) specifically relates to penal law only which must remain in force while the following paragraph permits a broader alteration of legislation of a non penal character.⁷¹⁰ He asserts that the provisions of Article 64(2) can be of a penal character but also more broadly of an administrative or civil character.⁷¹¹ The article clearly diverges into two separate and distinct paragraphs where the initial reference to penal law is significantly absent from the latter. Although the departure in Article 64(2) GCIV from the penal law precept appears to be an anachronism in the sequence of penal legislation which extends to Article 70 GCIV, Benvenisti argues that this is a purposeful measure and was intended to extend the parameters of Article 43, of the Hague Regulations. Applying Article 64(2) GCIV to occupied territory within this new interpolated framework would radically provide for the alteration of the economic laws providing that the ancillary formative Hague Regulations on public and private property rights and Geneva Convention rights are adhered to. However as Benvenisti notes the significance of Article 64GCIV was lost on international writers and consequently Article 43 of the Hague Regulations continues to provide the platform for the occupant's administrative powers.⁷¹²

However since the occupation of Iraq the debate on transformation of territory has come back into focus with many international law writers now according weight to Benvenisti's thesis.⁷¹³ Alternatively, Dinstein maintains that the authors of Article 64 GCIV "did not intend to expand the traditional scope of occupation legislation."⁷¹⁴ This argument is persuasive as the Geneva Conventions represent a body of additional humanitarian norms designed to enhance rather than repeal the existing regulations.

⁷⁰⁹ Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilians in Time of War* (Geneva International Committee of the Red Cross, 1958) p. 337.

⁷¹⁰ Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press, 2nd edition, 2004) p. 101; The Steven R. Ratner, "Foreign Occupation and Internatioanl Administration: The Challenges of Convergence" *EJIL* (2005), Vol. 16 No. 4, 695, 706.

⁷¹¹ *Ibid.*, at p. 101.

⁷¹² *Ibid.*, at p. 106.

⁷¹³ Marco Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers" *EJIL* (2005) Vol. 16, No. 4, 661, 669; Conor McCarthy, "The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq" *Journal of Conflict and Security Law*, Volume 10 Number 1 (Spring 2005), 43, 62.

⁷¹⁴ Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009) p. 111. This position is reluctantly echoed by Davis P. Goodman. Davis P. Goodman, "The Need for Fundamental Change in the Law of Belligerent Occupation" *Stanford Law Review*, Vol. 37, No. 6 (Jul., 1985), 1573, 1594.

Similarly, Yingling and Ginnane, members of the American delegation to the Geneva Conference refer singularly to Article 64(2) as a penal provision extension of Article 64(1). As a corollary Article 64 relates to penal legislation in its entirety, any transformation within that framework would be rendered inapt.

Even within the context of Article 64 (2) GCIV, the occupant does not have the authority to create a new State structure *ex nihilo*. Consonant with the Hague Regulations, the Geneva law requires that the occupant maintain the prevailing economic and social conditions intact.⁷¹⁵ The article balances the competing interests of the occupied population against the traditional military concerns for security, members of the armed forces and property belonging to the military forces. Apart from this, the article attenuates around the dual concern for firstly the fulfilment of obligations under the present convention and secondly the maintenance of the orderly government of the territory. Critically the duty to ‘maintain’ parrots the earlier Article 43 obligation to “ensure” public order and safety where the occupant preserves the government of the territory provided that it is operating in an “orderly” or functional manner. Appositely, where the government is functioning in a regular manner on occupation it does not impede the occupant’s military objectives and therefore must remain intact. The question is when is the government considered to be orderly or functional? Is this to be measured by the occupant’s standards, the deposed sovereign’s standards or the international community’s standards? Significantly, Article 64(2), apart from requiring the occupant to legislate in order to give effect to Convention norms, does not require the occupant to go beyond a basic standard of “orderly government”. Where there is a perfectly adequate socialist system of governance there is no obligation on the occupier to supplant this with a more internationally acceptable democratic liberal free market system as the standard rests on the maintenance of the orderly government.

Any arguments that Article 64 GCIV provides a transformative template supplanting the Hague Regulations is curtailed by Article 154 of the Fourth Geneva Convention which confirms that the Convention is supplementary to Sections II and III of the

⁷¹⁵ Ingrid Detter, *The Law of War* (Cambridge University Press, 2nd edition, 1987) p. 181

Hague Regulations.⁷¹⁶ The Geneva Convention bridges the gap in civilian protection that is lacking in the Hague Regulations. Therefore where the Hague Regulations continues to provide a framework for the occupant and provides a guide for the armed forces, the Geneva Convention is considered a humanitarian convention aimed at protecting civilians in the occupied territory.⁷¹⁷ Interestingly, Yingling and Ginnane members of the American delegation to the Geneva Conference, argue that Article 43 of the Hague Regulations has no counterpart in the supplementary Geneva law, which suggests that Article 64 is actually ancillary to independent Article 43 considerations.⁷¹⁸ However Pictet proposes that the penal law requirements Article 64 to 78, Article 54 on labour legislation, Article 55 regulating food and medical supplies, Article 56 preserving hygiene and public health and Article 58 on spiritual assistance concerning the protection of inhabitants of the occupied territory, are supplementary to the Article 43 of the Hague Regulations.⁷¹⁹

Critically, pre World War II, the duty of the occupier to maintain the substantive laws in force in the occupied territory was held in strict regard by the courts. Law creating, defining and regulating substantive rights in the form of contract, tort, succession and land, for example, could not be altered as these laws operated independently from the occupation regime. However, the procedural laws providing for the enforcement of the substantive laws of the occupied State could be modified to accommodate the new administrative regime. In *Marjamoff and Others v. Wloclawek* (1924) the Polish Supreme Court ruled that a decree authorising the German Governor General to expropriate property for public utility in place of the former Russian Emperor in occupied Poland was valid.⁷²⁰

While the substantive laws in force in the occupied territory may not change, the rules

⁷¹⁶ Article 154, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950; International Court of Justice Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (9 July 2004) par 89.

⁷¹⁷ Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, International Committee of the Red Cross, 1958) p. 614.

⁷¹⁸ Raymund T. Yingling, Robert W. Ginnane, "The Geneva Conventions of 1949" 46 *American Journal of International Law* 393 1952, 417.

⁷¹⁹ Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, International Committee of the Red Cross, 1958) p. 617.

⁷²⁰ *Marjamoff and Others v. Wloclawek* (Communal District of), Poland, Supreme Court, First Division, (5 December, 1924), Case 243, Annual Digest of Public International Law Cases, Years 1923 to 1924, p. 444.

of procedure may be altered. Interestingly, the Belgium court of Cassation in *Belgian State v. Botte* (1953) found that the Belgian forces of occupation in Germany after World War II had to respect local traffic rules existing in the territory unless a specific provision stating otherwise had been issued by the Belgian authorities.⁷²¹ In *Sch. v. W.* (1923) the German Reichsgericht in Civil Matters found that a decree issued by the United States army of occupation in Germany prohibiting the sale of alcohol in occupied territory could not be regarded as a prohibition within the meaning of Article 134 of the German Civil Code.⁷²² Despite the competence of the commander to issue the regulation for the purposes of occupation, this did not automatically alter the German law in question as this could be regulated by German authorities only for the purposes of German life. Certainly from the jurisprudence emerging after World War 1, the occupier was constrained to issuing military ordinances, which did not impact on the substratum of municipal law. In fact the suggestion that an occupier had the authority to jettison contradictory provisions of domestic law has met with sharp criticism by the local courts. In *Mahot v. Longué* (1921) the Belgian Court of Appeal of Liège countenanced the limitative thrust of the Hague rules stating:

“it is inaccurate to say that by virtue of the Convention the occupant has been given any portion whatever of legislative power....it appears from the text of the Convention itself and from the preliminary work that all that was intended... was to restrict the abuse of force by the occupant and not to give him or recognise him as possessing any authority in the sphere of law.”⁷²³

The ruling in *Cillekens v. de Haas* (1919) marks the first shift in the post World War 1 jurisprudence towards alteration of substantive laws during occupation.⁷²⁴ There the Dutch District Court of Rotterdam maintained that the belligerent occupant had the authority to abrogate a moratorium enacted by the deposed sovereign prior to the occupation. Central to the courts reasoning was the perspicacious Article 43 duty requiring the belligerent to re-establish and ensure public order and safety. By World

⁷²¹ *Belgian State v. Botte* (March 6, 1953) Belgium, Court of Cassation, International Law Reports Year 1953, (London Butterworth & Co. (Publishers) Ltd. 1957) p. 634.

⁷²² *Sch. v. W.* (2 April, 1923) Germany, Reichsgericht in Civil Matters, Annual Digest of Public International Law Cases Years 1923 to 1924, (Longmans, Green and Co. London, New York, Toronto, 1933) Case 238, p. 440.

⁷²³ *Mathot v. Longué*, (19 February, 1921) Belgium, Court of Appeal of Liège, Annual Digest of Public International Law Cases Years 1919 to 1922, (Longmans, Green and Co. London, New York, Toronto, 1932) Case No. 329, p. 463, p. 464.

⁷²⁴ *Cillekens v. De Haas* (14 May, 1919) Holland, District Court of Rotterdam, Annual Digest of Public International Law Cases Years 1919 to 1922, (Longmans, Green and Co. London, New York, Toronto, 1932) Case No. 336, p. 471.

War II the courts entertained a more permissive and expansive reading of Article 43. In *L. v. N. (Bulgarian Occupation of Greece)* (1947) the Greek Court of Appeal of Thrace ruled that a contract drawn up by a Bulgarian notary appointed by the Bulgarian occupier was valid, despite the Greek legal requirement for a Greek notary to be present.⁷²⁵ Elaborating on the application of Article 43 the court found that the occupier had a duty to maintain public safety in the “widest sense”.⁷²⁶ Where the “material conditions necessary for the enforcement of national law are lacking...the occupier...is not only entitled but also compelled to abrogate the laws in force in the country and replace them by new laws promulgated by his competent organs.”⁷²⁷ This broader conception of Article 43 is an anathema to the earlier post World War I position that correlated alteration of municipal laws to procedural rules. Moreover it is suggestive of a shift towards transformative occupation within the Article 43 paradigm.

It is worth noting in this case that the Bulgarian officials imported into occupied Greece operated under the umbrella of Bulgarian law. This raises the question of whether it is of necessity or convenience that the local commander abrogated the local contract law and implemented a foreign law on contracts to preserve public order and civil life. It is difficult to follow the reasoning that contract law in its entirety should be abrogated and replaced merely to suit the competence of the occupants administrative staff. The duty contained in Article 43 requires the occupier to respect “unless absolutely prevented the laws in force in the country”. It is debatable whether procedural or material anomalies should impact on the law in its entirety. However, a recent appraisal of occupation law published by Harvard University still highlighted the security of the armed forces as the belligerent’s only protected interest under Article 43.⁷²⁸

⁷²⁵ *L. v. N. (Bulgarian Occupation of Greece)*, (Judgement No. 21 of 1947) Greece Court of Appeal of Thrace, Annual Digest and Reports of Public International Law Cases Year 1947, (London Butterworth & Co. (Publishers), Ltd, 1951) Case No. 110 p. 242.

⁷²⁶ *Ibid.*, at p. 243.

⁷²⁷ *L. v. N. (Bulgarian Occupation of Greece)*, (Judgement No. 21 of 1947) Greece Court of Appeal of Thrace, Annual Digest and Reports of Public International Law Cases Year 1947, (London Butterworth & Co. (Publishers), Ltd, 1951) Case No. 110 p. 242, 243

⁷²⁸ Harvard University, Military Occupation of Iraq: I. Application of IHL and the Maintenance of Law and Order, (14 April 2003). Article at <http://ocha-gwapps1.unog.ch/rw/rwb.nsf/db900sid/ACOS-64D9VC?OpenDocument>

The ruling of the French Court of Appeal of Colmar in *Z. v. K.* (1951) indicated that the alteration of civil law is *ultra vires* the Hague Regulations.⁷²⁹ There, the French court questioned the legality of a divorce obtained during the German occupation of Alsace-Lorraine from a court established by the German occupying authorities which had applied German civil law. Although finding that the application of German law to questions of civil status violated international law, the court laudably gave effect to the legal orders in the interests of the individuals. Interestingly the court vehemently opposed the application of German law in civil cases substantiating the position in occupation law that the belligerent may only amend or replace laws in the most compelling of circumstances. Correspondingly, in *Quaglia v. Caiselli* (1952) the Italian Court of Cassation found that the occupying Allied Military Government did not have the authority to alter the rules respecting curial jurisdiction.⁷³⁰ Similarly in *Cobb v. United States* (1951) the United States Court of Appeals for the Ninth Circuit ruled that the US occupying troops did not have the authority to alter the tort law in Okinawa at will, as this would violate both the “spirit” and the “letter” of Article 43.⁷³¹

Pertinently, a central consideration in the application of Article 43 is whether laws may be abrogated and replaced for reasons other than military necessity. In *re Condarelli* (1952) the Italian Court of Cassation found that the establishment of a court of appeals by the British occupying force in Ethiopia endowed with jurisdiction over all ordinary crimes replacing the Italian Court of Appeals of Addis Ababa, was not justified under Article 43 of the Hague Regulations.⁷³² Elaborating on the authority of the belligerent, the Court of Cassation outlined that the occupant:

“may likewise do anything which is necessary in order to maintain public order or to supply deficiencies in the pre-existing administrative machine which may have developed, provided always that such measures as are resorted to are called for by operations of war.”⁷³³

⁷²⁹ *Z. v. K.* (June 12, 1951), France, Court of Appeal of Colmar, International Law Reports Year 1951, (London Butterworth & Co. (Publishers), Ltd., 1957) Case No. 183, p. 608.

⁷³⁰ *Quaglia v. Caiselli* (May 7, 1952) Italian Court of Cassation, International Law Reports Year 1952, (London Butterworth & Co. (Publishers), Ltd., 1957) p. 615.

⁷³¹ *Cobb v. United States*, United States Court of Appeals, Ninth Circuit, June 11th 1951, International Law Reports, Year 1951 p. 555-556.

⁷³² *Re Condarelli*, (July 5, 1952) Italy, Court of Cassation, International Law Reports Year 1952 (London Butterworth & Co. (Publishers), Ltd., 1957) Case No. 133, p. 609.

⁷³³ *Ibid.*, at p. 610.

As such, modifications to the law during hostilities are limited to cases of absolute necessity. Accordingly the alteration of civil marriage laws and contracts laws can be regarded as an infelicitous infringement on the sovereignty and legal order of the occupied State, which remains suspended for the duration of the occupation. The Italian Court of Cassation proceeded to denounce the alteration of the judicial system in occupied Ethiopia, “unless in an exceptional case justified by valid considerations of military necessity.”⁷³⁴

Belligerent occupation was not intended to be an all-encompassing display of authority. While the belligerent modified existing laws contingent on escalating security risks and a duty to continue the effective administrative of the territory, the local administrative units, the municipalities and governorates continue to operate independently of the occupier and their resources are especially protected from requisition as cultural property under Article 56 of the Hague Regulations. In *re Lecoq and Others* (1944), the French Council d’État found that the municipal council retained the authority to impose a special tax on commercial transactions for the maintenance of public order provided that such determination did not conflict with the rights of the occupying Power.⁷³⁵ Similarly, the occupier is restricted from altering the organisation of local government.⁷³⁶

3.3.2 *Application to Iraq*

It is clear from the Hague Regulations and the former Brussels Code that there is a duty on the occupier to “restore” public order and civil life in the occupied State. In Iraq this resulted in the creation of the Coalition Provisional Authority which introduced a series of legislative measures including regulations, orders and memoranda to administer the territory. Many of these orders, such as the Regulation of Armed Forces and Militias and the Notification of Criminal Offences, fit succinctly with the military necessity considerations of Article 43 of the Hague Regulations.⁷³⁷

⁷³⁴ *ibid.*

⁷³⁵ *In re Lecoq and Others*, (January 7, 1944) France, Conseil d’État, Annual Digest and Reports of Public International Law Cases Years 1943-1945, (London Butterworth & Co. (Publishers), Ltd, 1949) Case No. 161, p. 453.

⁷³⁶ *Municipality of Kiecle v. Stefan D. and Others* (May 29, 1947), Poland Supreme Court, International Law Reports Volume 25, (London Butterworths, 1963) p. 718

⁷³⁷ Coalition Provisional Authority Order 91, CPA/ORD/7 June 2004/91.

Coalition Provisional Authority Order 41, CPA/ORD/19 September 2003/41.

However the deep intrusion into the economic sphere of the State is questionable in light of the “conservationist” nature of Article 43 requiring the occupier to respect “unless absolutely prevented, the laws in force in the country”.

Appositely there is inconsistency in State practice over the extent to which the occupier can alter the civil laws of the occupied State. In *Marjamoff* procedural laws could be modified, in *Cillekens* the occupier legitimately abrogated a moratorium, in the *L Case* legislation to make provision for a notary was valid, while in *Lecoq* the occupier could revoke tax on commercial transactions. Conversely in *Belgian State* the court found that traffic laws must be respected, in the *Z Case* the application of the occupant’s marriage laws was *ultra vires* Article 43, in *Quaglia* the laws pertaining to curial jurisdiction could not be altered and in *Cobb* the court found that tort law could not be altered. Clearly state practice is divided, and there certainly appears to be grounds for limited alteration of the civil laws in the occupied State.

The sweeping nature of the economic reforms in Iraq is questionable when viewed in light of Iraq’s comprehensive corporate laws. Article 12, Company Law No. 21 of 1997 provided that founders, shareholders, or partners of Iraqi companies must be Iraqi nationals or the resident citizens of other Arab countries who are treated as Iraqis for the purposes of this law.⁷³⁸ Coalition Provisional Authority Order Number 64 on Amendment to the Company Law No. 21 of 1997 noted that this law no longer served a relevant social or economic purpose and hindered economic growth.⁷³⁹ However there was provision even within Company Law No. 21 of 1997 for foreign companies to implement contracts through a government “branch office”.⁷⁴⁰ Moreover foreign oil contractors were permitted to open branches under strict licensing arrangements.⁷⁴¹

Coalition Provisional Authority Foreign Investment Order Number 39 provided that “the problems arising from Iraq’s legal framework regulating commercial activity”

⁷³⁸ Overview of Commercial Law in Pre-War Iraq, www.export.gov/iraq/pdf/iraq.commercial_law_current.pdf

⁷³⁹ Coalition Provisional Authority Order Number 64, CPA/ORD/29 February 2004/64.

⁷⁴⁰ Overview of Commercial Law in Pre-War Iraq, www.export.gov/iraq/pdf/iraq.commercial_law_current.pdf

⁷⁴¹ Essam Al Tamimi, Adil Sinjakli, “Legal Aspects of Setting up Business in Iraq and Iraqi Company Regulations” *Arab Law Quarterly*, Vol. 14, No. 4. (1999), pp. 320, 328.

required the replacement of all foreign investment law to facilitate privatisation. However contrary to the view espoused by the CPA, Iraqi commercial law was already regarded as progressive and as a “westernised commercial code” by Arab standards.⁷⁴² It is certainly difficult to reconcile the abrogation of all foreign investment laws with the Article 43 obligation to respect the laws in force in the territory. Even in cases where the occupier did alter the domestic laws, these were for the most part slight modifications to facilitate the occupier in administering the territory. For example in the *L Case* the legislation provided that a Bulgarian notary that could act in place of a Greek notary and similarly in *Marjamoff* procedural laws were altered to facilitate the belligerent occupant taking the place of the government in administering the state.

3.3.3 *Maintaining the Status Quo and Institutional Alteration*

Towards the end of the occupation the framework for the new federal, decentralised Iraq was constructed under Coalition Provisional Authority Order 71 which provided:

“Noting that the system of government in Iraq shall be republican, federal, democratic and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates (also known as provinces), municipalities, and local administrations and that each governorate shall have the right to form a Governorate Council, namely a Governor and form a municipal and local councils and that regions and governorates shall be organised on the basis of the principle of self decentralisation and the devolution of authorities to municipal and local governments.”⁷⁴³

It eviscerated the central control Iraq had sustained over the oil industry and provided an amorphous, divided template for the new administration. Local government powers were established under CPA Order 71, allocating governorate councils the authority to set priorities for the provinces, deliver public services, impose taxes and fees and most importantly the authority to “initiate and implement provincial projects alone or in partnership with international and non-governmental organisations; conduct other activities, consistent with applicable laws.”⁷⁴⁴ Under the former regime, localities did not participate in the decision making process, which was highly

⁷⁴² Samir Saleh, “Fading Vestiges of Shari’a in Commercial Agency/Distributorship (Termination and Compensation)” Arab Law Quarterly, Vol.9, No. 1. (1994) pp. 91, 103.

⁷⁴³ Coalition Provisional Authority Order 71, Local Government Powers, CPA/ORD/6 April 2004/71.

⁷⁴⁴ *Ibid.*

centralised.⁷⁴⁵

The Article 43 alteration of the institutions in the occupied State has precipitated an avalanche of academic opinion over the decades.⁷⁴⁶ Does the capacious reading of Article 43 permit the occupier to overhaul the structural institutions of the occupied State for reasons of military necessity or contemporaneously to provide for humanitarian rights under the Fourth Geneva Convention? Naturally, earlier writers reflecting on the gravitas of the *status quo ante bellum* principle reprobated institutional transformation by the invading belligerent. Some commentators disputed the permissibility of fundamental institutional change even on a provisional basis.⁷⁴⁷ The occupant preserved the institutions of State on behalf of the ousted sovereign and in doing so protected the State from indigenous rebellion.⁷⁴⁸ However amidst the statuesque condemnation proffered by international writers, questions still remained over the issue of institutional reform. Firstly what exactly connotes a State institution? Is the concept broadly or narrowly framed? Recognised State institutions include the basic organs of government, however, do other commercial institutions such as banking or academic institutions fall within the paradigm? Secondly to what extent can a transformation of State institutions be entertained? Clearly there are grounds for the dismantling of State institutions which fall below international standards of human rights and where human rights abuses are propagated by the particular institution. However can the belligerent occupant alter, for example, the economic institutions of State such as the banking system on the premise that an adverse system will be more profitable to the occupied population?

Traditionally the occupying power was not entitled to alter the fundamental

⁷⁴⁵ Report to Congressional Committees, Rebuilding Iraq, Resource, Security, Governance, Essential Services, and Oversight Issues (June 2004), GAO-04-902R, p. 77.

⁷⁴⁶ See for example, Myres Smith McDougal, *Studies in World Public Order* (New Haven, 1906) 320; Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace, 1942) 89; Yutaka Arai Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with Human Rights Law* (Martinus Nijhoff Publishers, 2009) 758; Gerson, *Israel the West Bank and International Law, Volume 8* (Frank Cass and Company Limited, 1978) 285.

⁷⁴⁷ Yoram Dinstein, "Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding" *HPCR Occasional Paper Series* (Fall 2004) p. 12. Article at <http://www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf>; Allan Gerson, "War, Conquered Territory, and Military Occupation in the Contemporary International Legal System" 18 *Harv. Int'l L. J.* 525 1977, 537.

⁷⁴⁸ Allan Gerson, "War, Conquered Territory, and Military Occupation in the Contemporary International Legal System" 18 *Harv. Int'l L. J.* 525 1977, 537.

institutions of government in the occupied State, for example the occupant could not convert a monarchy to a republic, a unitary system into a federal system or transform a socialist State to a capitalist State as such an undertaking remained the preserve of the sovereign. Stone writing in 1954 observed, quite rightly, that the rule on reverse transformation faced a turbulent future.⁷⁴⁹ Although neither the Hague nor the Geneva rules specifically relate to the status of fundamental institutions there is overwhelming academic consensus that the institutions of State must be preserved intact.⁷⁵⁰ The only exception to this rule is in the perfidious event that the political system itself represents an immediate threat to the maintenance of the security of the occupant's forces and therefore it becomes necessary to reorder the occupied State's domestic institutions.⁷⁵¹ Accordingly this would appear to fall within the margins of extreme military necessity or *kreigsraison* proffered by Professor Lueder. He suggests:

“when therefore the circumstances are such that the attainment of the object of the war and the escape from extreme danger would be hindered by observing the limitations imposed by the laws of war, and can only be accomplished by breaking through those limitations, the latter is what ought to happen.”⁷⁵²

Accordingly, the extreme military necessity in dismantling Nazi institutions after World War II led some academics to argue that laws reflecting Nazi ideology were legitimately deconstructed under the lexicon of the Hague rules.⁷⁵³ However, the position of Nazi Germany as with Iraq were reduced to a state of *debellatio* during the occupation phase and can be differentiated from a beleaguered defeated sovereign on the periphery awaiting a final peace settlement. Where the threat still is potentially

⁷⁴⁹ Julius Stone, *Legal Controls of International Conflict A Treatise on the Dynamics of Disputes and War Law* (London: Stevens & Sons Limited, 1954) p. 699.

⁷⁵⁰ Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace, Monograph Series No. 6, 1942) p. 89; Yoram Dinstein, “Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding” HPCR Occasional Paper Series (Fall 2004) p. 10. Article at <http://www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf>; Julius Stone, *Legal Controls of International Conflict, A Treatise on the Dynamics of Disputes and War-Law* (London: Stevens & Sons Limited, 1954) p. 698. Knut Dormann, Laurent Colassis, “International Humanitarian Law in the Iraq Conflict” *German Yearbook of International Law* 47 (2004), 293, 305; Conor McCarthy, “The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq” *Journal of Conflict and Security Law* Volume 10, No. 1 (Spring 2005), 43, 66; Julius Stone, *Legal Controls of International Conflict A Treatise on the Dynamics of Disputes and War Law* (London: Stevens & Sons Limited, 1954) p. 698.

⁷⁵¹ Edmund H. Schwenk, “Legislative Power of the Military Occupant Under Article 43, Hague Regulations” 54 *Yale L. J.* 393 1944-1945, p. 403.

⁷⁵² John Westlake, *Chapters on the Principles of International Law* (Cambridge University Press Warehouse, 1894) p. 239.

⁷⁵³ Edmund H. Schwenk, “Legislative Power of the Military Occupant Under Article 43, Hague Regulations” 54 *Yale L. J.* 393 1944-1945, p. 407.

posed by the latter, the former could not possibly revert to a position of *kreigraison* as significantly the former regime along with its institutions no longer exist. Alternatively with the advent of the Geneva Convention some writers suggest that Article 64 recommends the alteration of political institutions and government machinery where these posit a threat to human beings as opposed to State apparatus in the occupied territory.⁷⁵⁴ The drafters of the Geneva Conventions were primarily concerned with the protection of civilians during occupation regardless of the status of the occupied State. What remains in the aftermath of the Iraq occupation is a deep dissensus amongst the international community on the transformative licence of occupation law.

3.3.4 *Application to Iraq*

The preamble to Resolution 1483 “resolved that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance.”⁷⁵⁵ Acting under Chapter VII of the UN Charter, the resolution further expressed that “member States and concerned organisations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution.”⁷⁵⁶ UNSC 1483 paragraph 8(c) required the Secretary-General’s Special Representative for Iraq, “working intensively with the Authority, the people of Iraq and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognised, representative government of Iraq.”⁷⁵⁷ Critically, the international intention was to reconstruct the local and national political institutions while working with the occupant during occupation. However, Yoo contends that the extensive overhaul of Iraqi institutions is engrained in the Article 43 duty to “restore and ensure as far as possible public order and safety” a view which

⁷⁵⁴ Marco Sassóli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers” *EJIL* (2005), Vol. 16 No. 4 661, 672.

⁷⁵⁵ S/RES/1483 (2003) preamble; During the occupation of Iraq, John Yoo suggested that an extensive reordering of Iraq’s domestic institutions was warranted on the grounds of U.S national security and the necessity to end human rights abuses. John Yoo, “Iraqi Reconstruction and the Law of Occupation” 11 *U.C Davis J. Int’l L. & Pol’y* 7, 9.

⁷⁵⁶ S/RES/1483 (2003) par 1.

⁷⁵⁷ S/RES/1483 (2003) par 8(c).

has been mirrored by others.⁷⁵⁸

The transformation of Iraq's institutions presents one of the most controversial aspects of the occupation. Prior to the occupation of Iraq, the British Attorney General, the Right Hon. Lord Goldsmith warned:

“Article 43 of the Hague Regulations imposes an obligation to respect the laws in force in the occupied territory ‘unless absolutely prevented.’ Thus, while some changes to the legislative and administrative structures of Iraq may be permissible if they are necessary for security or public order reasons, or in order to further humanitarian objectives, more wide-ranging reforms of governmental and administrative structures would not be lawful.”⁷⁵⁹

This reading of Article 43 suggests that the occupied territory may be reordered, including the local administrative structures, for limited security and humanitarian purposes but anything beyond this is absolutely prevented. Consonantly the permanent alteration of Iraq's institutional infrastructure is inconsistent with the *status quo ante bellum* policy of Article 43 of the Hague Regulations. Arguably the transformation from centralised to federal control could be described as benefiting the population. However the recognition of the Kurdish Regional Government in section 1 of Order 71, coupled with the allocation of excessive authority to regional entities with the aim of creating a weak central government, effectively heightened sectarian tensions for regional control in the territory and fell short of that mark.⁷⁶⁰

3.4 Can the Coalition Provisional Authority Legislate to Introduce Economic Changes for the Benefit of the Occupied Population?

The Iraq Interim Constitution, 1990 declared Iraq to be a Sovereign People's Democratic Republic with the objective of building up a socialist system.⁷⁶¹ Under

⁷⁵⁸ John Yoo, “Iraqi Reconstruction and the Law of Occupation” 11 U.C Davis J. Int'l L. & Pol'y 7, 16; Conor McCarthy, “The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq” Journal of Conflict and Security Law, Volume 10, No. 1 (Spring 2005), 43, 62.

⁷⁵⁹ Memorandum from the Right Hon. Lord Goldsmith, QC to the Prime Minister (March 26, 2003), reprinted in John Kampfner, *Blair Told it would be Illegal to Occupy Iraq*, New Statesman, May 26, 2003 at p.16-17.

⁷⁶⁰ Kenneth Katzman, The Kurds in Post-Saddam Iraq, CRS Report for Congress (23 October 2008) p. 1.

⁷⁶¹ Iraq Interim Constitution, 1990.

Article 12 economic policy was directed at “realising the economic Arab unity.”⁷⁶² Article 13 provided that the “national resources and basic means of production are owned by the people”.⁷⁶³ At the heart of Iraqi law was the precept of public ownership. Similarly considerations of the public were framed in Coalition Provisional Order 39 on Foreign Investment Law which underlines the Coalition’s “obligation to provide for the effective administration of Iraq, to ensure the well being of the Iraqi people and to enable the social functions and normal transactions of every day life”.⁷⁶⁴ Can a duty to introduce economic legislative measures “for the benefit of the occupied population” be extrapolated from international humanitarian law?

A belligerent occupier may initiate projects in response to public needs, which can produce both short term and long term permanent effects. In *Marjamoff* (1924) the occupying German Governor General issued a decree to change the law concerning the expropriation of private property for public utility.⁷⁶⁵ Formerly only the sovereign could expropriate property for public purposes under the law but the belligerent occupant altered the law by military ordinance. The impetus on the occupier to address the local and military needs of the occupied population was manifest in the alteration of local law and the substitution of rules of procedure. However the overall impact offended against ancillary Hague rules protecting the private immoveable property of the occupied population against expropriation.⁷⁶⁶ Legislative adjustments under Article 43 precipitating violations of concomitant Hague regulations are in themselves *ultra vires* the Hague Regulations regardless of arguments based on public policy or military necessity.⁷⁶⁷ The immoveable private property of the occupied population is beyond expropriation. Although the Polish Supreme Court ruled that procedural rules could be amended to substitute the actions of the occupier for those in place of the legitimate sovereign, it is doubtful that this may be permitted to the

⁷⁶² Article 12, Iraq Interim Constitution, 1990

⁷⁶³ Article 13, Iraq Interim Constitution, 1990

⁷⁶⁴ Coalition Provisional Authority Order Number 39, CPA/ORD/ 19 September 2003/39

⁷⁶⁵ *Marjamoff and Others v. Wloclawek (Communal District of)* (5 December, 1924) Poland, Supreme Court, First Division, Annual Digest of Public International Law Cases Years 1923 to 1924 (Longmans, Green and Co. London, New York, Toronto, 1933) Case No. 243, p. 444.

⁷⁶⁶ For discussion on private property see Chapter 1, p 12.

⁷⁶⁷ *Delville v. Servais*, Belgium, Court of Appeal of Liège, October 19, 1945, Annual Digest and Reports of Public International Law Cases Years 1943-1945, (London Butterworth & Co. (Publishers), Ltd., 1949) p. 499, Case No. 157; *Dalldorf and Others v. Director of Prosecutions*, British Zone of Germany, Control Commission Court of Appeal, December 31, 1949, Annual Digest and Reports of Public International Law Cases Year 1949 (London Butterworth & Co. (Publishers), Ltd., 1955) Case No. 159, p. 435.

extent that additional Hague Rules are violated. The belligerent occupier is not the legitimate sovereign of the occupied territory and while he takes the reins of administering the occupied State, international humanitarian law limits the belligerent's actions punctiliously. Jessup argues that the power of the occupant to act under the emergency legislation of the occupied State is subject to abuse where the occupant manages the territory for its own enrichment rather than for the benefit of the occupied population.⁷⁶⁸ Conversely, Article 56 of the Fourth Geneva Convention places a duty on the occupier 'to the fullest extent of the means available to it' to ensure and maintain public healthcare services. Notwithstanding, where domestic legislation provided a means for expropriating property for these limited purposes that certainly would comport with the Article 56 obligation. Seemingly parallel expropriation of property under the domestic Polish legislation for alternative purposes such as commercial use would violate the Hague rules.

During the German occupation of Norway, the German occupying authorities by *Fuhrerverordnung* (Decree of the Fuhrer) implemented a reform in social welfare payments to children born of German lineage.⁷⁶⁹ Aside from the unpalatable racial motivations behind the legislative reforms, the act posed the question, to what extent can the belligerent legislate for the social benefit of the occupied population in the field of family law, in cases which clearly do not warrant the consideration of the military necessity principle. Dr. Frede Castberg considered that the belligerent occupant had discretion in making social security provisions for persons who had a permanent connection with the army of occupation.⁷⁷⁰ However this narrowly addresses the right of the occupier to legislate socially to protect those who have relations to the army of occupation. Can the occupier expand this to broadly encompass society as a whole? Kruse-Jensen J argued *a contrario sensu* that the occupier was limited under Article 53 in administering cash, funds, realisable securities that are strictly the property of the State, for operations of war.⁷⁷¹ Using funds outside this context for the maintenance of illegitimate children conflicted with provisions of international law. The belligerent occupant will face legislative

⁷⁶⁸ Philip C. Jessup, "A Belligerent Occupant's Power over Property" *The American Journal of International Law*, Vol. 38, No. 3. (Jul., 1944), 457, 461.

⁷⁶⁹ *A v. Oslo Sparebank (The Crown Intervening)* (January 14, 1956) Norway Supreme Court, International Law Reports Year 1956, (London Butterworth & Co. (Publishers) 1960) p. 791.

⁷⁷⁰ *Ibid* at p. 792-793. Dr. Frede Castberg was director and professor of law at the University of Oslo.

⁷⁷¹ *Ibid.*, p. 794.

constraints within international humanitarian law where legislation for social purposes infringes the ancillary articles of international law protecting moveable cash resources of the occupied State. As a corollary, an abridged reading of Article 43 is espoused where the monetary resources of the territory are put beyond the use of the belligerent in cases not directly related to the operations of war. Where prolonged occupations become the norm the dividing line is obfuscated between when the belligerent may or may not legislate beyond military operations for the social and economic life of the occupied territory.

Clearly social reforms are limited by reference to military operations under the lens of the Hague Regulations. However the advent of the Geneva Conventions and, for the purposes of occupied territory, the Fourth Geneva Convention extols the confluent contemplation of military objectives and matters concerning the occupied population. Section III of the Fourth Geneva Convention pertains to occupied territories. Article 50 therein requires the occupier to cooperate with the national and local authorities to facilitate “the proper working of all institutions devoted to the care and education of children”.⁷⁷² The article is general in scope applying to a variety of institutions of a “social, educational and medical character” and places an obligation on the belligerent occupant to see to their effective administration where these cater for the care and education of children.⁷⁷³ Accordingly, there is an implicit duty for the belligerent to operate beyond the context of military necessity for the social benefit of the occupied territory. Von Glahn indicates that discriminatory laws based on race, colour, political opinion or religious creed may be suspended in the effort to promote public order and safety.⁷⁷⁴ Moreover, the belligerent is required to dispense the resources of the occupied State to achieve these aims. Article 56 of the fourth Geneva Convention requires that the occupant ‘to the fullest means available to it’ maintain in coordination with the local authorities, the hospital, public health and hygiene of the occupied territory.⁷⁷⁵ The additional authority granted to the belligerent in legislating

⁷⁷² Article 50, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

⁷⁷³ Jean S. Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (Geneva International Committee of the Red Cross, 1958) p. 286.

⁷⁷⁴ Von Glahn, *The Occupation of Enemy Territory; A Commentary on the law and Practice of Belligerent Occupation* (Minneapolis, University of Minnesota Press, 1957) p. 95.

⁷⁷⁵ Article 56, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

for broader social concerns beyond hostilities is axiomatically linked to a shared responsibility and cooperation with the national and local authorities. Consequently, this dual responsibility prevents the occupier from abusing the Geneva norms and using them as a means of extending the legislative measures of the belligerent home State to the occupied territory.

Beyond the latitude of the Fourth Geneva Convention considerations of social, educational and medical care the belligerent is not encouraged to engage in radical social reforms outside the context of maintenance public order and the security of the armed forces. In *Centrale Onderlinge Insurance Company v. State of the Netherlands* (1952), the Dutch District Court of the Hague found that the occupying authority did not have the competence to issue occupation orders compelling the State to contribute in underwriting the health insurance premiums of the plaintiff company.⁷⁷⁶ Although the measures served to buttress the insurance industry against sickness insurance claims made by employees and employers, the measures while radical were merely temporary in nature and did not create an obligation on the returning sovereign. Ostensibly, the ordinances were passed to secure social insurance for workers in the exogenous German Todt Organization for the insurance company. However, the case serves to illustrate the reluctance of occupied States to honour the social insurance measures of occupational forces even where promulgated in the interests protecting the citizen, suggesting a narrow focus on the legislative authority of the belligerent for social purposes.

The belligerent occupant may be obliged to legislate for the social benefit of the occupied territory going beyond the military necessity paradigm of hostilities. In *De Alwis (or Jayatilaka) v. De Alwis and Yeo Giak Choo* (1947) the Malayan Union Supreme Court ruled that the Japanese occupying authorities in Malaya had the authority under Article 43 to appoint a registrar for Christian Marriages under the provisions of the Christian Marriage Enactment in the State of Selangor.⁷⁷⁷ Consonantly the appointment depicted a necessary engagement with the rules of

⁷⁷⁶ *Centrale Onderlinge Insurance Company v. State of the Netherlands*, (April 2, 1952) Holland, District Court of the Hague, International Law Reports Year 1952, (London Butterworth & Co. (Publishers), Ltd, 1957) Case No. 129, p. 600.

⁷⁷⁷ *De Alwis (or Jayatilaka) v. De Alwis and Yeo Giak Choo*, (July 5, 1947) Malayan Union, Supreme Court, Annual Digest and Reports of Public International Law Cases Year 1948 (London Butterworth & Co. (Publishers), Ltd, 1953) Case No. 195, p. 589.

procedure on marriages to give effect to the predecessor marriage laws in the occupied State. Interestingly, this cannot be considered as a fundamental shift in policy of the occupying Power as a social transformative measure. The alterations stood only to give effect to the domestic pre-war legislation of the occupied State. Correspondingly, the Belgium Civil Court of Brussels narrowed the application of marriage ceremonies in *N v. Belgium State and Officier De L'État Civil of the Commune of Uccle* (1949) to those outlined in Belgian marriage law. There a Belgian woman who had married a German officer in occupied Belgium in a service performed by the German military authorities under German legislation, contended that the marriage was contrary to the formal requirements of Belgian law and thus invalid.⁷⁷⁸ There was no impetus on the German occupier to substitute German marriage laws for Belgian laws as the occupant was not absolutely prevented from respecting the laws in force in the territory on the grounds of public order or security. The lexicon of Belgian marriage law invested Belgian armed forces with the competence to perform the marriage ceremonies of soldiers. Notwithstanding, the provisions of Article 43 would possibly permit the catalytic alteration of procedural rules to provide for the substitution of German occupation armed forces for national Belgian forces in the marriage ceremony. However the outright imposition of the German law on marriages in occupied territory was beyond the intention of the Hague rules and highlights the cloistered impact of the rules on the occupiers social engineering endeavours.

The belligerent may regulate the relationship between landlords and tenants in the private sphere, in place of the legitimate sovereign. Accordingly the belligerent occupant may regulate both private and commercial landlord and tenant contractual leases. In *re Law 900 of 1943* (1944) the Greek Areopagus (Court of Cassation) ruled that a law passed by the German occupying authorities in Greece regulating the letting of premises for a certain period of time was valid.⁷⁷⁹ Unfortunately the court did not address the issue of permanence of contractual leases negotiated between the parties and the impact of the occupation measure on leases grossly exceeding the period of

⁷⁷⁸ *N v. Belgium State and Officier De L'État Civil of the Commune of Uccle*, (July 9, 1949) Belgium, Civil Court of Brussels, Annual Digest and Reports of Public International Law Cases Year 1949, (London Butterworth & Co. (Publishers), Ltd., 1955) Case 170, p. 470.

⁷⁷⁹ *re Law 900 of 1943*, (Judgment No. 68 of 1944), Greece, Areopagus (Court of Cassation), Annual Digest and Reports of Public International Law Cases Years 1943-1945, (London Butterworth & Co. (Publishers), Ltd., 1949), Case No. 152, p. 441.

occupation. Where the occupier has legislated for private landlord and tenant rights, disputes between the parties must be settled in the courts and the belligerent occupant must refrain from intervening unless there is a pressing security issue.⁷⁸⁰

Judge Parra-Aranguren in the recent International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo*, (2005) determined in his separate opinion that failure to restore public order and life in the occupied territory did not amount to a violation of Article 43, as the only obligation on the occupier is to 'take all measures within his power to restore and as far as possible, to insure public order and life.'⁷⁸¹ This signals a return to the World War II perceptions of occupation where the insouciant attitude of the occupier to the ailing occupied population devastated the occupied territory as witnessed for example in the British occupation of Tripolitania.⁷⁸² However Judge Kooijmans in his separate opinion argued that "the main purpose of that law is to protect persons caught up in conflict, even if it does take into account the interests of the belligerent parties."⁷⁸³ This is the first indication from a member of the International Court of Justice that the rights of the belligerent might actually be subordinate to the rights of the occupied population.

Allan Gerson, in 1973, interestingly coined a new category of "trustee occupation" which would apply to certain occupations that needed to operate outside the confines of occupation law. This may be necessary in cases where the sovereignty of the occupied territory is disputed, such as the Palestinian territories, and where the occupant needs to positively develop the territory economically, socially or politically.⁷⁸⁴ Admittedly, the occupation of Iraq (2003-2004) was predicated on the basis of an illegal invasion and Iraq's sovereignty was never in dispute.⁷⁸⁵ However

⁷⁸⁰ *Sabu v. Military Governor of Jaffa* (September 6, 1949) Israel, Supreme Court (sitting as High Court of Justice) Annual Digest and Reports of public International Law Cases Year 1949 (London Butterworth & Co. (Publishers), Ltd, 1955) Case No. 166, pp 464- 466.

⁷⁸¹ *Case Concerning Armed Activities on the Territory of the Congo*, International Court of Justice (19 December 2005), Separate Opinion of Judge Parra-Aranguren, p. 11, par 47.

⁷⁸² Eyal Benvenisti, *The International Law of Occupation*, (Princeton University Press, second edition, 2004) p. 79.

⁷⁸³ *Case Concerning Armed Activities on the Territory of the Congo*, International Court of Justice (19 December 2005), Separate Opinion of Judge Kooijmans, p. 321, par 58.

⁷⁸⁴ Gerson, "Trustee Occupant: The Legal Status of Israel's Presence in the West Bank" *Harvard International Law Journal*, 14 (1973), pp. 1-49; Israel, *The West Bank and International Law* (1978) pp. 78-82.

⁷⁸⁵ N.D White & E.P.J. Myer, "The Use of Force Against Iraq" *Journal of Conflict and Security Law* (2003), Vol. 8 No. 1, 1-14; Jutta Brunnee and Stephen J. Toope, "The Use of Force: International Law

Gerson's thesis offers the first serious attempt to create a new category of occupations premised on the desire to transform the political and economic self-determination of territory outside the confines of traditional international humanitarian law. The humanitarian occupations of the United Nations rooted in human rights law could be characterised as "trustee occupations". In parallel, the thesis also highlights the inadequacy of the Hague and Geneva law in transformative projects even where the belligerent liberally modifies the civil law of the occupied territory in response to the humanitarian provisions of the Fourth Geneva Convention. Roberts argues that the concept of trusteeship is manifest in all belligerent occupations and that *jus ad bellum* considerations of the lawful/unlawful aggressor are irrelevant.⁷⁸⁶

Case law suggests that the belligerent occupant may show a willingness to engage in social reforms. The overarching problem with creating legislation to overcome social problems is determining the extent that this is based on legitimate concern for the occupied population rather than the underlying self-serving war objectives of the occupant. Dinstein proposes, as a rule of thumb, comparing the legislation with that implemented in the belligerent occupant's home territory. If the belligerent has not shown the same due diligence and introduced the same level of social reform in the home territory, this is a good indicator that the reforms are not in the best interests of the occupied population.⁷⁸⁷ The difficulty with this test, is that in the reverse, the test encourages the occupier to introduce reforms in parallel with the home State, a practice strongly discouraged under international law.⁷⁸⁸ Furthermore, the type of social reform stemming from the home State may serve to benefit the occupant's home economy, to the detriment of the occupied population. An example of this would be the introduction of a mobile telecommunications system in Iraq during the occupation, which complemented the US telecommunications network but which was

After Iraq" *International Comparative Law Quarterly* Vol. 53, October 2004, pp 785-806; Vaughan Lowe, "The Iraq Crisis: What Now?" *International Comparative Law Quarterly* Vol 52, October 2003, pp 859-871; Christian Henderson "The Bush Doctrine: From Theory to Practice" *Journal of Conflict & Security Law* Vol.9, No. 1, 3-24; Michael Bothe, "Terrorism and the Legality of Pre-emptive Force" *European Journal of International Law*, Vol. 14, No. 2, 227-240; Richard N. Gardner, "Neither Bush nor the Jurisprudes" 97 *American Journal of International Law* (2003) 585; Miriam Sapiro, Iraq: The Shifting Sands of Pre-emptive Self-Defence, 97 *American Journal of International Law* (2003) 607.

⁷⁸⁶ Adam Roberts, What is a Military Occupation? *The British Year Book of International Law* 1984, Oxford University Press, 1985. p. 295.

⁷⁸⁷ Dinstein, The International Law of Occupation and Human Rights, 8 *IYHR* 104, 112 (1978).

⁷⁸⁸ Esther Rosalind Cohen, *Human Rights in the Israeli Occupied Territories 1967-1982* (Manchester University Press, 1985) 31

substantially different and incompatible with the telecommunications networks models in the Middle East. On the surface the reform of the telecommunication industry benefited the Iraqi people, however ultimately it served to extend the US telecommunications market into Iraq to the detriment of occupied population wishing to use the service to call friends and relatives in neighbouring States with incompatible networks.

3.4.1 Application to Iraq

Can the belligerent occupant introduce economic reforms for the benefit of the occupied population? Coalition Provisional Authority Foreign Investment Order 39 proposed that “facilitating foreign investment will help to develop infrastructure, foster the growth of Iraqi business, create jobs, raise capital, result in the introduction of new technology into Iraq and promote the transfer of knowledge and skills to Iraqis”.⁷⁸⁹ Pertinently the quagmire lies in the occupant’s conception of what is necessary for the State. Foreign Investment Order Number 39 contains reforms and completely alters the way that foreign investment is carried out in Iraq to benefit the Iraqi people. For example section 2 of the order stipulated that any measure “safeguards the general welfare and interests of the Iraqi people”.⁷⁹⁰ The order replaced all existing Iraqi foreign investment law and opened up Iraq to foreign investors without restrictions.

Limited alterations of law for humanitarian purposes are envisaged under the Fourth Geneva Convention, however these are restricted to primary social concerns such as public health, hygiene, childcare and education. Social welfare payments were legislated for in *Fuhrerverordnung* and marriage laws updated in *De Alwis*. In Iraq the establishment of the Ministry of Human Rights to promote the protection of human rights and fundamental freedoms during the occupation may be considered within this paradigm.⁷⁹¹ More radical reforms like the compulsory introduction of social insurance in *Centrale Onderlinge Insurance Company* were found to be ancillary to humanitarian requirements. Therefore one must question the humanitarian benefit to

⁷⁸⁹ Coalition Provisional Authority Foreign Investment Order Number 39, CPA/ORD/ 19 September 2003/39.

⁷⁹⁰ *Ibid.*, at section 2.

⁷⁹¹ Coalition Provisional Authority Foreign Investment Order Number 60, Establishment of the Ministry of Human Rights, CPA/ORD/ 19 February 2004/60,

the population of a legislative measure that favours foreign investors over the general public. Section 4 of the Foreign Investment Order places the treatment of foreign investors on an equal footing with Iraqi investors and removes limitations from the amount of foreign participation necessary in businesses.⁷⁹² Section 7 of the Foreign Investment Order facilitates:

“The transfer abroad without delay all funds associated with its foreign investment including shares or profits and dividends; proceeds from the sale or other disposition of its foreign investment or a position thereof; interest, royalty payments, management fees, other fees and payments made under a contract and other transfers approved by the Ministry of Trade.”⁷⁹³

It is difficult to extrapolate from such measures any corresponding benefit to the population. There is no requirement to retain a percentage of profits derived from investments in the occupied State.

The nature of the order, at a time when billions of dollars from the Development Fund for Iraq were awarded to foreign reconstruction companies entering Iraq is suspect. Accordingly any profits derived from the reconstruction contracts were readily removed from Iraq to foreign control under the order. This practice accords greater weight to Jessup’s argument that the “benefit of the occupied population” consideration is liberally subject to abuse by the occupier for its own enrichment. Moreover this is exactly the type of action which the conservationist policy of the Hague Regulations seeks to protect against. Admittedly Dinstein’s suggestion that the reforms implemented by the occupying administration should not exceed legislation implemented in the home territory would be well served in the case of Iraq. The United States Foreign Investment in Real Property Tax Act of 1981 requires that all foreign persons pay tax on dispositions of any interests in US real property.⁷⁹⁴ It is questionable why a similar mechanism is absent from the Foreign Investment Order in Iraq.

Gerson’s suggestion of a new form of “trustee occupation” outside the parameters of

⁷⁹² Coalition Provisional Authority Foreign Investment Order Number 39, CPA/ORD/ 19 September 2003/39, section 4.

⁷⁹³ *Ibid.*, at section 7.

⁷⁹⁴ United States Foreign Investment in Real Property Tax Act of 1981, Disposition of Investment in United States Real Property, § 897.

international humanitarian law to facilitate economic, social and political development in the occupied territory should be treated with caution. As a corollary, the invading belligerent's motivations to "benefit the occupied population" are never too far removed from their primary war objectives. Correspondingly, in Iraq Saddam's regime directed the economic agenda towards the realisation of Arab unity and maintained that national resources were owned by the people, objectives which on paper mirror positive social and economic objectives.⁷⁹⁵ Whereas those laws served to buttress megalomaniac dictatorship rule, alternative measures serve to inflate the home economy of the invading belligerent occupant.

Under Article 43 of the Hague Regulations the belligerent occupant is required to "take all 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." However the rule does not indicate how far exactly the occupier can operate in restoring public order and safety under the pretext of military necessity and if military necessity is the only factor for consideration when administering territory. The administration of occupied territory serves to protect the competing interests of the security forces of the occupying power, the sovereign State against internal attacks from within the occupied territory and the local population against exploitation.⁷⁹⁶ Is there a dichotomous duty to amend domestic legal provisions under military circumstances and a duty to the occupied population to maintain effective administration without recourse to military considerations?

Certain courts have conceded that both public order considerations and cases of absolute necessity permit the occupier to formally overrule the laws of the occupied State. In *Conservatorio Cherubini of Florence v. Saba* (1954) the Italian Court of Cassation determined that the formal acts of the military authorities may not outweigh the authority of administrative bodies under the law of the occupied State except in cases of military necessity and for the purposes of ensuring public order.⁷⁹⁷ In that case the belligerent occupant did not have the authority to cancel a public contract by

⁷⁹⁵ Article 12, Iraq Interim Constitution, 1990; Article 13, Iraq Interim Constitution, 1990

⁷⁹⁶ *Haetzni v. Minister of Defense* (1980) 34 (3) PD 595, 597.

⁷⁹⁷ *Conservatorio Cherubini of Florence v. Saba* (February 22, 1954) Italy Court of Cassation (United Chambers), International Law Reports Year 1955 (London Butterworth & Co. (Publishers) Ltd. 1958) p. 998, p. 999-1000.

occupation order between the *Conservatorio* and the respondent as the contract neither related to the conduct of war nor the maintenance of public order. Conversely, where these conditions were present the court accepted that the belligerent could employ legal measures beyond the authority of the occupied State to achieve its objectives.

During the occupation of the Palestinian territories, the Israeli Military Court in *Military Prosecutor v. Zuhadi Salah Hassin Zuhad* (1968), found that the military court had no authority to distinguish between orders except where the order was “patently and manifestly ultra vires”.⁷⁹⁸ Expansively, all orders issued by the military commander were considered valid except for those contrary and unreasonable to the principles of natural justice and arbitrarily enacted absent lawful consideration and purpose. Notwithstanding, the occupant was entitled in this case to enact a Traffic Law Order to supplement Jordanian traffic laws. Consonantly, no matter how loosely related the order is to the administration of the territory and security of the forces, it will be considered compatible with the principles of Article 43 of the Hague Regulations by the armed forces. Interestingly, the Israeli Supreme Court in *Sabu v. Military Governor of Java* (1949) found that a military order issued by the Military Governor of Java to settle a dispute between two parties over a written contract for rent of a property was not necessary for the safety of the army or for the effective maintenance of public order. Central to the court’s reasoning for finding against the military commander was the absence of any connection between the order and the safety of the army. This stricter reading of the Hague rules succinctly locates public order considerations within the confines of military necessity. Property is confiscated arbitrarily if it is confiscated for purposes other than satisfying public, administrative or security needs. In *Société Brassarie et Malteries de Franche-Compte Alsace v. Ripoll* (1960), the French Court of Cassation found that property expropriated from Ripoll, a Jewish café owner in France by the German occupying authorities and subsequently re-let, was an arbitrary act in the interests of the occupation as no substantial reasons were given for the cancellation of the lease.⁷⁹⁹

⁷⁹⁸ *Military Prosecutor v. Zuhadi Saleh Hassin Zuhad* (11 August 1968) Israel, Military Court sitting in Bethlehem, International Law Reports Volume 47, (London Butterworths 1974) p. 490.

⁷⁹⁹ *Société Brassarie et Malteries de Franche-Compte Alsace v. Ripoll* (27 January 1960) France, Court of Cassation, International Law Reports Volume 41, (London Butterworths, 1970) p. 475.

During the post World War II transformative allied occupations, the courts presented a broader dispensation of Article 43. Shedding the core conception of marginal alteration of domestic laws relative to military necessities, the courts explicated an Article 43 façade attenuated by reference to the whole social, commercial and economic life of the occupied community. In *Grahame v. The Director of Prosecutions* (1947) the Control Commission Court of Criminal Appeal considered *obiter dictum* the power of the British Military Commander to legislate and establish courts in occupied Berlin under Article 43.⁸⁰⁰ The court determined that measures to protect British property and German currency did not conflict with the German laws in force in that sector and were therefore compatible with Article 43. Even so, it was not necessary to submit the legislation to a test as strict as that. The authoritative Article 43 French translation incorporated the capacious spectre of “*l’ordre et la vie publics*” spanning the social, commercial and economic fabric of society.⁸⁰¹ This connoted a dichotomous test comprising of military need and societal considerations.

“It may likewise do anything which is necessary in order to maintain public order or to supply deficiencies in the pre-existing administrative machine which may have developed, provided always that such measures as are resorted to are called for by operations of war. For it is the requirements of belligerent operations which supply the general criterion employed by the rules of international law regulating belligerent occupation.”⁸⁰²

Consequently, the correct legal framework for addressing the transformation of territory outside of military operations is under domestic law coupled with the international human rights treaties system but the situation is less certain in light of the World War II precedents.⁸⁰³ Certainly during occupation where there is no argument for military operations, the belligerent has no authority to alter the legal or commercial system of the occupied State within the public order paradigm.

⁸⁰⁰ *Grahame v. The Director of Prosecutions* (July 26, 1947) Germany, British Zone of Control, Control Commission Court of Criminal Appeal, Annual Digest and Reports of public International Law Cases Year 1947, London Butterworth & Co. (Publishers), Ltd, 1951) Case No. 103, p. 228.

⁸⁰¹ *Ibid.*, at p. 232.

⁸⁰² *Re Condarelli* (July 5, 1952), Italy, Court of Cassation, International Law Reports Year 1952, (London Butterworth & Co. (Publishers), Ltd., 1957) Case No. 133, p. 610.

⁸⁰³ Roberta Arnold, Noelle N. R Quénivet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers, 2008) 125

3.4.2 *Military Necessity and Economic Change*

Can military necessity drive economic change? Can military objectives *jus ad bellum* to transform territory in line with the occupier's conceptions of liberal democracy justify radical alterations to the economic structure of the occupied state? In *City of Antwerp v. Germany* (1925) the Germano-Belgian Mixed Arbitral Tribunal framed the Article 43 duty to maintain public order and civil life within the theatre of hostilities. There the Tribunal found that a decree substituting the jurisdiction of ordinary courts for military courts composed of German subjects had impeded civilians claims for compensation that they were entitled to under a domestic Belgian decree. The decree provided for municipal responsibility over certain acts of mob violence against persons or their property. The Tribunal found that the decree was contrary to Article 43 as it did not satisfy military necessity or public order and thus Germany was responsible for the sums of money paid by the City of Antwerp. Correlating the ruling to economic concerns, the Tribunal did not consider the potential opening of the floodgates to damages claims under the Belgian decree during hostilities. Arguably the occupier could have opted to suspend the decree because the hostilities had provided an environment susceptible to mob violence and increased claims would have adversely affected the municipality funds. Remarkably, the economic factor was not argued, indicating that the Tribunal after World War I, was more narrowly focussed on existing local laws to regulate the day to day running of the municipality.

During the German occupation of Belgium during World War I the Germans argued that economic necessities justified a host of unpalatable practices such as forced labour and deportation of inhabitants. Smugglers and the illicit trading of goods at the frontier coloured the military necessity considerations of the belligerent occupant.⁸⁰⁴ Even so, transgressions by the German occupant into Belgians economic sphere were a disproportionate response to the frontier contraband and manifestly exceeded security considerations under Article 43. Amongst the questionable reforms were new laws affecting "trade, education, health, language, business and ordinary industrial pursuits such as agriculture, stock-breeding, slaughtering of livestock for food,

⁸⁰⁴ H. de Watteville, "The Military Administration of Occupied Territory in Time of War" *Transactions of the Grotius Society*, Vol. 7, Problems of Peace and War, Papers Read Before the Society in the Year 1921, (1921), p 133, 136.

muzzling of dogs, feeding of animals, planting and harvesting of crops, the sale of produce, the tanning of hides and the conservation of foods.”⁸⁰⁵

Security concerns during World War II occupations culminated in the practice of occupiers executing orders that impinged on the economic life of the State in a substantial way. In *Haw Pia v. The China Banking Corporation* (1948), the Philippines Supreme Court ruled that the Japanese military authorities in the occupied Philippines had the right to order the sequestration and liquidation of enemy assets in the privately owned China Banking Corporation for security purposes.⁸⁰⁶ The order, while meeting security concerns under Article 53, conflicted with the *status quo* requirement of Article 43. This drastic intrusion into private commercial enterprise was sharply criticised by Hilado J. who argued that the sequestration of property stood for the antithesis of the Article 43 duty on the occupier to restore and ensure as far as possible public order and safety.⁸⁰⁷ Sequestration of property and deep re-ordering of commercial activities raises the question of whether legitimate property expropriation under Article 52 and 53 may legally permit the occupier to fundamentally realign the commercial of life of the invaded territory in its endeavours to achieve mass property confiscations and sequestrations and of when, (if ever) this conflicts with the *status quo ante* policy of Article 43. Seemingly the invading belligerent has extensive legislative powers under Article 43.

In *Gibbs et al. v. Rodríguez et al* (1950) the Philippines Supreme Court rejected an argument put forward by Professor Hyde in a journal article entitled “Concerning the Haw Pia Case” that the forced payments of debt to the banks in worthless currency to facilitate the sequestration of enemy assets violated the spirit of Article 43.⁸⁰⁸ The belligerent’s right to sequester assets outweighed the Article 43 duty to maintain the *status quo ante* of the territory intact even where this interfered with the economic life of the State. Conversely and under similar circumstances the Burmese Chief Court in

⁸⁰⁵ Edmund H. Schwenk, “Legislative Power of the Military Occupant Under Article 43, Hague Regulations” 54 *Yale L. J.* 393 1944-1945, 407.

⁸⁰⁶ *Haw Pia v. The China Banking Corporation* (April 9, 1948) Philippines, Supreme Court, International Law Reports Year 1951, (London, Butterworth & Co. (Publishers), Ltd., 1957) Case No. 203, p. 642, 643.

⁸⁰⁷ *Ibid.*, 661.

⁸⁰⁸ *Gibbs et al. v. Rodríguez et al* (December 21, 1950) Philippines Supreme Court, International Law Reports Year 1951, (London Butterworth & Co (Publishers), Ltd, 1957) Case No. 204, p. 661; Professor Hyde, “Concerning the Haw Pia Case” *Philippine Law Journal*, 24 (1949) p. 141.

Dawsons Bank Ltd. v. Ko Sin Sein and Others (1963) found that the appointment of a Custodian of Enemy Property did not offend against Article 43 of the Hague Regulations but the discharge of a debt in devalued currency accepted by the Custodian on behalf of Dawsons Bank during the occupation was *ultra vires* Article 43.⁸⁰⁹ The payment of the mortgage debt in deflated currency was contrary to Article 46 of the Hague Regulations. Here the court determined that the alteration of the currency system violated both Article 43 and Article 46 on private property. However should the court have found in favour of Article 46 and decided that there was no significant infringement of private property rights, it is uncertain whether this finding would have swayed a ruling on Article 43 in the opposite direction. Ultimately the Court was not prepared to permit the discharge of a loan in devalued currency that would impact significantly on the regulation of economic life in the occupied territory.

3.4.3 Application to Iraq

In considering military necessity and societal needs, a distinction can be drawn between the necessity to override the laws of the occupied state *jus ad bellum* and *jus in bello*. Prior to the occupation of Iraq the US Department of State in its report, *Future of Iraq Project* (2003), alluded to the deteriorating state of Iraq's economy:

“it would be understandable, but incorrect, to assume, as many otherwise well informed observers do that the ‘lamentable state’ of Iraq’s oil industry, brought about by war and sanctions, is the sole, or even primary cause of Iraq’s economic impoverishment, and to conclude therefore, that Iraq’s economic impoverishment can be relatively easily reversed following the removal of sanctions by increased oil production brought about by readily forthcoming capital investment in Iraq’s oil industry.”⁸¹⁰

The report illustrated that during the early 1990's oil exports accounted for a mere 12.8 per cent of GDP and rose to 50 per cent GDP at the end of the decade. Economic activity had recovered marginally in the later years of the oil-for-food programme.⁸¹¹

The report indicated that the non-oil sectors rather than the oil industry accounted for

⁸⁰⁹ *Dawsons Bank Ltd. v. Ko Sin Sein and Others* (May 8, 1963) Chief Court, International Law Reports Volume 36, (London Butterworths, 1968) p. 497, 503.

⁸¹⁰ Oil and Energy Working Group, Considerations Relevant to an Oil Policy for a Liberated Iraq, The Future of Iraq Project, Department of State, United States of America (25 February 2003) p. 3

⁸¹¹ Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003), (17 July 2003), S/2003/715, p. 16.

the collapsed economy. The UN Secretary-General supported a trajectory towards a market economy to circumvent the escalation of poverty and further deterioration of the centralised Iraqi economy. However in a country where oil exports make up 86 per cent of government revenue it is difficult to accept that increased production would not generate substantial revenues.⁸¹²

Pre-war plans to reform the economy of the enemy State is governed by *jus ad bellum* rather than *jus in bello* considerations. It has been submitted that in certain cases military necessity considerations might permit alteration of the laws in force in the territory even where this intrudes into the economic and commercial laws of the occupied State.⁸¹³ However there must be a direct link between the impending hostilities and the legislative act. The domestic courts have adopted a limitative approach to the issue of military necessity and in *Conservatorio* and *Sabu*, the cancellation of a contract was not sufficiently linked to military necessity while orders undertaken outside of military necessity were considered “arbitrary” in *Military Prosecutor* and *City of Antwerp*. However in *Grahame*, the Control Commission Court of Criminal Appeal advanced a dual test of military necessity coupled with societal need. Even in the context of Iraq the deterioration of the economy alone is not a sufficient threat to warrant legislative change unless it directly impacts on the operations of the armed forces governing the territory.

Accordingly a line can be drawn between a poor economy and a collapsed economy. As was suggested in *Grahame* the complete destruction of the economy would necessitate reconstruction, however it is not so clear whether a poor economy requires reform on the grounds of Article 43 of the Hague Regulations. Contrariwise, the freezing of assets in *Haw Pia*, *Gibbs* and *Dawsons Bank* on the grounds of military necessity for the duration of the occupation had an adverse impact on the economies of the occupied States but this was still regarded as a legitimate measure under Article 43. Introducing economic reforms in Iraq on the basis of military necessity is questionable as firstly, the removal of sanctions alone altered the economic situation

⁸¹² Energy Information Administration, Country Analysis Briefs Iraq (June 2009). At www.eia.doe.gov (Last visited 20 May 2010)

⁸¹³ *Conservatio Cherubini of Florence v. Saba* (February 22, 1954) Italy Court of Cassation (United Chambers), International Law Reports Year 1955 (London Butterworth & Co. Publishers) Ltd 1958) p. 998, 999-1000).

positively and secondly the full impact of the insurgency meant that foreign investors other than those awarded reconstruction contracts were discouraged from entering the territory.

3.4.4 Can the Coalition Provisional Authority Alter the Laws of the Territory to Benefit the Home Economy?

It became clear that the reconstruction efforts resulted in defrauding Iraq out of Development Fund for Iraq and Iraq Reconstruction Fund monies, catapulted by exiguous oversight and monitoring mechanisms employed during belligerent occupation. By 2006 less than 35 per cent of the reconstruction projects had been achieved with the infrastructure of water and power facilities seriously impaired.⁸¹⁴ The failure to reconstruct the judicial system was acknowledged by the CPA who noted that the capacity of the courts during occupation was less than pre-war levels.⁸¹⁵ Moreover the failure to adequately manage reconstruction projects coupled with the rising costs of providing security personnel to protect contractors in the escalating insurgency meant that the radical transformation to a free market economy did not have the full economic impact intended and employment rates remained low.

Interestingly some of the key areas earmarked for reconstruction were satellite industries necessary to buttress the oil industry. Consequently reconstruction of the electricity sector featured prominently in the reform agenda to reconstruct the oil industry and provide essential public services such as restoring electric transmission and distribution lines. The costs of providing security personnel for the reconstruction of the electricity sector were estimated at 18 per cent of the total cost.⁸¹⁶ The CPA Programme Management Office awarded three contracts to reconstruct Iraq's electricity sector totalling \$1.5 billion to private foreign contractors in March 2004 from the Development Fund for Iraq and the cost of providing security at 18 per cent would have amounted to \$270 million.⁸¹⁷ However despite the massive allocation of

⁸¹⁴ House of Commons Foreign Affairs Committee, Foreign Policy Aspects of the War against Terrorism, Fourth Report of Session 2005-06 (21 June 2006) p. 100.

⁸¹⁵ Report to Congressional Committees, Rebuilding Iraq, Resource, Security, Governance, Essential Services, and Oversight Issues (June 2004), GAO-04-902R, p. 5.

⁸¹⁶ Report to Congressional Committees, Rebuilding Iraq, Resource, Security, Governance, Essential Services, and Oversight Issues (June 2004) GAO-04-902R, p. 86.

⁸¹⁷ *Ibid.*, at, p. 87.

resources to finance reconstruction projects by the DFI, and \$4.24 billion from the Iraq Relief and Reconstruction Fund, the electricity sector has been sabotaged by insurgents to hamper oil production with services in 2003 falling below pre-war levels, leaving the suitability of reconstruction during hostilities open to question.⁸¹⁸ This section examines the limitations in Article 43 to prevent the exploitation by the belligerent occupant of a territory's monetary resources through legislative measures.

Economic alterations by the occupant involve transgressions into the private sphere of the occupied State. During hostilities a State may radically alter economic measures in its own territory, extinguish the property rights of its own citizens and discriminate against the enemy nationals of belligerent States.⁸¹⁹ However during the occupation of enemy territory the occupying power must show reticence in interfering with private corporate transactions in the occupied State. In the interests of the occupied population the occupant must ensure a smooth administration and existing legislation should remain in place as far as possible. Early writers on international law warned that the laws governing private rights should remain undisturbed.⁸²⁰ While civil laws such as tort, contracts, property administrative, commercial law and penal laws remained beyond the remit of the occupant, financial political and administrative laws could be suspended and replaced. In light of this, Article 370 of the US Army Field Manual and Article 1209 of the Canadian Law of Armed Conflict maintain that the occupant should continue in force the ordinary civil and penal laws of the occupied territory.⁸²¹ However the more recent UK Ministry of Defence Military Manual suggests that the occupant may 'suspend any of those laws that affect its own security.'⁸²² Von Glahn describes the policy relating to the supremacy of private law in occupation and its near immunity from alteration as an "archaic" concept

⁸¹⁸ US Energy Information Administration Independent Statistics and Analysis (August 2007). At <http://www.eia.doe.gov/cabs/Iraq/Electricity.html> (Last visited 30 May 2010); House of Commons Foreign Affairs Committee, Foreign Policy Aspects of the War against Terrorism, Fourth Report of Session 2005-06 (21 June 2006) p. 101.

⁸¹⁹ James Thuo Gathii, "Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context" U. Pa J. int'l Econ. L. Vol. 25 (2), 491, 495; Westlake, Chapters on the Principles of International Law (London: C.J. Clay and Sons, Cambridge University Press Warehouse, 1894) p. 252.

⁸²⁰ Doris Appel Graber, The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey (New York, 1949) p.115.

⁸²¹ Army Field Manual, The Law of Land Warfare, 18th July 1956, par 370; Office of the Judge Advocate General, Law of Armed Conflict at the Operational and Tactical Levels, par 1209, p. 12-3.

⁸²² UK Ministry of Defence, The Manual of the Law of Armed Conflict (Oxford University Press, 2004) 11.25.

particularly in the light of altered warfare.⁸²³ Accordingly, the occupant may alter financial laws including the public law of banking, company law, capital markets regulation, and corporate governance where this affects the public functions of the occupied State. Charleville, author of the German military manual (1902) submits that the occupant may temporarily modify laws pertaining to “finance, public works, commerce, industry, agriculture, and diplomatic relations”.⁸²⁴ The area of financial and economic law, only lightly traversed in earlier occupations is now one of the most explosive and contentious areas for exploitation of State resources by contemporary occupants, where the financial burden of the occupation is overwhelmingly placed on the occupied population.

Domestic courts are willing to permit a degree of economic interference on the grounds of public order maintenance where the measure can be framed in some respect as a positive economic regulation in response to an altered economic climate. This is distinct from equivocal *jus ad bellum* military objectives of the belligerent occupant to burden the occupied population with adverse economic measures to inflate military success on the ground. In *Bochart v. Committee of Supplies of Corneux* (1920) the Belgian Court of Appeal of Liège ruled that the German Governor General in occupied Belgium had the authority to issue a decree declaring void all purchases of vegetables not yet gathered.⁸²⁵ The court acknowledged the possibility that the belligerent had adopted the measure with a view to personal profiteering for its own nationals but nevertheless decided that the occupant legitimately took action to regulate the inordinate price of vegetables and was therefore in conformity with the Hague Regulations.

This case highlights the difficulty of concretely establishing a policy of economic exploitation through a singular focus on the legality of the legislation under Article 43. Consonantly the Greek Aegean Court of Appeal in *L. v. N. (Olive Oil Case)* (1948) found that Proclamation No. 7 of 1942 issued in response to a food shortage

⁸²³ Von Glahn, *The Occupation of Enemy Territory; A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis, The University of Minnesota Press, 1957) p. 99.

⁸²⁴ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey* (New York, 1949) p.144.

⁸²⁵ *Bochart v. Committee of Supplies of Corneux* (28 February, 1920) Belgium, Court of Appeal of Liege, Annual Digest of Public International Law Cases Years 1919 to 1922 (Longmans, Green and Co, London, New York, Toronto, 1932) Case No. 327, p. 462.

by the occupation authority during the occupation of Greece, ordering the centralisation of olive oil stocks in order to control the distribution of the product to satisfy the immediate needs of the population, was in accordance with Article 43 of the Hague Regulations.⁸²⁶ The court underscored the duty implicit in Article 43 to respect ‘unless absolutely prevented the laws in force in the country.’ Manifestation of the food shortage and the emergence of a black market where profiteers obtained and sold large quantities of essential food stuffs at exorbitant prices forced the occupant to operate beyond the laws in force in the territory and intervene in the rights of private ownership. The court noted:

“Where such ‘absolute prevention’ exists, the occupant may lawfully modify the legislation of the occupied territory and any private rights acquired in conformity with such measures (and which are valid in law) shall be respected by the State after it has been restored to full sovereignty.”⁸²⁷

Clearly this represented a very obvious case of public order maintenance where sedulous legislation by the belligerent necessitated an infringement of private rights.

Analogously, in *Public Prosecutor v. H. and E.* (1947) the Tribunal d’Arrondissement of Luxemburg found that the occupier had a duty to ensure the equitable distribution of food-stuffs and essential supplies and had the authority under Article 43 to impose severe penalties on any person withholding raw materials or essential services.⁸²⁸ Again these measures necessarily impeded the private commercial activities of the occupied population for the greater good of the occupied State. Significantly the common denominator in the *Bochart, Olive Oil* and *Public Prosecutor* cases was the magnitude of the impending food crisis and the necessity to act despite the atomisation of private rights for the compendious public good. In all the cases the legislative measures intersected the private sphere only to the extent necessary to maintain public order. Similarly, the Italian Court of Cassation in *Raffineria Olii Minerali v. Soc. Selezione Semi Oleosi* (1952) ruled that the belligerent occupier had the power to issue ordinances and impose sanctions for the purpose of regulating trade

⁸²⁶ *L. v. N. (Olive Oil Case)* (Judgment No. 41 of 1948) Greece, Aegean Court of Appeal, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd., 1953) Case No. 186 p. 563.

⁸²⁷ *Ibid.*, at p. 565.

⁸²⁸ *Public Prosecutor v. H. and E.* (July 16, 1947) Luxemburg, Tribunal d’Arrondissement of Luxemburg (Special Chamber), Annual Digest and Reports of Public International Law Cases Year 1949 (London Butterworth & Co. (Publishers), Ltd, 1955) Case No. 174, p. 479.

and restricting traffic in certain goods, highlighting the necessary intrusion into the traffic of private goods for security and public order concerns.⁸²⁹

The occupier may need to amend exiguous gaps in the private law of the State in pursuit of Article 43 obligations. In *Christian Society for Holy Places v. Minister of Defence and Others* (1972) the military administration responding to an industrial dispute in occupied Bethlehem amended a provision of the Jordanian Labour Act of 1960, which required the appointment of an Arbitration Council composed of workers and employers selected by their representative organisations.⁸³⁰ As there were no such organisations in the territory, the occupier implemented a provision to bridge the lacuna, providing that workers and employees appoint their own representatives in the absence of the representative organisation and if not that the responsible officer would make the appointments. The Israel High Court of Justice held that the Military Government was competent to change the law where the existing local law did not enable the administration to fulfil its duties to the local inhabitants. Interestingly, the ruling was didactic in that it underlined the prolonged nature of the military occupation and therefore the added impetus on the belligerent to adopt legislation in response to the changing needs of the population over time. Conversely Cohn J. in the minority argued that the power to “restore” implicit in Article 43 of the Hague Regulations did not authorise a new public order and civil life beyond what had previously existed in the occupied territory as “one can only restore things to what they were”.⁸³¹ Representative organisations for employers and workers had never existed in the territory and placing them on a new legislative footing was akin to creating a new public order. However the majority of the court were satisfied to view the measure as an extension necessitated by the original Jordanian Labour Act.⁸³²

The belligerent does not have the authority to pass legislation under Article 43 that would impact on the private economic relations between citizens of the occupied

⁸²⁹ *Raffineria Olii Minerali v. Soc. Selezione Semi Oleosi* (January 17, 1952) Italian Court of Cassation, International Law Reports Year 1952 (London Butterworth & Co. (Publishers), Ltd., 1957) p. 615.

⁸³⁰ *Christian Society for Holy Places v. Minister of Defence and Others* (14 March 1972) Israel, Supreme Court sitting as the High Court of Justice, International Law Reports Volume 52 (Cambridge Grotius Publications Limited, 1979) p. 512.

⁸³¹ *Christian Society for Holy Places v. Minister of Defence and Others* (14 March 1972) Israel, Supreme Court sitting as the High Court of Justice, International Law Reports Volume 52 (Cambridge Grotius Publications Limited, 1979) p. 518.

⁸³² *Ibid.*, at p. 518.

territory where there is no consideration of military necessity or public order. The private relations of citizens are distinct from the public theatre of war and only limited interference is permitted under Article 43 to maintain the effective operation of civil life and provide for military operations. Both the UK and the Canadian military manuals permit the placing of conditions and restrictions on commercial activities in the occupied territory for military purposes.⁸³³ Significantly in *Vallicelli v. Bordese and Ricco* (1947) the Italian Court of First Instance of Turin found an occupation ordinance invalid under Article 43 during the Allied military occupation of Italy on the grounds of unwarranted intrusion into the private sphere of the State.⁸³⁴ An ordinance of the Allied Military Government required that owners and possessors of rubber tyres declare their stocks to the authorities and prohibited the disposal of tyres without the permission of the Allied Authorities. The ordinance restricted the alienability of private property, impacting broadly on the property rights of tyre owners. Noting the occupier's powers of requisition for purposes of security and public order under other articles the court found that the sweeping provision under Article 43 did not provide for the requisition of goods that were indispensable to the war effort.⁸³⁵ Moreover, the authorities had not listed tyres in an earlier list of industrial products to be regulated by the government, which denigrated their status as potential war material in the eyes of the court. The ruling suggests that only substantial and quantifiable threats to the security of the occupier and the occupied population can justify transgressions into the private sphere. Where the domestic laws of the State provide for alienation of private chattels under a predefined legal structure, the occupier may alter, suspend or abrogate the laws in force in the territory. Some laws may be suspended with reference to security considerations but the entire legal framework must remain intact.

What is less certain is the extent to which the belligerent occupier can influence the administration of businesses in occupied territory under Article 43. Article 32 of the

⁸³³ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) Par 11.32; Office of the Judge Advocate General, *Law of Armed Conflict at the Operational and Tactical Levels* (2001-08-13) par 1214, p. 12-4.

⁸³⁴ *Vallicelli v. Bordese and Ricco* (January 22, 1947) Italy Court of First Instance of Turin, Annual Digest and Reports of Public International Law Cases Years 1947, (London, Butterworth & Co. (Publishers) Ltd, 1951) Case No. 112 p. 246.

⁸³⁵ *Vallicelli v. Bordese and Ricco* (January 22, 1947) Italy Court of First Instance of Turin, Annual Digest and Reports of Public International Law Cases Years 1947, (London, Butterworth & Co. (Publishers) Ltd, 1951) Case No. 112 p. 247.

Lieber Code permitted the occupier to deeply penetrate the private contractual relations between citizens of the occupied State providing,

“A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another. The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.”⁸³⁶

Although the Rousseau-Portalis ideology of the public private divide was indoctrinated into the private property articles of the Hague rules and dominated the discourse at the preparatory Hague and Brussels conferences, the silence of the Hague law over the extent to which the belligerent can control private corporations presents a dilemma and one not easily resolved by the later Geneva Conventions. It would appear that the occupier has the flexibility to administer private corporations and enterprises during belligerent occupation up to the point where the administration does not conflict with corresponding Hague rules. In fact an overly pedantic reading of the Hague rules could amount to ‘the freezing of the economic structure and stagnation in the occupied territory.’⁸³⁷

During the German occupation of Poland in World War I, the German occupation authorities subjected to compulsory administration businesses in occupied territory conducted or supervised from enemy States. In *Tencer and Others v. Mining and Industrial Corporation “Hrabia Renard”* (1927) the German civil occupation authorities in occupied Poland elected a representative to oversee the administration of the plaintiff’s corporation which consisted of 983 shares owned by French citizens or companies.⁸³⁸ During the occupation the German representative sold to the defendants, property belonging to the plaintiff corporation. Interestingly, the Supreme Court of Poland found that the belligerent occupier could undertake the administration of the private corporation under limited circumstances relating to hostilities provided

⁸³⁶ Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863, D.Schindler and J.Toman, *The Laws of Armed Conflicts*, Martinus Nijhoff Publisher, 1988, pp.3-23.

⁸³⁷ Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press, 2nd edition, 2004) p. 11.

⁸³⁸ *Tencer and Others v. Mining and Industrial Corporation “Hrabia Renard”* (12 May, 1927) Supreme Court of Poland, First Division, Annual Digest of Public International Law Cases Years 1927 and 1928 (Longmans, Green and Co, London, New York, Toronto, 1931) Case No. 381, p. 561.

that the measures were necessary to “insure order and revive social activities” and did not infringe the private property protections outlined in Article 43 and 46 of the Hague Regulations.⁸³⁹ The onus on the occupier to “revive social activities” highlights a quagmire under the lemma of Article 43. Does the duty to stimulate the economy identified in “*Hrabia Renard*” require the occupier to promote an adverse economic system in the territory, but one that will profit by international margins, or does this remain the preserve of the returning sovereign?

One critical consideration in the examination of the role of the belligerent in the economic life of the State is on the authority that the belligerent commands. When the belligerent occupant enters into a contract on behalf of the occupied State, the returning sovereign is bound to respect the terms of the contract *post bellum* provided it does not exceed international humanitarian law limitations.⁸⁴⁰ Conversely, the private enterprise forcibly administered by the belligerent occupier during the occupation may repudiate any measures entered into on its behalf and will not necessarily remain bound by contracts negotiated by the belligerent administrator. Therefore the extent to which the occupier crosses into the private divide must be limited as the purpose of administrative authority is to maintain the *status quo* subject to security concerns. Measures taken beyond the *status quo* risk rupturing the economic fabric of the state *post bellum*.

One interesting example is the case *British and Polish Trade Bank A.G. v. Handelmaatschappij Albert de Bary and Co* (1954).⁸⁴¹ During the German occupation of Danzig in 1939, the German appointed “Gauleiter” for Danzig dismissed the management and the board of directors of the British and Polish Trade Bank and declared that de Bary of Handelmaatschappij Albert de Bary & Co, was competent to exercise the executive powers of the bank. During this period de Bary was forced to transfer the credit balance of the bank to the Reichsbank in Berlin. German Ordinance No. 179/1940 outlined that the law obtaining in the Greater Reich and occupied

⁸³⁹ *Ibid.*, at p. 562.

⁸⁴⁰ *Zeeuwsche Hypotheek-Bank v. State of the Netherlands* (January 30, 1948) Court of Cassation, Annual Digest and Reports of public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd, 1953) Case No. 188, p. 567.

⁸⁴¹ *British and Polish Trade Bank A.G. v. Handelmaatschappij Albert de Bary and Co* (June 17, 1954) Holland, Court of Appeal of Amsterdam, International law Reports Year 1954, (London Butterworth & Co. (Publishers) Ltd. 1957) p. 485.

Polish territories was conclusive and applied to the authorities competent in the territories with administering and managing a business. This precipitated a situation where the administrative authority effected control over the organisation and widely operated the business under the laws in force in the territory, transferring funds from one bank to another. When the British Polish and Trade Bank took action against de Bary to retrieve the credit balance, the Dutch Court of Appeal of Amsterdam observed that the managers were no longer connected with the bank according to its Articles of Association and that de Bary had validly discharged the transfer to the Reichsbank in Berlin.⁸⁴² Notwithstanding this, the intrusion into the private economic affairs of the bank by the belligerent served to deprive the corporation of its assets and it was finally liquidated in 1948. International humanitarian law provides a platform to address the illegality of such measures by the occupant, with particular reference to unwarranted trespass into the private sector, where a singular focus under private law would not.

3.4.5 Contracts under Article 43 of the Hague Regulations

After liberation, the returning sovereign will only honour contracts entered into by the occupying belligerent, if they comport with the Article 43 duty to restore and maintain public order and civil life. Reconstruction contracts and oil product-sharing contracts negotiated during belligerent occupation need not be honoured by the occupied State after liberation if they represent an exploitation for profit benefiting third parties and States at the expense of the occupied State. In *Zeeuwsche Hypotheek-Bank Ltd. V. State of the Netherlands* (1946) the Dutch Court of Cassation examined the position of Dutch officials acting under an order of the occupation authority who engaged in a contract to let a house for the Ordungs-Polizei and whether payment of the contract bound the returning sovereign.⁸⁴³ The Court found that the State was liable provided that contracts negotiated during the occupation conformed with the principles established in Article 43. Likewise the Dutch Court of Appeal in "*Aniem*" v. *State of the Netherlands* (1949) found that the Dutch State was only liable for acts

⁸⁴² *Ibid* at p. 486.

⁸⁴³ *Zeeuwsche Hypotheek-Bank Ltd. V. State of the Netherlands* Holland, District Court of the Hague, (December 17, 1946); Court of Cassation (January 30, 1948) Annual Digest and Reports of Public International Law Cases (London Butterworth & Co. (Publishers), Ltd., 1953) Case No. 188 p. 567, 569. Edmund H. Schwenk, "Legislative Power of the Military Occupant Under Article 43, Hague Regulations" 54 Yale L. J. 393 1944-1945, p. 407.

of the occupier that came within the limits of Article 43.⁸⁴⁴ In antithesis, any contractual arrangements engaged in by officials of the occupied State acting on behalf of the occupant will not be binding on the State where these do not comport with Article 43. That being said, private parties cannot rely on Article 43 for a privately enforceable cause of action against the occupying power as the Hague Regulations are not a self executing treaty.⁸⁴⁵ However, private parties may allude to the conventions provisions in cases of undue *postliminium* against the returning legitimate sovereign where illegal practices during occupation are left entrenched in the domestic law after occupation.

The detrimental impact of the occupant's control over enterprises in the private sphere can be contrasted with the belligerent occupant's participation in the public sphere and the greater weight placed on the liability of the public body for the actions of the occupying belligerent. In *Conservatorio Cherubini of Florence v. Saba* (1954) the German occupation authorities in Italy issued an occupation order cancelling a contract between the *Conservatorio* and Saba.⁸⁴⁶ The *Conservatorio* stood to benefit from the broken contract and obeyed the order *perinde ac cadaver*.⁸⁴⁷ On appeal the Italian Court of Cassation found that the judgment of the Court of Florence to award damages to Saba for breach of contract had to be confirmed as the *Conservatorio* was both entitled and under a duty to question the legality of the occupation ordinance. The legislative and administrative activities of the belligerent occupant were subject to the observance of the law and limited by Article 43 of the Hague Regulations. Addressing the role of the *Conservatorio* in its capacity as an inferior public authority subjected to the ordinances of the superior occupying authority the court stated:

“The legal system cannot – without contradicting its own fundamental principle – tolerate a superior authority taking the place of the law. If that were not so, the system of law and order would be completely upset; the intrinsic force which belongs to a legislative provision would be annulled, and the will

⁸⁴⁴ “*Aniem*” v. *State of the Netherlands* (December 7, 1949) Court of Appeal of the Hague, Annual Digest and Reports of Public International Law Cases Year 1949, (London Butterworth & Co. (Publishers), Ltd., 1955) Case No. 163, p. 458.

⁸⁴⁵ *Goldstar (Panama) SA v. United States*, (16 June 1992), United States Court of Appeals, Fourth Circuit, International Law Reports Vol 96, (Grotius Publications Cambridge University Press) p. 55.

⁸⁴⁶ *Conservatorio Cherubini of Florence v. Saba* (February 22, 1954) Italy, Court of Cassation United Chambers) International Law Reports Year 1955 (London Butterworth & Co. (Publishers) Ltd. 1958) p. 998.

⁸⁴⁷ *Ibid.*

of the higher authorities substituted for it.”⁸⁴⁸

The belligerent occupant does not have the authority to issue random ordinances that disrupt the independent operation of private contract law. Furthermore the occupant may not abrogate long term contractual rights such as leases or concessions under international law.⁸⁴⁹

Generally, where the belligerent operates in the place of the legitimate sovereign and legitimately manifests its authority relating to the conduct of war and the maintenance of public order, the returning sovereign is under an obligation to honour the contracts entered into on its behalf.⁸⁵⁰ In *Rhode v. Rheden* [1950] the Dutch District Court of Arnhem found that the municipal authorities in the town of Rheden must pay contractors for the work on a prison even though the contract was concluded with the former occupying authority.⁸⁵¹ Likewise if the returning administration is set to profit from illegal measures purposively orchestrated by the belligerent occupant on its behalf through illegal occupation ordinances, the returning administration will be liable for gains made under those acts. Similarly in *Chop Sun Cheong Loong v. Lian Teck Trading Co* (1947) the Supreme Court of the Malayan Union upheld a tenancy granted by the Japanese Custodian of Enemy Property after the Japanese belligerent occupation.⁸⁵² The court stated that if “the Japanese authorities dealt with what was to them enemy property in a manner somewhat similar to that in which it might have been dealt with under English law, it must be assumed that such actions were legitimate.”⁸⁵³

During the occupation of Western Thrace by Bulgarian troops in World War II, the Bulgarian occupying administration introduced their civil, commercial and penal legislation into the region in an attempt to annex the territory. They applied the Bulgarian justice system, replacing Greek courts with Bulgarian courts where

⁸⁴⁸ *Ibid* at p. 1000.

⁸⁴⁹ Pieter Bekker, The Legal Status of Foreign Economic Interests in Occupied Iraq, ASIL Insights, July 2003. At <http://www.asil.org/insigh114.cfm> (Last visited 27 November 2010).

⁸⁵⁰ *Zeeuwsche Hypotheek-Bank v. State of Netherlands*, NJ 1948, No. 108; *Chop Sun Cheong Loong v. Lian Teck Trading Co.* [1947] Malayan Union Reports 80.

⁸⁵¹ *Rhode v. Rheden*, Holland District Court of Arnhem (July 20 1950), Case No. 136, p. 414, International Law Reports, Volume 17. (London Butterworth & Co. (Publishers) Ltd. 1956)

⁸⁵² *Chop Sun Cheong Loong v. Lian Teck Trading Co.* [1947] Malayan Union Reports 80.

⁸⁵³ *Ibid* at 86.

Bulgarian substantive law and procedure was applied. In *re P (Komotini Case)* (1948) the Greek Court of First Instance of Rhodope, addressed the status of a will dictated to a Bulgarian judge under Bulgarian law.⁸⁵⁴ The court noted that the Bulgarian occupation had created a *de facto* situation where the authorities should have organised a provisional system based on Greek law. However this was not practicable, at least in the sphere of justice as members of the judiciary had fled fearing persecution. Accordingly, it was necessary under the conditions for the occupier to apply the provisions of Bulgarian law. Following this line of reasoning, it is equally plausible for the belligerent to apply its vestigial civil law, commercial laws and economic structure to a territory especially when confronted with the chaos of a failed or failing state on occupation. Notwithstanding, the laws apply on a limited *de facto* basis. Feilchenfeld supports this theory:

“The general rule requiring respect for fundamental institutions would seem to have important economic and financial implications. It would seem that an occupant has no right to transform a liberal into a communistic or fascist economy, except so far as military or public order needs should require individual changes.”⁸⁵⁵

Certainly, the occupant can introduce fledgling changes from an alternative economic model in response to situational needs on an *ad hoc* basis. What is less likely compatible with a reading of Article 43 is the sweeping introduction of a surrogate economic system by the occupant with no obvious necessity than to vitiate the former regime.

3.4.6 Article 43 interpretation and Israeli Practice

The highly contentious VAT case presented a tectonic shift in the “public order” considerations of a military commander, where a belligerent occupant introduces co-joint legislation into the occupied territory and the home State thus propagating the dependency between the occupant and the occupied.⁸⁵⁶ The VAT case concerned the imposition of an equalising VAT tax on products and services in the Palestinian

⁸⁵⁴ *re P (Komotini Case)* (Judgment No. 67 of 1948) Greece, Court of First Instance of Rhodope, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd, 1953), Case No. 187, p. 566.

⁸⁵⁵ Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace, Monograph Series No. 6, 1942) par. 331, p. 90.

⁸⁵⁶ *Abu Itta v. IDF Commander in Judea and Samaria* (1981) 37(2) PD 197 (VAT Case) [English Summary: 13 Isr YHR (1983) 348].

territories by military order and whether the commander had exceeded his legislative authority under occupation law. Politically underpinning the reform was a concern on the part of the Israeli government that increased VAT would drive consumers across the border to the Palestinian territories and so the dual tax was introduced to remove the threat to the Israeli economy.⁸⁵⁷ Article 48 of the Hague Regulations requires that the occupant collect taxes “in accordance with the rules of assessment in force” limiting the collection to the pre-war legislation, a restriction that is twice mirrored in Article 49 and Article 51. Appositely, the mechanisms of requisition and contribution supplement the belligerent occupant’s means of providing for its armed forces should military necessity dictate. Accordingly merchants from the West Bank and Gaza argued against the VAT measures on the grounds that the occupant could not introduce new taxes into the occupied territory nor could they introduce measures designed to benefit the home economy.

Neatly sidestepping the issue of incompatibility with Article 48 and Article 49, Justice Shamgar considered that the occupant may introduce legislation that strikes a fair balance between “military necessity” and “humanitarian rights” in the pursuance of public order and civil life under Article 43.⁸⁵⁸ Critically, this places the tax provisions of the Hague Regulations in a subordinate position by reference to Article 43. Incredulously, Justice Shamgar advanced that the legislative measure far from creating an undue dependency on Israel, actually prevented economic stagnation in the Palestinian territories by promoting equal trading opportunities between the two territories. Taking a step towards impressing legislative measures with positive social obligations, the commander argued that the introduction of new VAT measures would ensure civil life for the local population. Interestingly the UN General Assembly in Resolution 41/63D (December 3, 1986) proscribed the Israeli economic practice of illegally imposing heavy and disproportionate taxes and dues within the Palestinian territories.⁸⁵⁹

The Israeli courts have found that the occupant may legislate to alter private

⁸⁵⁷ David Kretzmer, *The Occupation of Justice, The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002) p. 216, fn. 56.

⁸⁵⁸ HCJ 69/81 Abu Aita et al. v. Commander of Judea and Samaria et al. (VAT case), 37(2) PD 197, 310. English translation in 13 IYHR 348 (1983).

⁸⁵⁹ GA Res. 41/63D (Dec. 3., 1986).

concession rights over public utilities under Article 43. *Jerusalem District Electricity Co. Ltd v. Minister of Defence* (Electricity Company No. 1 Case) (1972) addressed the inadequate supply of electricity to Hebron and the surrounding settlement of Kiryat Arba. The Palestinian Electricity Company for the Jerusalem District had held a concession to supply electricity to the area from the Jordanian government but the electricity supply could not accommodate the burgeoning population. Under military order, additional powers to generate, supply and sell electricity were granted to the Israel Electricity Company. Nevertheless the Palestinian Electricity Company for the Jerusalem District argued that the order altered the legal concession granted by the Jordanian government and was incompatible with Article 43 of the Hague Regulations. Dismissing the petition the court found that the original concession did not extend to the city of Hebron and therefore the commander was justified in legislating for another provider to do so.⁸⁶⁰ Justice Barack maintained that Article 43 of the Hague Regulations provided that a company make long term infrastructure investments involving the erection of a permanent high voltage line for the economic welfare of the area's population.⁸⁶¹

The court expanded its consideration of the welfare of the population to receive electricity to include the Israeli settled community of Kiryat Arba. This raised the question, to what extent can the occupant factor in the needs of a settled population who are illegally present in the occupied territory under the public order and security provisions of Article 43? Schwenk contends that the restoration of public order and civil life 'aims primarily if not exclusively, at the interest of the population.'⁸⁶² Correspondingly, the nebulous categorisation of "population" more generally pertains to the civilian population and the protection of individuals.⁸⁶³ For all intents and purposes the settlers acquire the mien of the occupied population and the ersatz settlers are thus factored into military necessity considerations as members of the occupied population.⁸⁶⁴ This elevated position of settlers as members of the occupied

⁸⁶⁰ *Ibid.*, at 381.

⁸⁶¹ HCJ 256/72, *Jerusalem District Electricity Co. Ltd. v. Minister of Defence et al.*, 27(1) PD 124, 138. English translation in 5 IYHR 381 (1975).

⁸⁶² Edmund H. Schwenk, "Legislative Power of the Military Occupant under Article 43, Hague Regulations" 54 Yale L.J 393 1944-1945, 400.

⁸⁶³ Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, International Committee of the Red Cross, 1958) p. 12.

⁸⁶⁴ *Nadia Matar and Ors v. The Commander of the Israeli Defence Force in Gaza*, Original Petition, HCJ 6339/05; ILDC 73 (IL 2005), par 8.

population has diluted and extirpated the collective occupation rights of the legitimate Palestinian occupied population. The end result is the tenuous position where concessions are altered to generate additional resources in order to facilitate the new population. By extension the occupant could alter public or private concessions under the Article 43 framework to accommodate the needs of foreign private enterprises established in occupied territory.

The quandary of factoring exogenous corporate factors into the dynamic of occupation was addressed in the recent case *Kav Laoved Association and Ors v. National Labour Court and Ors* (2007).⁸⁶⁵ On appeal, the Israel High Court of Justice considered whether Israeli labour law governed employment relations between Palestinian workers and their Israeli employers in the Israeli enclaves in occupied Palestinian territory. The National Labour Court found the applicable law to be Jordanian law and found that collective agreements binding Israeli employers and Palestinian workers did not apply to Palestinian workers in the Israeli enclaves. Kav Laoved, an NGO argued that the decision discriminated against Palestinian workers in the enclaves. Finding principally on the grounds of discrimination the Israel High Court of Justice held:

“Absent an explicit agreement between the parties, the choice of law should lead to an application of identical and equal law on all similarly situated workers, performing the same or similar work. Workers expected not to be discriminated against, despite different applicable legal systems in the workplace. A Palestinian worker within the Israeli Enclaves ought not to be discriminated against as compared to Palestinian workers permitted to work in the state of Israel or from Israeli workers working in the Israeli Enclaves, as long as they performed same or similar work. Nationality based discrimination was unacceptable, and was unnecessary under the circumstances in this case.”⁸⁶⁶

The case reveals a myriad of problems surrounding the treatment of workers in occupied territory and the extent to which the occupant can intercept private law as applied in the occupied State. On one hand the court was adamant to eviscerate the discriminatory practice of unequal treatment of workers similarly situated based on ethnicity. Rather simplistically the court weighed the employment provisions in the

⁸⁶⁵ *Kav Laoved Association and Ors v. National Labour Court and Ors*, HCJ 5666/03; ILDC 817 (IL 2007)

⁸⁶⁶ *ibid.*, at par 26.

two legal systems and settled on the Israeli law as being more progressive. Unfortunately this represents a clear infraction of Article 43 of the Hague Regulations, which incidentally was omitted from consideration in the judgment. The test for maintaining the laws in force in the territory is not measured comparatively by reference to the occupant's labour law standards but by considerations of military requirement and public order. Labour laws in the occupied territory could have been altered to counter discriminatory practices under human rights legislation or under the public order considerations of Article 43. The extension of Israeli law into the Palestinian territories is the least palatable option and despite the good intentions of the court, may well be perceived as another link in the chain permanently shackling the Palestinian economy to Israel.

In *Jerusalem Electricity Co. Ltd. v. Minister of Energy* (Electricity Company No. 2 Case) (1981) the Supreme Court of Israel examined whether the Israeli government could purchase the Jerusalem Electricity Company, after the original concession granted by the Jordanian government had expired, and further grant a new concession for the supply of electricity to the Israel Electricity Company. The Court also considered whether these actions constituted a permanent measure and was therefore ancillary to the Hague rules. Prior to the forced takeover, the occupant had frequently refused requests by the company to purchase, develop and install modern technical equipment.⁸⁶⁷ On the eve of the takeover the Israeli government schematically argued that the company under the concession was incapable of covering the requirements of development and consumption in the area.⁸⁶⁸ The chairman of the company's board of directors, Anwar Nusaiba rejected the Israeli allegations contending that the requisition was both "arbitrary" and "illegal" while lawyer for the company Jiryis Khuri asserted that the takeover was designed "to attach our economy to the Zionist economy and to obliterate the Arab character of Jerusalem."⁸⁶⁹ Interestingly the High Court of Justice found that the notice served to the company by the commander was unlawful. The company did not pose a security threat and the motive for the acquisition was manifestly political. Arguing against permanent corporate arrangements Justice Kahan remarked:

⁸⁶⁷ "Arab Electricity Company Taken Over" *Journal of Palestinian Studies*, Vol. 9, No., 3 (Spring, 1980) pp. 171, 171.

⁸⁶⁸ *Ibid.*, at 172.

⁸⁶⁹ *Ibid.*, at 175.

“Generally, in the absence of special circumstances, the Commander of the region should not introduce in an occupied area modifications which, even if they do not alter the existing law, would have a far reaching and prolonged impact on it, far beyond the period when the military administration will be terminated one way or another, save for actions undertaken for the benefit of the inhabitants of the area.”⁸⁷⁰

In this case handing the control over the supply of electricity, which is integral to the functioning of the occupied territory, to the occupant had consequences, which reverberated beyond the occupation. Justice Kahan stated:

“When the area came under the control of the commander of the area, electricity was supplied by the petitioner, who is a local company, The result of using the option [to end the concession] will be that supply and distribution of electricity will be entirely in the hands of bodies outside the area, and given the importance of electricity in maintaining regular life of the public, this change has implications that go beyond the economic and technical aspects of the matter.”⁸⁷¹

The case indicates that even measures driven by the need for social transformation must be balanced by the competing post-occupation considerations. Fundamentally, the permanence of the measures integrated the two electricity companies and offended against the *status quo ante bellum* policy of Article 43 despite the concordant duty to maintain public order.

3.4.7 *Application to Iraq*

A distinction can be drawn between the *ad hoc* measures which a belligerent occupant can adopt traversing into private law for the purposes of responding to a humanitarian crises during occupation and measures designed to facilitate the exploitation of resources of the occupied territory. In *L v. N, Public Prosecutor and Raffineria* decrees issued regulating trade in response to olive oil and food shortages comported with Article 43. Greater weight was placed on countering a humanitarian catastrophe than rigidly sticking to the status quo limitations of Article 43. However the economic legislation introduced in Iraq is future orientated and Foreign Investment Order 39 provides that the reforms “will help to develop infrastructure” and as such does not

⁸⁷⁰ *Jerusalem Electricity Co.v. Minister of Energy*, No. H.C. 351/80, 35(2) Piskei Din 673 (1981). English translation in 11 Isr. Y.B. Hum. Rts. 354, 357 (1981)

⁸⁷¹ *ibid*, at 357

respond in any urgent way to a specific crisis.⁸⁷² Although the introduction of a new labour law in Christian Society for Holy Places was a future orientated reform, this can be distinguished from Iraq as it took into consideration the prolonged nature of the occupation of the Palestinian territories.

A question remains over the legality of measures which operate on a dual basis such as Foreign Investment Order 39 to open up Iraq for the economic benefit of the population but which also reinforce the war aims of the invading belligerent by allocating public monies to private contractors at inflated prices who then channel profits back to their home territory. The haemorrhaging of monies from the Development Fund for Iraq can only be described as exploitation. However is this practice limited by reference to Article 43 of the Hague Regulations? Analogously, in *Bochart* during World War I legislation introduced by belligerent occupant in Belgium, which voided the price of vegetables to counter food shortages served also as a tool for personal profiteering. However this was found not to be *ultra vires* Article 43 due to the consideration of the occupied population. In VAT a legal mechanism directing VAT monies to the home territory of the belligerent occupant was found to be consistent with Article 43. Conversely in *Conservatorio* the court found that the *Conservatorio* had a duty to question the legality of the ordinance and that the subsequent cancellation of a contract for the purposes of profiteering was limited by Article 43. Similarly in *Jerusalem Electricity Co. Ltd.* the Supreme Court of Israel found that measures designed to force the electricity company out of the market were arbitrary and illegal.

Critically the question arises whether there is a situation in Iraq that requires the belligerent occupant to rebuild the territory to such a degree that overshadows the siphoning of resources. The difficulty in managing Iraq's oil resources was noted in a report to the United States Congress:

“The existence of vast resources suggests easy exploitation and lucrative export earnings that could help fund Iraq's development. But the sheer resource size masks the difficulty, of generating export revenues that could fund reconstruction and development and offset several appropriations

⁸⁷² Coalition Provisional Authority, Foreign Investment Order 39, CPA/ORD/ 19 September 2003/39

approved by Congress.”⁸⁷³

It would appear from the interpretation of the laws, belligerent occupation is returning to a more liberalised application similar to the Lieber Code, which was far more permissive towards the army of occupation. Nevertheless, the belligerent occupant is prevented from altering the corporate and civil laws of the occupied territory except in cases of emergency where to do otherwise would impinge on the occupied population.

Appositely, whether exploitation of reconstruction contracts is considered ancillary to Article 43 depends on the weight given to the ‘benefit to the occupied population’. The distinction is critical as the returning sovereign is liable for the contractual expenses incurred by the belligerent occupant that are consistent with Article 43.

Conclusion

There are immediate tensions between the transformative objectives of the belligerent occupant reinforced by UN Security Council Resolution 1483 and the conservationist nature of Article 43 of the Hague Regulations which is an entirely unsuitable framework within which to base those reforms. The mandate to reconstruct the economy of Iraq, while abiding by the Hague Regulations of 1907 and the Geneva Conventions of 1949 obscures the restrictions contained in these laws which serve as minimum standards in mitigating the excesses of the belligerent occupant’s authority. Following the international humanitarian occupations in Bosnia, East Timor, Kosovo and Eastern Slavonia in the 1990’s, it was only a matter of time before the traditional law of belligerent occupation became “internationalised”. The United Nations would participate in the administration of the occupied territory alongside the belligerent occupant who operates under international humanitarian law.

The Coalition Provisional Authority introduced a series of intrusive legislative reforms, which effectively transformed Iraq from a centrally planned socialist State to a federal free market capitalist state. However where Resolution 1483 required the

⁸⁷³ Lawrence Kumins, “Iraq Oil: Reserves, Production, and Potential Revenues” CRS Report for Congress, Order Code RS21626, CRS-1.

Coalition Provisional Authority to work with the United Nations Special Representative to promote economic reconstruction and the conditions for sustainable development, arguably some of these reforms could have been built on the structures already in place in Iraq. Prior to the occupation, Iraq was advancing towards a modest form of privatisation and this could have been incrementally advanced during the belligerent occupation without exceeding the *status quo ante* nature of Article 43 of the Hague Regulations.

Prior to the invasion, the United Nations operated an Oil-for-Food programme with the former regime. According to international humanitarian law, the Oil-for-Food mechanism should have continued subject to considerations of military necessity. UN Security Council Resolution 1483 paragraph 10, terminated the Oil-for-Food programme stating

“that, with the exception of prohibitions related to the sale or supply to Iraq of arms and related materiel other than those arms and related materiel required by the Authority to serve the purposes of this and other related resolutions, all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq established by resolution 661 (1990) and subsequent relevant resolutions, including resolution 778 (1992) of 2 October 1992, shall no longer apply.”⁸⁷⁴

The Coalition Provisional Authority agreed that oil contracts concluded with foreign oil companies under the terms of the Oil-for-Food programme would continue after the suspension of the programme.⁸⁷⁵ Even removing the Oil-for-Food mechanism the homologous centralised structure of the oil industry should have been retained under occupation law. However it became clear that the oil industry would not revert to the 1970’s nationalised model and an incongruous trajectory towards privatisation was pursued.

Under the Oil-for-Food programme, the United Nations Office for Project Services engaged in a series of reconstruction projects upgrading the water and sanitation

⁸⁷⁴ S/RES/1483 (2003) par 10.

⁸⁷⁵ Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003), (17 July 2003), S/2003/715, p. 16.

systems.⁸⁷⁶ Article 43 of the Hague Regulations alongside Article 64 of the Fourth Geneva Convention permit limited alteration of the laws in force in the occupied territory for the purposes of benefiting the occupied population. Accordingly minor intrusions into the economic sphere and civil law can be permitted provided there is a consideration of military necessity. Measures which operate outside of impending necessity are arbitrary and threaten the *status quo ante* policy of Article 43. Consequently a series of economic legislative measures which collectively transform the economic institutions of state are difficult to reconcile with the temporary nature of Article 43.

Arguably the seeds for reconstruction were planted long before the occupation at least in terms of humanitarian projects negotiated between the United Nations and Saddam Hussein's regime. For the UN Secretary General reconstruction during the occupation was perceived as the augmentation of these projects into a medium term framework which would include the development and modernisation of vital public infrastructure.⁸⁷⁷ The continuance of these humanitarian projects initiated before the invasion comport with the *status quo* principle of Article 43 of the Hague Regulations. However any projects outside the humanitarian agenda such as institutional reform and economic restructuring must be considered within the purview of Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention.

Interestingly the Oil for Food scheme negotiated during Saddam Hussein's regime in response to the devastating impact of sanctions on the territory, laid the foundation for a free market investment model for the oil industry. In 2002 Iraq was placed 110 out of 111 countries reviewed in the UNDP Arab Human Development Report with 80% of the population living in poverty.⁸⁷⁸ The United Nations Secretary General depicted the Oil for Food programme as the one of the "early macroeconomic steps" in the medium term reconstruction and development framework.⁸⁷⁹ UNSC resolution 1284

⁸⁷⁶ Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003) and paragraph 12 of resolution 1511 (2003), (5 December 2003), S/2003/1149, p. 9.

⁸⁷⁷ Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003), (17 July 2003), S/2003/715, p. 18.

⁸⁷⁸ *Ibid.*, at p. 16.

⁸⁷⁹ *Ibid.*, at p. 18.

(1999) endorsed the possibility of increasing oil production in Iraq through private foreign oil companies provided that the Secretary-General:

“Establish a group of experts, including oil industry experts, to report within 100 days of the date of adoption of this resolution on Iraq’s existing petroleum production and export capacity and to make recommendations, to be updated as necessary, on alternatives for increasing Iraq’s petroleum production and export capacity in a manner consistent with the purposes of relevant resolutions, and on the options for involving foreign oil companies in Iraq’s oil sector, including investments, subject to appropriate monitoring and controls.”⁸⁸⁰

The drive towards increased production was buttressed by the permitted allocation of additional export routes for petroleum and petroleum products and the allocation of additional oil spare parts and equipment to improve conditions in the oil production sector.⁸⁸¹ Iraqi refineries were unable to meet the domestic demand for refined oil products owing to the antiquated infrastructure of the refineries which produce heavy fuel oil.⁸⁸² This was a renewed attempt to vitiate the damage done to the oil sector through neglect during the Saddam Hussein era. Resolution 1293 (2000) increased the expenditure for oil parts and equipment to \$600 million from the escrow account.⁸⁸³ UN Security Council Resolution 1284 paved the way for the suspension of the hyperpunitive sanction regime for a trial period of 120 days subject to financial and operational measures to ensure that Iraq did not acquire prohibited items.⁸⁸⁴ This appeared to return to Iraq, limited control over oil revenues for humanitarian purposes, a move which would have had a significant impact on the regeneration of the oil sector.

Appositely, these earlier reforms were contemplated within the framework of a centralised and primarily nationalised State. It is potentially this creeping privatisation under the rubric of public institutions which the Secretary General had in mind in relation to the economic reconstruction of Iraq. Nevertheless, the United Nations was

⁸⁸⁰ S/RES/1284 (1999) par 30.

⁸⁸¹ *Ibid.*, at par 16, 18, 29, 30.

⁸⁸² Energy Information Administration, Country Analysis Briefs, Iraq. At www.eia.doe.gov (last visited 18 May 2010).

⁸⁸³ S/RES/1293 (2000) par 1.

⁸⁸⁴ S/RES/1284 (1999) par 33.

Appositely, these earlier reforms were contemplated within the framework of a centralised and primarily nationalised State. It is potentially this creeping privatisation under the rubric of public institutions which the Secretary General had in mind in relation to the economic reconstruction of Iraq. Nevertheless, the United Nations was forced to leave Iraq due to the escalating insurgency.⁸⁸⁵ Despite the Security Council Resolution 1483 mandate to work with the Coalition Provisional Authority, the Coalition Provisional Authority single-handedly altered the economic model in Iraq, leaving the legitimacy of the reforms open to dispute.

The new internationalised model of belligerent occupation adopted during the occupation of Iraq while on one hand providing for economic reconstruction, on the other left a lacuna in protection facilitating massive economic exploitation of Development Fund for Iraq resources. With the proportionality and military necessity considerations of Article 43 obscured, the Coalition Provisional Authority adopted Foreign Investment Order 39 which provided a mechanism for corporate entities to remove financial assets from the territory. Arguably, the Coalition Provisional Authority remained constrained by occupation law when operating independently of the United Nations Special Representative in Iraq.

⁸⁸⁵ Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003), 17 July 2003, S/2003/715, par 28.

Chapter 4

Can economic reconstruction carried out by the Governing Council be considered independent from the actions of the Coalition Provisional Authority and therefore ancillary to the conduct of the belligerent occupant for purposes of international humanitarian law?

Introduction

Resolution 1483 contemplated a role for the United Nations Assistance Mission for Iraq (UNAMI) assisting the people of Iraq by facilitating humanitarian and reconstruction activities in co-ordination with the Authority. The role was ancillary to the legislative authority of the CPA. From the outset the role of the UN was open to negotiation and the assistance provided by the UN was at the request of the CPA. As such, the UN would provide an interface between the international assistance community in providing humanitarian relief and the occupying authority. The UN's reconstruction activities veered obliquely to the humanitarian spectrum, to rehabilitating water treatment plants, power plants, restructuring the health care system, rehabilitating schools, capacity building support to the National Mine Action Authority rather than any direct role in the transformation of the institutions of State.⁸⁸⁶ UNAMI facilitated dialogue between international experts on human rights and judicial and legal reform and Iraqi ministries stopping short of implementing structural judicial reform.⁸⁸⁷ Consequently, as relations between the UN and the occupants became increasingly strained, the UN's assistance in the reconstruction activities were diluted accordingly. In his report to the Security Council, the UN Secretary-General breviloquently observed that the Governing Council and the Coalition Provisional Authority:

“expressed less enthusiasm for United Nations involvement in other areas noted in paragraph 99 of my report to the Security Council of 17 July 2003. They made no formal requests to my Special Representative for United Nations involvement in any of the areas.”⁸⁸⁸

In particular, the then President of the Governing Council, Jalal Talabani, stoked tensions recommending that the Special Representative of the Secretary General reside

⁸⁸⁶ Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 (2003) and paragraph 12 of resolution 1511 (2003), 5 August 2004, S/2004/625, par 10-14.

⁸⁸⁷ *Ibid.*, at par 12.

⁸⁸⁸ Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 (2003) and paragraph 12 of resolution 1511 (2003), 5 December 2003, S/2003/1149, par 6.

outside Iraq and consult with the Governing Council when needed.⁸⁸⁹ Accordingly, the authority of the United Nations in assisting the transformative actions of the Coalition Provisional Authority and Governing Council was rejected and the United Nations staff from the safety of neighbouring countries engaged in an attenuated humanitarian role directing agricultural production, planning emergency water supply projects, national immunisation campaigns and reporting on the education and culture sectors.⁸⁹⁰ Reconstruction efforts during the occupation were stymied by highly organised attacks on the “electrical infrastructure, water supply and oil pipelines, stocks of textbooks and currency printing premises”.⁸⁹¹ The discourse on assistance for economic reconstruction which dominated the Secretary-General’s report to the Security Council in July 2003, was notably absent in the next report only five months later in December 2003.

The legitimacy of structural reforms beyond occupation law, far from being conferred by the United Nations, devolved to a broadly representative Iraqi governing body, whose objective was to operate on behalf of the Iraqi people in conjunction with the United Nations. Paragraph 9 of Resolution 1483:

“Supports the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognised, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.”⁸⁹²

Seemingly, the Interim Governing Council would work with the UN in “assisting” the decisions implemented by the belligerent occupant as distinct from forming a part of the belligerent’s governing cabinet. As such, the formation of the Iraqi Governing Council on 13th July 2003 marked a departure from the traditional patriarchal authoritative governing structure of the belligerent occupant.

This chapter seeks to establish whether the actions of the Governing Council are constrained by international humanitarian law and examines (1) the De-

⁸⁸⁹ *Ibid.*, at par 73.

⁸⁹⁰ *ibid.*, at par 36-46.

⁸⁹¹ Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003), 17 July 2003, S/2003/715, par 36.

⁸⁹² S/RES/1483 (2003) par 9.

Ba'athification of Iraq (2) the authority of the Governing Council to independently alter the economic structure of Iraq (3) the impact of an independent Governing Council on the effective control of the Coalition as occupying powers (4) whether international humanitarian law limits the Coalition Provisional Authority and the Governing Council in altering the constitution? (5) whether the International Covenant on Economic, Social and Cultural Rights 1966 entitles or obliges the Governing Council to alter the economic structure of Iraq.

4.1 The De-Ba'athification of Iraq

Resolution 1483 required that an interim administration formed by Iraqis with the help of the occupying power, function as a transitional administration during the occupation.⁸⁹³ The preamble to Resolution 1483 states:

Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, *welcoming* the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and *expressing* resolve that the day when Iraqis govern themselves must come quickly.⁸⁹⁴

The installation of the broadly representative administration as an institution of governance was legitimately mandated by the Security Council resolution. This limited indigenous input into the governance of occupied territory had been suggested previously by Benvenisti in the context of long term occupations. However finding that the idea was plausible in theory, he noted "it had never been applied. No occupant has ever allowed the prescriptions of the ousted government to take effect in the territory under its control."⁸⁹⁵ Besides not being in the interest of the occupant to allow an indigenous government assume control during an occupation, the relationship between the occupant and the occupied population is limited by Article 47 of the Fourth Geneva Convention. This states that protected persons "shall not be deprived of the benefits of the present Convention by any change introduced...nor by any agreement concluded between the authorities of the occupied territories and the

⁸⁹³ S/RES/1483 (2003) par 9

⁸⁹⁴ S/RES/1483.

⁸⁹⁵ Eyal Benvenisti, *The International Law of Occupation* (United States of America: Princeton University Press, 1992), p. 147.

occupying power.”⁸⁹⁶ In particular this limits the scope of any changes introduced by the indigenous interim administration in rebuilding occupied territory beyond the humanitarian provisions of the Fourth Geneva Convention.

Prior to the adoption of the Hague Regulations both the Brussels Code (1874) and the Oxford Code (1880) contained articles pertaining to the continuance of the employment of civil administrative staff in the occupied territory recommending that the structure of the occupied State remain intact. Article 4 of the Brussels Code (1874) provides:

“The functionaries and employees of every class who consent on his invitation, to continue their functions, shall enjoy his protection. They shall not be dismissed or subjected to disciplinary punishment unless they fail in fulfilling the obligations undertaken by them, and they shall not be prosecuted unless they betray their trust.”⁸⁹⁷

The continuance of the functions of State as they operated before military occupation and the requirement that public officials remain under the employment of the occupation regime, subject to certain security considerations of the occupier, underscores the integrity of the structure of the occupied State. Accordingly, the Brussels Code places greater emphasis on the continued employment of officials, limiting removal from office on the grounds of incompetence or betrayal of trust. The Oxford Code permits a more expansive reading of the employment requirement, whereby the occupant may revoke the employment contract at any time. The Article was not incorporated into the final Hague Codes of 1899 and 1907 on the basis that it unduly compelled officials in the occupied territory to work for the belligerent against their will.⁸⁹⁸ Incidentally the vestiges of the earlier articles highlight the stress on maintaining not only the institutions of State but also their functionaries. However

⁸⁹⁶ Article 47, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

⁸⁹⁷ Article 4, Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, 65 BRIT. FOREIGN & ST. PAPERS 1005 (1873-74). Article 45 of the Oxford Code provides:

Functionaries and civil employees of every class who consent to continue their functions, enjoy the protection of the occupant. They may be recalled at any time and have the right to resign at any time. They may not be punished disciplinarily except when they fail in the obligations freely assumed by them, or delivered to justice except when they betray them. (Article 45, The Laws of War on Land, Manual published by the Institute of International Law (Oxford Manual), Adopted by the Institute of International Law at Oxford, September 9, 1880).

⁸⁹⁸ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914 A Historical Survey* (New York, 1949) p. 149

where the articles promote the continuance of the administrative mechanism, there is also room for the belligerent occupant to manipulate the administrative structure and replace the entire body of staff.

What is uncertain is the potential for the occupant to install a completely new structure into the territory so as to alter the very organisation of the State. Where the Hague Regulations fail to safeguard against this eventuality, Article 54(1) of the Fourth Geneva Convention fills the gap and provides that the occupant “may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.”⁸⁹⁹ This underscores the integrity and continuance of the administrative and judicial structure in the occupied territory.⁹⁰⁰

The practice of appointing occupation-friendly representatives to govern occupied territory is deeply engrained in European jurisprudence. The appointments reflect the Article 43 duty to maintain public order and safety. It is less certain whether the role can assume a divergent trajectory, as the independent voice of the occupied population in the business of transforming territory. In *Privat v. Bertaux* (1941), the Court of the Peace of Givet found that a mayor-commissary appointed by the German occupation authorities accorded with the Article 43 duty to uphold public order and civil life where the civic authorities had withdrawn from the occupied territory.⁹⁰¹ The court sedulously underscored the *de facto* nature of the appointment and indicated that the appointment could be challenged.

In *Burger v. Ente Naz. Tre Venezia* (1952) the Italian Court of Cassation determined that the occupant may appoint public officials to the local government to replace hostile elements or in cases where the government had fundamentally broken

⁸⁹⁹ Article 54, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force Oct. 21, 1950.

⁹⁰⁰ Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) Article 551, p. 257

⁹⁰¹ *Privat v. Bertaux* (September 19, 1941) France, Court of the Peace of Givet, Annual Digest and Reports of Public International Law Cases Years 1919-1942, (London, Butterworth & Co. (Publishers), Ltd, 1947) Case No. 159, p. 284

down.⁹⁰² Elaborating the court maintains that such appointments must not be taken in order “to subvert the local administration or to impose the occupant’s own power to the extent of destroying the autonomy enjoyed by entities of either public or private law under the régime of the occupied State.”⁹⁰³ *Ergo* should the territory plummet into a state of *deballatio* during the transitional invasion and occupation stage of hostilities and the occupier is impressed with the duty to appoint public officials to administer the occupied territory, these appointees must still function independently of the occupying Power and within the purview of the local law subject to military necessity.

More common during occupation and certainly an area burgeoning with case law is the appointment of judiciary and the establishment of courts of justice during belligerent occupation by the administration to maintain public order. For the most part the decisions have been found to be legally binding post occupation. The question is whether this practice can extend to legitimate the political decisions of the appointed administrative wing post bellum. From the case *The King v. Maung Hmin et al.* (1946) it is instructive that Courts established by the Japanese occupant in Burma, were established under the municipal law of Burma and administered the municipal law of Burma thus maintaining as narrowly as possible the *status quo ante*.⁹⁰⁴ Likewise the Burmese High Court in *Maung Hli Maung v. Ko Maung Maung* (1946) found that the establishment of the Rangoon City Court did not offend against Article 43 as the court did not purport to exercise additional jurisdiction.⁹⁰⁵

In *Thrace (Notarial Services) Case* (1949) the Court of Appeal of Thrace found that the Bulgarian occupation authorities had acted legally in appointing their own legal officials where the Greek legal officials had withdrawn their services.⁹⁰⁶ The intention

⁹⁰² *Burger v. Ente Naz. Tre Venezia*, (1952), Italian Court of Cassation, International Law Reports Year 1952, (London, Butterworth & Co. (Publishers) Ltd., 1957), Case No. 136, p. 614.

⁹⁰³ *Ibid.*, at p. 615.

⁹⁰⁴ *The King v. Maung Hmin et al* (March 11, 1946) Burma, High Court of Judicature, Annual Digest and Reports of Public International Law Cases Year 1946 (London, Butterworth & Co. (Publishers), Ltd, 1951, Case139, p. 334.

⁹⁰⁵ *Maung Hli Maung v. Ko Maung Maung*, Burma High Court (Appellate Civil), December 20, 1946, Annual Digest and Reports of Public International Law Cases Year 1946, (London Butterworth & Co. (Publishers), Ltd., 1951) Case 141, p. 344.

⁹⁰⁶ *Thrace (Notarial Services) Case*, Greece, Court of Appeal of Thrace, 1949, Annual Digest and Reports of Public International Law Cases Year 1949, (London Butterworth & Co. (Publishers), Ltd., 1955, Case No. 167, p. 466; Likewise in re Will of Jan M. (July 14, 1950) Poland Supreme Court,

of the court was the continuation of the justice system in closest proximation to the former laws. Likewise, the appointment of a judge by the Soviet commander in occupied Germany was in accordance with customary international law in *Recognition of Divorce (Eastern Germany) Case* (1956).⁹⁰⁷

In *Grahame v. The Director of Prosecutions* (1947) the Court of Criminal Appeal in the British Zone of Control, found that the British occupation administration had the competence to set up courts.⁹⁰⁸ Commenting *per curiam* the court posited, that none of the ordinances conflicted with the German laws in force and without the establishment of the court, there would be no court to administer justice in the territory. Again it is significant that the Court drew on the continuation of the national German legislation and sought to emphasise the limited nature of the transformation, despite the consideration of the post World War II allied occupation of Germany as a transformative occupation. In line with the contemporaneous pronouncements, the Supreme Court of Sarawak ruled that the Central Police Station in Kuching was not a substitute for a court of law under Article 43.⁹⁰⁹ The Italian Court of Cassation ruled in *re Cresciani* (1959) that military courts established to try citizens for common crimes were a nullity where local tribunals existed for this end.⁹¹⁰ Fundamentally the restructuring of the justice system had nothing to do with the needs of belligerent occupation and accordingly the ordinances conferring the power were declared a nullity.

International Law Reports 1957, (London, Butterworths, 1961) p. 971; Muhammad Amin Al-Ja'bari v. Ahmad Ya'qub 'Abd Al-Karim Al-'Awiwi, (June 17, 1968) Jordan, Court of Appeal of Ramallah, International Law Reports Volume 42 (London Butterworths, 1971) p. 484.

⁹⁰⁷ *Recognition of Divorce (Eastern Germany) Case*, (November 14, 1956) German Federal Republic, Federal Supreme Court, International Law Reports Year 1956, (London Butterworth & Co. (Publishers) Ltd. 1960) p. 795. Similarly the Supreme Court of Sarawak found that a military occupant may suspend judges and magistrates but if so must temporarily appoint others in their place. *Ellin Anak Masing v. The King* (March 22, 1948) Sarawak, Supreme Court, International Law Reports 1957, (London, Butterworths, 1961) p. 943, 944; *Zbigniew G. v. Land and Building Company E. in Cracow*, (December 3, 1945), Poland Supreme Court, International Law Reports Volume 25, (London Butterworths, 1963) p. 714.

⁹⁰⁸ *Grahame v. The Director of Prosecutions* (July 26, 1947) Germany, British Zone of Control, Control Commission, Court of Criminal Appeal, Annual Digest and Reports of Public International Law Cases Year 1947, (London, Butterworth & Co. (Publishers), Ltd., 1951, Case 103, p. 228.

⁹⁰⁹ *Ellin Anak Masing v. The King* (March 22, 1948) Sarawak, Supreme Court, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd., 1953) Case No. 193, p. 586.

⁹¹⁰ *Re Cresciani* (March 14, 1959) Italy, Court of Cassation, International Law Reports Volume 28, (London Butterworths 1963) p. 643.

Even the vicissitudes of replacing and propping up the pillars of justice during occupation as a fundamental structure of State is perceived as a temporary measure by the returning courts of justice after occupation. In some cases the criminal records from military courts may be wiped clean. As a rule of thumb, the further the system deviates from the core laws of the State during occupation, regardless of the necessities of war, the less likely the measures will be respected on the resumption of sovereignty. Accordingly, in *re Dr. J. H. Carp* (1946) the Dutch Special Court of Cassation found that the appointment of a judge in the Netherlands to a special court established to try nationals who collaborated with the Nazis had no legal validity.⁹¹¹ Critically the court was outside the judicial control of the ordinary Supreme Court and placed supporters of the occupying German authorities in an exceptional legal position.⁹¹² Similarly, in police *Inspector G. v. Innsbruck Police Inspectorate* (1953) the Austrian Administrative Court ruled that a conviction handed down by a French military tribunal did not have the same legal effect as an Austrian tribunal and was accordingly invalid.⁹¹³ The juridical structure of the state remains intact and functions independently of the occupiers military tribunals subject to military necessity.⁹¹⁴ As such military law is regarded as foreign law and military tribunals are regarded as foreign tribunals operating within the occupied territory.⁹¹⁵

⁹¹¹ In *re Dr. J. H. Carp* (June 17, 1946), Holland Special Court of Cassation, Annual Digest and Reports of Public International Law Cases Year 1946, (London Butterworth & Co. (Publishers), Ltd. 1951) Case No. 155, p. 367

⁹¹² *United States High Commissioner for Germany v. Migo and Another* (October 23, 1951) Germany (United States Zone of Occupation), United States Court of Appeals, International Law Reports Year 1951, (London Butterworth & Co. (Publishers), Ltd., 1957) Case No. 187, p. 614; In *re Dismissal from the Civil Service*, (August 22, 1951) German Federal Republic, Administrative Court of Appeal of Luneburg, International Law Reports Year 1951, (London Butterworth & Co. (Publishers), Ltd., 1957) Case No. 188, p. 615; Criminal Files (Greece) Case, (1951), Greece, Tribunal of First Instance of Thrace, International Law Reports Year 1951, (London Butterworth & Co. (Publishers), Ltd., 1957) Case No. 195, p. 629.

⁹¹³ *Police Inspector G. Innsbruck Police Inspectorate* (February 27, 1953) Austria, Administrative Court, International Law Reports Year 1953, (London Butterworth & Co. (Publishers) Ltd. 1957) p. 649.

⁹¹⁴ *Offences Against Law of Occupant Case* (May 21, 1953) German Federal Republic, Federal Supreme Court, International Law Reports Year 1953, (London Butterworth & Co. (Publishers) Ltd. 1957) p. 650.

⁹¹⁵ *Probation of Offender (Germany) Case* (March 5, 1954), German Federal Republic, Federal Supreme Court, International Law Reports Year 1954, (London Butterworth & Co. (Publishers) Ltd, 1957) p. 479; *Double Jeopardy Case* (May 21, 1954) German Federal Republic, Federal Supreme Court, International Law Reports Year 1954, (London Butterworth & Co. (Publishers) Ltd, 1957) p. 480. *German Amnesty Case* (August 19, 1954) German Federal Republic, Court of Appeal of Hamburg, International Law Reports Year 1954, (London Butterworth & Co. (Publishers) Ltd, 1957) p. 482; *Austrian Amnesty Case* (June 17, 1955) Austria, Court of Appeal of Vienna, International Law Reports Year 1955, (London Butterworth & Co. (Publishers) Ltd. 1958) p. 996.

4.1.1 *Application to Iraq*

The appointment of a Governing Council for Iraq constituting members of the indigenous population marked a turning point in the occupation, whereby the belligerent occupant and Iraqi representatives would collaborate on projects beneficial to the reconstruction of Iraq. While the indigenous administration is mandated under Resolution 1483, the appointment of the Governing Council was necessitated by the Coalition Provisional Authority's decision to remove members of the Ba'ath party from all levels of administration at the start of the occupation. Coalition Provisional Authority Order Number 1, dismantled the Ba'ath ruling party of the former regime and eliminated the party's structures removing its leaders from positions of authority. Full members of the Ba'ath party and individuals employed in the top three layers of management in every "national government ministry, affiliated corporations and other government institutions (e.g., universities and hospitals)" were removed from their positions under the order, leaving many of Iraq's ministries bereft of its administrative and technical machinery.⁹¹⁶

Article 4 of the Brussels Code and Article 45 of the Oxford Code provide for the continued employment of the civil administration of the occupied State. The Hague Regulations do not contain any equivalent provision. Notwithstanding the exclusion, the intent of the drafters was that the civil administration would continue in force on the grounds that the belligerent occupant must maintain the *status quo ante* unless the workers declined to work for the invading belligerent.⁹¹⁷ Coalition Provisional Authority Order Number 1, paragraph 1 stated:

On April 16, 2003 the Coalition Provisional Authority disestablished the Ba'ath Party of Iraq. This order implements the declaration by eliminating the party's structures and removing its leadership from positions of authority and responsibility in Iraqi society. By this means, the Coalition Provisional Authority will ensure that representative government in Iraq is not threatened by Ba'athist elements returning to power and that those in positions of authority in the future are acceptable to the people of Iraq.⁹¹⁸

⁹¹⁶ Coalition Provisional Authority Order Number 1, De-Ba'athification of Iraqi Society, CPA/ORD/16/May 2003/01 par 1.

⁹¹⁷ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914: A Historical Survey* (New York, 1949) p. 149.

⁹¹⁸ Coalition Provisional Authority Order Number 1, De-Ba'athification of Iraqi Society, CPA/ORD/16/May 2003/01 par 1.

Coalition Provisional Authority Order Number 1, paragraph 2 removed Ba'ath officials from office and barred them from future employment in the public sector. The extensive dismantling of the Ba'ath party at all levels of Iraqi society discriminated against ordinary Iraqi workers who had no option but to join the party during the Saddam era to obtain employment in state owned hospitals, schools and other entities. It later emerged that the De-Ba'athification process was implemented to pervasively purge the public sector of up to 100,000 Ba'ath employees.⁹¹⁹

Distinctions can be drawn between the forced removal of the Ba'ath party necessitating the later appointment of the Governing Council and the resignation of state officials, requiring the appointment of representatives by the belligerent occupant. In *Privat* the court found that the belligerent occupant had a duty to appoint a mayor-commissary where the civic authorities had withdrawn from the territory. Similarly in *Thrace* the Greek legal officials had withdrawn their services. However where the functionaries of the former regime remain in office and there is no immediate threat posed to the belligerent occupant, the functionaries must retain their positions. Correspondingly, the belligerent occupant may dismiss the top levels of authority to maintain effective control but this generally does not extend to the lower ranking civil servants.

The Iraqi De-Ba'athification Council was established under Coalition Provisional Authority Order Number 1 to compile information on Ba'ath Party affiliations of employees at all ministries to conduct investigations into the affiliations of employees and make determinations about Ba'ath Party membership.⁹²⁰ In *Burger* the court found that the belligerent occupant could replace public officials where the government had fundamentally broken down. However even taking into consideration the possibility that the structures of Iraq needed to be dismantled on the basis of *debellatio*, the removal of Ba'ath members from future employment in the public sector far exceeds the temporary nature of the Hague Regulations and the duty to retain as far as possible the institutions in force in the country. Article 45 of the Hague Regulations states that "it is forbidden to compel the inhabitants of occupied territory

⁹¹⁹ Charles H. Ferguson, *No End in Sight, Iraq's Descent into Chaos* (PublicAffairs, 2008) 156.

⁹²⁰ Coalition Provisional Authority Order Number 1, CPA/MEM/3 June 2003/01.

to swear allegiance to the hostile power.”⁹²¹ Conversely the occupied population is entitled to retain membership of political parties and maintain allegiance to the state.

Consequently, the installation of the Coalition Provisional Authority friendly Governing Council is potentially based on the illegal removal of the Ba’ath party from the institutions of state. The Governing Council maintained the intractable position of approving long term transformative measures which may not be challenged by the occupied population. Furthermore by the time *de jure* authority has been established, the transformative measures may be deeply entrenched in society and will be difficult if not impossible to undo. The appointment of the Interim Governing Council by the belligerent occupier to profoundly transform the structure of the State lacks congruity even with the broader manifestations of public appointment.

4.1.2 Does the Governing Council have the authority to independently alter the economic infrastructure of Iraq?

Coalition Provisional Authority Regulation Number 74, the Interim Law on Securities Markets acknowledges the Governing Councils desire to improve conditions for the people of Iraq and bring about significant change to the Iraqi economic system.⁹²² Coalition Provisional Authority Regulation Number 80, Amendment to the Trademarks and Descriptions Law No. 21 of 1957 recognises:

“the demonstrated interest of the Governing Council for Iraq to become a full member in the international trading system, known as the World Trade Organisation, and the desirability of adopting modern intellectual property standards.”⁹²³

Coalition Provisional Authority Regulation Number 81, Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law outlined the desire of the Governing Council to change the Iraqi intellectual property system to

⁹²¹ Article 45, Hague Convention IV and Regulations, 1907.

⁹²² Coalition Provisional Authority Regulation Number 74, Interim Law on Securities, CPA/ORD/18 April 2004/74.

⁹²³ Coalition Provisional Authority Regulation Number 80, Amendment to the Trademarks and Descriptions Law No. 21 of 1957, CPA/ORD/26 Apr 04/80

facilitate economic change.⁹²⁴ Coalition Provisional Authority Regulation Number 83, Amendment to the Copyright Law describes the close relationship between the Governing Council and the Coalition Provisional Authority to ensure economic change beneficial to the people of Iraq.⁹²⁵ Coalition Provisional Authority Regulation Number 39, Foreign Investment Order states that the Coalition Provisional Authority is working in consultation and coordination with the Governing Council.⁹²⁶

Article 47 of the Fourth Geneva Convention (1949) offers a didactic insight into the question of maintaining the previous structures of State providing that protected persons shall not be deprived of the protection of the Convention in the event that changes are introduced in the institutions of government during occupation by arrangements concluded between the belligerent occupant and authorities in the occupied territory.⁹²⁷ Naturally the article is couched in protectionist terms towards the occupied population and underscores the continued humanitarian guarantees of the Geneva Convention regardless of illegal measures undertaken by occupying powers such as annexation and institutional alteration. Of interest, is the transformative reference to institutional change and whether this proscribes or predicts an element of transformation within the remit of Geneva law. Pictet in the ICRC Commentary, notes that Article 47, does not “expressly prohibit the occupying power from modifying the institutions or government of the occupied territory. Certain changes might be considered necessary and even an improvement.”⁹²⁸

Accordingly, Pictet’s analysis of Article 47 suggests that where the original institutions of the occupied State operate to the detriment of the humanitarian guarantees provided for under Geneva law, an element of transformation and State engineering may be required by the belligerent occupant to fulfil its humanitarian obligations. The protection of core humanitarian norms outweighs the obligation to

⁹²⁴ Coalition Provisional Authority Regulation Number 81, Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law, CPA/ORD/26 April 04/81

⁹²⁵ Coalition Provisional Authority Regulation Number 83, Amendment to the Copyright Law, CPA/ORD/ 29 April 2004/83

⁹²⁶ Coalition Provisional Authority Regulation Number 39, Foreign Investment Order, CPA/ORD/19 September 2003/39

⁹²⁷ Article 47, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950.

⁹²⁸ Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva International Committee of the Red Cross, 1958) p. 274.

preserve the machinery and institutions of State. Article 43 provides the barometer for addressing the transformation where the occupant respects “unless absolutely prevented” the laws in force in the territory.⁹²⁹ The problem with ‘improvements’ implemented by the seemingly benevolent belligerent occupant is that they may not necessarily be viewed as “improvements” by the occupied population, regardless of the humanitarian design. For example the quest to bring liberal democracy to Iraq and quench the megalomaniac totalitarian regime of Saddam Hussein arguably did not take into account the voices of ruling families who wished to revert to a loose structure of decentralised tribal rule enjoyed during the Ottoman period.⁹³⁰

Despite Pictet’s radical statement in 1958, on the potential of the belligerent occupant to transform the institutions or government of the occupied State, international law writers in the intervening years have resiled from this position and reverted to the traditional policy manifest in the Hague rules to maintain unless absolutely prevented the *status quo ante bellum*. Fox concludes that the occupier “possesses no local legitimacy or necessary stake in the welfare of the territory after it departs and it is not competent to enact reforms that fundamentally alter the governing structures in the territory or create long-term consequences for the local population.”⁹³¹ Again rooted in the conservationist principle Dinstein observes:

“The occupying power is not allowed to shake off the pillars of government in the occupied territory. Thus, it cannot validly transform a unitary system in the occupied territory into a federal one (or vice versa), even if the metamorphosis would allegedly be in force only during the period of occupation.”⁹³²

This echoes the earlier Article 43 restrictions on change to the fundamental institutions of the occupied State on the basis that radical reformatting was the preserve of the sovereign and the occupant’s authority extended to powers of administration only.⁹³³ Similarly the International Committee of the Red Cross in an

⁹²⁹ Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva International Committee of the Red Cross, 1958) p. 274, fn. 1.

⁹³⁰ Denise Natalie, *The Kurds and the State: Evolving National Identity in Iraq, Turkey and Iran* (Syracuse University Press, 2005) 20.

⁹³¹ Gregory H. Fox, *Humanitarian Occupation* (Cambridge University Press, 2008) p. 237.

⁹³² Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009) p. 124.

⁹³³ Feilchenfeld, *The International Law of Belligerent Occupation* (Carnegie Endowment for International Peace, Monograph Series No. 6, 1942) p. 89. Feilchenfeld similarly proposes that the

official statement on current challenges to the law of occupation admitted that those laws on occupation preclude transformative occupation.⁹³⁴ Meanwhile Kretzmer suggests that changes to the political status of the occupied State must not be orchestrated by force but by international negotiations.⁹³⁵ The International Court of Justice in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion observed that Article 47 of the Fourth Geneva Convention did not contain a qualifying provision to account for military exigencies, therefore the occupant cannot bend the rule in Article 47 in contemplation of security concerns contrary to the position espoused by Pictet.⁹³⁶

During World War I and World War II, a practice developed where the ousted sovereign continued to legislate for the occupied State from beyond the territorial borders.⁹³⁷ After the First World War, the Latvian Senate determined that the fact of occupation does not preclude the coming into force of laws enacted by the State's central authorities.⁹³⁸ The practice placed both the administrative orders of the inimical occupying belligerent and the national constitutions of the occupied territories under particular strain. Not even the most progressive constitution could foresee the need to allow for the joint legislation of the deposed sovereign and the belligerent occupant in its emergency measures.⁹³⁹ Although the practice is rightly regarded as redundant, for only the authority of the occupied territory is placed in the hands of the invading belligerent, the Hague Regulations do not categorically prohibit

occupant may not transform a democratic republic into an absolute monarchy or engage in other such measures.

⁹³⁴ Daniel Thürer, Malcolm MacLaren, ICRC Official Statement. Speech at <http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105>.

⁹³⁵ David Kretzmer, *The Occupation of Justice, The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, 2002) p. 57.

⁹³⁶ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J Reports (9 July 2004), par 135.

⁹³⁷ *Auditeur Militaire v. G. Van Dieren, Belgium*, Council of War (Court-Martial) of Brabant, (31 January, 1919) Case No, 310, p. 445, Annual Digest of Public International Law Cases Years 1919 to 1922 (Longmans, Green and Co. London, New York, Toronto, 1932); *Kauhlen Case*, Belgium, Court of Cassation, 19 October, 1920, Case No. 323, p. 457 Annual Digest of Public International Law Cases Years 1919 to 1922 (Longmans, Green and Co. London, New York, Toronto, 1932); *Occupation of Cavella Case*, Greece, Court of Thrace, 1930, Case 292, p. 496, Annual Digest of Public International Law Cases Years 1929 and 1930, (Longmans, Green and Co. London, New York, Toronto, 1935)

⁹³⁸ *Kulturās Balss Co-operative Society v. Latvian Ministry for Home Affairs, Latvia*, The Senate, (19 November, 1920) Case No. 321, p. 456, Annual Digest of Public International Law Cases Years 1919 to 1922 (Longmans, Green and Co. London, New York, Toronto, 1932); Yoram Dinstein, "Legislation under Article 43 of the Hague Regulations and Peacebuilding" HPCR Occasional Paper Series (2004), p. 4. Article at <http://www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf>

⁹³⁹ Samuel Anatole Lourie, Max Meyer, "Governments-in-Exile and the Effect of their Expropriatory Decrees" 11 U. Chi. L. Rev. 26 1943-1944, p.28.

the ousted sovereign from continuing to introduce legislation during the occupation, a factor which of course has enormous symbolic value. In fact, Feilchenfeld has suggested that the ousted sovereign may continue to legislate from beyond the territorial boundaries in areas outside the competence of the belligerent occupant, a view which has garnered support from other international law writers.⁹⁴⁰ Not surprisingly, national courts have been willing to give effect to the anomalous legislative measures of the deposed sovereign *post bellum*.⁹⁴¹

After World War II, the Norwegian Supreme Court ruled that the sovereign could issue valid decree laws during occupation including legislation to reinstate an abolished death penalty.⁹⁴² In *Public Prosecutor v. Lian* (1945), the Norwegian Supreme Court found that Norwegian decrees introduced *in absentia* were binding on citizens despite being at variance with international law.⁹⁴³ Correspondingly, the Court of Appeal of the Hague found that the decrees of the rightful sovereign were *de facto* suspended in occupied territory but that this did not prevent them from acquiring the force of law in occupied territory.⁹⁴⁴ In *Mommer and Others v. Renerken*, (1953) the Court of Appeal of Liège was prepared to nullify all occupation ordinances based on a Decree Law issued in London during the occupation.⁹⁴⁵ However the act of legislating is highly significant in itself in that it indicates a belief on the part of the legitimate sovereign that the occupation ordinances are of a temporary nature and an

⁹⁴⁰ Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Carnegie Endowment for International Peace, Monograph Series No. 6, 1942) p. 135 par 463. Eyal Benvenisti, *The International Law of Occupation*, (Princeton University Press, 2nd edition, 2004) p. 18; Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) Article 547, p. 254.

⁹⁴¹ *Re X.Y.*, Greece, Council of State, Judgement No. 54 of 1945, Case No. 147, p. 431, Annual Digest and Reports of Public International Law Cases Years 1943-1945, (London Butterworth & Co. (Publishers), Ltd., 1949)

⁹⁴² *Public Prosecutor v. Reidar Haaland*, Norway, Supreme Court (Appellate Division) August 9, 1945, Case No. 154, p. 444, Annual Digest and Reports of Public International Law Cases Years 1943-1945, (London Butterworth & Co. (Publishers), Ltd., 1949)

⁹⁴³ *Public Prosecutor v. Lian*, Norway, Supreme Court, November 14, 1945, Case No. 155, p. 446, Annual Digest and Reports of Public International Law Cases Years 1943-1945, (London Butterworth & Co. (Publishers), Ltd., 1949)

⁹⁴⁴ *Rotterdamsche Bank, Ltd. V. Nederlandsch Beheers-Institute*, Holland, Court of Appeal of the Hague, December 15, 1948, Case No. 174 p. 531, Annual Digest and Reports of Public International Law Cases Year 1948, (London Butterworth & Co. (Publishers), Ltd., 1953). In a similar case the Dutch Supreme Court ruled that legislation introduced extraterritorially was valid during the belligerent occupation. *Damhof v. State of the Netherlands*, Supreme Court, May 5, 1950, Case No. 155, p. 429-430, Annual Digest and Reports of Public International Law Cases Year 1949, (London Butterworth & Co. (Publishers), Ltd., 1955).

⁹⁴⁵ *Mommer and Others v. Renerken*, Belgium, Court of Cassation, December 11, 1953, p. 468, International Law Reports Year 1953, London Butterworth & Co. (Publishers) Ltd. 1957.

alternative parallel framework of measures are ready for immediate implementation *post bellum*. State practice appears inconsistent arguably leaving the belligerent some flexibility in framing administrative arrangements.

Application to Iraq

United Nations Security Council Resolution 1483 “supports” the formation of an interim administration run by Iraqis but critically does not confer the entity with executive or legislative authority. This stance can be distinguished from interim administrations in United Nations occupations such as East Timor where acting under Chapter VII the Security Council “decide to establish” a United Nations transitional administration “empowered to exercise all legislative and executive authority, including the administration of justice.”⁹⁴⁶ Similarly the establishment of the Palestinian Authority negotiated between Israel and the Palestine Liberation Organisation assumed “powers and responsibilities from the Israeli military government” in “education, culture, health, social welfare, tourism, direct taxation and Value Added Tax on local production.”⁹⁴⁷

UN Security Council Resolution 1500 welcomed the establishment of the Governing Council on 13 July 2003, as a step towards the formation of an internationally recognised sovereign government of Iraq.⁹⁴⁸ Meanwhile, UN Security Council Resolution 1511, calls upon the Coalition Provisional Authority to return governing responsibilities to the people of Iraq as soon as possible indicating that the Governing Council maintains merely an advisory role as opposed to a legislative role during the occupation.⁹⁴⁹ Instead, the Governing Council is directed to draft a new constitution and draw up a timetable for the elections and the United Nations resources are placed at its disposal in support.⁹⁵⁰ Coalition Provisional Authority Regulation Number 6 outlined the responsibilities and authority of the Governing Authority, as representing the Iraq people during the interim administration and determining the means of establishing an internationally recognised representative government.⁹⁵¹

⁹⁴⁶ S/RES/1272 (1999) par 1.

⁹⁴⁷ Article II, Agreement on Preparatory Transfer of Powers and Responsibilities (August 29, 1994) Preparatory Transfer of Powers and Responsibilities, par 1.

⁹⁴⁸ S/RES/1500 (2003) par 1.

⁹⁴⁹ S/RES/1511 (2003) par 6.

⁹⁵⁰ S/RES/1511 (2003) par 7, 11.

⁹⁵¹ Coalition Provisional Authority Number 6, Governing Council of Iraq, CPA/REG/13 July 2003/06

The practice of ousted sovereigns during the two World Wars would suggest some scope for parallel legislative measures to be issued during belligerent occupation. Feilchenfeld's argument that the ousted sovereign may continue to legislate in areas beyond the competence of the belligerent occupant is certainly interesting particularly in the area of transformative economic reforms. However it is evident in the occupation of Iraq that the competence of the Governing Council was limited to drafting a new interim constitution for Iraq and did not extend to economic reconstruction.

Security Council Resolution 1511 underscores the vital role of the United Nations in promoting economic reconstruction and the conditions for sustainable development in Iraq including efforts to "restore and establish national and local institutions for representative governance"⁹⁵² Interestingly, the resolution calls upon member states and international organisations to provide funding to the Governing Council for economic reconstruction but again this falls short of a legislative role. Consequently the economic reconstruction of Iraq presents a unique hybrid of authority where the UN plays a "vital role", the Coalition Provisional Authority a legislative role and the Governing Council an advisory role. In particular the object and purpose of Security Council Resolution 1511 limits the authority of the Governing Council to preparing for the constitutional process. While there is a marginal role etched for the Governing Council in disbursing funds to reconstruction projects this is subordinate to the Coalition Provisional Authority which maintains ultimate legislative authority.

Accordingly Article 47 of the Geneva Convention provides that the occupied population should not be deprived of the protection of the Fourth Geneva Convention regardless of any agreements concluded between the authorities in the occupied territories and the belligerent occupant. If, as Pictet indicated in 1958, institutional alteration is permitted for the benefit of the occupied population there is possibly scope for some transformative measures during belligerent occupation. The difficulty is that Article 47 pertains to the humanitarian provisions of the Fourth Geneva Convention and any such transformative measures are necessarily limited accordingly

⁹⁵² S/RES/1511 (2003) par 8.

to that realm. Alternatively, the economic transformation evidenced in Iraq is limited by reference to the Hague Regulations, which substantially curtails the belligerent occupant's authority. While the Governing Council represents a separate administrative entity to the Coalition Provisional Authority, it is still potentially party to the type of illicit agreement recognised in Article 47 of the Fourth Geneva Convention.

4.2 Does the status of the Interim Governing Council impact on the effective control of the Coalition as occupying powers?

Security Council Resolution 1500 (2003) welcomes the formation of the Interim Governing Council which is considered broadly representative of the people of Iraq and which marks an important step towards the formation of an internationally recognised representative government.⁹⁵³ However expanding on this, Security Council Resolution 1511 (2003) indicates that the Interim Governing Council embodies the sovereignty of the Iraqi state until a recognised representative government is formed.⁹⁵⁴ Paragraph 4 of Resolution 1511 determines:

“That 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 recognised, representative government is established and assumes the responsibilities of the Authority.”⁹⁵⁵

Paragraph 6 of Resolution 1511 requires that the Coalition Provisional Authority return the governing responsibilities to the Iraq people as soon as possible “in cooperation as appropriate with the Governing Council and the Secretary-General”.⁹⁵⁶ The resources of the United Nations and its organisations are placed at the disposal of the Interim Governing Council in paragraph 9 of Resolution 1511. The role of the Interim Governing Council in economic reconstruction is outlined in paragraph 20 which:

“*Appeals* to Member States and the international financial institutions to

⁹⁵³ S/RES/1500 (2003) par 1.

⁹⁵⁴ S/RES/1511 (2003) par 4.

⁹⁵⁵ *Ibid.*

⁹⁵⁶ *Ibid.* at par. 6.

strengthen their efforts to assist the people of Iraq in the reconstruction and development of their economy, and *urges* those institutions to take immediate steps to provide their full range of loans and other financial assistance to Iraq, working with the Governing Council and appropriate Iraqi ministries.”⁹⁵⁷

Consequently, given that the Interim Governing Council assumes a prominent role in the reconstruction of the territory and embodies the sovereignty of the Iraqi state, what impact does this have on the requisite control of the Coalition Provisional Authority as the occupying authority over the economic reconstruction of the occupied territory?

Article 42 of the Hague Regulations describes the legal criteria for establishing *de facto* military occupation of foreign territory providing:

territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.⁹⁵⁸

The definition of occupied territory contained in Article 41, Lieber Instructions of 1863 finds:

Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the state to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading state is alone in a position to maintain order there. The limits within which this state of affairs exists determine the extent and duration of the occupation.⁹⁵⁹

The Lieber Instructions apply when territory is invaded by hostile forces curtailing the exercise of the sovereign’s authority during belligerent occupation. Certainly this reflects the traditional concept of state warfare where different insurgents and two different states are involved in the fringes of the conflict.⁹⁶⁰ A situation under which the State’s authority has ceased due to instability caused by the uprising of internal

⁹⁵⁷ *Ibid* at par 20.

⁹⁵⁸ Article 42, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

⁹⁵⁹ Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents*, (Martinus Nijhoff, 1988). Reproduction of the ‘Instructions for the Government of Armies of the United States in the Field.’

⁹⁶⁰ Conflict between States was deemed to be the only conflict model. Oppenheim declared, “war is a contention, which means a violent struggle through the application of armed force. For a war to be in existence, two or more States must actually have their armed forces fighting against each other.” Hyde defined war as “a condition of armed hostility between States.” Quoted from Clyde Eagleton, “The Attempt to Define War,” 15 *International Conciliation* 237 (1932-1933) p260.

forces for example, would be rendered inapplicable, if as a consequence of this, a second State then began to occupy the territory.

Oppenheim has lamented that the Art 42 definition of occupation, “is not at all precise, but it is as precise as a legal definition of a fact such as occupation can be.”⁹⁶¹ A member of the Institute of International Law, addressing the vague nature of the article, commented that “the occupying army will always be its own judge of the extent of occupation, its beginning and its end.”⁹⁶² Schwarzenberger distinguishes between territory over which the dispossessed sovereign has abandoned and territory over which the invading forces have not yet effected their authority. The law of belligerent occupation does not extend “to invaded enemy territory in which fighting still takes place or to those parts of it which the territorial sovereign may have abandoned, but in which the invader has not yet established his own authority.”⁹⁶³ In this regard there may be a gap in the hostilities where neither party has effective control over the territory in question. However the provisions of the Fourth Geneva Convention will apply “to all cases of partial or total occupation.”⁹⁶⁴

Schwarzenberger highlights the absolute necessity under occupation law for the “substitution of authority” requirement to be fulfilled in the pursuit of a successful belligerent occupation. The gap in control due to the withdrawal of the legitimate sovereign does not necessarily suggest a military occupation, regardless of the presence of foreign troops. The amount of authority that must be exercised to establish a belligerent occupation has been described as “an unsettled point” in international humanitarian law.⁹⁶⁵ Gerson points out that “unlike the invader, the belligerent occupant, upon cessation of active hostilities and establishment of effective control, must assume governmental functions.”⁹⁶⁶

⁹⁶¹ L. Oppenheim, *International Law A Treatise, Vol II Disputes War and Neutrality*, (Longmans, 7th Edition) pp 435.

⁹⁶² Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863 – 1914, A Historical Survey*, (Columbia University Press, 1949), p46. At footnote 24.

⁹⁶³ Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, (Stevens & Sons Ltd, 1968) pp 174.

⁹⁶⁴ Article 2, Geneva Convention Relative to the Protection of Civilian Person in Time of War (12 August 1949).

⁹⁶⁵ Davis P. Goodman, “The Need for Fundamental Change in the Law of Belligerent Occupation” *Stanford Law Review*, Vol. 37, No. 6 (Jul., 1985) 1573, 1583.

⁹⁶⁶ Allan Gerson, “War Conquered Territory and Military Occupation in the Contemporary International Legal System,” *Harvard International Law Review*, Vol. 18, (1977) pp. 525, 529.

For Oppenheim, occupation is synonymous with administrative control. The test of a successful belligerent occupation is when possession of the territory is manifested in the temporary administration of the territory by the invading army. Again the gulf between an invasion and an actual occupation is emphasised. Oppenheim submits:

“Occupation is invasion *plus* taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent from the fact that an occupant sets up some kind of administration, whereas the mere invader does not.”⁹⁶⁷

The key differential here between the invasion and the belligerent occupation is the administrative factor. Although this is the crucial decider for Oppenheim, the Hague Regulations in Article 42 remain silent on administration referring only to “establishment” and “exercise” of authority without referring to the word administration?⁹⁶⁸ It is only when reading Article 42 together with Article 43 that any legal significance attaches to the administrative component. Where the Governing Council administers the territory making central decisions in the reconstruction plans subject to Security Council resolutions does the Coalition Provisional Authority retain any meaningful control?

The possessory factor is crucial to the establishment of a successful belligerent occupation. Possession is taken of military targets in villages and towns such as police stations and post offices. From these strategic military points, the belligerent can exert authority. Oppenheim concludes that once this occurs “such villages and towns are then ‘occupied.’”⁹⁶⁹ In this respect administration takes on a more translucent form, rather than achieving solid administration over key governmental institutions, authority over secondary targets such as post offices would appear to be a sufficient level of control. Consequently, the administration of the territory and the control that is established is not important as it is the fact of the actions that symbolises the occupation. It is as Oppenheim declares “when the legitimate sovereign is prevented

⁹⁶⁷ L. Oppenheim, *International Law A Treatise, Vol II Disputes War and Neutrality*, (Longmans, 7th Edition) pp 434.

⁹⁶⁸ Article 42, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land, 1907.

⁹⁶⁹ L. Oppenheim, *International Law A Treatise, Vol II Disputes War and Neutrality*, (Longmans, 7th Edition) pp 435.

from exercising his powers, and the occupant, being able to assert his authority, actually establishes an administration over a territory, it matters not with what means, and in what ways, his authority is exercised.”⁹⁷⁰ The parameters of the actual administrative control remain uncertain. Once the administrative control of the legitimate government is prevented and some amount of administrative control is exerted by the invading military force then this amounts to the establishment and exercise of control under Article 42.⁹⁷¹

Despite its apparent factual simplicity, the article is less clear on application. As Murray-Aynsley C.J noted in *Loh Khing Woon v Lai Kong Jin and Another* (1946):

“To decide when territory becomes occupied is to decide a difficult and complicated question of fact. It is not merely the question of the presence of forces of the one side and the absence of those on the other; to constitute occupation one must look for a certain element of permanency.”⁹⁷²

Three conditions must be satisfied to establish the necessary effective control for belligerent occupation of enemy territory. Firstly, the previous government must be rendered incapable of exercising governmental authority and the occupying power then must establish its authority over the hostile territory.⁹⁷³ Secondly, there must be a military presence in the territory and thirdly the invading power must substitute its authority for that of the previous government. The substitution of authority may be actual or potential.

⁹⁷⁰ *Ibid.*

⁹⁷¹ More pressing and uncertain is what affect the level of resistance orchestrated against the hostile Power has on the belligerent occupant. Technically the authority of the sovereign state should be subdued before the occupation stage begins. Resistance would therefore suggest that the invasion stage was still in thrust. This is a grey area of occupation law and certainly would depend on the circumstances of the hostilities. French writer Pillet suggests that “while resistance continues, mere invasion not occupation, exists.” Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863 – 1914, A Historical Survey*, (Columbia University Press, 1949), p. 62.

⁹⁷² *Loh Khing Woon v Lai Kong Jin and Another*, (1946) (Annual Digest and Reports of Public International Law Cases, 1953 (London), Vol. 15 (1948), Case No. 138, p. 449). In a similar vein Adam Roberts has remarked of Article 42 “the core meaning of the term is obvious enough; but as usually happens with abstract concepts, its frontiers are less clear.” Adam Roberts, “What is Military Occupation?” (1984) 55 *BYIL* 249.

⁹⁷³ Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press, 1959), at 213.

Under the actual control test the authority of the legitimate power is suspended and passed in fact into the hands of the belligerent occupant.⁹⁷⁴ For Oppenheim, administrative control was the hallmark of actual authority. The difference between occupation and invasion became “apparent from the fact that an occupant sets up some kind of administration, whereas the invader does not.”⁹⁷⁵ Actual control of disputed territory is provisional and merely treated as a “settled acquisition” for the purposes of effective administration.⁹⁷⁶ However under an actual control reading, the occupier, who maintains a military presence on the occupied territory but refrains or withdraws from the exercise of actual authority is no longer be regarded as a belligerent occupant.

The potential control test is more suited to application in contemporary hostilities. The two World Wars exposed the escalating contempt of certain belligerents for their obligations to the occupied State under international humanitarian law. The installation of a puppet government by Japan during the occupation of Manchuria in World War II served as a sophisticated means of evading its administrative responsibilities under the Article 43 of the Hague Regulations.⁹⁷⁷ More recently the US/UK as occupying powers in Iraq attempted to evade their responsibilities under international humanitarian law, arguing that Iraq constituted a “liberation” as opposed to an “occupation” of territory, a term devoid of meaning in international law.⁹⁷⁸

Earlier strains of the broader potential control test are evident from the Lieber Code (1863). Article 41 of the Lieber Code states:

⁹⁷⁴ This stems from the earlier military code, the Brussels Code where “the authority of the legitimate power being suspended and having in fact passed into the hands of the occupants, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety.” Project of an International Declaration Concerning the Laws and Customs of War, Aug 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, 65 BRIT. FOREIGN & SR. PAPERS 1005 (1873-74).

⁹⁷⁴ *Seethalakshmi Achi st al. v V.T. Veerappa Chettiar*, (1951) 11 ILR 576.

⁹⁷⁵ L. Oppenheim, *International Law A Treatise, Vol II Disputes War and Neutrality* (7th ed., Longmans, 1952), at 434. This was also the view of Lord Kingsdown that the belligerents intention to hold the invaded territory was indicated by the establishment of some kind of administration over it. *Cremidi v. Powell (Gerasimo's Case)*, (1857) 11 MOO. P.C. 88; 14 E.R. 628.

⁹⁷⁶ (1951) 11 ILR 576.

⁹⁷⁷ Article 43, Annex to the Convention Respecting the Laws and Customs of War on Land (1907).

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

⁹⁷⁸ *PM Interview with the BBC World Service*, <http://www.number10.gov.uk/Page3423> (visited 21 May 2009).

“territory is regarded as occupied when, as a consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and *the invading State is alone in a position to maintain order there*. The limits within which this state of affairs exists determine the extent and duration of the occupation.”⁹⁷⁹ (emphasis added)

The potential control test embodied in the Lieber Code, the Oxford Code, and silently carried within the Brussels and the Hague Conventions has been subject to expansive interpretation. Bluntschli, writing in 1878, concluded that physical military presence on the occupied territory was not essential so long as control could be maintained without physical force.⁹⁸⁰ Pillet believed that one single soldier might be sufficient in certain cases to signify belligerent occupation.⁹⁸¹ The French military manual of 1893 suggests that territory is occupied when the invading belligerent surrounds the territory, even if there has been no specific act of authority on it.⁹⁸² In particular, the UK military manual (2004) determines that two conditions be satisfied for an effective belligerent occupation where firstly “the former government has been rendered incapable of publicly exercising its authority in that area: and secondly that the occupying power is in *a position to substitute its own authority* for that of the former government.”⁹⁸³ In line with earlier writings the manual did not appear to place any limitations on the scope of the test for potential control.

The most authoritative interpretation of the potential control test stems from the ruling in *re List and Others (Hostages Trial)* (1948).⁹⁸⁴ There the issue arose as to whether parts of Greece and Yugoslavia which had been occupied by the German armed forces under the test of actual control but which then fell under the partisan control of members of the Greek and Yugoslav population, could continue to be regarded as

⁹⁷⁹ Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts, A Collection of Conventions, Resolutions and Other Documents* (Martinus Nijhoff, 1988). Reproduction of the ‘Instructions for the Government of Armies of the United States in the Field.’ The Lieber Instructions were originally developed for use in the American Civil War but were soon reproduced to serve as guidelines for wars of an international character.

⁹⁸⁰ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey* (New York: Columbia University Press, 1949), at 52.

⁹⁸¹ *Ibid.*, at 62.

⁹⁸² *Ibid.*, at 56. Manuel de Droit International à l’Usage des Officiers de l’Armée de Terre.

⁹⁸³ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (University Oxford Press, 2004), at para 11.3.

⁹⁸⁴ *re List and Others (Hostages Trial)*, (1948) 15 Ann Dig 632.

occupied territories in the context of Article 42 of the Hague Regulations. The Military Tribunal at Nuremberg found that:

“The German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant.”⁹⁸⁵

Critically, this ruling substantially narrows the earlier conceptions of the potential control test. The authority of the German Armed Forces is actually established in the disputed territory. A temporary disruption in the balance of control by the partisans was not enough to terminate the German occupation of territory. Despite pockets of hostilities there was still military presence and substitution of authority in both Greece and Yugoslavia and the German Armed Forces could potentially extend authority to the unsettled areas if and when required. As a pre-requisite to the potential control test for belligerent occupation it would appear that substitution of authority and military presence be formerly established on part of the territory. This would expunge the proposition that the armed forces may potentially exert authority over territory for the purposes of occupation by merely surrounding it, even if there has been no specific act of authority within it.

Uncertainty over the use of the potential control test to determine belligerent occupation of territory under Article 42 of the Hague Regulations has arisen since the ICJ ruling in *Armed Activities in the Territory of the Democratic Republic of Congo* (2005).⁹⁸⁶ There the ICJ found that Ituri, a region in the Democratic Republic of Congo (DRC) where a governor had been appointed and an administration established by Ugandan armed forces was occupied. The Ugandan commander General Kazini had in a letter of 18th June 1999, appointed a provisional Governor Ms Adele Lotsove, over the newly Ugandan created province Kibali-Ituri and had also given suggestions regarding the administration of this new province. The conduct of General Kazini was held to be “clear evidence of the fact that Uganda established and

⁹⁸⁵ (1948) 15 Ann Dig 638.

⁹⁸⁶ *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), Judgement, I.C.J. Reports 2005.

exercised authority in Ituri as an occupying power.”⁹⁸⁷ This the court noted, was supported by material from the Porter Commission and the Sixth Report of the Secretary General on MONUC.⁹⁸⁸

Appositely, the surrounding regions where Ugandan forces were present and had taken control over specific military targets such as airfields, were not occupied despite the potential for the Ugandan armed forces to exert control. In reaching this conclusion the Court relied on the traditional test of actual control only. The Court needed to:

“examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.”⁹⁸⁹

The Court found that despite Uganda’s military presence in certain areas outside the Kibali-Ituri province and control over specific targets such as airfields, there was no evidence in the case file to allow for a broader finding of regional occupation outside Ituri.⁹⁹⁰ The need for actual evidence of control sidesteps the possibility of potential or constructive military control over the region. Unfortunately the judgment did not contain any reason for using the traditional actual control test to the exclusion of the test for potential control which was a regrettable departure from the customary application of Article 42 of the Hague Regulations to hostilities as outlined in the earlier *Hostages* case.

Arguably the ICJ in *Armed Activities in the Territory of the Democratic Republic of Congo* alluded to the potential control test in its independent determination of the Ugandan occupation of the entire Ituri/Kibali province outside the capital of Bunia. In his separate opinion Judge Parra-Aranguren departed from the reasoning of the Court

⁹⁸⁷ *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), International Court of Justice, 19th December 2005 p. 59, par. 176.

⁹⁸⁸ S/2001/128 of 12th February 2001.

⁹⁸⁹ *Ibid.*, at para 173.

⁹⁹⁰ *Ibid.* “However the DRC does not provide any specific evidence to show that authority was exercised by Ugandan armed forces in any areas other than in Ituri district.”

in finding that the Ituri region in the DRC was under the *de facto* authority of the Ugandan armed forces. He stated:

“It is also true that the UPDF was in control in Bunia (capital of Kibali-Ituri district), but control over Bunia does not imply effective control over the whole province of Kibali-Ituri, just as control over the capital (Kinsasha) by the Government of the DRC does not inevitably mean that it actually controls the whole territory of the country.”⁹⁹¹

Judge Parra-Aranguren noted that complicating factors such as regional instability and contributing rebel factions made a finding of occupation difficult to ascertain.⁹⁹² Moreover the neighbouring state Rwanda had also been identified by the DRC as a belligerent occupant over the same territory before the creation of the Ituri district by Uganda. Critical that these considerations were not examined by the Court, he concluded that Uganda had not been an occupying power over the entire Kibali-Ituri province “but over some parts of it and at different times.” The fact that the Court was willing to extend the status of occupied territory to areas beyond Bunia in Ituri where other rebel groups were stationed indicates that although the Court did not adopt the potential control test in arriving at that conclusion, conceivably the court was latently moving in this direction as the surrounding areas were under the *de facto* potential control of the Ugandan armed forces. Despite this, the singular reference to the actual control test to the exclusion of the test for potential control in the *Congo* judgement, arguably placed the issue of effective control in belligerent occupation in an unfamiliar and calamitous position.

Judge Kooijmans favoured a more liberal interpretation of Article 42 and discussed broadening the boundaries of “effective control” to match problems encountered in modern warfare. In agreeing with the court on the identification of Uganda as an occupying power in the Ituri district he noted that problems surfaced with extending the reach of Uganda as belligerent occupant. The factual basis of Article 42 was problematic in applying this article to complicated matters on the ground. He identified the traditional concept of establishing an administration by a belligerent

⁹⁹¹ *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), International Court of Justice, 19th December 2005. Separate Opinion of Judge Parra-Aranguren, p. 7, para 33.

⁹⁹² *Ibid.*, at p.9, para 39. The 2004 MONUC report highlighted the activities of eleven different armed and political groups involved in the Ituri conflict.

occupant through the evidence of substitution of authority, as a dated concept. The practice of administering territory had recently become “the exception rather than the rule” in modern conflicts.⁹⁹³ Rebel movements and transitional governments were instead used by occupants in alternative administrative arrangements.⁹⁹⁴ In examples such as this the occupant will distance itself from the fact of occupation, making it increasingly difficult to prove and to apply *de facto* Article 42 of the Hague Regulations. Drawing on the doctrinal argument of “substitution of authority”, he quotes Article 41 of the “Oxford Manual” by the Institut de droit International, 1880 where a territory was considered to be occupied when, “the State to which it belongs has ceased, in fact, to exercise its authority therein, and the invading state is alone in a position to maintain order there.”⁹⁹⁵ Therefore paradoxically while the definition of occupation presented in Article 42 appears straightforward on the facts, compounded with changing realities on the ground, the clarity of the article’s application wanes.

In this context a “structured military administration” is not necessary, as authority over military targets such as post offices and so forth is sufficient. This requires a different understanding of administration to the structured idea of governance. In taking this idea forward and applying the facts of the *Congo* case, one can conclude that the presence of the Ugandan troops coupled with their authority over the airbases and riverports in the Democratic Republic of the Congo would have constituted, according to Oppenheim’s treatment of the law, an occupation. However the Court did not find that there was an occupation in these particular areas, only in the region where General Kazini had appointed the governor by letter. Therefore relying strictly on a test of actual control.

In a laudable appraisal of Article 42 of the Hague Regulations, the Israeli High Court of Justice specifically addressed the use of the potential control test in *Physicians for*

⁹⁹³ *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), International Court of Justice, 19th December 2005, Separate Opinion of Judge Kooijmans, p. 9, para 40. This claim he supported by reference to Eyal Benvenisti, *The International Law of Occupation*, 1993, p. 212.

⁹⁹⁴ *Ibid.*, Separate Opinion of Judge Kooijmans, p. 9, para 41.

⁹⁹⁵ *ibid.*, Separate Opinion of Judge Kooijmans, p. 10, para 45. The text of Article 42 of the Hague Regulations of 1907 is borrowed from the predecessor of the Oxford Code, the Brussels Code. The Oxford Code failed to translate into an internationally legally binding instrument and remained a scientific project of the Institut de droit International.

Human Rights et al. v Prime Minister et al. (2009).⁹⁹⁶ On December 27th, 2008 Israel launched its military offensive Operation Cast Lead on the Hamas controlled Gaza Strip. Following weeks of sporadic military incursions into Gaza the Israeli offensive marked an endeavour to stop Hamas launching rockets into Southern Israel and smuggling weapons through the Rafah tunnels under the Gaza-Egypt border.⁹⁹⁷ During the hostilities the deliberate targeting of civilians, high Palestinian casualties, excessive destruction of property and blocked humanitarian efforts prompted international criticism.⁹⁹⁸ The scale of the humanitarian catastrophe prompted the *Physicians for Human Rights* group to challenge Israel's humanitarian responsibilities to the inhabitants of the Gaza Strip in the Israeli High Court and whether these humanitarian responsibilities were regulated under occupation law. Interestingly, Operation Cast Lead was the first full scale Israeli invasion into the Gaza Strip since the Disengagement Plan (2005). In September 2005, Israel had dismantled the Gaza settlements, removed Israeli Defence Forces from the territory and unilaterally declared an end to the forty year occupation of the Gaza Strip.⁹⁹⁹

Drawing on the precedent set in *Tzemel v. Minister of Defence*, the court held that the law of belligerent occupation is conditional upon the potential to exercise government authority by military forces and not necessarily upon the practical exercise of military

⁹⁹⁶ *Physicians for Human Rights et al. v. Prime Minister et al.*, HCJ 201/209, 248/09; ILDC 1213 (IL 2009).

⁹⁹⁷ Marie Colvin, Uzi Mahnaimi, "'Successful' Israel signals ceasefire" *The Sunday Times*, 18 January 2009. However other reports indicate that planning for Operation Cast Lead began up to six months prior to the attacks. Barak Ravid, *Disinformation, secrecy and lies: How the Gaza offensive came about* <http://www.haaretz.com/hasen/spages/1050426.html> (visited 20 May 2009). Ben White, *Israel wanted a humanitarian crisis* <http://www.guardian.co.uk/commentisfree/2009/jan/20/gaza-israelandthepalestinians> (visited 20 May 2009).

⁹⁹⁸ UN Secretary General Ban Ki-Moon condemned the 'excessive use' of violence wrought by Israel and Hamas rockets. Guardian Service, Reuters, "Shelling of three UN sites must be investigated, says Ban" *The Irish Times*, 21 January 2009; John Holmes, UN Undersecretary General for Humanitarian Affairs castigated the systematic destruction of industrial property and its implications for the economic development of Gaza. Michael Jansen, "Shelling of Gaza coast injures four Palestinians" *The Irish Times*, 23 January 2009; Correspondingly, Human Rights Council resolution on "the grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip," outlined that the Israeli siege and the cutting of the fuel, food and medicine supply was leading to 'disasterous humanitarian and environmental consequences' in the Gaza Strip. Human Rights Council, The United Nations General Assembly, Resolution, *The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip* (12 January 2009) A/HRC/S-9/L.1.

⁹⁹⁹ The Disengagement Plan <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan+-+General+Outline.htm> (visited 25 March 2009).

authority in the territory.¹⁰⁰⁰ Furthermore, the military could effectively maintain temporary control over the territory for the application of Article 42 of the Hague Regulations without actually establishing a special military framework for governmental purposes.¹⁰⁰¹ This resiles the scope of the test for authority back to the settled parametres of the *Hostages Case* and illustrates that in domestic law states favour the potential control test.

4.2.1 *Application to Iraq*

The extent to which the Coalition Provisional Authority controls the actions of the Governing Council depends to a large extent on the application of the tests of actual and potential control. Arguably the Coalition Provisional Authority is not responsible for the acts of the Governing Council under the narrow focus of the actual control test. Alternatively applying the broader test of potential control the Coalition Provisional Authority does exert effective control.

Oppenheim argues that the establishment of some sort of administration is central to the occupation. A distinction can be drawn between the appointment of an indigenous governing entity by the belligerent occupant and the requirement for an indigenous governing authority mandated by a Security Council resolution to form an indigenous administration. In *Armed Activities* the International Court of Justice found that a letter detailing the appointment of Ms. Adele Lotsove to the position of governor was evidence that Uganda was an occupying authority there. Appositly the belligerent intended to appoint the governor to the position and the Court based its assessment on a finding of actual control. However Security Council Resolution 1483 “supports the formation, by the people of Iraq, with the help of the Authority” of an interim administration.¹⁰⁰² Coalition Provisional Authority Regulation Number 6 on the Governing Council of Iraq states:

“*Recognizing* that, as stated in paragraph 9 of Resolution 1483, the Security Council supports the formation of an Iraqi interim administration as a transitional administration run by Iraqis, until the people of Iraq establish an internationally recognised, representative government that assumes the

¹⁰⁰⁰ *Ibid.*, at para 14; *Tzemel v. Minister of Defence*, P.D. 37(3) 365, HCJ 102/82.

¹⁰⁰¹ HCJ 201/209, 248/09; ILDC 1213 (IL 2009), para 14.

¹⁰⁰² S/RES/1483 (2003) par 9.

responsibilities of the CPA.”¹⁰⁰³

Section 2 outlines the relationship of the Governing Council with the Coalition Provisional Authority:

“In accordance with Resolution 1483, the Governing Council and the CPA shall consult and coordinate on all matters involving the temporary governance of Iraq, including the authorities of the Governing Council.”¹⁰⁰⁴

Accordingly, the origins of the Governing Council in Security Council resolution 1483 affects its nature as an extension of the belligerent occupants effective control. Taking into consideration the test of actual control it is the belligerent occupant who substitutes its authority for that of the occupied government. Clearly the intervention of the United Nations Security Council impacts on the authority of the Coalition Provisional Authority in establishing the entity.

There were a variety of actors operating on the Iraqi landscape during the territorial occupation including the United Nations, the Coalition Provisional Authority, the Governing Authority and forces implicated in the insurgency. Incidentally, the former Lieber Code finds that an occupation exists when “the invading state is alone in a position to maintain order there.”¹⁰⁰⁵ However the later Hague Regulations do not contain any singular references to the occupying administration and evidently there may be more than one faction in a position to maintain order. The critical requirement is that the authority is established and can be exercised. In the *Armed Activities* case Judge Parra-Arranguren argued that a belligerent occupant may not occupy the entire territory where there are complicating factors but only some parts of it at different times. Arguably there were parts of Iraq where hostilities during the occupation were controlled by insurgents and this seriously calls into question whether the Coalition forces exercised the requisite effective control.

Alternatively under the potential control test it is arguable that the occupation of Iraq continued after the official hand over of power in June 2004. The ruling in *List* finds that territory is occupied when the forces can “at any time they desire assume physical

¹⁰⁰³ Coalition Provisional Authority Regulation Number 6, Governing Council of Iraq, CPA/REG/13 July 2003/06

¹⁰⁰⁴ *Ibid.*, at par 2.

¹⁰⁰⁵ Article 41, Lieber Instructions of 1863.

control of any part of the country” regardless of the presence of other factions.¹⁰⁰⁶ The definitive statement of occupation in Security Council Resolution 1483 (2003) describing the status of the “Authority” as an occupying power and the subsequent statement in Resolution 1546 (2004) that the occupation will end by 30 June 2004, are difficult to reconcile with the *de facto* application of Article 42.¹⁰⁰⁷ Security Council Resolution 1546 notes that the multinational force will continue to be present in Iraq at the request of the Interim Government of Iraq.¹⁰⁰⁸ Coalition Provisional Authority Order Number 100 facilitates the transfer of full governing authority to the Iraqi Interim Government on 30 June 2004.¹⁰⁰⁹ Despite the determination by the Security Council that the occupation would terminate in June 2004, a test of potential effective control might still suggest that there is a continuing *de facto* belligerent occupation where the legitimate sovereign is still prevented from exercising its *de jure* authority. Clearly the forces could still establish physical control over any part of the territory at any time they desired.

By the same margins under the potential control test, where the *de facto* Governing Council and the *de facto* Coalition Provisional Authority share administrative authority, the Coalition Provisional Authority may exercise potential control regardless of the practical exercise of authority by the two separate governing entities. Pertinently, despite the input of the Governing Council, the Coalition Provisional Authority maintained full powers to legislate and authorise disbursements from the Development Fund for Iraq and the role of the Governing Council was subordinate to this.

4.2.2 Does International Humanitarian Law Limit the Coalition Provisional Authority and the Governing Council in Altering the Constitution?

Security Council Resolution 1546 (2004) saw the dissolution of the Interim Governing Council and the establishment of a “sovereign” Interim Government of Iraq. It provided that democratic elections would be held by January 2005, at the

¹⁰⁰⁶ *Re List and Others (Hostages Trial)*, (1948) 15 Ann Dig 638.

¹⁰⁰⁷ S/RES/1483 (2003); S/RES/1546 (2004) par 2.

¹⁰⁰⁸ S/RES/1546 (2004) par 8.

¹⁰⁰⁹ Coalition Provisional Authority Order Number 100, Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority. CPA/ORD/28 June 2004/100

latest, forming a Transitional National Assembly which would have the dual responsibility of forming a Transitional Government of Iraq and drafting a permanent constitution for Iraq.¹⁰¹⁰ The Coalition Provisional Authority would supervise the process of caucuses held throughout 18 governorates through which the transitional national assembly would be established. Borrowed from the U.S political system, a caucus-style election consists of political groups who nominate candidates for office as opposed to the more pellucid system of direct elections. The diaphanous selection method met with vehement criticism from Grand Ayatallah Ali al-Sistani who argued for direct elections.¹⁰¹¹ Furthermore the Coalition Provisional Authority and the Interim Governing Council would approve a “fundamental law” to govern the new transitional administration.¹⁰¹² Moreover it carved an international role for the Special Representative of the Secretary General in Iraq and UNAMI to provide support in the constitutional process where requested by the Government of Iraq for consensus building and promoting national dialogue for the drafting of a national constitution for the people of Iraq, thereby lending legitimacy to the constitutional process.¹⁰¹³ Nevertheless on 16 October 2005, the constitutional referendum was passed with over 60 per cent of Iraqis voting at 6,300 polling stations.¹⁰¹⁴

Can the occupational orders of the invading belligerent overturn the constitutional provisions of the occupied State? In Iraq the entire economic structure of the territory was outlined in the Iraqi Constitution of 1990, used by the government of Saddam Hussein as the ruling constitution and although never formally adopted by referendum, this was the applicable constitutive text immediately prior to the invasion.¹⁰¹⁵ Article 1 provided “Iraq is a Sovereign People’s Democratic Republic. Its basic objective is the realisation of one Arab State and the build-up of the socialist

¹⁰¹⁰ S/RES/1546 (2004) par 4(c).

¹⁰¹¹ Joel Roberts, “Iraq caucus plans in doubt but U.S plans to hand over sovereignty to Iraqi’s in July does not change” CBS News World (25 January 2004).

¹⁰¹² Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 (2003) and paragraph 12 of resolution 1511 (2003), 5 December 2003, S/2003/1149, par 65.

¹⁰¹³ S/RES/1546 (2004) par 7 (a) (iii); Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 (2003) and paragraph 12 of resolution 1511 (2003), 5 August 2004, S/2004/625, par 36.

¹⁰¹⁴ House of Commons Foreign Affairs Committee, Foreign Policy Aspects of the War against Terrorism, Fourth Report of Session 2005-06, (21 June 2006) p. 97.

¹⁰¹⁵ Details of the constitutional background of Iraq can be found at www.oefre.unibe.ch/law/icl/iz_indx.html.

system.”¹⁰¹⁶ Socialism was the dominant ideology in Iraq and Article 12 of the constitution steered the economic policy towards “realising the economic Arab unity.”¹⁰¹⁷ Article 13 outlined “national resources and basic means of production are owned by the people.”¹⁰¹⁸ Section 2, Coalition Provisional Authority Order Number 1 (2003), determined that the domestic law of Iraq would remain in force unless suspended, repealed or superseded by orders issued by the Coalition Provisional Authority.¹⁰¹⁹

There is some degree of discord between writers on the issue of whether or not the occupant is prohibited from altering the constitution of the occupied State. Constitutional alteration is inconsistent with Article 43 policy on temporary measures. While the sovereignty of the occupied State is suspended, the belligerent occupant takes over the established reins of authority in the constitutional, political, economical and social sense. Manipulation of the political and economical pillars of State enumerated in the constitution represent an unequivocal permanent intrusion into the composition of the occupied State. Certainly the belligerent may override laws which impact on security provisions necessitated by immediate hostilities such as freedom of the press or free movement of persons. Loening submits that the occupier may not create a new constitution for the occupied territory.¹⁰²⁰ Seemingly this would also suggest that the occupier may not go further and effectively create a new constitution.

In contrast, Von Glahn considers that any constitutional provisions may be jettisoned in accordance with the occupant’s administrative measures.¹⁰²¹ Article 1205 of the Canadian military manual, notes that “generally speaking, the occupant is not entitled to alter the existing form of government, to upset the constitution and domestic laws

¹⁰¹⁶ Iraq Interim Constitution, 1990, the text of which can be found at www.oefre.unibe.ch/law/icl/iz01000_html#001_

¹⁰¹⁷ Article 12 (Economic Arab Unity), Iraq Interim Constitution, 1990, the text of which can be found at www.oefre.unibe.ch/law/icl/iz01000_html#001_

¹⁰¹⁸ Article 13, (Public Property and Planning) Iraq Interim Constitution, 1990, the text of which can be found at www.oefre.unibe.ch/law/icl/iz01000_html#001_

¹⁰¹⁹ Section 2, Coalition Provisional Authority Regulation Number 1, (16 May 2003)

¹⁰²⁰ Doris Appel Graber, *The Development of the Law of Belligerent Occupation 1863-1914, A Historical Survey* (New York, 1949) p. 114.

¹⁰²¹ Von Glahn, Gerhard, *The Occupation of Enemy Territory; A Commentary on the Law and Practice of Belligerent Occupation* (The University of Minnesota Press, 1957) p. 97.

of the occupied territory, or to set aside the rights of the inhabitants.”¹⁰²² Other military manuals take a broader view of the legislative rights of the occupant and do not exempt the constitution from the occupant’s legislative purview. The UK military manual finds that the occupant “may amend the existing law of the occupied territory or promulgate new law if this is necessitated by the exigencies of armed conflict, the maintenance of order, or the welfare of the population.”¹⁰²³ Meanwhile the US Army Field Manual narrowly indicates that the ordinary civil and penal laws will be kept in force and omits any reference to the constitutional law of the occupied State.¹⁰²⁴ Seemingly, this stems from an exiguous focus on the penal law banner title of Article 64 of the Fourth Geneva Convention, however this is an unduly narrow one. Gasser argues, that the occupied territory must be administered within the framework of the existing legislation and while Article 64 of the Fourth Geneva Convention highlights the integrity of criminal law, which must remain in force, this consideration extends to the entire spectrum of law in the occupied territory.¹⁰²⁵ Consonantly, the ICRC Commentary considers that the penal law protection in Article 64 of the Fourth Geneva Convention extends to the civil law and constitution of the occupied country.¹⁰²⁶

Yoo argues “that United Nations Security Council resolutions and the international law of occupation provide the United States with broad discretion to establish a new Iraq constitution, one that guarantees fundamental human rights protected by democratic institutions that limit government power.”¹⁰²⁷ The “discretion” to create a new constitution goes far beyond the perforce, minute intrusions into the constitutional text and departs from the laissez faire policy of the Hague Regulations. Resolution 1483 par (4):

“Calls upon the Authority, consistent with the Charter of the United Nations

¹⁰²² Office of the Judge Advocate General, *Law of Armed Conflict at the Operational and Tactical Levels* (21-08-13) par. 1205, p. 12-2.

¹⁰²³ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) par. 11.25.

¹⁰²⁴ Army Field Manual, *The Law of Land Warfare* (18 July 1956) par 370.

¹⁰²⁵ Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) par 547, p. 254-255.

¹⁰²⁶ Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva International Committee of the Red Cross, 1958) p. 335.

¹⁰²⁷ John Yoo, “Iraqi Reconstruction and the Law of Occupation” (2004) 11 U.C. Davis J. Int’l L. & Pol’y 7

and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration and conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.”¹⁰²⁸

It is uncertain from the vague language of the text whether a new permanent constitutional text drawn up by the belligerent occupant is a necessary condition in the occupation of Iraq. While Yoo advocates that Article 64 of the Fourth Geneva Convention permits the alteration of constitutional, civil, criminal and administrative law, such manipulative measures are in fact limited to occupation measures necessary to implement the humanitarian Geneva norms and not the broader war objectives of the invading belligerent regardless of promises to promote Western standards of liberal democracy.¹⁰²⁹ Whereas Resolution 1483 certainly promotes the restoration and establishment of local institutions for representative governance, this falls short of permitting the belligerent occupant to draft a new constitutional text.¹⁰³⁰ Certainly the belligerent occupant operates independently of constitutional provisions, in the interests of primarily protecting the safety of his armed forces, however this conception of military necessity does not extend to an outright abrogation of the former constitution followed by the extempore function of writing a new constitutional text.¹⁰³¹

Constitutional alteration is not a phenomenon limited to the occupation of Iraq. In *re G.D.* (1942), the Greek Council of State refused an application by the Legal Counsellor to the Greek Maritime Chamber of Commerce to annul a decree introduced by the occupier, purporting to abolish the post of legal counsellor.¹⁰³² Holding that the application must be refused, the court considered that the regime change introduced under the Legislative Decree 1 of 1941 permitted the government of occupation to issue administrative orders of “a fundamental or constitutional

¹⁰²⁸ S/RES/1483 (2003) par 4.

¹⁰²⁹ John Yoo, “Iraqi Reconstruction and the Law of Occupation” (2004) 11 U.C. Davis J. Int'l L. & Pol'y 7, 18.

¹⁰³⁰ S/RES/1483 (2003) par 8(c).

¹⁰³¹ L. Oppenheim, *International Law, A Treatise, Vol II Disputes, War and Neutrality* (Longmans, 7th edition by Lauterpacht, 1952) p. 437; Edmund H. Schwenk, “Legislative Power of the Military Occupant under Article 43, Hague Regulations” 54 *Yale L. J.* 393 1944-1945, 403.

¹⁰³² In *re G.D.* (March 17, 1942) Greece, Council of State (All Chambers Combined), Annual Digest and Reports of Public International Law Cases Years 1919-1942, (London Butterworth & Co. (Publishers), Ltd, 1947) Case No. 153, p. 276.

nature.”¹⁰³³ However the court neglected to enquire into the legality of the changes in light of Article 43 of the Hague Regulations resorting singularly to the occupation ordinance.

During the British occupation of Germany after World War II, the occupational authorities introduced a sweeping transformation of the laws of Nazi Germany. Notably the transformation was conducted outside the margins of occupation law. However in *re S.* (1947) it was contended that an occupation order which retroactively made membership of certain organisations criminal, was a violation of the principle *nullum crimen sine lege*.¹⁰³⁴ The court rejected the appeal and ruled that the occupant could amend constitutional provisions and the legal principles it contained. Interestingly, the court accorded the occupier authority to amend the constitution under Article 43 of the Hague Regulations.¹⁰³⁵ Notwithstanding, as an organ of the Allied occupation authorities in Germany, one cannot help but apply the maxim *iniquum est aliquem rei sui esse iudicem*.¹⁰³⁶ In this respect judgements issued by the occupational authority must be measured with a modicum of cynicism. In *De-Nazification Case* (1953), the German Federal Administrative Court addressed the status of “de-nazification” legislation enacted by the occupying authorities and its relationship to German constitutional law.¹⁰³⁷ The ordinance operated in parallel to the constitution and even where the provisions contravened the constitution it did not become constitutional law subject to the Federal Constitutional Court. This suggests that even constitutional articles repealed by occupation ordinances during occupation may not have permanent effect after the occupation ends as the legal effect is contingent on the competence of the occupation ordinance.

In *Greco-German Institute of Biology (Greece) Case* (1948) the Court of Appeal of Athens found that a special decree law promulgated by the occupying authority to

¹⁰³³ *Ibid.*, at p. 277.

¹⁰³⁴ In *re S.* (September 23, 1947) Germany, British Zone of Control, Oberster Spruchgerichtshof, Annual Digest and Reports of Public International Law Cases Year 1947, (London Butterworth & Co. (Publishers), Ltd., 1951, Case No. 111, p. 245.

¹⁰³⁵ In *re S.* (September 23, 1947) Germany, British Zone of Control, Oberster Spruchgerichtshof, Annual Digest and Reports of Public International Law Cases Year 1947, (London Butterworth & Co. (Publishers), Ltd., 1951, Case No. 111, p. 246.

¹⁰³⁶ It is unjust that anyone should be judge in their own case.

¹⁰³⁷ *De-Nazification Case* (November 20, 1953) German Federal Republic, Federal Administrative Court, International Law Reports Year 1953 (London Butterworth & Co. (Publishers) Ltd., 1957) p. 651.

expand the provisions under Article 17 of the Greek Constitution to facilitate expropriation of private immovable property for the foundation of a Greco-German Institute of Biology, was invalid as contrary to Article 17 of the Greek Constitution.¹⁰³⁸ The court did not specifically identify the expansive decree law as *ultra vires* Article 43 of the Hague Regulations but did find it to be unconstitutional under national law. However the augmentation of constitutional provisions to facilitate private property expropriation violates not only Article 43 of the Hague Regulations pertaining to legislative alteration but also Article 52 on property requisitions. As such this case provides the suggestion that constitutional alteration is beyond the power of the belligerent occupier.

The Norwegian District Court of Aker in *Overland's Case* (1943) found that the belligerent occupant did not have the authority to disregard constitutional provisions by occupational ordinance.¹⁰³⁹ There the German occupational authorities issued a decree to override constitutionally protected *allodial* or real estate privileges and extricate immovable property for State expropriation. Repudiating the decree on the basis of Article 43, the court underscored the importance of finding a cogent reason to suspend ordinary constitutional provisions. Elaborating the court stated:

“the wording of that Article (43) shows clearly that there is an explicit distinction between regulations issued by the occupant and ordinary constitutional legislation. The use of the words ‘unless absolutely prevented’ shows that there must be compelling reasons to set aside a former law...The occupant is not permitted to abrogate a law if the desired result can be reached by other means.”¹⁰⁴⁰

Orders to supersede constitutional provisions may only be implemented under the most tumultuous circumstances and certainly not to free up public or private immovable property, which is suitable addressed under parallel property rules within the Hague dialectic.

¹⁰³⁸ *Greco-German Institute of Biology (Greece) Case*, (Judgement No. 2283 of 1948), Greece Court of Appeal of Athens, Annual Digest and Reports of Public International Law Cases Year 1948, (London, Butterworth & Co. (Publishers) Ltd., 1953) Case No. 185, p. 561.

¹⁰³⁹ *Overlands Case* (August 25, 1943) Norway, District Court of Aker, Annual Digest and Reports of Public International Law Cases Years 1943 – 1945, (London Butterworth & Co. (Publishers), Ltd., 1949) Case No.156, p. 446.

¹⁰⁴⁰ *Ibid at*, p. 447.

After the Japanese occupation of the Philippines in World War II, the plaintiff in *Bautista et al. v. Hilaria Uy Isabelo* (1953) argued that a deed conveying property to the Chinese defendant must be annulled on the grounds that the Philippine Constitution prohibited the alienation of Philippine property to non-nationals.¹⁰⁴¹ The Philippines Supreme Court held that the plaintiff's petition must be dismissed as the Philippine Constitution was not in force during the occupation and therefore the constitutional provision disqualifying aliens from procuring property was inapplicable. Although the Constitution was suspended the court did not pronounce on the legality of the suspension by reference to Article 43.

4.2.3 *Application to Iraq*

Article 2 of the Coalition Provisional Authority Regulation Number 10 provides that the Coalition Provisional Authority will consult and coordinate with members of the Iraqi Interim Government on matters including the temporary governance of Iraq until the Iraqi Interim Government assumes full governance authority over Iraq.¹⁰⁴² Coalition Authority Regulation Number 10 illustrates the actual effective control that the Coalition Provisional Authority retains over the Iraqi Interim Government during the occupation and it is difficult to accord the Interim Government any real independence in this regard while Iraq is occupied. Furthermore the report of the Secretary General states:

“By 30 June 2004, the new transitional administration — whose scope and structures are to be set out in a “*fundamental law*” to be approved by the Coalition Provisional Authority and the Governing Council by 28 February 2004 — will assume from the Coalition Provisional Authority full responsibility for governing Iraq.”¹⁰⁴³ (emphasis added)

This highlights the central role of the Coalition Provisional Authority as belligerent occupant in approving the new transitional constitution which effectively replaces Iraq's former Constitution of Iraq, 1990. Moreover, it stretches the mandate of the belligerent occupant further than traditional occupation law has ever intended, and calls into question the integrity of the Governing Council as an independent entity

¹⁰⁴¹ *Bautista et al. v. Hilaria Uy Isabelo* (September 29, 1953) Philippines Supreme Court, International Law Reports Year 1953, (London Butterworth & Co. (Publishers) Ltd., 1957) p. 643.

¹⁰⁴² Coalition Provisional Authority Regulation Number 10, Members of Designated Iraqi Interim Government, CPA/REG/9 June 2004/10.

¹⁰⁴³ Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 (2003) and paragraph 12 of Resolution 1511 (2003), 5 December 2003, S/2003/1149, par 65.

established by Security Council resolutions.

Although Leoning submits that the belligerent occupant cannot alter the constitution of the occupied territory, there is some basis for limited constitutional alteration in the Fourth Geneva Convention and in state practice evinced in the case law. While Von Glahn argues that constitutional measures that are incompatible with the belligerent occupants ordinances may be struck down, these are certainly judged on an *ad hoc* basis in line with considerations of military necessity. The role of the belligerent in creating a new constitutional text for the incoming Interim Government of Iraq falls short of these limited measures. However, what is unique in the case of Iraq is the insertion of Article 26(3) of the Interim Constitution, which retains the laws of the Coalition Provisional Authority in force after the termination of occupation stating:

“The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.”¹⁰⁴⁴

Effectively the laws of the occupying power adopted in response to temporary military hostilities under the Hague and Geneva Conventions form part of the transitional legislative framework. Clearly the belligerent occupant continues to retain some level of authority over the occupied population even after the official termination of occupation. However Article 29 of the Interim Constitution, provides that both the Governing Council and the Coalition Provisional Authority will be dissolved once the Iraqi Interim Administration assumes full authority. Despite the presence of the newly appointed interim ministers, in addition each ministry remained supervised by a Coalition Provisional Authority appointed advisor.¹⁰⁴⁵ While the administrative structure of the territory was shaped with a view to ultimate transferral of authority, the belligerent occupant maintained a dominant presence over each new ministry.

In recent years there has been a trajectory towards human rights based considerations

¹⁰⁴⁴ Article 26 (3), Iraq Interim Constitution (8 March 2004).

¹⁰⁴⁵ *Rebuilding Iraq, Resource, Security, Governance, Essential Services, and Oversight Issues*, Report to Congressional Committees (June 2004) GAO-04-902R, P. 75. Some Ministeries had many U.S advisors, for example the Ministry of Finance had 11 U.S advisors and the Ministry of the Interior had 27 U.S advisors.

influencing the protection of the occupied population during occupation. Accordingly the British military manual provides for alteration of the laws in the occupied state for the welfare of the population. Admittedly this might extend to the alteration or revocation of a constitutional text providing that this is consistent with and does not extend beyond the humanitarian provisions of the Fourth Geneva Convention. Notably the protection of the occupied population continues under the Fourth Geneva Convention:

“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, not by any agreement concluded between the authorities of the occupied territories and the occupying power, nor by any annexation by the latter of the whole part of the occupied territory.”¹⁰⁴⁶

This is particularly significant in relation to the agreement to maintain the armed forces under the unified command of the invading Coalition in Article 59 of the Interim Constitution which states:

“Consistent with Iraq's status as a sovereign state, and with its desire to join other nations in helping to maintain peace and security and fight terrorism during the transitional period, the Iraqi Armed Forces will be a principal partner in the multi-national force operating in Iraq under unified command pursuant to the provisions of United Nations Security Council Resolution 1511 (2003) and any subsequent relevant resolutions. This arrangement shall last until the ratification of a permanent constitution and the election of a new government pursuant to that new constitution.”¹⁰⁴⁷

Pertinently Security Council Resolution 1511 (2003) pertains to the position of the multinational force during the belligerent occupation, however the object and purpose of this resolution, does not extend beyond that timeframe. While Yoo argues that a new constitution for Iraq is provided for under international law and United Nations Security Council resolutions, the terms of the constitution must certainly not exceed the provisions contained therein.

There is some precedent in the application of the Hague Regulations that constitutional alteration is not permitted during occupation if the same result can be

¹⁰⁴⁶ Article 47, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949).

¹⁰⁴⁷ Article 59 (2), Iraq Interim Constitution (8 March 2004).

obtained by other less dramatic means. In *Overland's Case* and in *Greco-German Institute of Biology (Greece) Case* the courts found that decrees introduced by the belligerent occupant could not override the constitutional privileges afforded to immovable property. The Hague Regulations grant the belligerent occupant rights of *usufruct* over immovable property and therefore the occupant is restricted from altering constitutional immovable property privileges.

The Interim Governing Council under the control of the US/UK occupational authority the Coalition Provisional Authority selected the constitutional team to draft the Transitional Administrative Law until new elections and a new constitution could be drafted. Although an election to select the candidates to write the constitution would be more broadly representative it is less practical in hostilities. Appointed committees may give all sides equal access to all information but ideally the committee should be independent.¹⁰⁴⁸ In 2005, the Interim Constitution stipulated that elections would be held to elect a new parliament, which would act as the constituent assembly to draft the permanent constitution.¹⁰⁴⁹ A large part of the problem was that the process was boycotted by the Sunni Arabs who make up 20% of the Iraqi population. To address this the U.S ambassador sponsored individuals who he believed to be Sunni representatives to the constitutional process in their place.¹⁰⁵⁰ In some areas as little as 2% of Sunni Arabs casted votes. Under an atmosphere of tension and violence, the Constitution was barely passed.

4.3 Does the Governing Council have obligations under the International Covenant on Economic, Social and Cultural Rights to engage in economic restructuring on behalf of the occupied population?

The argument has been advanced that human rights treaties which operate during belligerent occupation may be used as a vehicle for the transformative objectives of the occupant in line with human rights concerns. Certainly this is true in the case of UN territorial administrations. However, the nebulous relationship between human

¹⁰⁴⁸ Jamal Benomar, "Constitution-Making After Conflict: Lessons for Iraq" *Journal of Democracy*, Vol 15, Number 2 April 2004, p. 86

¹⁰⁴⁹ Feisal Amin Rasoul al-Istrabadi, "A Constitution without constitutionalism: Reflections on Iraq's Failed Constitutional Process," 87 *Texas Law Review* 1627 (2008-2009) p. 1637

¹⁰⁵⁰ *Ibid.*, at p. 1640

rights and humanitarian provisions in the occupation context substantially weakens this argument. Benvenisti, is the key proponent, that contemporary occupation law is moving away from the conservationist principle and instead encompassing positive human rights obligations which necessarily require a measure of transformation by the occupant.¹⁰⁵¹ However, Dennis staunchly rejects this contention arguing that “the obligations assumed by States under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict. Nor were they intended to replace the *lex specialis* of international humanitarian law.”¹⁰⁵²

The International Court of Justice has ruled that human rights treaties apply during armed conflict and belligerent occupation. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the International Court of Justice found that the International Covenant on Civil and Political Rights (ICCPR) continues to apply during armed conflict subject to Article 4 where certain provisions may be derogated from in times of emergency.¹⁰⁵³ In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice stated that the International Covenant on Economic Social and Cultural Rights (ICESCR) along with the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC) was “applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory.”¹⁰⁵⁴ Addressing the restriction of ICESCR rights due to the construction of the wall, the ICJ favoured broad implementation of the covenant rights and found that the construction of the security wall by the Israeli military in Palestinian territory undermined the right to work, health and education of the Palestinian population obstructed by it.¹⁰⁵⁵

More specifically the *Committee on Economic, Social and Cultural Rights* have stated that Israel’s obligations under the ICESCR “apply to all territories and populations

¹⁰⁵¹ Eyal Benvenisti, ‘The Security Council and the Law on Occupation: Resolution 1483 in Historical Perspective’ (2003) 1 IDF L. REV. 19 35-8.

¹⁰⁵² Michael J. Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’ (2005) 99 AJIL 119, 141.

¹⁰⁵³ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, No. 95 (8 July 1986) 226 at 240.

¹⁰⁵⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004 p. 109

¹⁰⁵⁵ Article 4, ICESCR.

under its effective control.”¹⁰⁵⁶ Accordingly, the Israeli High Court of Justice applied the ICCPR to the occupied territories in *Ma’arab v. The IDF Commander in Judea and Samaria* (2003).¹⁰⁵⁷ In *Armed Activities on the Democratic Republic of the Congo* (2005) the ICJ found that Uganda as occupying power in the Ituri province of DRC had a duty to comply with human rights norms in the ICCPR, the CRC and its optional protocol and the African Charter on Human and People’s Rights according to Article 43 of the Hague Regulations.¹⁰⁵⁸

Clearly human rights treaties apply in occupied territory but what is less certain is the extent that the implementation of these measures can justify a transformation of the structure of the occupied state beyond the *status quo* constraints of Article 43 of the Hague Regulations. Aeyal Gross points out that in the context of belligerent occupation “rights analysis is weak at creating structural changes.”¹⁰⁵⁹ To date the ICJ has sought to restrain the actions of the belligerent occupant such as protection of property in occupied territories through the application of human rights treaties rather than looking progressively at human rights in terms of the transformation of state structures. Implementing human rights norms requires extensive legislation. Grant T. Harris points out that this may take the form of permitted legislation under international humanitarian law to creating a functioning state with permanent institutions capable of doing so.¹⁰⁶⁰ However, relating this to the occupied Palestinian territories, he concludes that only a Chapter VII Security Council decision could relax international humanitarian law restrictions to allow the occupant to change the political and economic infrastructure of the occupied state.¹⁰⁶¹

It is now generally accepted from the ICJ Advisory Opinion in the *Wall* case that human rights treaties which apply within the occupation framework are intended to supplement humanitarian provisions where there is a lacuna in human rights

¹⁰⁵⁶ 31 U.N Doc. E/C.12/1/Add.90 (May 23, 2003)

¹⁰⁵⁷ HCJ 3239/02, *Ma’arab v. The IDF Commander in Judea and Samaria*, 57(2) PD 349.

¹⁰⁵⁸ *Armed Activities*, par 217-220

¹⁰⁵⁹ Aeyal Gross, *Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?* EJIL 2007, Vol. 18 No. 1. P. 8

¹⁰⁶⁰ Grant T. Harris, “Human Rights, Israel and the Political Realities of Occupation” *Israel Law Review*, Vol 41 (2008) p. 121.

¹⁰⁶¹ *Ibid.*, at p. 146.

protection.¹⁰⁶² The Israeli Supreme Court in *Public Committee Against Torture in Israel v. Israel* (2006), examining the legality of targeted killings explained that in the event of armed conflict international humanitarian law is the *lex specialis* where there is a lacuna in international humanitarian law, it can be supplemented by human rights law.¹⁰⁶³

The *lex specialis* doctrine provides a framework where the special norm or the more effective norm is applied. In the *Wall* Advisory Opinion the ICJ stated:

“as regards the relationship between international humanitarian law and human rights law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law...the court will have to take into consideration both these branches of international law, namely human rights law and as *lex specialis*, international law.”¹⁰⁶⁴

Unfortunately the ruling does not provide any specific guidance on the overlapping rules and co-application of norms. In *Case Concerning Armed Activities on the Democratic Republic of the Congo* the ICJ alluded to the joint application of the two sets of norms which would suggest that international human rights law is not merely relegated to filling the gaps in rights protection during occupation but has a broader role. Unfortunately the ICJ did not expand on the nature of this role.

In *Democratic Republic of the Congo v. Rwanda* (2006), Judge Kooijmans noted the complexities involved in choosing the relevant norm to apply from the wide variety of human rights and humanitarian norms stating:

“In view of the character and mandate of the international institutions to which these grievances were addressed, the complaints could not be expected to itemise on a treaty-by-treaty basis the provisions allegedly breached. By requiring the complainant nevertheless to do so, the Court in actual fact makes it virtually impossible to characterise such protests in a multilateral context as

¹⁰⁶² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 ICJ REP. 136, para 111 (July 9); Respect for Human Rights in Armed Conflicts, GA Res. 2444 (XXIII) (Dec. 19, 1968); Roberts, ‘Prolonged Military Occupation: The Israeli-Occupied Territories since 1967’ (1990) 84 AJIL 44, 72.

¹⁰⁶³ *Public Committee Against Torture in Israel v. Government of Israel et al.*, HCJ 769/021, para. 18 (Dec. 13 2006)

¹⁰⁶⁴ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, ICJ Report 2004, 136 at 178, para 106.

attempts to negotiate as required by, *inter alia*, the compromissory clause in the Convention on Discrimination against Women.”¹⁰⁶⁵

However the ruling is significant as it injects a progressive human rights framework into the traditionally limitative sphere of occupation law. The difficulty remains in contextualising the two sets of norms into a workable relationship that operates as a template for governance.

4.3.1 *Application to Iraq*

Resolution 1483 falls short of actually establishing a complementary international human rights and international humanitarian law framework, where human rights considerations can go beyond the restrictive provisions of humanitarian law to facilitate economic structural reforms. The authority of the Coalition Provisional Authority to engage in economic reconstruction is based on the “laws and usages of war” and “relevant UN Security Council resolutions.”¹⁰⁶⁶ However that human rights continue to apply in times of belligerent occupation is evident in the decisions in *Legality of the Threat or Use of Nuclear Weapons*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Ma’arab*, *Public Committee Against Torture*, *Case Concerning Armed Activities on the Territory of the Congo* and *Armed Activities (New Application) Case*. This highlights the possibility that the Governing Council could independently reform the economic structure of the occupied territory under human rights treaties in force in the occupied State. The issue of *de facto* succession to the International Covenant on Economic, Social and Cultural Rights is duly complex and outside the scope of this thesis however the present discussion assumes that the Governing Council is bound by the terms of the Covenant.

Interestingly, the preamble of the International Covenant on Economic, Social and Cultural Rights places obligations on the State and the individual who has “a responsibility to strive for the promotion and observance of the rights recognised in

¹⁰⁶⁵ *Case Concerning Armed Activities on the Territory of the Congo: New Application 2002 (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, Opinion Judge Kooijmans, p. 74, 19th December 2005, p. 28, par. 33.

¹⁰⁶⁶ Coalition Provisional Authority, Foreign Investment Order 39 CPA/ORD/19 September 2003/39

the present Covenant.”¹⁰⁶⁷ Accordingly, the Governing Council and the Iraqi people have the right to freely determine their “economic, social and cultural development.”¹⁰⁶⁸ The recognition of the individual in this regard highlights the potential for the belligerent occupant in the place of the sovereign to work towards economic, social and cultural reforms under a human rights mandate with a broadly representative indigenous administration. This may indicate that the Governing Council is entitled to transform the territory. However this remains uncharted water and in the context of Iraq the discussion though interesting is merely academic. The authority of the Governing Council was curtailed by Security Council resolution to drafting the new constitution and there is no indication that the Governing Council had the competence to alter the economic structure of the State.

Even so, Gross and Harris argue against the extension of the belligerent occupant’s authority during occupation to conduct extensive institutional reforms under the international human rights treaty framework. The extent to which a parallel *de facto* administration operating alongside the belligerent occupant can forge human rights based structural change is less clear. Notwithstanding, the complexities are compounded by the application of the *lex specialis* doctrine. Judge Kooijmans admission that the application of treaty and humanitarian provisions was “virtually impossible to characterise” during armed conflict reflects the potential for the system to be abused where the invading belligerent can choose from wide ranging and often diametrically opposed norms to achieve their war objectives.¹⁰⁶⁹

However it would be difficult to read in the *lex specialis* principle at the start of the hostilities in Iraq in a way that the human rights norms were the *lex specialis* as this would require a period of relative normality which was absent in the face of the insurgency. Even if the human rights treaties were to override the *laissez faire* policy of the Hague Regulations it would be difficult to read an urgent transformative economic objective into the relevant provisions of the International Covenant on Economic, Social and Cultural Rights. Firstly the Convention holds economic

¹⁰⁶⁷ International Covenant on Economic, Social and Cultural Rights (3 January 1976).

¹⁰⁶⁸ Article 1, International Covenant on Economic, Social and Cultural Rights (3 January 1976).

¹⁰⁶⁹ *Case Concerning Armed Activities on the Territory of the Congo: New Application 2002 (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, Opinion Judge Kooijmans, p. 74, 19th December 2005, p. 28, par. 33.

development to be a right of self determination and secondly the convention is viewed more as a programme of government where “the full realisation of the relevant rights may be achieved progressively.”¹⁰⁷⁰ This is difficult to reconcile with hasty reforms implemented in Iraq during the occupation regardless of Governing Council’s role.

Conclusion

The characterisation of the Governing Council comprises of two competing descriptions established under Resolution 1483 “with the help of the Authority” and therefore seemingly an extension of the belligerent occupant’s administration and the contrasting Resolution 1511 statement that the Governing Council embodied “the sovereignty of the State of Iraq” indicating its independence as a parallel *de facto* administration. The effect of the Governing Council’s decisions after the belligerent occupation depend on the nature of the Governing Council and its independence in making key economic decisions binding the Iraqi state *post bellum*. Critically the Governing Council may be viewed in three ways, as an independent *de facto* entity operating in parallel with the belligerent occupant, an entity established under UN mandate and operating under the auspices of international control or operating as an extension of the belligerent occupant’s administration.

The potential status of the Governing Council as an independent *de facto* administration operating during belligerent occupation creates some tensions with the traditional authority of the belligerent occupant operating under international humanitarian law. If, as Oppenheim suggests, an administration is central to belligerent occupation what then is the status of a separate independent parallel governing entity operating under the umbrella of an international mandate? Seemingly under a test of actual control the substitution of the belligerent’s authority does not extend to the Governing Council, a position supported by the recent International Court of Justice ruling in *Case Concerning Armed Activities on the Territory of the Congo*. Moreover, the contention that the Governing Council “embodies the sovereignty of the State of Iraq”, indicates that the incoming Iraqi

¹⁰⁷⁰ Article 1, International Covenant on Social, Economic and Cultural Rights, 3 January 1976; CESCR General Comment No. 3, The Nature of States Parties Obligations, Art. 2 par 1(14/12/90).

administration will be bound by its decisions in particular economic reforms predicated on the desire of the Governing Council to join the World Trade Organisation.

The actions of the independent Governing Council in allocating resources to reconstruction projects and negotiating reconstruction contracts may bind the future government particularly in the event where its financial decrees and contracts are enforced in foreign courts. In *Civil Air Transport Inc. v. Central Air Transport Corporation* Viscount Simon opined, “retroactivity of recognition operates to validate acts of a *de facto* Government which has subsequently become the new *de jure* Government, and not to invalidate acts of the previous *de jure* Government.”¹⁰⁷¹ This position can be distinguished from Iraq in that the *de facto* Governing Council did not later become the *de jure* government of Iraq. However in *Wye Oak Technology Inc. v. Republic of Iraq* (2010) the holder of a reconstruction contract issued by the Interim Governing Authority in 2004, filed a claim against the Republic of Iraq for the breach of a broker services agreement.¹⁰⁷² The district court found that there was no meaningful distinction between the sovereign state and the political subdivision that served as the party to the contract. Although the case relates to the *de facto* status of the Interim Governing Authority established immediately after the occupation, it could by extension have repercussions where the Republic of Iraq is found liable for the actions of the *de facto* Governing Council.

The difficulty with this approach is underscored by the application of the potential control test to determine effective belligerent control over occupied territory. As applied in the *Hostages* case, effective control is based on the ability of the belligerent occupant to assume authority over territory at any time they desire. Accordingly the establishment of an administrative unit is less significant. This seriously calls into question the independence of the Governing Council during the occupation and the independence of the Interim Governing Authority after the official close of occupation when Coalition forces remained in the territory. The independence of the Governing Council to fulfil its mandate under Resolution 1511 in its capacity as “embodying the sovereignty of Iraq” to draft a new constitution is further eroded by

¹⁰⁷¹ *Air Transport Inc. v. Central Air Transport Corporation* [1953] AC 70; 19 ILR, pp. 85, 93, 110.

¹⁰⁷² *Wye Oak Technology Inc. v. Republic of Iraq*, 2010 WL 2613323 (E.D. Va. 2010)

the participation of the Coalition Provisional Authority in approving the “fundamental law”.

Alternatively it could be posited that the Governing Council operates under the direction of the United Nations during the belligerent occupation. However Security Council Resolution 1511 paragraph 11 places the resources and expertise of the United Nations and associated organisations at the disposal of the Governing Council “if requested”.¹⁰⁷³ This certainly limits the authority of the United Nations over the actions of the Governing Council who operate at the discretion of the Governing Council. The UN had a restricted role in overseeing the transformative economic process vitiated by the weak construction of the Resolution 1483 mandate and further enervated by growing Coalition Provisional Authority and Governing Council antagonisms as the occupation continued.

The attack on UN headquarters in Baghdad on August 19th 2003, killing 15 United Nations staff including the High Commissioner for Human Rights Sergio Vieira, marked a turning point in the UN role. In his report to the Security Council in August 2004, the Secretary General outlined the failure of the UN to carry out the tasks detailed in the correlative report pursuant to resolution 1483 (2003) due to the deleterious security situation in Iraq.¹⁰⁷⁴ The operation reached it’s nadir in assisting in the administration of Iraq when the UN programme for Iraq retreated to Cyprus, Jordan and Kuwait for the remainder of the occupation retaining only essential assistance activities in Iraq.¹⁰⁷⁵ UN offices in Basra, Hilla and Mosul were vacated and the number of international staff in Baghdad and the Northern governorates reduced from 800 to a skeleton staff of 80.¹⁰⁷⁶

It is evident that the Governing Council operated under the authority of the Coalition Provisional Authority during the belligerent occupation of Iraq. Although the

¹⁰⁷³ S/RES/1511 (2003) par 11.

¹⁰⁷⁴ Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 (2003) and paragraph 12 of resolution 1511 (2003), 5 August 2004, S/2004/625, par 2; Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 (2003) and paragraph 12 of resolution 1511 (2003), 5 December 2003, S/2003/1149, par 1(b).

¹⁰⁷⁵ Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 (2003) and paragraph 12 of resolution 1511 (2003), 5 August 2004, S/2004/625, par 4.

¹⁰⁷⁶ *Ibid.*, at, par 24.

Governing Council directed resources to reconstruction projects, Bremer, the Coalition Provisional Authority Administrator ultimately signed off on each contract. The legitimacy of reforms seemingly endorsed by the Governing Authority are further hampered by the action of the Coalition in dismantling the Ba'ath party and installing an occupation friendly indigenous administration. Such arrangements are specifically limited by reference to Article 47 of the Fourth Geneva Convention. Accordingly the actions of the Governing Council steered by the Coalition Provisional Authority are governed by international humanitarian law.

Conclusion

Arguably, Iraq presented the first case of belligerent occupation following *deballatio* since the Allied occupations of Germany and Japan after World War II. Iraq's institutions had disintegrated following Operation Iraqi Freedom in March 2003 and by May the Coalition Provisional Authority was established and exercised control over the failed State. Critically under the doctrine of *deballatio* the laws of occupation do not apply to the devastated territory because the former entity no longer exists.¹⁰⁷⁷ Kelsen argues that *deballatio* is "the essential condition of assuming supreme authority" placing the territory alongside its population under the "sovereignty of occupant powers."¹⁰⁷⁸ However, unlike the occupations of Germany and Japan which operated outside the framework of international humanitarian law, Resolution 1483 determined that the occupying states were bound by their obligations under the Hague Regulations of 1907 and the Geneva Conventions of 1949. This placed the formal framework of occupation law on what formerly would have amounted to a territorial annexation.

However while Iraq has all the appearances of *deballatio* on closer inspection there is some basis for considering otherwise. Firstly, it became evident that the Coalition Forces had difficulty securing the territory, and certainly by August 19th 2003 when the United Nations headquarters was attacked in Baghdad forcing the United Nations staff to retreat from the territory, it would appear that many parts of Iraq had escalated back into full blown hostilities. Dinstein submits that there are three aspects to *deballatio*:

"(i) the territory of the former belligerent is occupied in its entirety, no remnant being left for the exercise of sovereignty; (ii) the armed forces of the erstwhile belligerent are no longer in the field (usually there is an unconditional surrender), and no allied forces carry on fighting by proxy; and (iii) the Government of the former belligerent has passed out of existence and no other Government (not even a Government in exile) continues to offer effective opposition."¹⁰⁷⁹

¹⁰⁷⁷ Benvenisti, *The International Law of Occupation* (Princeton University Press, 2004) p. 92.

¹⁰⁷⁸ Kelsen, "Legal Status of Germany According to the Declaration of Berlin" 39 *American Journal of International Law* 520 (1945).

¹⁰⁷⁹ Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2001) p. 46.

Admittedly, the Government had disintegrated in its entirety however Coalition Provisional Order Number 1 on the De-Ba'athification of Iraqi Society, removed members of the Ba'ath party from "every national government ministry" who could potentially continue on the administration.¹⁰⁸⁰ What appeared to be *deballatio* looks more like a lull in the hostilities before the Iraqis mobilised once more.

Privatisation was the signature of the occupation of Iraq however there was already a trend towards privatisation in other United Nations administrations. As such the privatisation model was borrowed from Kosovo and applied to Iraq under the framework of belligerent occupation. In 2002, UNMIK established the Kosovo Trust Agency to restructure and privatise socially owned agencies.¹⁰⁸¹ The privatisation process in Kosovo was highly criticised and Serbian authorities argued that UNMIK ignored ownership and credit claims by companies in Serbia.¹⁰⁸² The quest to privatise Iraq saw the removal of many of the formal constraints of occupation law. Article 55 of the Hague Regulations limits the occupants use over public immovable property in particular prohibiting the alteration of the property's status. However, Foreign Investment Order 39 introduced forty year licences offending against the temporary nature of usufruct and also against the Article 43 obligation to maintain the *status quo ante*.

The alteration of economic, banking, commercial and foreign investment laws by the Coalition Provisional Authority facilitated a "creeping privatisation" which impacted significantly on the oil industry which accounts for over 80 per cent of Iraq's revenues. The difficulty with providing a belligerent occupant with a broad mandate to implement economic reforms is that the additional authority may be used to achieve the invading belligerents war objectives. In *re Krupp* the Military Tribunal at Nuremberg found:

"Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's

¹⁰⁸⁰ Coalition Provisional Authority Order Number 1, The De-Ba'athification of Iraq, CPA/ORD/16 May 2003/01.

¹⁰⁸¹ Jens Stilhoff Sorensen, *State Collapse and Reconstruction in the Periphery* (Berghahn Books, 2009) p. 245.

¹⁰⁸² Richard Caplan, *International Governance of War Torn Territories: Rule and Reconstruction* (Oxford University Press, 2005) p. 149

allies, so must the economic assets of the occupied territory not be used in such a manner.”¹⁰⁸³

Prior to the occupation, Iraq’s oil became the primary focus of the Future of Iraq Working Group initiated by the US State Department in 2002, which allocated \$5 million towards the project. The report was compiled by a group of Iraqi exiles, senior US officials and international experts on Iraq and identified *inter alia* the oil and energy sector as a significant area for reform. By 20th April, 2003 the Subcommittee on Oil Policy of the Future of Iraq Project concluded that the oil industry needed to be decentralised to resolve the country’s economic impoverishment.¹⁰⁸⁴ The benefits of qualitative production sharing agreements for private oil companies are extolled in the Subcommittee on Oil Policy’s draft for consultation on 25th February, 2003:

“Key attractions of production sharing agreements to private oil companies are that although the reserves are owned by the State, accounting procedures permit the companies to book the reserve in their accounts, but, other things being equal, the most important feature from the perspective of private oil companies is that the government take is defined in the terms of the production sharing agreements and the oil companies are therefore protected under Production Sharing Agreements from future adverse legislation.”¹⁰⁸⁵

Accordingly, the restructuring of Iraq and the “creeping privatisation” implemented during the belligerent occupation and under Security Council Resolution 1483 are difficult to divorce from the war objectives of the Coalition.

During the occupation of Iraq it became evident that the Development Fund for Iraq resources were used for purposes other than the reconstruction required by UN Security Council Resolution 1483. A series of exploitative measures including the award of reconstruction contracts at inflated prices, missing receipts and fraudulent accounting practices left the Development Fund for Iraq bereft of oil resource funds belonging to the Iraqi State. In *Case Concerning Armed Activities on the Territory of the Congo* the Democratic Republic of the Congo successfully instituted proceedings against Uganda concerning flagrant violations of human rights and of international

¹⁰⁸³ *Krupp* trial (Krupp et al.) (US Military Tribunal, Nuremberg, 1948), 10 LRTWC 69, 134.

¹⁰⁸⁴ Subcommittee on Oil Policy, Oil and Energy Working Group, Future of Iraq Project, Department of State, United States of America (20 April 2003). Unclassified 22 Jun 2005 200304121, p. 2.

¹⁰⁸⁵ *Ibid.*, at p. 6.

humanitarian law including *inter alia* the plunder of natural resources.¹⁰⁸⁶ Iraq could potentially seek a remedy against the United States in the International Court of Justice for the illegal exploitation of the Development Fund for Iraq resources. However the difficulty is that the United States has never submitted itself to the plenary authority of the International Court of Justice and has withdrawn from the compulsory jurisdiction of the Court since 1986.¹⁰⁸⁷ While the exploitation of property during belligerent occupation is also established as a war crime before the International Criminal Court under the Rome Statute, neither the United States nor Iraq have ratified it.¹⁰⁸⁸ However the United Kingdom has ratified and incorporated the Statute into domestic law and potentially recourse may be had before the British courts on the basis of complementarity.

Iraqi citizens may have recourse to the domestic courts where their rights under the Fourth Geneva Convention are violated. Iraq follows a dualist theory of international law and therefore must enact incorporating legislation to give effect to ratified conventions.¹⁰⁸⁹ While Iraq has ratified and incorporated the Four Geneva Conventions of 1949, it is not a signatory to the Hague Regulations and has not incorporated the Hague Regulations into Iraqi law.¹⁰⁹⁰ Therefore the Geneva Conventions are directly actionable and can be relied upon in Iraqi Courts. In particular, Article 51 of the Fourth Geneva Convention protecting the status of workers may be invoked by members of the Ba'ath party indiscriminantly removed from employment during the occupation.¹⁰⁹¹ However Article 1 of Coalition Provisional Authority Order Number 17 on the Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq finds that the personnel, property, funds and assets of the Multinational Force, the Coalition Provisional Authority and the Foreign Liaison Missions shall be immune from Iraqi legal

¹⁰⁸⁶ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice, 19th December 2005.

¹⁰⁸⁷ Sean D. Murphy, "The United States and the International Court of Justice: Coping with Antinomies" in Cesare Romano, *The United States and International Courts and Tribunals* (2008); SSRN [GWU Legal Studies Research Paper No. 291](http://www.gwu.edu/~legalstudies/papers/291) p. 1

¹⁰⁸⁸ <http://www.icc-cpi.int/Menus/ASP/states+parties/> (Last visited 25 November 2010)

¹⁰⁸⁹ M. Cherif Bassiouni, *International Criminal Law: Sources, Subjects and Contents* (Martinus Nijhoff Publishers, 3rd Ed, 2008) p. 99

¹⁰⁹⁰ M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law" in T.M.C. Asser Institut, *Yearbook of International Humanitarian Law* (T.M.C. Asser Press, 2003) p. 142.

¹⁰⁹¹ Article 51, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

process.¹⁰⁹² Coalition Provisional Authority Order 17 operates beyond the close of occupation.

Potentially Iraq could bring a claim against the United Kingdom for the illegal alteration of property title under Article 1 of Protocol 1 of the European Convention of Human Rights. Recent years have witnessed the extra-territorial application of the Convention to non member states. Of interest is the European Court of Human Rights ruling in *Issa v. Turkey*.¹⁰⁹³ There, six Iraqi women alleged that Turkish armed forces had arrested, detained, ill-treated and killed their sons and husbands on Iraqi territory. The Court was faced with a jurisdictional question which could only be answered in terms of “effective control” due to a military operation. The troops present on Iraqi soil were in cross border pursuit of terrorists sheltering in the territory and were therefore neither invited into Iraq nor acquiescence or consent granted for the military presence. Reviewing the procedural aspect of the case, the Court used the “reasonableness standard” to prove beyond reasonable doubt, that Turkish troops were present at the time the atrocities took place. In addition to the lack of eye witness testimony, the Court also drew attention to the fact that there could have been PKK militants fighting KDP peshmergas at the same time. However the case highlights the potential for Iraqi citizens during the occupation to base a claim on the European Convention of Human Rights.

More recently in *Al Skeini* (2007), the House of Lords found that the United Kingdom, despite its status in Iraq alongside the US as an occupying power under the Hague Regulations and Fourth Geneva Convention, was not in effective control of Basrah City for the purposes of applying the European Convention on Human Rights. Although the US and the UK were recognised as occupying forces under the unified command of the “Authority” in Iraq under UN Security Council resolution 1483 and despite the letter from the UK and the US to the UN outlining the creation of the Coalition Provisional Authority in Iraq to “exercise powers of government

¹⁰⁹² Article 1, Coalition Provisional Authority Order Number 17 on the Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 June 2004/17

¹⁰⁹³ *Issa v. Turkey* (2005) 41 E.H.R.R. 27.

temporarily” the UK’s authority did not equate to a civil power.¹⁰⁹⁴ The Court found that “the UK possessed no executive, legislative or judicial authority in Basrah City, other than the limited authority given to its military forces and as an occupying power it was bound to respect the laws in Iraq unless absolutely prevented.”¹⁰⁹⁵ The forces must observe the laws in force in Iraq and maintain security but beyond this their authority is limited.

However, in *Al-Saadoon and Mufdhi* (2009) the European Court of Human Rights was prepared to extend the application of the European Convention of Human Rights in the case of Iraqi citizens detained in a British run detention centre in Iraq.¹⁰⁹⁶ The Court found that the United Kingdom had exercised control and authority both over the individuals and over the premises. The ruling marks a departure from the *Al Skeini* case and underscores the potential for the application of the Convention to be extended to other premises under the control of the British forces in Iraq particularly in their capacity as members of the Coalition Provisional Authority. Interestingly the case pivoted on the fact that the United Kingdom’s *de facto* control over the premises was “reflected in law” and specifically cited Coalition Provisional Authority Order Number 17.¹⁰⁹⁷ Pertinently, this order governs the operations of the multinational force operating after the occupation. Accordingly, the Orders introduced during the occupation provide greater evidence of control and authority and it would appear that the United Kingdom may be held responsible for violations of Convention rights by virtue of these.

The transformative occupation of Iraq represents a departure from the conservationist application of traditional occupation law. Although the unilateral invasion and occupation of Iraq was unexpected, the development of a new collaborative model of occupation was long overdue. Writing in 1951, Luan argued that the transformative

¹⁰⁹⁴ Letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538)

¹⁰⁹⁵ *R (Al-Skeini) v. Secretary of State for Defence*, [2005] EWCA Civ 1609, at para 124 (per Brooke LJ). Judgement Affirmed by House of Lords in *R (Al Skeini) v. Secretary of State for Defence* [2007] UKHL. 26.

¹⁰⁹⁶ *Al-Saadoon and Mufdhi v. United Kingdom*, App. No. 61498/08.

¹⁰⁹⁷ *Ibid.*, at par. 87.

character of the occupations of Germany and Japan created an “*ein sonderrecht*”.¹⁰⁹⁸ In recent years the United Nations humanitarian occupations of Kosovo, East Timor, Eastern Slavonia and Bosnia have generated a corpus of principles applicable to transformative state building exercises. While these fall short of creating any immediate customary law on transformative occupation there is certainly a precedent for this type of occupation. Appositely, the practice in Iraq illustrates that the invading belligerent is constrained by occupation law even in the event of *debellatio*. However regardless of the status of the territory occupied or otherwise, once the institutions of state have disintegrated and there is no government left in place the United Nations will intervene and apply the principles common to state building such as creating an interim administration, economic reconstruction based on privatisation, drafting a new constitution and creating the conditions for free and fair elections.

This type of occupation can be differentiated from the small and medium occupations considered at the Brussels Conference when the laws of occupation were drafted in two respects (1) decisions are made for the benefit of occupied population and not the occupied State and (2) the annexation of territory is prohibited. However the Hague Regulations remain shackled to nineteenth century conceptions of armed conflict and belligerent occupation. In the absence of any real international political consensus to modernise the laws of war and convene a new conference, it is likely that the laws of belligerent occupation will instead be interpreted according to the type of conflict they frame. For example prolonged occupations represent a more rights based approach, short term occupations a traditional approach and transformative occupations a multi-party approach.

However, the transformative occupation of Iraq, may be considered as *sui generis* in respect of the unusual and complementary intersection of the United Nations State building principles and the exploitative war objectives of the invading Coalition to open up Iraq’s oil industry to foreign oil contractors. The Future of Iraq Working Group had outlined prior to the invasion that a decentralised oil industry where private oil companies could engage in long term production sharing contracts with the

¹⁰⁹⁸ Kurt V. Luan “The Legal Status of Germany,” *The American Journal of International Law*, Vol. 45, (1951), pp 267

Iraqi State would be a key attraction to foreign oil corporations.¹⁰⁹⁹ The plan to decentralise, privatise and install a new indigenous administration mirrored in part features of the practice of United Nations administrations. For example in Cambodia the United Nations Transitional Administration for Cambodia (UNTAC) moved from a centrally planned to a market economy establishing a privatisation system for the sale of property.¹¹⁰⁰ However in Iraq, unconstrained by occupation law the Coalition Provisional Authority liberally altered the economic structure of Iraq to facilitate resource exploitation. Arguably, applying the framework of international humanitarian law, a modicum of transformation on the basis of reforms instigated under the Oil-for-Food Program may have been permitted even within the *status quo* limitations of Article 43 of the Hague Regulations thus calling into question the need to mandate far reaching reforms.

Certain features of the transformative occupation are peculiar to Iraq such as the Development Fund for Iraq which replaced the Oil-for-Food scheme and the Governing Council for Iraq. However these ideas may be extrapolated and used again in other occupations particularly where there are substantial public assets in the occupied territory.

The involvement of the United Nations created an “internationalised” belligerent occupation of Iraq. The reconstruction of the territory pivoted around “laying the foundations for economic recovery and rehabilitation” and “longer term economic reform”.¹¹⁰¹ Resolution 1483 requires that the Special Representative to the Secretary General coordinate post conflict processes in Iraq with the Authority and international agencies:

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

¹⁰⁹⁹ Subcommittee on Oil Policy, Oil and Energy Working Group, Future of Iraq Project, Draft for Consultation, Department of State, United States of America (15 February 2003). Unclassified Date/Case ID 22 Jun 2005 200304121, p. 6.

¹¹⁰⁰ Nassrine de Rham-Azimi, Institute of Policy Studies (Singapore), United Nations Institute for Training and Research, *The United Nations Transitional Authority in Cambodia (UNTAC) Debriefing and Lessons* (Klewer Law International, 1994) 34

¹¹⁰¹ Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003), (17 July 2003), S/2003/715, p. 17, par 87.

government of Iraq;

(d) facilitating the reconstruction of key infrastructure, in cooperation with other international organisations;

(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organisations, as appropriate, civil society, donors, and the international financial institutions.”¹¹⁰²

Although the resolution broadly refers to the intertwined roles of the Special Representative, the Authority and international agencies in the introduction to paragraph 8, the subsequent parts feature a differentiated role with paragraph 8(c) relating to the role of the occupant in reconstructing the institutions of government and 8(d) and 8(e) pertaining to economic reconstruction by United Nations and other international organisations. Critical to the occupation of Iraq, and distinct from other occupations, was the presence of exogenous parties and a strong international agenda steering economic reform. The UN Secretary General welcomed in particular the experience and expertise of international financial institutions and the United Nations Development Plan which would intervene at a climacteric macroeconomic level establishing policy for government expenditure management, social services, creating a fully functioning financial system, a banking sector, limiting inflation and most significantly creating a private sector with the objective of creating employment.¹¹⁰³

While Security Council Resolution 1483 conferred legitimacy on the economic reconstruction of Iraq, the mandate operates to the extent that both parties are working together with the Governing Council during occupation. There is no interpretation that suggests that the Coalition Provisional Authority could independently implement the reforms and certainly is not a case of *legem non habentis ipsi sibi sunt lex*.¹¹⁰⁴ The belligerent occupant maintained full authority over Iraq after the United Nations retreated from the territory, and as such is responsible for any ensuing claims of expropriation.

¹¹⁰² S/RES/1483 (2003) par 8(d), 8(e), 8(f).

¹¹⁰³ Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003), (17 July 2003), S/2003/715, p. 17, par 88.

¹¹⁰⁴ Those having not the law being a law onto themselves.

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