

**The Occupying State as Legislator in Occupied Territory:
Challenges to the duty imposed by the international law
of belligerent occupation to respect the existing law
and institutions in occupied territory**

PhD 2020

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Summary

The law of occupation requires an occupying state, subject to limited exceptions, to respect the existing law and institutions of the occupied territory. Three principal challenges to those rules can be identified in the literature: (i) the idea that occupying states should be freed of these obligations so as to be permitted to engage in “transformative” or “transformational” occupations; (ii) the applicability of human rights treaties in occupied territory; and (iii) the idea that the Security Council may authorise a departure from, or override, these rules. This thesis explores these challenges by examining as a case study the occupation of Iraq by the US and UK in 2003-04, although the wider context, including subsequent practice, is taken into account where relevant. This thesis makes use of new evidence and information which has been disclosed in the years since the occupation, including that contained in the Report of the ‘Iraq Inquiry’ (the Chilcot Report) in the UK, which was published in July 2016.

The analysis of the Iraq case study undertaken here suggests that occupying states should not be freed of their obligations so as to be permitted to engage in “transformative” occupations. The legislation on de-Ba’athification and dissolution of the Iraqi army, and the damaging consequences thereof, are considered. Additionally, evidence was found that during the occupation the Coalition Provisional Authority (“CPA”) enacted a large number of laws which were not implemented (including most of the commercial laws). Again, the CPA enacted a substantial amount of legislation in the field of human rights but evidence suggests that this legislation did not transform the human rights position in Iraq and that in the years since the occupation serious and widespread human rights abuses, including torture, have continued. The experience in Iraq in relation to occupation legislation calls into question the idea of “transformative” occupation.

There is disagreement among states whether an occupying state’s obligations under the International Covenant on Civil and Political Rights (“ICCPR”) apply in occupied territory. General Assembly resolutions suggest that there is an emerging consensus among states parties to the ICCPR that where a state party occupies territory, its obligations will be applicable there. However, the fact that other states parties such as the US have made clear their disagreement, prevents these resolutions from amounting to subsequent practice “which establishes the agreement of the parties” regarding the interpretation of the treaty, within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. This extensive practice by states parties therefore does not establish the applicability of the ICCPR in occupied territory.

As regards the interpretation of Article 2(1) of the ICCPR by the International Court of Justice in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, contained within its interpretation of the *travaux préparatoires* there appears to be a potentially important qualification to the extraterritorial application of the ICCPR, on the basis of which it can be argued that an individual in occupied territory would not be able to assert against the occupying state that his or her rights were being breached by legislation enacted prior to the occupation.

As to whether the European Convention on Human Rights (“ECHR”) requires an occupying power which is a state party to it to change pre-occupation laws in occupied territory which are incompatible with the ECHR rights, in Al-Skeini v. The UK the European Court of Human Rights held that where the basis for extraterritorial jurisdiction for the purpose of Article 1 of the ECHR is “State agent authority and control”, the ECHR rights are “divided and tailored”, and consequently the occupying state may well not be obliged, or entitled, on the basis of the ECHR to alter any pre-occupation laws which are inconsistent with the ECHR. The Court appears to indicate that where a state party occupies the territory of a non-party (i.e. the occupation is outside the “legal space of the Convention”), the Court will use the “State agent authority and control” basis of jurisdiction (as it did in the Al-Skeini case as regards Iraq), if it finds jurisdiction at all, thus avoiding the imposition of ECHR standards on non-European societies and any requirement to change pre-occupation laws.

In relation to the occupation of Iraq, the UK Attorney General advised that, on the basis of Resolution 1483, the occupying powers could engage in certain activities going beyond the limits of occupation law, but provided that such actions were undertaken in coordination with the UN Secretary-General’s Special Representative for Iraq. That advice is open to doubt for reasons discussed in the thesis. In any event, in the period after the assassination of the Special Representative for Iraq, the CPA Administrator, Mr Bremer, continued to promulgate legislation, including laws which changed the existing law in Iraq, which was not co-ordinated with a Special Representative. Furthermore, the Chilcot Report discloses that after a Special Representative for Iraq *ad interim* was appointed, Mr Bremer and the U.S. State Department decided not to send copies of proposed legislation to him for the purposes of co-ordination because a “reliable source” had informed the State Department that the UN would veto the legislation. Accordingly Resolution 1483 did not provide a basis for legislation enacted during these periods which was outside the constraints of the law of occupation. If in the future the Security Council should be called upon to adopt a resolution in the context of an occupation, the lessons of what happened in Iraq need to be learned. Guidelines are proposed for such resolutions in order to reduce the scope for abuse.

I would like to acknowledge with thanks the guidance of
Professor Rosemary Byrne
in the researching and writing of this thesis.

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List of Abbreviations

AD	Annual Digest of Public International Law Cases (and, later, the Annual Digest and Reports of Public International Law cases) (now the International Law Reports)
AJIL	American Journal of International Law
B.Y.B.I.L.	British Yearbook of International Law
Charter	Charter of the United Nations, 1945
Chilcot Report	The Report of the Iraq Inquiry, Report of a Committee of Privy Counsellors, 6 July 2016 (HC 264)
CPA	Coalition Provisional Authority
CRC	Convention on the Rights of the Child
ECHR	[European] Convention on Human Rights and Fundamental Freedoms, 1950
EJIL	European Journal of International Law
FCO	Foreign and Commonwealth Office [UK]
GC	Governing Council [Iraq]
Geneva Convention	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
Hague Regulations	Convention Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907
HNDC	Higher National De-Ba'athification Commission
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
IHCHR	Iraq High Commission for Human Rights

ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
INIS	Iraqi National Intelligence Service
IPU	Iraq Policy Unit [UK] [formerly the Iraq Planning Unit]
ISIL	“Islamic State in Iraq and the Levant”
ISIS	“Islamic State of Iraq and Syria”
Is YBHR	Israel Yearbook on Human Rights
NGO	non-governmental organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
OHRA	Office of Reconstruction and Humanitarian Assistance
PMF	Popular Mobilisation Forces
PMU	Popular Mobilisation Units
SOE	state-owned enterprise
TAL	Law of Administration for the State of Iraq for the Transitional Period
TIP	Transition and Integration Program [for existing Iraqi police officers]
TRNC	“Turkish Republic of Northern Cyprus”
TWAIL	Third World Approaches to International Law
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNAMI	UN Assistance Mission for Iraq
UNTS	United Nations Treaty Series
US	United States of America
USAID	U.S. Agency for International Development

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Chapter 1

Introduction

We live in a time when it is regularly pointed out that the “rules-based international order” is under threat.¹ Among the rules of international law which are under threat are those which come within the sphere of the law of occupation. In 2014 a permanent member of the U.N. Security Council, Russia, unlawfully annexed part of the territory of a neighbouring state, Ukraine.² In 2019, in disregard of international law, another permanent member of the U.N. Security Council, the United States of America, formally recognised the sovereignty of Israel over part of the territory of Syria (the Golan Heights) which was, and is, under Israeli occupation.³ Such actions threaten to erode the framework of international law which governs occupation and, indeed, the wider international order.⁴

¹ See e.g. Chatham House, The Royal Institute of International Affairs, ‘Challenges to the Rules-Based International Order’ (The London Conference, 2015, Session One). Available at <https://www.chathamhouse.org/sites/default/files/London%20Conference%202015%20-%20Background%20Papers.pdf>. Accessed: 15 May 2019.

² See President of Russia, ‘Laws on admitting Crimea and Sevastopol to the Russian Federation’, 21 March 2014. Available at <http://en.kremlin.ru/acts/news/20625>. Accessed: 15 May 2019. See also U.N. General Assembly Resolution 68/262, ‘Territorial integrity of Ukraine’, adopted 27 March 2014 (U.N. Doc. A/RES/68/262), in which the General Assembly affirmed *inter alia* its commitment to the “... unity and territorial integrity of Ukraine within its internationally recognized borders” and called upon all states, international organisations and specialised agencies not to recognise any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol and to refrain from any action or dealing which might be interpreted as recognition of such altered status (paras. 1 and 6). For an overview of events and an assessment of the arguments put forward by Russia in an attempt to justify the purported annexation, see Thomas D. Grant ‘Annexation of Crimea’ (in Current Developments), (2015) Vol. 109 A.J.I.L. p. 68

³ President Donald J. Trump, Proclamation on Recognizing the Golan Heights as Part of the State of Israel, 25 March 2019. Available at <https://www.whitehouse.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel/>. Accessed: 15 May 2019. On Israel’s attempts to extend its law, jurisdiction and administration to the occupied Golan Heights, see note 142, below.

⁴ There is a link here with the *jus ad bellum*: if states believe that they can obtain sovereignty over territory as a result of the use of force, they are more likely to attempt to resolve territorial disputes by the use of military force. It is regrettable that two permanent members of the body which is charged, under Article 24(1) of the Charter of the United Nations, with the “primary responsibility for the maintenance of international peace and security” should engage in such actions.

This thesis is concerned with the limitations which the law of occupation places upon the power of an occupying state to legislate for the territory which it occupies, and the challenges to the rules which embody those limitations. These rules, whilst they may not be within the public consciousness to the same extent as the prohibition of annexation, are nevertheless important for reasons which are explained below. Before looking at these rules, the reasons why they are important and the challenges to them, we will consider the legal position of the occupying state in international law.

The legal position of the occupying state in international law

The fundamental principle of the law of occupation is that a state which occupies the territory of another state does not acquire sovereignty over that territory merely as a result of going into occupation.⁵ Furthermore, international law places limitations upon what such an occupying state can do in the occupied territory. This position is however a departure from that which pertained previously. Writing in the early years of the 20th century, Oppenheim traced the evolution in the status of the occupying state and the development of the relevant international law:

“...In former times enemy territory that was occupied by a belligerent was in every point considered his State property, with which and with the inhabitants therein he could do what he liked. He could devastate the country with fire and

⁵ See L. Oppenheim, *International Law, A Treatise*, Vol. II, War and Neutrality (Longmans, Green, and Co., London, 1906), p. 169 and p. 174; H. Lauterpacht (Ed.), *International Law, A Treatise*, By L. Oppenheim (7th Ed., Longmans, Green & Co, 1952), Vol. II, Disputes, War and Neutrality, p. 433 and p. 437; Gerhard von Glahn, *The Occupation of Enemy Territory, A Commentary on the Law and Practice of Belligerent Occupation* (The University of Minnesota Press, Minneapolis, 1957), p. 31; G.I.A.D. Draper, *The Red Cross Conventions* (Stevens & Sons Ltd, London, 1958), p. 39; Christopher Greenwood, ‘The Administration of Occupied Territory in International Law’, p. 244, in Emma Playfair (Ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Oxford University Press, 1992), at p. 241; Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, Cambridge, 2009), p. 49; Charles Cheney Hyde, *International Law, chiefly as interpreted and applied by the United States* (Little, Brown, and Co., Boston, 1922), Vol. Two, p. 362; *Ottoman Debt Arbitration*, 18 April 1925, Borel, Arbitrator, [1925-26] A.D. 472; The War Office [UK], *The Law of War on Land, being Part III of the Manual of Military Law* (H.M. Stationery Office, 1958), p. 143, para. 510; The Joint Service Manual of the Law of Armed Conflict (Joint Service Publication 383) (2004 Edition), promulgated as directed by the Chiefs of Staff [UK], p. 278, para. 11.9; Department of the Army [US], *Department of the Army Field Manual FM 27-10, The Law of Land Warfare* (July 1956), p. 140, para. 358; Department of Defense [US], *Law of War Manual* (June 2015, Updated December 2016, Office of General Counsel, Department of Defense), pp. 771-72, § 11.4; *Law of Armed Conflict* (2006, issued by the Chief of the Defence Force) (Australian Defence Doctrine Publication 06.4) [Australia], p. 12-3, para. 12.12.

sword, appropriate all public and private property therein, kill the inhabitants, or take them away into captivity, or make them take an oath of allegiance. He could, even before the war was decided and his occupation was definitive, dispose of the territory by ceding it to a third State.... That an occupant could force the inhabitants of the occupied territory to serve in his own army and to fight against their legitimate sovereign, was indubitable But during the second half of the eighteenth century things gradually began to undergo a change. The distinction between mere temporary military occupation, on the one hand, and, on the other, real acquisition of territory through conquest and subjugation became more and more apparent, since Vattel had drawn attention to it. However, it was not till long after the Napoleonic wars in the nineteenth century that the consequences of this distinction were carried to their full extent by the theory and practice of International Law. The first to do this was Heffter, whose treatise made its appearance in 1844. And it is certain that it took the whole of the nineteenth century to develop such rules regarding occupation as are now universally recognised and in many respects enacted by articles 42-56 of the Hague Regulations [respecting the Laws and Customs of War on Land, adopted by the Hague Peace Conference of 1899].”⁶

The principle underlying these modern rules, Oppenheim concluded, is that “although the occupant does in no wise acquire sovereignty over such territory through the mere fact of having occupied it, he actually exercises for the time being a military authority over it”.⁷ The occupant acquires “a temporary right of administration” over the occupied territory and its inhabitants.⁸

Many of the key rules of international law which govern the occupation of territory are contained in the Hague Convention Respecting the Laws and Customs of War on Land of 1907, more specifically in the Regulations annexed thereto (“the Hague

⁶ Oppenheim *International Law, A Treatise*, Vol. II, (1906) (n 5), pp. 168-69. (References to volume and section numbers given in parenthesis in the text omitted.)

⁷ *Ibid*, p. 169

⁸ *Ibid*, p. 173. See now Lauterpacht, *Oppenheim’s International Law*, Vol. II (n 5), p. 436, who retained Oppenheim’s characterisation of the occupant having “a temporary right of administration”.

Regulations”).⁹ As Oppenheim pointed out, the principle underlying the modern rules on occupation, including the Hague Regulations of 1907, is that the occupant does not acquire sovereignty over the occupied territory through the mere fact of having occupied it but exercises for the time being a military authority over it.¹⁰ Thus:

- (i) Article 45 of the Regulations provides that it is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power;
- (ii) Article 52, which deals with requisitions in kind and services, provides that such requisitions must be of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country;
- (iii) Article 55 provides 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; and further requires that the occupying State must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct;¹¹
- (iv) Article 43 requires that the occupying Power respect the laws in force in the country, unless absolutely prevented from doing so. Article 43 will, of course, be considered in much greater detail below.

⁹ Convention Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907. Reproduced in Adam Roberts and Richard Guelff (Eds.), *Documents on the Laws of War* (3rd Ed., 2000, Oxford University Press), p. 69. The Hague Regulations of 1907 were a revised version of the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1899. Article 4 of the 1907 Convention provided that once ratified it would, as between the states parties, replace the Convention of 1899.

¹⁰ L. Oppenheim, *International Law, A Treatise*, Vol. II, War and Neutrality (2nd Ed., 1912, Longmans, Green & Co., London), p. 206. This 1912 edition was the first edition of Oppenheim to be published after adoption of the 1907 Regulations. See now Lauterpacht, *Oppenheim’s International Law*, Vol. II (n 5), pp. 433-34, who retained this analysis.

¹¹ Usufruct is the right to use property which belongs to another and to acquire ownership of what it produces (“the fruits”) but without substantially changing the character of the property: see e.g. Peter Stein, *Legal Institutions, The Development of Dispute Settlement* (1984, Butterworths, London), p. 152 and p. 162. The usufruct is a Roman law concept which is used in civil law legal systems (ibid).

The Hague Regulations form part of customary international law. The International Military Tribunal at Nuremberg held that the rules of land warfare contained in the Hague Convention of 1907 “undoubtedly represented an advance over existing international law at the time of their adoption” but that by 1939 these rules “were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war...”.¹² Similarly, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice confirmed that the Hague Regulations have become part of customary international law.¹³

It is sometimes suggested that an occupying power is a trustee. For example, von Glahn states in his work on occupation that the occupant exercises a temporary right of administration “on a trustee basis”.¹⁴ Similarly, Roberts states that “some idea of ‘trusteeship’ is implicit in all occupation law...”.¹⁵ Stahn states that, as a result of the Fourth Geneva Convention (see below), occupying powers “became trustees bound to serve the interests and benefits of the territorial sovereign and its population when ruling foreign territory”.¹⁶ However, on closer inspection the trustee analogy does not stand up to scrutiny. In domestic law, a trust arises where legal ownership of property is vested in a trustee (or trustees) who must hold the property for the benefit of beneficiaries.¹⁷ In the case of occupation, the occupying power does not acquire sovereignty and therefore does not hold legal title to the occupied territory. If the occupying power acquires title to the hitherto occupied territory under a peace treaty, it ceases to be an occupying power. An occupying power is therefore not a trustee.¹⁸

¹² Judgment, 30 September 1946, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, Volume I (Nuremberg, 1947), pp. 253-54; Vol. XXII (Nuremberg, 1948), p. 497

¹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, [2004] I.C. J. Reports, p. 136, at p. 172 (para. 89)

¹⁴ von Glahn, *The Occupation of Enemy Territory* (n 5) p. 31

¹⁵ Adam Roberts, ‘Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988’ in Emma Playfair (Ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Oxford University Press, 1992), p. 25, at p. 51

¹⁶ Carsten Stahn, *The Law and Practice of International Territorial Administration, Versailles to Iraq and Beyond* (Cambridge University Press, 2008), pp. 117-18

¹⁷ Jamie Glister and James Lee, *Hanbury & Martin, Modern Equity* (21st Ed., 2018, Thomson Reuters t/a Sweet & Maxwell, London), p. 39

¹⁸ See also Greenwood, ‘The Administration of Occupied Territory in International Law’ (n 5) 250-51 who also concludes that an occupying power does not administer occupied territory as a trustee but for the different reason that the basis of the occupying state’s position in occupied territory is not law but the successful use of force, “whereas trusteeship is an institution founded upon law”; and that the

It has long been established that the occupying power is not entitled to annex the occupied territory whilst the conflict continues.¹⁹ Furthermore, it has become increasingly accepted that, since the entry into force of the U.N. Charter, territorial acquisition resulting from the use of force is illegal²⁰, and this has been confirmed by the International Court of Justice.²¹

Having considered the legal position of the occupying power in international law, we will now turn to the reasons why the rules requiring the occupying state to respect the existing laws and institutions in the occupied territory matter.

duties imposed by the law of occupation are “far more rudimentary than those of any concept of trusteeship”. See also Yoram Dinstein, *The International Law of Belligerent Occupation* (n 5), who also concludes that an occupying power is not a trustee but on the grounds that “[a] position of a trustee postulates trust”; “[i]ncontrovertibly, no premise of trust between enemies in wartime is warranted”; and that an occupied territory “is not entrusted” to the occupying power but rather the latter seizes control of it by military force (p. 36). That reasoning, however, seems to assume that the only type of trust is the express trust. There are also trusts which are imposed by operation of law, such as the constructive trust: see e.g. *A-G for Hong Kong v Reid* [1994] 1 AC 324 (Privy Council), in which it was held that bribes received by the acting DPP for Hong Kong, and property purchased therewith, were held on constructive trust for the Crown, and *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 in which it was held that bribes or secret commissions received by an agent in breach of his fiduciary duty to his principal are held on trust for his principal. In such cases the trustee has not been “entrusted” with trust property by settlor, testator or principal, but rather has received the bribe or secret commission from a third party.

¹⁹ See e.g. Lauterpacht, *Oppenheim’s International Law*, Vol. II (n 5), p. 437; The War Office [UK], *The Law of War on Land*, being Part III of the Manual of Military Law (H.M. Stationery Office, 1958), p. 143, para. 512; The Joint Service Manual of the Law of Armed Conflict (Joint Service Publication 383) (2004 Edition), promulgated as directed by the Chiefs of Staff [UK], p. 278, para. 11.10; Department of the Army [US], Department of the Army Field Manual FM 27-10, *The Law of Land Warfare* (July 1956), p. 140, para. 358; Department of Defense [US], *Law of War Manual* (June 2015, Updated December 2016, Office of General Counsel, Department of Defense), p. 772, § 11.4.2

²⁰ See e.g. M. Akehurst, *A Modern Introduction to International Law* (6th Ed., 1987, Allen and Unwin, London), pp. 148-50; Greenwood, ‘The Administration of Occupied Territory in International Law’ (n 5) 241. See further Ch. 2, below, under ‘*Debellatio*’

²¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Reports, p. 136, at p. 171 (para. 87). The Court held that there is a rule of customary international law rendering illegal territorial acquisition resulting from the threat or use of force and that that is a “corollary” of the rules on the use of force which are incorporated in the UN Charter and which reflect customary international law. The Court referred, apparently by way of evidence for this customary rule regarding the non-acquisition of territory, to General Assembly Resolution 2625 (XXV) of 24 October 1970 entitled ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States’ in which it was emphasised that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal”.

Why the rules requiring respect for existing laws and institutions matter

As mentioned above, Article 43 of the Hague Regulations requires that the occupying state is to respect the laws in force in the occupied state, unless it is absolutely prevented from doing so. Furthermore, as will be seen below, many writers attest to a rule that the occupying state is not entitled to make changes to the institutions of the occupied state. Why do these rules matter?

An important reason of principle is derived from the fact that, as shown above, the occupying state does not acquire sovereignty over the territory which he occupies as a result of going into occupation. Oppenheim regarded the fact that the occupying state is not the sovereign of the territory, as the reason why it had no right to make changes to the laws (or administration) of the territory.²² Lauterpacht endorsed that view.²³ Viewed from this perspective, Article 43 carves out a limited exception to the principle that the occupying state may not change the existing law. There is thus a strong reason of legal principle for the requirement that (subject to the established exceptions) the occupying state must respect the existing law and institutions of the occupied territory.

Furthermore, various of the laws extant in a state will often reflect the values, morality and religion (or religions) of the population. This is likely to be the case in relation to occupied states as with other states. Again, a number of laws and institutions of a state may reflect ideological preferences, for example in relation to the economy (whether free-market, communist or mixed), decided upon by the sovereign government of that state. Such choices may have support within society. This again may be the case in relation to a state which falls under occupation as in relation to other states. The restrictions which occupation law places upon the power of an occupying state to change the laws and institutions of an occupied state serve to protect laws and institutions of the foregoing types. Additionally, some writers argue that the right to self-determination of the population of the occupied territory may be engaged where an occupying power makes changes to the local law and institutions.²⁴

²² Oppenheim *International Law, A Treatise*, Vol. II, (1906) (n 5), p. 174

²³ Lauterpacht, *Oppenheim's International Law*, Vol. II (n 5), p. 437

²⁴ See e.g. Ralph Wilde, 'Complementing Occupation Law? Selective Judicial Treatment of the Suitability of Human Rights Norms', (2009) Vol. 42 *Israel Law Review* p. 80, at p. 94, p. 96, p. 99, and p. 100

In Western states there has of course been a tendency to decriminalise acts which fall within the sphere of personal morality. That has however followed a period of public debate in the state concerned and was then legislated for by that state's legislature. In the UK, for example, such debate could be said to have included Mill's *On Liberty*, which was originally published in 1859, the Wolfenden Report of 1957, the Hart-Devlin debate and the parliamentary debates on individual pieces of legislation.²⁵ If an occupying state were to legislate to change the law of the occupied territory in relation to personal morality, it is unlikely that such public debate will take place and the legislation will have been enacted not by the representatives of the population but by a military officer or other official installed by, and acting on behalf of, a foreign government.

The issues being discussed here are not simply, or necessarily, about cultural relativism.²⁶ One can take the view that (after the end of occupation) normal human rights processes – human rights diplomacy, universal periodic review, periodic review under the International Covenant on Civil and Political Rights etc - should proceed in respect of the formerly occupied state, whilst at the same time recognising the objection that the occupying state should not be permitted to take advantage of its period of military occupation to change the laws of the occupied states so as to make them accord with its interpretation of what human rights require.

A further reason why it matters that the law of occupation requires the occupying state to respect the existing laws and institutions is that if an occupying state is able to make changes to commercial laws or to the economy, there is a danger that it will make such changes in order to pursue its own commercial or economic interests. The rules

²⁵ See John Stuart Mill, *On Liberty* [originally published, 1859] (Penguin classics, 1987); Report of the Committee on Homosexual Offences and Prostitution, Cmnd. 247, September 1957; H.L.A. Hart, *Law, Liberty, and Morality* (Oxford University Press, Oxford, 1963); Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, Oxford, 1965); and see e.g. Hansard, House of Commons Debates, 5 July 1966, Cols. 259-67 (Vol. 731) (Sexual Offences No. 2); and 19 December 1966, Cols. 1068-129 (Vol. 738) (Sexual Offences No. 2 Bill)

²⁶ On cultural relativism, see e.g. Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context, Law, Politics, Morals, Text and Materials* (3rd Ed., 2007, Oxford University Press, Oxford), pp. 517-40

prohibiting changes to laws and institutions serve to protect the occupied territory and its population in that regard.

The importance of the law of belligerent occupation, including the rules which restrict the making of changes to laws and institutions, is underlined if we look at it from a “Third World” perspective. In the next section we will consider the perspective offered by scholars drawn from the “Third World Approaches to International Law” school of thought.

Third World Approaches to International Law

The origins of “Third World Approaches to International Law” (TWAIL) can be traced to the late 1990s.²⁷ It has been described as a “decentralized network of scholars”²⁸, and “both a political and intellectual movement”²⁹. TWAIL “has not sought to produce a single authoritative voice or text”³⁰ and “does not ... have a specific creed or dogma”.³¹ Indeed, one TWAIL scholar has described TWAIL as “a movement that is defined by shared constructive disagreements” and refers to “...the disagreements that constitute TWAIL”.³²

Nevertheless, Gathii identifies one of the central insights of TWAIL as being that “by having exercised substantial economic, military, political power over the former colonies, Europe and the United States have established patterns of dominance that

²⁷ James Thuo Gathii, ‘TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography’, (2011) Vol. 3 Trade, Law and Development p. 26, at p. 27 and pp. 28-29

²⁸ Ibid, at p. 27

²⁹ Makau Mutua, ‘What is TWAIL?’, [2000] A.S.I.L. Proceedings, p. 31, at p. 36. For Mutua, the purpose of any TWAIL scholarship “must be to eliminate or alleviate the harm or injury that the Third World would likely have suffered as a result of the unjust international legal, political, and economic order” and such scholarship “will be concerned with justice or the fairness of norms, institutions, processes, and practices in the transnational arena” (ibid). The “overriding purpose” of such scholarship, he continues, “must be the elimination of an aspect of Third World powerlessness”. He states that “[a]t a minimum the author ... exposes, attacks, or unpacks a particular phenomenon that is inimical to the Third World”. According to Mutua, “[t]his is the most fundamental characteristic of TWAIL scholarship”.

³⁰ Gathii (n 27) 27

³¹ Mutua, ‘What is TWAIL?’ (n 29) 36

³² Michael Fakhri, ‘Questioning TWAIL’s Agenda’, (2012) 14 Oregon Review of International Law p. 1, at p. 9

persist till date”.³³ Gathii states that “[f]or many TWAIL-ers ... international law ... carries forward the legacy of imperialism and colonial conquest”.³⁴

Within that current, Antony Anghie, in his book *Imperialism, Sovereignty and the Making of International Law*, argues that “imperialism” on the part of Western states continued after the end of formal colonialism and to the present day.³⁵ Furthermore, he argues that many of the basic doctrines of international law were created for the purpose of addressing relations between the European and non-European worlds in the “colonial confrontation”.³⁶ Moreover, Anghie sees the “civilizing mission” – the justification which was used by imperial powers to the effect that empire should be extended for the higher purpose of civilising non-European peoples - being reproduced in the present day.³⁷ How does occupation law fit in with these theories?

The law of belligerent occupation emerged out of conflict between European powers in the 19th Century.³⁸ It did not emerge from “the colonial encounter” (to use one of Anghie’s phrases). Indeed, it has been pointed out that in the colonial period non-European peoples were excluded from the ambit of application of the law of belligerent occupation and were therefore denied the protections which it offers.³⁹ Perhaps because the law of belligerent occupation was designed for the protection of European states under occupation, it contains real limitations upon what an occupying state may do in occupied territory, including as regards making changes to laws and institutions. The law of belligerent occupation therefore counters imperialism and prohibits an occupying power from recreating the occupied state in its own image as part of some

³³ Gathii (n 27) 38

³⁴ Gathii (n 27) 30-31

³⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005, Cambridge University Press, Cambridge), pp. 11-12. Anghie adopts a definition of “imperialism” which includes both formal and informal relationships in which one state controls the effective political sovereignty of another political society (ibid, p. 11). Under the definition employed, imperialism may be carried out by *inter alia* economic dependence, as well as by force.

³⁶ Ibid, pp. 2-3

³⁷ Ibid, p. 3, p. 96, p. 268, p. 291, p. 292, p. 298, p. 302, p. 309

³⁸ Nehal Bhuta, ‘The Antinomies of Transformative Occupation’, (2005) Vol. 16 E.J.I.L. p. 721, at pp. 725-32, especially p. 729. See also Yutaka Arai-Takahashi, ‘Preoccupied with occupation: critical examinations of the historical development of the law of occupation’, (2012) Vol. 94 International Review of the Red Cross p. 51, at p. 58

³⁹ Nehal Bhuta, ‘The Antinomies of Transformative Occupation’, (2005) Vol. 16 E.J.I.L. p. 721, pp. 729-30; Yutaka Arai-Takahashi, ‘Preoccupied with occupation: critical examinations of the historical development of the law of occupation’, (2012) Vol. 94 International Review of the Red Cross p. 51, at pp. 72-79

latter-day “civilising mission”. The law of belligerent occupation, including the rules which restrict legal and institutional change, therefore offers real benefits to “Third World” states (as to other states) which might find themselves under occupation.

We will further consider the views of TWAIL scholars in relation to human rights in Chapter 4.

Challenges to the rules requiring respect for existing laws and institutions

During the occupation of Iraq by the US and UK and its aftermath, there was discussion by writers of the possibility of “transformational occupation” and “transformative occupation”. Scheffer observed that the occupation of Iraq was intended to be a “transformational process” but “requires strained interpretations of occupation law to suit modern requirements”.⁴⁰ Writing whilst the occupation was continuing, he stated that “Iraq is a clear example of a country where an epic transformation must take place over a number of years but in a manner largely unsuited to occupation law”.⁴¹

Further, Scheffer refers to a practice of “multilateral or humanitarian occupation” in “recent years” (he was writing in 2003) and states that “Occupation law was never designed for such transforming exercises”.⁴² He states that a society in political, judicial and economic collapse, or a society which has overthrown a repressive leader and “seeks radical transformation”, “requires far more latitude for transformational development” than would be anticipated under the Hague Regulations and Geneva Convention (IV). He suggests that such a society may require:

“... revolutionary changes in its economy (including a leap into robust capitalism), rigorous implementation of international human rights standards, a

⁴⁰ David J. Scheffer, ‘Beyond Occupation Law’, (2003) 97 A.J.I.L. 842, p. 843

⁴¹ Ibid, p. 853

⁴² Ibid, p. 849. Scheffer does not identify the “multilateral or humanitarian occupations” to which he refers. Elsewhere in the article he refers *inter alia* to UN-authorized deployments of military forces in Kosovo and East Timor but points out that occupation law was not “invoked in any meaningful way” during these deployments and that the establishment of UN civilian administration of such territories did not lead to any assumption that obligations under occupation law were triggered (ibid, p.852).

new constitution and judiciary, and a new political structure (most likely consistent with principles of democracy) never contemplated by occupation law....”⁴³

Whilst noting that the limitations of occupation law may be overcome by the Security Council acting under Chapter VII to modify obligations under occupation law (see below), Scheffer also argues that occupation law should be revised to permit “transformational occupation”, i.e. an occupation aimed at transforming a society, by one or more military powers acting with UN Security Council authorisation, or, in certain circumstances, without such authorisation.⁴⁴

A major weakness in this article by Scheffer is that, although the focus of the article is the occupation of Iraq from 2003, he does not refer to or analyse any of the occupation legislation enacted by the Coalition Provisional Authority in Iraq.⁴⁵ Scheffer thus discusses his proposed reform of the scope of occupation law in a somewhat abstract way. As will be seen below, an analysis of some of the occupation legislation enacted in Iraq, and its consequences, indicates that his proposed reform of the scope of occupation law is problematic.

Roberts uses the phrase “transformative occupation”, rather than “transformational occupation”, referring to “the special and important case of transformative occupation”.⁴⁶ He defines “transformative occupations” as occupations, “whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule”.⁴⁷ He argues that the restrictions which occupation law places on transformative occupation may be dealt with by using human rights law or by obtaining a UN Security Council Resolution varying the application of occupation law on an *ad hoc* basis.⁴⁸ Roberts has suggested that an occupying power may properly

⁴³ Ibid, p. 849

⁴⁴ Ibid, p. 842, at pp. 849-50. p. 852 and pp. 859-60

⁴⁵ In fairness, Scheffer was writing during the course of the occupation. However, he is able to refer in his article (p. 845, note 15) to Security Council Resolution 1511, which was adopted on 16 October 2003, by which time the CPA Administrator had promulgated 43 Orders on a range of subjects.

⁴⁶ Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) 100 A.J.I.L. 580, at p. 622.

⁴⁷ Ibid, p. 580

⁴⁸ Ibid, at p. 622.

rely on human rights law as a basis for setting goals for a “transformative occupation”.⁴⁹ In contrast to Scheffer, he argues against a revision of the law of occupation to make allowance for transformative occupations.⁵⁰ Roberts also states that “[t]he need for foreign military presences with transformative political purposes is not going to disappear”.⁵¹ Carcano adopts Roberts’ phrase “transformative occupation” and notes that it “can be used to describe the occupation of Iraq”.⁵² The occupation of Iraq by the US and UK in 2003-04 would indeed fall within Roberts’ definition of “transformative occupation” (see above). Carcano recognises that “transformative occupation” is “in breach of the Hague Regulations”.⁵³

Scheffer’s notion of “transformational occupation” poses an obvious challenge to occupation law in that Scheffer is arguing for the revision of occupation law to permit it. Roberts’ idea of “transformative occupation” poses a challenge to occupation law in that he argues for the use of human rights law and Security Council authorisation in order to override occupation law. One of the issues which we will explore below is the efficacy of these proposals. In particular, in Chapter 4 we will consider what light is shed by experience in Iraq on whether an occupying state can successfully transform an occupied state through the legislation which it enacts. This will be explored by examining the legislation enacted by the occupation authorities in the field of human rights and making an assessment as to whether that legislation succeeded in transforming Iraq, from a human rights point of view.

Another challenge to the requirement that an occupying power respect the existing law and institutions of the occupied territory is posed by decisions by international courts on the applicability of human rights treaties in occupied territory. As will be seen below, from around the beginning of the 21st Century there has been a succession of decisions in which international courts have held that the obligations of an occupying state under international human rights conventions to which it is a party apply in occupied territory. A number of writers have argued that an occupying power is

⁴⁹ Ibid, at pp. 600-01.

⁵⁰ Ibid, at p. 622

⁵¹ Ibid, p. 618

⁵² Andrea Carcano, *The Transformation of Occupied Territory in International Law* (2015, Brill Nijhoff, Leiden), p. 37 and p. 157

⁵³ Ibid, p. 37 and p. 451

entitled to repeal or change pre-occupation laws in occupied territory which violate international human rights law.⁵⁴ Sassòli, for example, argues that an occupying state is under an obligation to repeal local legislation which is in breach of international human rights standards and that such a state has a “strong argument” that it is “absolutely prevented” under Article 43 of the Hague Regulations from leaving such legislation in force.⁵⁵ Such an argument is based on the assumption that an occupying state’s obligations under a human rights treaty apply in territory which it occupies. We will consider in Chapter 5 what light the occupation of Iraq sheds on the issue whether international human rights law requires an occupying power to change pre-occupation laws in occupied territory.

A further challenge to the rules of occupation law which require respect for existing law and institutions comes from the idea that the Security Council may authorise a departure from, or override, these rules. A number of writers have expressed the view that the Security Council may authorise an occupying state to change the existing law in occupied territory when this would not otherwise be permitted under the law of occupation.⁵⁶ In the case of Iraq, the Security Council adopted a number of resolutions

⁵⁴ Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, (2005) 16 E.J.I.L. p. 661, at p. 676; Roberts, ‘Transformative Military Occupation’ (n 46) 588 and 601; Yoram Dinstein, *The International Law of Belligerent Occupation* (2009), p. 114 (at least as regards non-derogable human rights norms contained in treaties); Eyal Benvenisti, *The International Law of Occupation* (2nd ed., 2012, Oxford University Press), p. 75 and pp. 102-03. Carcano (n 52) 331 argues that an occupying power may *suspend* an existing law in occupied territory in order to comply with the occupying power’s own human rights obligations. Carcano also proposes, as an “interpretative development” of the law, a “narrowly construed” exception to Article 43 whereby the existing law in occupied territory could be changed to reflect “universally recognized human rights-standards entrenched in customary international law” (e.g. torture) (ibid, pp. 253-54). He notes that not all human rights norms are universally agreed or have evolved into customary international law. However, Carcano emphasises that he does not endorse “human rights-based transformative occupation”, which he states “remains forbidden under the law of occupation” (ibid, p. 254).

⁵⁵ Sassòli (n 54) 676

⁵⁶ Scheffer (n 40) 849-50; Sassòli (n 54) 680-81; Michael N. Schmitt and Charles H.B. Garraway, ‘Occupation Policy in Iraq and International Law’, (2004) Vol. 9 International Peacekeeping: The Yearbook of International Peace Operations, p. 27, at p 31; Roberts, ‘Transformative Military Occupation’ (n 46) 622. See also Marten Zwanenburg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’ (2004) Vol. 86 IRRC p. 745, at p. 763, who states that the Security Council can derogate from the law of occupation, at least as regards non-peremptory norms. See also Rüdiger Wolfrum, ‘Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference’ (2005) Vol. 9 Max Planck Yearbook of United Nations Law 1, at p. 16, who states, more generally, that the “possibility exists” for Security Council resolutions to mandate an occupying power to take steps which go beyond the limitations set by international humanitarian law (citing Scheffer). See also Eyal Benvenisti, *The International Law of Occupation* (2nd ed., 2012, Oxford University Press), at p. 66, who argues that the Security Council has authority to authorise “the transformation of a regime under occupation beyond what the law of

in relation to the occupation, in particular Resolution 1483.⁵⁷ Schmitt and Garraway therefore state that, in addition to occupation law, U.N. law, as expressed in Resolution 1483 and the subsequent resolutions, applied in Iraq and that “[t]hus two bodies of law coexist and complement each other in Iraq”.⁵⁸ The Iraq case study therefore provides an opportunity to examine the challenge posed by Security Council authorisation. In Chapter 6 we will examine the idea that the Security Council may authorise an occupying state to change the existing law and institutions in the occupied territory when such change would not otherwise be permitted under the law of occupation.

The Iraq Case Study

Occupations which last for a significant period of time and in which occupation legislation is enacted by the occupation authorities are relatively uncommon. The occupation of Iraq by the US and UK between April 2003 and June 2004 represents one such occupation. During that occupation the occupation authority, the Coalition Provisional Authority, enacted over 100 pieces of legislation.

An important factor in selecting Iraq as a case study is the wealth of material and information which has become available as a result of the ‘Iraq Inquiry’, or ‘Chilcot Inquiry’. In June 2009 the then prime minister of the UK, Mr Gordon Brown, announced the establishment of an independent committee of Inquiry, comprised of Privy Counsellors, to examine the run-up to the invasion of Iraq, the conflict itself and the subsequent period in which the UK was involved in Iraq, including the period of occupation.⁵⁹ The committee was chaired by Sir John Chilcot, a former senior civil

occupation would otherwise allow”. See also Carcano (n 52), who states that binding resolutions of the Security Council may “amend” the law of occupation (at p. 107) and suggests that “transformative occupations authorised by the Security Council” may be lawful (at p. 451).

⁵⁷ U.N. Security Council Resolution 1483 (2003), adopted 22 May 2003 (U.N. Doc. S/RES/1483 (2003)); U.N. Security Council Resolution 1500 (2003), adopted 14 August 2003 (U.N. Doc. S/RES/1500 (2003)); U.N. Security Council Resolution 1511 (2003), adopted 16 October 2003 (U.N. Doc. S/RES/1511 (2003)); and U.N. Security Council Resolution 1546 (2004), adopted 8 June 2004 (U.N. Doc. S/RES/1546 (2004)). For an overview of the first three of these resolutions, see Thomas D. Grant, ‘The Security Council and Iraq: an Incremental Practice’, (2003) Vol. 97 A.J.I.L. 823.

⁵⁸ Michael N. Schmitt and Charles H.B. Garraway, ‘Occupation Policy in Iraq and International Law’, (2004) Vol. 9 International Peacekeeping: The Yearbook of International Peace Operations, p. 27, at p. 30

⁵⁹ Hansard, House of Commons Debates, 15 June 2009, Col. 23 (Vol. 494, Part No. 91)

servant.⁶⁰ The Report (“the Chilcot Report”) was published on 6 July 2016.⁶¹ It consists of 12 volumes plus an Executive Summary.

The material available as a result of the Inquiry consists not only of the contents of the Report itself. The Inquiry took evidence from more than 150 witnesses in hearings which commenced in November 2009.⁶² Transcripts of the evidence given by those witnesses were then published on the Inquiry’s web site. A number of witnesses also provided witness statements. Additionally contemporaneous documents were declassified and published on the Inquiry’s web site.⁶³ The Report itself gives a highly detailed account of events, meetings, decisions, correspondence and other documents, including quoting extracts from, or summarising the contents of, documents which it was not able to publish.⁶⁴ The Report observes that “[t]he material agreed by the Government for disclosure by the Inquiry is highly unusual in its scale and sensitivity”.⁶⁵

In addition to the Chilcot Report and the evidence on which it was based, other material has become available in the years since the occupation. Further documentation has been released by departments of the US Government. A number of those involved in decision-making in relation to the occupation have written memoirs. Whilst one must treat such memoirs with a degree of caution, those writing them have acknowledged therein mistakes which were made in relation to the occupation of Iraq.

There is therefore a great deal of additional material and information which was not available to those writing about the occupation whilst it was continuing or in the period shortly thereafter. Furthermore, with the passage of time we are able to make a

⁶⁰ The other members of the Committee were Sir Lawrence Freedman (Professor of War Studies at King’s College, London); Sir Martin Gilbert (the historian); Sir Roderic Lyne (a former British diplomat and ambassador) and Baroness Usha Prashar (a member of the House of Lords). Sir Martin Gilbert became seriously ill in April 2012, after which he was unable to participate in the Inquiry’s work, and died in 2015, prior to publication of the Report. None of the Committee were lawyers. The Report states that “none of its [i.e. the Inquiry’s] members is legally qualified” (Vol 1, para. 99).

⁶¹ The Report of the Iraq Inquiry, Report of a Committee of Privy Counsellors, 6 July 2016 (HC 264)

⁶² Ibid, Vol. 1, paras. 39 and 41

⁶³ The Report states that around 1,800 documents were published in this way (Ibid, Vol. 1, para. 55).

⁶⁴ The Report states that it used around 7,000 documents in this way (Ibid, Vol. 1, para. 55).

⁶⁵ Ibid, Vol. 1, para. 56

judgment about the extent to which certain legislation enacted during the occupation achieved its objective, for example the legislation in the field of human rights.

Finally, seven years after the end of the occupation of Iraq, judgment was given by the Grand Chamber of the European Court of Human Rights in the *Al-Skeini* case, which arose out of that occupation. That judgment enables us to examine the issue of how the applicability of the European Convention on Human Rights in territory occupied by a state party might impact upon the rules requiring respect for the existing law and institutions.

Something should perhaps be said about the book by Carcano about the transformation of occupied territory, as it is primarily about the occupation of Iraq.⁶⁶ The timing of publication of that work was unfortunate in that it was published in 2015, the year before the Chilcot Report was published, and therefore it does not take into account the conclusions or the highly detailed factual information set out in the Report. Moreover, the book does not refer to the evidence published by the Chilcot Inquiry on its website in the years before the book was written and published.⁶⁷ Thus the book does not refer to the transcripts of evidence, witness statements (including that by the head of the occupation authority, Mr Bremer) and declassified documents (including the extremely important document setting out the advice of the UK Attorney General on the effect of Security Council Resolution 1483), which were published on the Inquiry's web in 2010 and available thereafter.⁶⁸ This thesis, however, does make use of the information contained in the Chilcot Report and of the supporting evidence published by the Inquiry.

Carcano does not consider the evidence of non-implementation of CPA commercial laws, which is presented below. Nor does he consider the evidence of Iraq's human

⁶⁶ Carcano (n 52)

⁶⁷ Carcano (n 52) 405, n 2 states that the time of writing was March 2013

⁶⁸ See e.g. the archived Chilcot Inquiry web site as at 19 September 2010 at <https://webarchive.nationalarchives.gov.uk/20100919030700/http://www.iraqinquiry.org.uk/>. Last accessed: 02.05.19. Part of the problem here may be that, although the existence of the Chilcot Inquiry was very well-known in the UK, where footage of witnesses (such as the former prime minister, Tony Blair, the (chief) Legal Adviser at the Foreign and Commonwealth Office, Sir Michael Wood, and his Deputy, Elizabeth Wilmshurst) giving their oral evidence to the Inquiry was shown on the national television news, its existence may not have been so well known outside of the UK. Carcano is a scholar based in Italy.

rights record in the years since the occupation and what this tells us about the failure of CPA laws to transform Iraq from a human rights point of view. As regards the applicability of human rights treaties in occupied territory, Carcano does not engage with, or even describe, the legal arguments put forward by the US as to why it denies that its obligations under the ICCPR are applicable in territory which it occupies.⁶⁹ Nor does he make his own inquiries of the *travaux préparatoires* on this issue. As to the applicability of the ECHR, Carcano deals with the judgment of the European Court in the *Al-Skeini* case in a very brief fashion and does not analyse the principles set out in the judgment regarding the applicability of the obligations of a state party to the European Convention outside of its territory.⁷⁰ Indeed, he mentions *Al-Skeini* in connection with only one of the two possible bases of extra-territorial jurisdiction identified in that case, and not the one which was actually found to be applicable in the particular case in Iraq. He does not discuss, or refer to, the more innovative element of the judgment on the question of jurisdiction, including the “dividing and tailoring of rights”. In particular he does not consider what the judgment tells us about the applicability of the Convention rights outside of the “legal space” of Europe. As regards the question of Security Council authorisation, because Carcano did not apparently have sight of the document setting out the advice of the UK Attorney General on the effect of Resolution 1483, he does not engage with the specific argument used by the Attorney as has been done below. These are all issues which will be discussed below.

“Legal battles” between the US and UK

Part of the interest in the Chilcot Report, as regards the topic with which we are here concerned, lies in what it tells us about the divergent approaches of the two occupying powers in relation to the legal and institutional changes which were being made in Iraq. The Report discloses that, shortly before the end of the occupation, legal advisers in the

⁶⁹ See Carcano, (n 52) 83, n 27, where he merely cites the US document which sets out its position without describing the arguments made or engaging with them. He concludes that, “Although it would be unwise to regard the matter as unanimously accepted, it is fair to suggest that contemporary international law has come to recognise the applicability of human rights treaties to situations of occupation.”

⁷⁰ Carcano (n 52) 89-90 and 243-44

UK's Foreign and Commonwealth Office provided advice which was forwarded to the Foreign Secretary via his private secretary and which included the following statement:

“As the Secretary of State is aware, we have since the beginning of the Occupation fought a series of policy and legal battles with the US over various CPA initiatives or pieces of legislation. These have occurred in some cases over differences of approach to policy, particularly given the US ambitious agenda to lay the foundations for long-term reform of the Iraqi economy and society, and in some cases because of an expansive US approach to the law of Occupation.”⁷¹

This is an extraordinary statement – referring as it does to “legal battles with the US” and to “an expansive US approach to the law of Occupation” - given that the US and UK were military allies and joint occupying powers in Iraq.

Details of these “legal battles” will be seen below. A picture emerges of senior UK lawyers and officials grappling to keep the legislative actions of the occupation authorities within a credible legal framework, whilst certain US officials seemed more concerned about achieving their objectives than complying with legal niceties.

We will see, for example, how UK military lawyers became “alarmed” when the initial occupation authority created by the US legislated, in violation of the law of occupation, to make US domestic laws applicable to Iraqi territory which had fallen under occupation.

Another example which we shall see relates to the question of Security Council authorisation for certain legal changes. As we shall see, the UK Attorney General advised that Security Council authorisation would be necessary for reform and restructuring to be imposed on Iraq. Once a Security Council Resolution was duly obtained, the UK Attorney General then advised that under the Resolution certain activities could only be carried out by the occupation authority in consultation with the

⁷¹ Chilcot Report, Vol. 7, p. 392 (Section 9.2, paras. 1119-20), citing minute Crompton to Private Secretary [FCO], 23 June 2004, ‘Iraq: The Extent of the UK’s Obligations in Iraq’

UN Secretary-General's Special Representative for Iraq. We will see however that the US official heading the occupation authority, after being informed that the Special Representative was likely to veto his proposed legislation, introduced a policy of no longer sending draft legislation to the Special Representative prior to enacting it and of instead merely "mentioning" to him that he had legislation in various areas in process. As will be seen that policy was adopted on the advice of the US State Department and even the chief lawyer within the occupation authority was of the view that it did not comply with the relevant Security Council Resolution. Furthermore, we learn that the UK requested that the head of the occupation authority resume sending draft legislation to the Special Representative before enacting it but that he was not content to do so. As will be seen, all of this has implications for the supposed legal basis for certain legislation enacted during the occupation. Thus, although the Chilcot Inquiry was a UK Inquiry, the Report contains highly sensitive and damaging details of US policies and actions in Iraq.

Before we commence examination of the occupation of Iraq, we will look at the rules which determine when territory is considered occupied.

When is territory considered occupied?

The question of when territory becomes occupied is dealt with in Article 42 of the Hague Regulations, which provides:

“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.”

On this basis, the key test of whether territory is occupied is whether the territory in question has been “actually placed under the authority” of the enemy forces.

Occupation must be distinguished from invasion, which is the sending of armed forces into enemy territory. As can be seen from Article 42, for territory to be deemed

occupied, it must have been placed “under the authority” of the occupying forces. Oppenheim explained that “Occupation is invasion *plus* taking possession of enemy country for the purpose of holding it, at any rate temporarily”.⁷² When an invading power has prevented the sovereign power from exercising its authority over territory, has asserted its own authority in its place and established an administration in respect of the occupied territory, the territory is occupied.⁷³

The practical application of Article 42 of the Hague Regulations in the determination of whether territory is occupied is illustrated by the judgment of the International Court of Justice in the case of Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda).⁷⁴ In that case the Court was called upon to determine whether the presence of Ugandan forces on the territory of the Democratic Republic of the Congo (DRC) rendered Uganda an occupying power. Uganda denied that it was an occupying power in the areas where its troops were present, maintaining that its forces were confined to the border region between the two parties and to certain strategic locations, such as airfields, from which Uganda was vulnerable to attack by the DRC, and that there was no Ugandan “military administration” in place.⁷⁵ The following pertinent points emerge from the judgment:

- (i) Citing Article 42 of the Hague Regulations, the Court held that in order to determine whether a state, the armed forces of which were present on the

⁷² L. Oppenheim, *International Law, A Treatise*, Vol. II (2nd ed., 1912, Longmans, Green & Co.), p. 207; Lauterpacht, *Oppenheim’s International Law*, Vol. II (n 5) 434; Dinstein, *The International Law of Belligerent Occupation* (2009) (n 5) 38

⁷³ Oppenheim, *International Law, A Treatise*, Vol. II (1906) (n 5) 171; Lauterpacht, *Oppenheim’s International Law*, Vol. II (n 5) 435; von Glahn, *The Occupation of Enemy Territory* (n 5) 28. See also *In re List and Others (Hostages Trial)*, United States Military Tribunal at Nuremberg, 19 February 1948, [1948] A.D. p. 632 at p. 638, in which it was held that (i) whether an invasion has developed into an occupation is a question of fact; (ii) the term “occupation” indicates “the exercise of governmental authority to the exclusion of the established government”; (iii) that presupposes the destruction of organised resistance and “the establishment of an administration to preserve law and order”. C.f. *Prosecutor v. Rajić (Rule 61)*, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, 13 September 1996, I.L.R. p. 108, at pp. 160-61 in which it was held that the village of Stupni Do became occupied territory when it was overrun by Bosnian Croat forces (which were regarded as agents of Croatia in view of the evidence of control by Croatia). However, part of the Tribunal’s reasoning was that the Bosnian Croats, and thus Croatia, already controlled the area surrounding Stupni Do prior to its being overrun.

⁷⁴ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) [2005] I.C.J. Reports, p. 168

⁷⁵ *Ibid*, p. 229 (para. 170)

territory of another state as a result of an intervention, was an occupying power, within the meaning of the term as it is understood in the *jus in bello*, the Court must examine “whether there is sufficient evidence to demonstrate that the ... authority [of the hostile army] was in fact established and exercised by the intervening State in the areas in question”.⁷⁶

- (ii) In the context of the case before it, the Court held, this required the Court to be satisfied that the armed forces of Uganda were “not only stationed in particular locations” in the DRC but also that they had “substituted their own authority for that of the Congolese Government”.⁷⁷
- (iii) The Court further held that it was irrelevant whether or not Uganda had established a “structured military administration of the territory occupied”.⁷⁸
- (iv) The Court observed that the territorial limits of any zone of occupation established by Uganda within the DRC “cannot be determined by simply drawing a line connecting the geographical locations where Ugandan troops were present”, as had been done on a sketch-map submitted to the Court by the DRC.⁷⁹
- (v) The Court attached importance to the fact (not denied by Uganda) that the commander of the Ugandan forces in the DRC had purported to create a new “province of Kibali-Ituri” within the territory of the DRC by merging two districts (Ituri and Haut-Uélé) which he detached from an existing province of the DRC, and that he had then appointed a governor to the new province.⁸⁰ The Court held that this conduct of the commander was clear evidence that Uganda had established and exercised authority in Ituri as an

⁷⁶ Ibid, p. 230 (para. 173)

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid, p. 230 (para. 174)

⁸⁰ Ibid, p. 230 (para. 175) and see p, 228 (para. 168)

occupying power.⁸¹ The Court concluded that Uganda was an occupying Power in respect of the district of Ituri at the relevant time.⁸²

- (vi) The Court pointed out that the DRC had not provided any specific evidence to show that authority was exercised by Ugandan armed forces in any areas other than in Ituri district.⁸³

Additionally, some sources indicate that territory is to be considered occupied, even though the invading forces have not actually exercised authority over the territory, if those forces are *in a position* to exercise such authority. The UK military manual of 1958 (citing a French manual of 1893) contained a test of occupation under which territory was to be considered occupied if two conditions were satisfied: (i) that the legitimate government was rendered incapable of publicly exercising its authority within the occupied territory as a result of the act of the invader; and (ii) that the invader is “in a position to substitute his own authority for that of the legitimate government”.⁸⁴ The same test is contained in the UK military manual of 2004.⁸⁵

The rationale for this approach was cogently explained by Leggatt J in the recent case of *Alseran v. Ministry of Defence* in the High Court in England:

“There is an ambiguity in some formulations of the test as to whether the actual exercise of authority by the invading forces is necessary or whether the ability

⁸¹ Ibid, p. 230 (para. 176)

⁸² Ibid, p. 231 (para. 178). The Court also referred to a report by the UN Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (MONUC) which stated that according to MONUC military observers, Ugandan forces were in effective control of Bunia, the capital of Ituri district (p. 230, para. 175).

⁸³ Ibid, p. 230-31 (para. 177)

⁸⁴ The War Office [UK], *The Law of War on Land*, being Part III of the Manual of Military Law (H.M. Stationery Office, 1958), pp. 141-42 (para. 503), citing the French Manual of 1893 (p. 67) as having proposed this test.

⁸⁵ The Joint Service Manual of the Law of Armed Conflict (Joint Service Publication 383) (2004 Edition), promulgated as directed by the Chiefs of Staff [UK], p. 275 (para. 11.3), the wording of the test having been slightly amended. The second limb of the test now reads in the 2004 Manual: “... that the occupying power is in a position to substitute its own authority for that of the former government”. C.f. the US manuals, which stipulate as a necessary condition for occupation that the invader has actually substituted its authority for that of the legitimate government in the occupied territory: see Department of the Army [US], *Department of the Army Field Manual FM 27-10, The Law of Land Warfare* (July 1956), p. 139, para. 355; Department of Defense [US], *Law of War Manual* (June 2015, Updated December 2016, Office of General Counsel, Department of Defense), pp. 765-66, § 11.2.2.2

to exercise authority is sufficient. The former interpretation would be unsatisfactory, as it would allow a state which invades territory to avoid the duties of an occupying power by declining to exercise authority within the territory.”⁸⁶

Accordingly, the Court held that, prior to the occupation of Iraq as a whole (see below), the area in which US/UK Coalition forces set up an internment camp (‘Camp Bucca’) near the border with Kuwait was already occupied territory when the Camp was set up on the basis that US/UK forces were “in a position to exercise authority” over that territory.⁸⁷ The Court approved the test of occupation contained in the UK military manual of 2004.⁸⁸

In a similar vein, where the Israel Defence Forces set up an internment camp (‘Antzar Camp’) in South Lebanon following their entry into that area in June 1982, the Supreme Court of Israel held that the area constituted occupied territory, even though no military government whatsoever had been established by Israel on Lebanese territory and no Israeli military or other legislation had been applied to Lebanese territory.⁸⁹ The Court endorsed the test of occupation contained in the UK military manual of 1958 and held that the status of an area as occupied territory was not contingent upon the existence of a durable belligerent occupation or the establishment of a military administration in the area.⁹⁰

It has to be said that it is difficult to reconcile the approach whereby a state is considered an occupying power if it is merely “in a position to substitute” its authority for that of the sovereign government, as stipulated in successive UK military manuals, with the approach applied by the International Court of Justice in the *Armed Activities* case. As noted above, in that case the Court held that, in determining whether a state was an occupying power, the appropriate test was “whether there is sufficient evidence

⁸⁶ *Alseran and others v. Ministry of Defence*, Judgment, 14 December 2017, High Court, England and Wales, [2017] EWHC 3289 (QB), [2018] 3 WLR 95, at p. 154 (para. 264)

⁸⁷ *Ibid*, at p. 158 (para. 281)

⁸⁸ *Ibid*, at p. 154 (para. 264)

⁸⁹ *Tzemel Adv. et al v. Minister of Defence, (b) Commander of the Antzar Camp*, Supreme Court, Israel (H.C. 593/82) (1983) Vol. 13 Israel Yearbook on Human Rights, p. 360, at p. 363 and p. 361

⁹⁰ *Ibid*, p. 363

to demonstrate that the ... authority [of the hostile army] was in fact established *and exercised* by the intervening State in the areas in question” (italics added), and the Court further held that in the case before it the Court needed to be satisfied that the armed forces of Uganda were not only stationed in particular locations in the DRC but also that they had “*substituted their own authority* for that of the Congolese Government” (italics added). Thus the approach employed by the International Court of Justice requires that the armed forces of the intervening state must have exercised authority in the territory in question, and thus actually substituted their authority for that of the sovereign government, for such intervening state to be considered an occupying power.

It is not necessary for an occupying power to have its forces stationed in every locality within a territory for such territory to be considered occupied.⁹¹ If the occupying power has established its authority over the territory as a whole and is able, “within reasonable time”, to deploy a sufficient force to assert its authority over each place in the territory, the territory is occupied.⁹²

It should be noted that where a state occupies territory, the rules of the law of occupation (including both the rights and duties under that law) will apply to that state whether its use of armed force in occupying the territory was lawful or not.⁹³

The occupation of Iraq

By 16 April 2003 Iraq was under occupation by the United States and “Coalition”. On 16 April 2003 U.S. Central Command in Iraq sent a cable to the U.S. Secretary of Defense stating that,

“...we have achieved decisive military victory in Iraq”

⁹¹ Oppenheim, *International Law, A Treatise*, Vol. II (1906) (n 5) 170; Lauterpacht (n 5) 435; von Glahn, *The Occupation of Enemy Territory* (n 5) 28; Dinstein, *The International Law of Belligerent Occupation* (2009), (n 5) 44

⁹² Oppenheim, *International Law, A Treatise*, Vol. II (1906) (n 5) 171; von Glahn, *The Occupation of Enemy Territory* (n 5) 29; Dinstein, *The International Law of Belligerent Occupation* (2009) (n 5) 44

⁹³ *In re List and Others (Hostages Trial)*, United States Military Tribunal at Nuremberg, 19 February 1948, [1948] A.D. p. 632 at pp. 636-37

and that,

“Coalition armed forces have ... captured the main population centres...”.⁹⁴

That same day, the Commander-in-Chief of US forces, General Franks, issued a proclamation entitled ‘Freedom Message to the Iraqi People’ in which he stated, among other things, that he was creating the Coalition Provisional Authority “to exercise powers of government temporarily”.⁹⁵

On 8 May 2003 the Permanent Representatives to the United Nations of the United States and United Kingdom sent a letter to the President of the Security Council informing the Council that in order, *inter alia*, to meet their obligations under international law in the “post-conflict period”, the US, UK and their Coalition Partners had created a Coalition Provisional Authority “to exercise powers of government temporarily”.⁹⁶ The letter also stated that “[t]he States participating in the Coalition will strictly abide by their obligations under international law”.

On 22 May 2003 the Security Council expressly identified the US and UK as occupying powers. On that date the Council adopted Resolution 1483, which, in its preamble, referred to the Council noting the letter from the Permanent Representatives of the US and UK of 8 May and “recognizing the specific authorities, responsibilities,

⁹⁴ Available at www.dod.gov/pubs/foi/specialCollections/Rumsfeld, Documents released to Secretary Rumsfeld under MDR [Mandatory Declassification Review], p.75. Site accessed: 22.05.14. (The date does not appear on the cable but is indicated on the accompanying Index of Documents Released to Secretary Rumsfeld under Mandatory Declassification Review (MDR).) As noted above, for a territory to be occupied, it is not necessary for occupation forces to be stationed in every locality within the territory. Furthermore, parts of Iraqi territory had of course fallen under occupation prior to 16 April. As will be seen below, the Office of Reconstruction and Humanitarian Assistance established by the US began enacting legislation in respect of the Iraqi port of Umm Qasr during March 2003, and the US was therefore exercising authority over that area at that time. Moreover, as seen above, the High Court in England has held that Coalition forces were in occupation of the area in which Camp Bucca (which is near Umm Qasr) was established prior to the setting up of the Camp, which was before the occupation of Iraq as a whole. The Court found that the first two claimants were admitted to the Camp on 1 April, indicating that the Camp was established prior to that date (see *Alseran*, [2018] 3 WLR 95, at p. 143, para. 166).

⁹⁵ General Franks, ‘Freedom Message to the Iraqi People’, 16 April 2003, reproduced in Stefan Talmon, *The Occupation of Iraq, Vol. II, The Official Documents of the Coalition Provisional Authority and the Iraqi Governing Council* (Hart Publishing, 2013), p. 795.

⁹⁶ UN Doc. S/2003/538

and obligations under applicable international law of these states as occupying powers under unified command (“the Authority”).⁹⁷ The Council went on in the resolution to call 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 1907.⁹⁸

Whilst the Security Council identified the US and UK as occupying powers, it also indicated in the resolution that certain other states which had contributed forces and which were working with the occupation authorities were not to be regarded as occupying powers. The preamble to Resolution 1483, after referring to the Council recognising the authorities, responsibilities and obligations of the US and UK “as occupying powers”, went on to refer to the Council noting that “other States that are not occupying powers” are working or may in the future work under the unified command (“the Authority”) created by the US and UK. On 8 September 2003, the Australian Minister for Foreign Affairs, Mr Alexander Downer, in response to a Parliamentary question, stated that

“In United Nations Security Council Resolution (UNSCR) 1483 of 22 May 2003, only the United states of America and the United Kingdom of Great Britain and Northern Ireland are named as Occupying Powers. Accordingly, these States have specific and special responsibilities and obligations under UNSCR 1483, the Geneva Conventions and the Hague Regulations. Australia is not named as an Occupying Power and thus does not bear the full burden of meeting these obligations.”⁹⁹

The approach taken by the Australian Government on this point seems to be consistent with the intention of the Security Council as expressed in Resolution 1483.

⁹⁷ U.N. Security Council Resolution 1483 (2003) of 22 May 2003 (U.N. Doc. S/RES/1483 (2003))

⁹⁸ Ibid, paragraph 5

⁹⁹ Commonwealth of Australia, Parliamentary Debates, House of Representatives, Hansard, 8 September 2003, p. 19497. Available at https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2003-09-08/0223/hansard_frag.pdf;fileType=application%2Fpdf. Last accessed: 13.10.18.

Initially, administration of Iraqi territory occupied by the US-led Coalition was carried out through the Office of Reconstruction and Humanitarian Assistance (ORHA) which had been established by President Bush and was headed by former Army Lieutenant General, Jay Garner.¹⁰⁰ However, on 13 May 2003 the U.S. Secretary of Defense designated L. Paul Bremer, who had already been appointed Presidential Envoy to Iraq, as head of the Coalition Provisional Authority (CPA) with the title Administrator, to be responsible for the temporary governance of Iraq and “oversee, direct and coordinate all executive, legislative and judicial functions necessary to carry out this responsibility”.¹⁰¹

On 16 May 2003 L. Paul Bremer, the Administrator of the CPA promulgated Regulation No. 1, which provided, *inter alia*, that 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”.¹⁰² Section 1(2) provided that:

“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.”

As regards the applicable law in Iraq, the Regulation provided that:

“Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from

¹⁰⁰ See Douglas J. Feith, *War and Decision, Inside the Pentagon at the Dawn of the War on Terrorism* (Harper, New York, 2009), pp. 347-50, 423, 425, 441. The ORHA was later merged into the Coalition Provisional Authority (see main text below).

¹⁰¹ Memorandum for Presidential Envoy to Iraq, May 13 2003, available at http://www.dod.gov/pubs/foi/operation_and_plans/CPA_ORHA/05-F-1435doc14.pdf. Site accessed: 05.06.14

¹⁰² Section 1(1), CPA Regulation No. 1, promulgated 16 May 2003 (CPA/REG/16 May 2003/01)

exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.”¹⁰³

The Regulation referred to two types of legislation which the Administrator would issue: Regulations and Orders.¹⁰⁴ Regulations were defined as “those instruments that define the institutions and authorities of the CPA”. Orders were defined as “binding instructions issued by the CPA”. It was provided that Regulations and Orders were to remain in force until repealed by the Administrator or superseded by the legislation issued by democratic institutions of Iraq. It was further provided that Regulations and Orders issued by the Administrator “shall take precedence over all other laws and publications to the extent such other laws and publications are inconsistent”. Regulations and Orders were to be promulgated in “the relevant languages” and to be disseminated “as widely as possible”.¹⁰⁵ It was provided that in the case of divergence, the English text was to prevail. The Administrator was also empowered to issue Memoranda in relation to the interpretation and application of any Regulation or Order.¹⁰⁶

The CPA enacted over 100 pieces of legislation (including 12 Regulations and 100 Orders) during what was a relatively brief occupation, lasting less than a year and quarter. Areas impacted by the legislation included the economy and commercial law; criminal justice; the judiciary; the armed forces and security; human rights; and the media. Different in character from the Regulations and Orders was the Law of Administration for the State of Iraq for the Transitional Period (generally referred to as the “TAL”), enacted on 8 March 2004.¹⁰⁷ Although it was enacted during the occupation, the TAL was enacted by the Governing Council (see below) rather than being signed and promulgated by the CPA Administrator.¹⁰⁸ In effect, the TAL was a transitional constitution for the period commencing at the end of the occupation, establishing institutions of government, setting out fundamental rights, and laying

¹⁰³ Section 2

¹⁰⁴ Section 3(1)

¹⁰⁵ Section 3(2)

¹⁰⁶ Section 4(1)

¹⁰⁷ Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004

¹⁰⁸ See Governing Council Resolution No. 33 of 2004, 8 March 2004, reproduced in Talmon (n 95) 1205

down a timetable for the drafting of a permanent constitution and elections.¹⁰⁹ As it did not come into operation until after the occupation, it will not be considered in detail.¹¹⁰ Furthermore, as explained below, we will not be examining the political process or “democratisation”.

The occupation ended on 28 June 2004, when the CPA was dissolved and an Iraqi Interim Government assumed authority for governing Iraq, although Coalition troops remained in Iraq after that date.¹¹¹ The Security Council had expressly endorsed the formation of the Interim Government, which it described as “sovereign”.¹¹² The Council had also expressly welcomed that “by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty”.¹¹³ The Security Council reaffirmed its authorisation for the multinational force in Iraq under unified command, having noted that the incoming Interim Government had requested its continued presence in Iraq.¹¹⁴

¹⁰⁹ The Preamble states that the Law (i.e. the TAL) has been established to govern the affairs of Iraq during the “transitional period” until an elected government operating under a permanent democratic constitution has come into being. Article 3(A) of the TAL provided that “This Law is the Supreme Law of the land and shall be binding in all parts of Iraq without exception”, whilst Article 3(B) provided that any legal provision which conflicts with the TAL is null and void.

¹¹⁰ Article 2 defines the “transitional period” as commencing on 30 June 2004 and lasting until the formation of an elected government pursuant to a permanent constitution

¹¹¹ See letter from L. Paul Bremer III to Judge Medhat al Mahmood, 28 June 2004, reproduced in Talmon (n 95) 1111. Some writers have expressed the view that the occupation continued beyond that date, e.g. Rüdiger Wolfrum, ‘Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference’ (2005) Vol. 9 Max Planck Yearbook of United Nations Law 1, at p. 35, who states that Iraq remained under occupation under the Interim and Transitional governments, referring *inter alia* to the restrictions which were placed on the ability of the Interim and Transitional Governments of Iraq to alter the law in force. And see e.g. Carcano (n 52) 413-14 who states that there was “a form of *sui generis* indirect occupation” after the dissolution of the CPA until 2005, during which period the Coalition forces maintained control over Iraq through a “non-sovereign indigenous government”. See however Sassòli (n 54) 683-84 and Dinstein, *The International Law of Belligerent Occupation* (2009) (n 5) 273

¹¹² Security Council Resolution 1546 of 2004, adopted 8 June 2004 (U.N. Doc. S/RES/1546 (2004)), para. 1. The Council also referred to the assumption by the Interim Government of “full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq’s destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office” (ibid, para. 1), as envisaged in the proposed timetable for Iraq’s political transition to democratic government, which was also endorsed by the Council, and which included direct democratic elections to a Transitional National Assembly to be held by 31 December 2004 if possible, and in any event by 31 January 2005 (ibid, para. 4).

¹¹³ Ibid, para. 2

¹¹⁴ Ibid, para. 9. The letter, dated 5 June 2004, from the Prime Minister in the Interim Government, Dr Ayad Allawi, to the President of the Security Council seeking a renewed mandate for the multinational force in Iraq is annexed to the Resolution. Whilst the Security Council decided that the mandate for the multinational force would expire upon completion of the political process (i.e. upon the election of an Iraqi government elected on the basis of a permanent constitution for Iraq to be drafted by the

The demographic background

In relation to a number of different pieces of legislation it is relevant to bear in mind the demographic composition of Iraq. Iraqi society is divided into three principal groups: Sunni Arabs, Shi'ite Arabs and Kurds. Indeed it has been stated that the state of Iraq created by Britain in 1921 contained "major fissures" between Sunni and Shi'ite and Arab and Kurd.¹¹⁵ The majority of Iraq's population are Shi'ite Arabs. However, it was primarily Sunni Arabs who governed Iraq from the creation of the Iraqi state in 1921 until the occupation of the country by the US and UK in 2003.¹¹⁶ Sunni Arabs are estimated to account for only around 20 per cent of the Iraqi population.¹¹⁷ The Kurds are ethnically distinct from the Arabs, speaking Kurdish rather than Arabic.¹¹⁸ They constitute around 18 per cent of the Iraqi population.¹¹⁹ There has been a long-standing ambition, held by many Kurds, for an independent Kurdish state.¹²⁰ Successive Iraqi governments have faced Kurdish insurrections aimed at the establishment of either a separate Kurdish state or autonomy.¹²¹ As will be seen below, certain pieces of legislation enacted by the CPA affected one of these three ethnic/religious groups disproportionately.

Transitional National Assembly), it also declared that it would terminate the mandate earlier if requested by the Government of Iraq (ibid, para. 12). The multinational force had previously been established under Resolution 1511, adopted on 16 October 2003.

¹¹⁵ Adeed Dawisha, *Iraq, A Political History from Independence to Occupation* (Princeton University Press, 2009), p. 69. Iraq was created by the merger of three *vilayets* (provinces) of the former Ottoman Empire: Baghdad, Basra and Mosul (ibid, p. 67). The *vilayet* of Baghdad and the central part of Iraq primarily consisted of Sunni Arabs (ibid, p. 69). The Basra *vilayet*, in the South, was predominantly Shi'ite Arab. The Mosul *vilayet*, in the North, was primarily populated by Kurds (p. 26).

¹¹⁶ See ibid, p. 6, p. 71 and p. 244

¹¹⁷ Dawisha refers to Sunni Arabs constituting "a mere 20 percent of the population" at the time of Iraq's creation (Ibid, p. 81). Sir David Richmond, who was UK Deputy Special Representative in Iraq between September 2003 and March 2004, and later the UK Special Representative between March and June 2004, gave evidence to the Chilcott Inquiry that Sunni Arabs "were perhaps 20% of the population" but that "nobody really knows" and that "Nobody really disputes the figure of roughly 20, maybe a few more percent" (Transcript of Sir David Richmond's evidence, 26 January 2011, pp. 53-54).

¹¹⁸ See e.g. Adeed Dawisha, *Iraq, A Political History from Independence to Occupation* (Princeton University Press, 2009), p. 26

¹¹⁹ Ibid, p. 69

¹²⁰ Ibid, p. 26

¹²¹ Ibid, p. 26

The role of the Governing Council

On 13 July 2003 the CPA Administrator promulgated CPA Regulation No. 6 under the terms of which the CPA “recognized the formation of the Governing Council as the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq....”¹²² The preamble to Regulation No. 6 refers to the Governing Council having met and announced its formation earlier that day. Section 2(1) of the Regulation provided that the Governing Council and the CPA “shall consult and coordinate on all matters involving the temporary governance of Iraq....”

Many CPA Orders refer in their preambles to the Governing Council (GC) having been consulted or a past decision of the GC. It appears to be generally accepted by writers on the subject that such involvement by the GC does not itself entail that the restrictions which international humanitarian law places upon legislation by an occupant do not apply.¹²³

Further support for the view that the role of the GC should not protect CPA legislation from the restrictions of international humanitarian law may be garnered from the memoirs of Mr Bremer. In particular, Mr Bremer quotes from a memorandum which he sent to the Secretary of Defence, Donald Rumsfeld, on 13 September 2003 in which he described the Governing Council in the following terms:

“The Governing Council has no mandate to rule Iraq. Its members, however capable as individuals, have little support. They lack credibility in large sectors of the population. As yet, they have hesitated in making important policy decisions unless pushed and prodded by the CPA.”¹²⁴

¹²² Section 1, CPA Regulation No. 6, promulgated 13 July 2003

¹²³ Gregory H. Fox, ‘The Occupation of Iraq’, (2005) 36 *Georgetown Journal of International Law* 195, at pp. 247-54; Conor McCarthy, ‘The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq’, (2005) 10 *Journal of Conflict and Security Law* 43, at pp. 57-59; Sassòli (n 54) 682, referring to Article 47, Geneva Convention (IV), which provides that protected persons in occupied territory shall not be deprived of the benefits of the Convention by, *inter alia*, any change introduced, as a result of the occupation, into the institutions or government of the occupied territory.

¹²⁴ Ambassador L. Paul Bremer III, with Malcolm McConnell, *My Year In Iraq, The Struggle to Build a Future of Hope* (Simon and Schuster, 2006), pp.167-68

The context for that statement was Rumsfeld's suggestion that full governing authority be transferred to the GC as soon as possible so that the occupation could be formally terminated more rapidly, and Bremer's opposition to that suggestion. Nevertheless, this description of the GC by the CPA Administrator attests to the fact that even the assessment of the occupation authorities was that the GC possessed little support among the population and was ineffective as an institution of government.

Furthermore, the CPA Administrator had an effective veto over proposals by the GC for legislation. When the GC adopted Resolution 137¹²⁵, which provided for the introduction of Sharia law in relation to personal status matters, including marriage, divorce and inheritance, Mr Bremer refused to sign the resolution into law.¹²⁶ It would appear that it would have been a breach of Article 43 of the Hague Regulations for such a law to have been enacted during the occupation.¹²⁷ Nevertheless, the episode illustrates the subordinate role of the GC, despite the CPA's purported recognition of it "as the principal body of the Iraqi interim administration" in section 1 of Regulation No. 6.

It is also relevant to note in this regard the advice given by UK Attorney General in June 2003 which has been declassified and published by the Chilcot Inquiry.¹²⁸ The document which sets out the advice states that the Attorney "notes the fact that the IIA ["interim Iraqi administration"] is likely to be under the control of the Occupying Powers in the initial phase of its existence".¹²⁹ The document continues:

"The Attorney agrees that if the IIA were to be structured so that it does in fact operate under Coalition control, then its scope of authority would not extend

¹²⁵ Governing Council Resolution No. 137 of 2003, adopted 29 December 2003, reproduced in Talmon (n 95) 1188

¹²⁶ Bremer (n 124) 292

¹²⁷ A point made by the group, Women Living Under Muslim Laws. See <http://www.wluml.org/action/iraq-protect-iraqi-womens-rights-family-laws>. Site accessed on 14.05.14.

¹²⁸ Letter dated 9 June 2003 from Ms Cathy Adams, the Legal Secretariat to the Law Officers to Mr Huw Llewellyn, Legal Counsellor, Foreign and Commonwealth Office, 'Iraq: Effect of Security Council Resolution 1483 on the Authority of the Occupying Powers'. The letter states in its opening paragraph "... I am writing to record the Attorney's views'.

¹²⁹ Ibid, p. 3, para. 7

beyond that of the Coalition under occupation law and such further powers as conferred on the Coalition by the resolution [Resolution 1483].”¹³⁰

It is difficult to disagree with that analysis, regarding the effect of the IIA operating under the control of the occupying powers. Support for such an approach can be found in decisions of national courts in relation to legislation enacted by “governments” installed by Germany during its occupation of other European states during the Second World War, such as the “Quisling Government” in Norway.¹³¹

Methodology

Before we consider the challenges to the rules of the law of occupation which require an occupying state to respect the existing law and institutions of the occupied territory, we will first identify what those rules are and examine them in some detail. In identifying the rules and their interpretation, the relevant treaties were considered, as well as the views of writers and military manuals issued by states. The *travaux préparatoires* to treaty provisions was examined where relevant.

Having identified the relevant rules of occupation law, the challenges to those rules will be considered by reference to the Iraq case study. The legislation enacted by the CPA

¹³⁰ Ibid

¹³¹ See *Randsfjordsbruket and Jevnaker Kommune v. Viul Tresliperi*, Supreme Court, Norway, 30 November 1951, [1951] I.L.R. 635, in which it was held that a certain law promulgated by the Quisling regime must be treated as a law made by the occupying power and was in violation of Article 43 of the Hague Regulations and therefore illegal. And see *Øverland's Case*, Norway, District Court of Aker, 25 August 1943, [1943-1945] A.D. p. 446, in which the court held that a law enacted by the Norwegian authorities installed by the German occupant in Norway with the consent of the occupant must be set aside as being contrary to Article 43 of the Hague Regulations. See also *In re G*, Criminal Court of Heraklion (Crete), Greece, Judgment of 1 January 1945, 12 I.L.R. 437, in which it was held that the “Governments” established in Greece by the German and Italian armies towards the end of the occupation of Greece “constitute mere organs of the occupant” (at pp. 438-39) and that the legislative measures enacted by the “Governments” set up by the occupant “are essentially no more than laws promulgated by the occupant himself” (at pp. 439-40). The Court noted that the “Governments” established by the occupants were based on the consent and military power of the occupants, derived their power from the will of the occupants and could exercise that power only within the limits of the military interests and political objects of the occupants (at p. 439). (C.f. *In re Law 900 of 1943*, Areopagus (Court of Cassation), Greece, Judgment No. 68 of 1944, 12 I.L.R. 441, in which it was held that the government established by the occupant during the German occupation of Greece was sovereign and that the laws which it promulgated possessed the binding force of laws of the State. It should be noted, however, that that judgment was given prior to the withdrawal of German forces from Athens.)

was located on the CPA's website and considered.¹³² The Chilcot Report (see above) was examined, as well as transcripts of evidence of witnesses who gave evidence to the Chilcot Inquiry, witness statements provided to the Inquiry and contemporaneous documents which were declassified and published by the Inquiry. The Report and the supporting evidence were sourced from the Inquiry's web site and later the archived web site.¹³³ Resolutions of the Governing Council were sourced from Talmon.¹³⁴ Other documents were sourced as indicated.

Where a particular methodology has been employed in relation to a chapter below, it is described near the beginning of the chapter. We will not consider the political process in Iraq or "democratisation". Much of this process took place after the end of the occupation.¹³⁵

Overview

In Chapter 2 we will identify the rules of the law of occupation which require the occupying state to respect the laws and institutions of the occupied territory and will examine them in some detail.

In Chapter 3 we will commence an examination of the challenge posed to those rules by the idea that occupying states should be freed of their obligations to respect the

¹³² At the beginning of the research the legislation was available from the CPA's web site at <http://www.iraqcoalition.org>. Subsequently, that web site ceased to be operational but was archived at <http://govinfo.library.unt.edu/cpa-iraq/regulations/> (jointly hosted by the US Government Printing Office and the University of North Texas Libraries).

¹³³ The web site of the Iraq (Chilcot) Inquiry was originally at <http://www.iraqinquiry.org.uk> but has now been archived as part of the UK Government Web Archive (part of the UK National Archives) at <https://webarchive.nationalarchives.gov.uk/20171130130529/http://www.iraqinquiry.org.uk/>.

¹³⁴ Stefan Talmon, *The Occupation of Iraq, Vol. II, The Official Documents of the Coalition Provisional Authority and the Iraqi Governing Council* (Hart Publishing, 2013). Talmon has provided an important service to scholars of the occupation of Iraq by obtaining the text of the resolutions of the Governing Council, arranging for them to be translated into English and publishing them, as well as by reproducing certain other documents which are difficult to track down otherwise.

¹³⁵ Key events in the political process which took place after the end of occupation included: elections to a Transitional National Assembly on 30 January 2005; the assumption of power by the Iraqi Transitional Government on 3 May 2005; the referendum on a new Iraqi Constitution on 15 October 2005; and parliamentary elections on 15 December 2005: see the useful timeline of events at p. 141 of the Executive Summary to The Report of the Iraq Inquiry, Report of a Committee of Privy Counsellors, 6 July 2016 (HC 264). However, as noted above, some writers argue that the occupation continued after 28 June 2004.

existing law and institutions so as to be permitted to engage in “transformational” or “transformative” occupations. More specifically, that chapter will consider the damaging consequences of the CPA’s legislation on de-Ba’athification and on the dissolution of the Iraqi armed forces; the fate of proposals for privatisation of Iraq’s state-owned enterprises; and evidence of non-implementation of the CPA’s commercial laws during the occupation.

In Chapter 4 we will continue examination of the challenge from “transformational” or “transformative” occupation by examining the CPA’s legislation in the field of human rights and whether it succeeded in transforming the human rights position in Iraq.

In Chapter 5 we will examine the challenge to the rules of occupation law which require an occupying state to respect the existing law and institutions posed by the applicability of human rights treaties in occupied territory.

In Chapter 6 we will examine the challenge posed by the idea that the Security Council may authorise a departure from, or override, the rules which require respect for existing laws and institutions.

In Chapter 7 we will draw together the conclusions.

Chapter 2

The rules of the law of occupation requiring respect for the existing law and institutions

Before we consider the challenges to those rules of the law of occupation which require the occupying state to respect the laws and institutions of the occupied territory, we will identify those rules and examine them in some detail. We are here concerned with “the law of occupation”, as that term is normally understood, i.e. as a branch of international humanitarian law, or the international law of armed conflict. We will consider the application of international human rights law in occupied territory in Chapter 5.

The fundamental rule of international law which deals with the power of an occupying state to legislate in occupied territory is contained in Article 43 of the Regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 (“the Hague Regulations”). As will be seen in greater detail below, Article 43 requires an occupying state to respect the laws in force in the territory occupied unless it is absolutely prevented from doing so. As shown above, the rules contained in the Hague Regulations form part of customary international law. Therefore the rule contained in Article 43 which requires an occupying state to respect the existing law in occupied territory (unless absolutely prevented from doing so) forms part of customary international law.

It is important to note that where an occupying state enacts legislation in violation of the restrictions placed upon its legislative power by Article 43, there is a risk that courts in the occupied territory will hold the legislation to be legally invalid and devoid of legal effect.¹³⁶ In some occupied states the basis for this will be that the occupied state

¹³⁶ See Felice Morgenstern, ‘Validity of the Acts of the Belligerent Occupant’, (1951) 28 B.Y.B.I.L. 291. (See also the UK’s military manual on the law of armed conflict, which states that “the local courts [in occupied territory] ... have an obligation to enforce the proper laws and orders of the occupying power, but before doing so are entitled to determine whether those laws and regulations are within the competence of the occupying power under international law”: The Joint Service Manual of the Law of

has enacted legislation incorporating the Hague Regulations into its domestic law.¹³⁷ However, in many cases courts in occupied territory have held that the rules contained in the Hague Regulations form part of customary international law and on that basis form part of the domestic law of the occupied state.¹³⁸ Courts in occupied territory have made decisions during the course of the occupation concerned holding that occupation legislation is invalid.¹³⁹ Courts in formerly occupied territory have also ruled, after the relevant occupation has ended, that occupation legislation was invalid *during the occupation*.¹⁴⁰ Again, the Courts of third states have on occasion ruled that legislation of an occupying state cannot be recognised as valid.¹⁴¹ Where legislation is held to be invalid it may have consequences for individuals and companies who have relied upon it.

It therefore requires to be emphasised that there needs to be a sound legal basis for legislation enacted by an occupying state. This is something which needs to be borne in mind when we later consider relatively novel arguments for an occupying state to have broad legislative power.

One consequence of Article 43, and indeed of the fact that an occupying state does not acquire sovereignty over the occupied territory by virtue of going into occupation of it, is that, as a number of writers have acknowledged, the occupying state is not entitled to apply its own domestic laws to the occupied territory.¹⁴² However, we learn from the

Armed Conflict (2004, promulgated as directed by the Chiefs of Staff) (Joint Service Publication 383) [United Kingdom], p. 284, para. 11.27)

¹³⁷ Ibid, pp. 291-92

¹³⁸ Ibid, pp. 292-93

¹³⁹ Ibid, pp. 301-04. And see *Øverland's Case*, Norway, District Court of Aker, 25 August 1943, [1943-1945] A.D. p. 446 (referred to by Morgenstern at p. 303)

¹⁴⁰ Morgenstern (n 136) 304-05. See also Lord McNair and A.D. Watts, *The Legal Effects of War* (4th ed., 1966, Cambridge University Press), p. 409. And see e.g. *De Brabant and Gosselin v. T. and A. Florent*, Belgium, Court of Appeal of Brussels, 22 July 1920, [1919-22] A.D. p. 463 (referred to by Morgenstern at p. 305). And see also *Commune of Grace-Berleur v. Colliery of Gosson Laqasse and Associates*, Belgium, Court of Cassation, 29 July 1919 [1919-1922] A.D. p. 461; *Randsfjordsbruket and Jevnaker Kommune v. Viul Tresliperi*, Supreme Court, Norway, 30 November 1951, [1951] I.L.R. 635

¹⁴¹ Morgenstern (n 136) 317. See e.g. *Aboitiz & Co v. Price*, United States District Court, Utah, 16 June 1951, [1951] I.L.R. p. 592 (referred to by Morgenstern at p. 317)

¹⁴² Von Glahn, *The Occupation of Enemy Territory, A Commentary on the Law and Practice of Belligerent Occupation* (The University of Minnesota Press, Minneapolis, 1957), p. 94; Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', (2005) 16 EJIL 661, p. 668. See also the UK's military manual which states that "The domestic law of the occupying power (apart from that affecting its own armed forces) does not extend to occupied territory": see The Joint Service Manual of the Law of Armed Conflict (2004, promulgated as directed by the Chiefs of Staff) (Joint

Chilcot Report that the ORHA, the forerunner of the CPA, enacted orders applying US labour and customs laws to the Iraqi port of Umm Qasr.¹⁴³ On the basis of the principle just stated, that was unlawful.

The origin of Article 43 of the Hague Regulations

The origin of Article 43 of the Hague Regulations can be traced back to the Draft International Declaration on the Laws and Customs of War adopted by the Brussels Conference in 1874. Articles II and III of the Draft International Declaration provided (in the English translation which was employed by British officials) as follows:

“II. The authority of the legal power being suspended, and having actually passed into the hands of the occupier, he shall take every step in his power to re-establish and secure, as far as possible, public safety and social order [*l’ordre et la vie publique*”¹⁴⁴].

“III. With this object he will maintain the laws which were in force in the country in time of peace, and he will only modify, suspend, or replace them by others if necessity obliges him to do so.”¹⁴⁵

Service Publication 383) [United Kingdom], p. 284, para. 11.25. Further state practice on this point can be found in the response of the U.N. Security Council to the Golan Heights Law enacted by the Israeli Knesset, which provided that “The law, jurisdiction and administration of the State shall apply to the Golan Heights...”: see Golan Heights Law – 5742/1981, 14 December 1981 [Israel], reproduced in (1982) Vol. 21 I.L.M., p. 163. In response the Security Council adopted Resolution 497 (1981) which stated that the Council “*Decides* that the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect” and “*Demands* that Israel, the occupying Power, should rescind forthwith its decision”: see U.N. Security Council Resolution 497 (1981), adopted 17 December 1981 (italics in original). The Resolution was adopted unanimously.

¹⁴³ Chilcot Report, Vol. 9, p. 33 (Section 10.1, para, 177), citing minute, Llewellyn to Chilcott, 31 March 2003, ‘Iraq: ORHA: Current Activity’. The Report records that at the time it was noted that “UK military lawyers ... were becoming alarmed at ORHA’s activities” because “there was no clear legal authority” for these orders (ibid). No further details are given in the Report of the legal analysis.

¹⁴⁴ On the proper translation of “*l’ordre et la vie publique*” see main text below.

¹⁴⁵ Report on the Proceedings of the Brussels Conference on the proposed Rules for Military Warfare, 4 September 1874 [UK] [drawn up by Sir A. Horsford, the delegate of Great Britain], reproduced in (1873-1874) Vol. LXV British and Foreign State Papers, p. 1067, at p. 1075. The original French is as follows:

“II. *L’autorité du pouvoir legal étant suspendue et ayant passé de fait entre les mains de l’occupant, celui-ci prendra toutes les mesures qui dependent de lui en vue de rétablir et d’assurer, autant qu’il est possible, l’ordre et la vie publique.*

“III. *A cet effet il maintiendra les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifier, ne les suspendra, ou ne les remplacera que s’il y a nécessité.*”

As can be seen, Article III of the Draft International Declaration provided that an occupying state was required to maintain the laws which were in force prior to the occupation and was not permitted to modify, suspend or replace such laws unless necessity obliged it to do so.

This formulation of the occupying power's obligations in relation to the laws in the occupied territory, as adopted by the Brussels Conference, should be contrasted with the original proposal contained in the draft convention which was produced by Russia and which was used as the basis of the negotiations at the Conference, Russia having instigated the calling of the Conference. The original proposal, contained in clause 2 of the draft convention, was as follows:

“The enemy who occupies a district can, according to the requirements of the war and in the public interest, either maintain in full force the laws existing there in time of peace; modify them in part; or suspend them altogether.”¹⁴⁶

On the face of it, this original proposal would have permitted an occupying state to modify or suspend pre-occupation laws “in the public interest” (“*en vue de l'intérêt public*”) without there being a necessity to do so. The Conference replaced this permissive approach with a more restrictive formula which would permit the occupying power to modify, suspend or replace such laws only where necessity requires it to do so.

The Brussels Conference submitted the Draft International Declaration, as amended and adopted by the Conference, to the governments which were represented at the

(Projet d'une Déclaration Internationale concernant les Lois et Coutumes de la Guerre (Texte modifié par la Conférence), reproduced in (1873-1874) Vol. LXV British and Foreign State Papers, p. 1059, at pp. 1059-60)

¹⁴⁶ English translation reproduced in Report on the Proceedings of the Brussels Conference on the proposed Rules for Military Warfare, 4 September 1874 [UK], reproduced in (1873-1874) Vol. LXV British and Foreign State Papers, p. 1067, at, p. 1072. The original French is “*L'ennemi qui occupe un territoire peut, selon les exigences de la guerre et en vue de l'intérêt public, soit maintenir la force obligatoire des lois qui y étaient en vigueur en temps de paix, soit les modifier en partie, soit les suspendre entièrement.*”: see *Projet d'une Convention Internationale concernant les Lois et Coutumes de la Guerre* (Russian draft), Clause 2, reproduced in (1873-1874) Vol. LXV British and Foreign State Papers, p. 1005, at p. 1006

Conference with the intention that further discussion would take place with a view to the finalisation of an international agreement.¹⁴⁷ However, it was not until The Hague Conference of 1899 that agreement was reached on a treaty on the laws and customs of war as they apply in land warfare. The Convention (II) with respect to the Laws and Customs of War on Land signed at The Hague on 29 July 1899 is based on the Draft International Declaration produced by the Brussels Convention.¹⁴⁸ Articles II and III of the Brussels Draft were, in effect, amended and merged, becoming Article 43 of the Regulations annexed to the 1899 Convention.

A second conference took place at The Hague in 1907 at which further conventions relating to the laws of war were adopted. The Convention (IV) respecting the Laws and Customs of War on Land signed at The Hague on 18 October 1907, with its annexed Regulations, is a revised version of the 1899 Convention (II) and Regulations.¹⁴⁹ Generally, each of the rules contained in the 1907 Regulations appears under the same article number as the corresponding rule of the 1899 Regulations. Article 43 of the 1899 Regulations was not revised by the second Hague Conference so that the version contained in the 1907 Regulations is (in the original French) identical to that in the 1899 Regulations (although English translations produced subsequently contain differences as between the two versions giving the somewhat misleading impression that the text of Article 43 as it appeared in the 1899 Regulations was amended when it was incorporated into the 1907 Regulations).¹⁵⁰ We will now turn to the precise terms of Article 43 and their proper interpretation.

¹⁴⁷ English translation of the final Protocol of the Conference, reproduced in Report on the Proceedings of the Brussels Conference on the proposed Rules for Military Warfare, 4 September 1874 [UK], reproduced in (1873-1874) Vol. LXV British and Foreign State Papers, p. 1067, at pp. 1108-09

¹⁴⁸ An English translation of the text appears in James Brown Scott (Ed.), *The Hague Conventions and Declarations of 1899 and 1907* (3rd Ed., 1918, Oxford University Press, New York), at pp. 100-29

¹⁴⁹ The two conventions and sets of regulations are reproduced side-by-side in James Brown Scott (Ed.), *The Hague Conventions and Declarations of 1899 and 1907* (3rd Ed., 1918, Oxford University Press, New York), at pp. 100-29

¹⁵⁰ In the UK Treaty Series, the English translations appended to the 1899 and 1907 Conventions contain a number of discrepancies: "The authority of the legitimate power" (1899) became "The authority of the power of the State" (1907); "having actually passed" became "having passed *de facto*"; "take all steps in his power" became "do all in his power"; "to re-establish and insure" became "to restore, and ensure"; "while respecting" became "respecting at the same time". Again, the two versions of Article 43 are not translated consistently in Scott, who places them side-by-side: "having actually passed" (1899) becomes "having in fact passed" (1907); "take all steps in his power" becomes "take all the measures in his power"; "to re-establish and insure" becomes "to restore, and ensure": see James Brown Scott, *The Hague Conventions and Declarations of 1899 and 1907* (3rd Ed., 1918, Oxford University Press, New York), at p. 123.

Article 43¹⁵¹

The Hague Convention (IV) of 1907 was done in French. Accordingly, Article 43 of the Regulations annexed to the Convention is in French.¹⁵² A commonly-used English translation of Article 43 is as follows:

“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.”¹⁵³

However, it was realised from an early stage that “safety” is not an accurate translation of the phrase “*vie publique*” which appears in the French text. Thus, Westlake, writing in 1907, noted that the word “safety” does not adequately render the “*vie publique*” of the original, which, he stated, describes “the social and commercial life of the country”.¹⁵⁴ Similarly, Phillipson wrote that “*l’ordre et la vie publics*” refers not only to public order and safety but also to “the entire social and commercial life of the community”.¹⁵⁵ Schwenk points out that the meaning of “*la vie publique*” was

¹⁵¹ Oppenheim described the rule enacted in Article 43 as “of fundamental importance”: L. Oppenheim, *International Law, A Treatise*, Vol. II, War and Neutrality (2nd Ed., 1912, Longmans, Green & Co., London), p, 211.

¹⁵² “*L’autorité du pouvoir légal ayant passé de fait entre les mains de l’occupant, 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.*”

¹⁵³ This is the official United States Government translation of Article 43, reproduced in Charles I. Bevans, *Treaties and Other International Agreements of the United States America 1776-1949*, Vol. 1 (Department of State Publication 8407, released November 1968), at p. 651. This translation is also reproduced in James Brown Scott (Ed.), *The Hague Conventions and Declarations of 1899 and 1907* (3rd Ed., 1918, Oxford University Press, New York), at p. 123 and Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War* (3rd Ed., 2000, Oxford University Press), pp. 80-81. C.f. the UK Government translation in [UK] Treaty Series, No. 9 of 1910 (Cd. 5030): “The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country.” It may be noted that, despite the other differences between them, both the US and the UK translations of Article 43 contain, as the questionable translation of “*l’ordre et la vie publics*”, “public order and safety” – see main text below.

¹⁵⁴ John Westlake, *International Law*, Part II, War (Cambridge University Press, 1907), p. 84; 2nd Ed., 1913, p. 95

¹⁵⁵ Coleman Phillipson, *Wheaton’s Elements of International Law* (5th English Ed., 1916, Stevens & Sons Ltd), p. 522. See also A. Berriedale Keith, *Wheaton’s Elements of International Law* (6th English Edition, 1929, Stevens & Sons Ltd), Vol. II, p.783, retaining the text on this point.

explained at the Convention of Brussels on 12 August 1874 by the Belgian representative, Baron Lambert, as “*des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours*” (“social functions, ordinary transactions which constitute daily life”).¹⁵⁶ This led Schwenk to suggest “civil life” as a suitable translation of “*la vie publique*”.¹⁵⁷

There is also judicial authority for the interpretation that “*l’ordre et la vie publics*” embraces the entire social and commercial life of the community. In *Grahame-v-The Director of Prosecutions*, the Court of Criminal Appeal in the British Zone of Control in Germany held that “*l’ordre et la vie publics*” “refers to the whole social, commercial and economic life of the community”.¹⁵⁸

Article 43 therefore contains two obligations. First, the occupying state is under a duty to take all measures in his power to restore, and ensure, as far as possible, public order and the social and commercial life of the country (“*l’ordre et la vie publics*”).¹⁵⁹ Second, the occupying power is under a duty to respect the pre-occupation laws in force in the occupied territory “unless absolutely prevented” (“*sauf empêchement absolu*”, in the authentic French text). The occupying state would fail to respect the existing law if it repealed, amended or suspended a legal provision, or if it enacted a new provision which was inconsistent with an existing provision. It would only be entitled to take such measures if it was “absolutely prevented” from leaving the existing law as it was.

¹⁵⁶ Edmund H. Schwenk, ‘Legislative Power of the Military Occupant Under Article 43, Hague Regulations’, (1944-45) 54 Yale Law Journal 393. Schwenk’s translation.

¹⁵⁷ *Ibid*

¹⁵⁸ *Grahame-v-The Director of Prosecutions*, (Court of Criminal Appeal, British Zone of Control, Germany) (1947) 14 A.D. 228, at p. 232. See also *Abu Aita-v-Commander of the Judea and Samaria Region* (Supreme Court of Israel) (1983) 13 IYBHR 348, at p. 355

¹⁵⁹ For an example of an occupying state being held by a court to have breached the obligation contained in Article 43 to restore and ensure public order in occupied territory, see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] I.C.J. Reports, p. 168 at p.231 (para. 178); p. 240-41 (para. 209) and p. 244 (para. 219) (regarding the failure to prevent the killing of civilians in an inter-ethnic conflict in the occupied territory); and p. 253 (para. 250) (regarding the failure to prevent the looting, plundering and exploitation of natural resources)

What does “unless absolutely prevented” mean? The most plausible interpretation of the phrase “unless absolutely prevented” is offered by Schwenk.¹⁶⁰ He argues that the term “*sauf empêchement absolu*” should not be interpreted literally “since the occupant is never absolutely prevented from respecting the laws of the occupied country”.¹⁶¹ The term has meaning, he continues, only if it is completed by a phrase such as “by necessity”.¹⁶² Schwenk points to the fact that the term “unless absolutely prevented” is a rephrasing of the word “necessity” in Article 3 of the Declaration of Brussels of 1874 and cites Meurer who commented that “... Art. 3, Declaration of Brussels, already permitted changes of the laws in case of ‘necessity’; but this limitation, expressed at the end of Art. 43, has been emphasised more sharply and more definitely”.¹⁶³ Schwenk concludes that “*empêchement absolu*” means “absolute necessity” and that, accordingly, an occupant must respect the existing law of the occupied country unless it is prevented from doing so by “absolute necessity”.¹⁶⁴

Support for this test of absolute necessity can be found in the current UK manual on the law of armed conflict, the Joint Service Manual of the Law of Armed Conflict, which was issued in 2004.¹⁶⁵ That manual states:

“The occupying power 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....

¹⁶⁰ Edmund H. Schwenk, ‘Legislative Power of the Military Occupant Under Article 43, Hague Regulations’, (1944-45) 54 Yale Law Journal 393

¹⁶¹ Ibid, pp. 399-400

¹⁶² Ibid, p. 400

¹⁶³ Meurer, *Die Voelkerrechtliche Stellung der vom Feind besetzten Gebiete* (Tübingen, 1915), p. 237, cited by Schwenk (n 160) 401, n. 40 (translation by Schwenk)

¹⁶⁴ Schwenk (n 160), p. 401. Whilst Schwenk does also use the term “necessity” in this article, apparently as shorthand for “absolute necessity” (a practice which will sometimes be adopted here also), he makes clear, as shown in the main text above, that he regards the test as one of “absolute necessity”. C.f. Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942, Carnegie Endowment for International Peace), at p. 89, who argues that “absolutely prevented” means “at least” that new laws can only be supplements to old laws, that they must be “sufficiently justified”, and that “the benefit of doubt belongs to the old, not to the new, laws”. The suggestion that existing laws may be amended if the change is “sufficiently justified” represents a rather permissive approach and does not appear to be consistent with the phrase “unless absolutely prevented”, even if one accepts that the latter phrase cannot be taken literally.

¹⁶⁵ The Joint Service Manual of the Law of Armed Conflict (2004, promulgated as directed by the Chiefs of Staff) (Joint Service Publication 383) [United Kingdom]

“...The occupying power should make no more changes to the law than are *absolutely necessary*, particularly where the occupied territory already has an adequate legal system.”¹⁶⁶ (Italics added)

It is submitted that a requirement of necessity in order for a change in the law to be justified represents a relatively high hurdle for an occupying Power to overcome. In order to understand the meaning of the word “necessity” it is enlightening to consider the relevant entry in the Oxford English Dictionary, which contains the following potentially relevant senses of the word:

“... 3.a. The constraining power of circumstances; a condition or state of things compelling to a certain course of action....

7. a. An unavoidable compulsion or obligation of doing something b. an imperative need *for* or *of* something

8. The fact of being indispensable; the indispensableness *of* some act or thing

9. b. An indispensable or necessary thing”¹⁶⁷

What is the effect of placing the word “absolute” in front of “necessity”? The definition of “absolute” in the Oxford English Dictionary contains a number of senses of the word but there appear to be only two which seem applicable to “necessity”: “in the strictest sense” and “in the fullest sense”.¹⁶⁸ The occupying state is therefore obliged to leave the existing law in place unless there is a necessity in the strictest sense, or in the fullest sense, for changing it. On the basis of the dictionary definition of “necessity” quoted above, an occupying power may be justified in changing the law where it can fairly be said that it is compelled to do so by conditions in the occupied

¹⁶⁶ Ibid, p. 284 (paras. 11.25-11.25.1)

¹⁶⁷ J. A. Simpson and E. S. C. Weiner (eds.), *The Oxford English Dictionary* (2nd Ed., 1989, Clarendon Press, Oxford), Vol. X, pp. 277-78

¹⁶⁸ J. A. Simpson and E. S. C. Weiner (eds.), *The Oxford English Dictionary* (2nd Ed., 1989, Clarendon Press, Oxford), Vol. I, p. 48. Other senses of the word “absolute” in the definition, such as “complete”, “perfect” or “entire”, do not seem relevant.

territory, or that there is an imperative need to make the change to the law, or that the change is indispensable or necessary. It would not be a sufficient justification for changing the law in occupied territory for the occupying state to be able to say that the change would be administratively convenient, or that it would be reasonable, or that it would be (merely) beneficial to the population. Dinstein, who regards the appropriate test under Article 43 as one of “necessity”, lapses at one point in his book into saying that the concept of necessity allows “additional legislation that is *reasonably required by the conditions of occupation*” (italics added).¹⁶⁹ This appears to suggest a lowering of the relevant hurdle and suggests that it may be well to recall that the appropriate test is one of “absolute necessity”.

That states have understood the restrictive and conservative nature of the law of belligerent occupation in relation to the occupying state’s power to change the existing law in occupied territory is indicated by a number of military manuals which have been issued over the years and which state that important or significant changes to the existing law should be avoided. Thus, the Manual of Military Law issued by the UK in 1914 stated that “important changes [to the existing laws] can seldom be necessary and should be avoided as far as possible”.¹⁷⁰ Similarly, the Manual of Military Law issued by the UK in 1958 stated:

“... in occupied territory possessing an adequate legal system in conformity with generally recognised principles of law important changes [to the existing law] should be avoided as far as possible”¹⁷¹

The equivalent section of the UK’s Joint Service Manual of 2004 states, as noted above, that an occupying power should make “no more changes to the law than are absolutely necessary...”. The Australian manual issued in 2006 states:

¹⁶⁹ Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, Cambridge, 2009), p. 116

¹⁷⁰ War Office, *Manual of Military Law* (1914, His Majesty’s Stationery Office, London) [United Kingdom], p.290 (para. 366)

¹⁷¹ The War Office, *The Law of War on Land, Being Part III of the Manual of Military Law, Issued by Command of the Army Council* (1958, Her Majesty’s Stationery Office, London) [United Kingdom], p. 145 (para. 523)

“In occupied territory possessing an adequate legal system conforming with generally recognised principles of law, significant changes [to the existing law] should be avoided.”¹⁷²

The US Army and Navy Manual of Civil Affairs Military Government issued in 1947 states that “Only essential ordinances” should be issued and that “Therefore, the fullest advantage should be taken of established laws and customs”.¹⁷³

What categories of purposes or objectives would justify an occupying state to alter the existing law, subject to surmounting the “unless absolutely prevented” hurdle? First, there is widespread agreement among writers that military purposes, including protection of the security and safety of the occupying forces, may justify changes to, or suspension of laws.¹⁷⁴ There is also judicial authority that military purposes may

¹⁷² Law of Armed Conflict (2006, issued by the Chief of the Defence Force) (Australian Defence Doctrine Publication 06.4) [Australia], p.12-6 (para. 12.24)

¹⁷³ Departments of the Army and Navy, United States Army and Navy Manual of Civil Affairs Military Government (October 1947) (Department of the Army Field Manual FM 27-5; Department of the Navy Manual OPNAV P22-1115), p. 59 (Section 29.a.).

¹⁷⁴ L. Oppenheim, *International Law*, Vol. II (1912) (n 151) 214-15 (occupant may “temporarily alter the laws, especially the Criminal Law” “so far as it is necessary for military purposes”) and 211 (occupant may make changes in the law “which are temporarily necessitated by his interest in the maintenance and safety of his army and the realisation of the purpose of war”); H. Lauterpacht, *International Law, A Treatise*, By L. Oppenheim, vol. II (7th ed., 1952, Longmans, Green & Co), p. 446 (“so far as it is necessary for military purposes” an occupant may “temporarily alter the laws...”); and p. 437 (occupant may make changes in the law “which are temporarily necessitated by his [the occupant’s] interest in the maintenance and safety of his army and the realisation of the purpose of war”); John Westlake, *International Law*, Part II, War (Cambridge University Press, 2nd Ed., 1913), p. 96 (variations in the law “...necessary for the protection of [the invading army and its followers], and for the unhindered prosecution of the war by them...”); Lord McNair and A.D. Watts, *The Legal Effects of War* (4th ed., 1966, Cambridge University Press), p. 369 (“in so far as it may be necessary for ... the safety of his [the occupant’s] forces and the realization of the legitimate purpose of his occupation”); M Bothe, ‘Occupation, Belligerent’, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. III (1997, Elsevier), p. 763 at p. 765 (constitutional and administrative norms and penal laws may be repealed by the occupant “to the extent that the military purpose of the occupation necessitates a change”); Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942, Carnegie Endowment for International Peace), p. 86 (occupants would seem to have the right to issue such regulations as may be “required for legitimate military ends”); Schwenk (n 160) 406-07 (“[absolute] necessity created ... by the occupant’s military interest” justifies changes to the law; because the “Nazi system” constituted a threat to the security of the Allied occupant’s army, the Allies as occupants were entitled to abolish all legal provisions which expressed racial, religious or political discrimination); Julius Stone, *Legal Controls of International Conflict, A Treatise on the Dynamics of Disputes – and War – Law* (1954, Stevens & Sons Ltd), p. 699 (“in all matters touching the security and operations of the army of occupation, where the administration of the ordinary law in the ordinary courts does not suffice, the local law and courts are liable to be replaced by military law and courts”); Gerhard von Glahn, *The Occupation of Enemy Territory, A Commentary on the Law and Practice of Belligerent Occupation* (1957, The University of Minnesota Press), p. 100 (the occupant’s military security); Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press, 1959), p.

justify changes to the existing law.¹⁷⁵ Where such a ground is invoked for changing the law in occupied territory it must be borne in mind that, as in relation to any general prohibition in the laws of war which is subject to an exception for military necessity, it has to be ascertained whether the exception is relied upon properly and in good faith.¹⁷⁶ An occupying state will normally suspend laws relating to recruitment and conscription, the right to bear arms, freedom of assembly, freedom of expression (including freedom of the press) and suffrage.¹⁷⁷ The suspension of such laws for the duration of the occupation may be justified under military necessity.¹⁷⁸

Second, there is broad agreement among writers that an occupying state may alter the existing law where it is necessary for the maintenance of public order.¹⁷⁹ There is also judicial authority to the effect that the maintenance of public order is a justification for amending the existing law.¹⁸⁰

Third, a number of writers acknowledge that an occupying state may alter the law for the purpose of protecting the welfare of the population of the occupied territory.¹⁸¹ In

223 (occupier may exercise the power “necessary” for “the purposes of the war”) and p. 224 (occupant may alter or suspend existing laws, or promulgate new ones, “if demanded by the exigencies of war”).

¹⁷⁵ *City of Antwerp-v-Germany* (Germano-Belgian Mixed Arbitral Tribunal, 19 October 1925) [1925-26] A.D. 473, at p. 474 (military necessity may justify change to existing law but such justification not made out on the facts of the case)

¹⁷⁶ Yoram Dinstein, ‘Military Necessity’, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. III (1997, Elsevier), p. 395 at p. 396.

¹⁷⁷ Stone (n 174) 699; von Glahn, *The Occupation of Enemy Territory* (n 174) 98; Greenspan, *The Modern Law of Land Warfare* (n 174) 223; Schwenk (n 160) 403-04 [citing Hyde]

¹⁷⁸ Stone (n 174) 699 (justified as “matters touching the security and operations of the army of occupation”)

¹⁷⁹ Oppenheim, *International Law*, Vol. II (1912) (n 151) 214-15 (“so far as it is necessary ... for the maintenance of public order and safety”); Lauterpacht, *Oppenheim’s International Law*, Vol. II (n 174) 446 (“so far as it is necessary ... for the maintenance of public order and safety”); McNair and Watts, (n 174) 369 (“...in so far as it may be necessary for the maintenance of order...”); Feilchenfeld (n 174) 86-87 (to maintain and to promote law and order); Stone (n 174) 698 (the occupant’s duty to ensure “public order and safety” under Article 43 is part of the “dual basis” for the Occupant’s legislative power (along with his right to pursue his own military ends)); Schwenk (160) 406 (“necessity created ... by the occupied country’s interest in the restoration of public order...” may justify changes to the law); Greenspan, *The Modern Law of Land Warfare* (n 174) 223 (the power necessary for the maintenance of order and safety).

¹⁸⁰ *City of Antwerp-v-Germany* (Germano-Belgian Mixed Arbitral Tribunal, 19 October 1925), [1925-26] A.D. 473, at p. 474 (maintenance of public order may justify decree amending the existing law but such justification not established on the facts of the case)

¹⁸¹ von Glahn, *The Occupation of Enemy Territory* (n 174) 97, giving the example of a law which provides for a moratorium on the repayment of debts and which is enacted purely for the benefit of a distressed population; Sassòli (n 142) 678 (occupant may legislate to ensure the “civil life” of the population if the existing law or its absence absolutely prevents it from achieving that objective); Dinstein, *The*

terms of state practice, the manuals on the law of armed conflict issued by a number of states expressly recognise “the welfare of the population” as a ground for altering the existing law.¹⁸² There is also judicial authority that measures enacted in the interest of the population in occupied territory may be justified under Article 43.¹⁸³

Lauterpacht argued that in the “exceptional cases” in which the law of the occupied state is “such as to flout and shock elementary conceptions of justice and of the rule of law” the occupying state is entitled to disregard it.¹⁸⁴ He refers to a law enacted in 1944 by the Allied occupation authorities in Germany which provided that Nazi laws were not to be applied judicially or administratively where such laws would cause injustice or inequality, *inter alia*, by discriminating against any person by reason of his race, nationality, religious belief or opposition to the Nazi Party.¹⁸⁵ Lauterpacht argued that it could be said “without unduly straining the interpretation of Article 43” that the Western Powers were “absolutely prevented” from administering laws the application

International Law of Belligerent Occupation (2009) (n 169) 115 (the legislative power vested in the occupying power covers “action taken ... on behalf ... of the local inhabitants”)

¹⁸² The War Office, *The Law of War on Land*, being Part III of the Manual of Military Law, Issued by Command of the Army Council (1958, Her Majesty’s Stationery Office, London) [United Kingdom], p. 145 (para. 523) (if, *inter alia*, “the welfare of the population” so requires, it is within the power of the Occupant to alter, suspend or repeal existing laws, or to promulgate new laws); The Joint Service Manual of the Law of Armed Conflict (2004, promulgated as directed by the Chiefs of Staff) (Joint Service Publication 383) [United Kingdom], p. 284 (para. 11.25) (occupying power may amend the existing law or promulgate new law if this is necessitated by, *inter alia*, “the welfare of the population”); Law of Armed Conflict (2006, issued by the Chief of the Defence Force) (Australian Defence Doctrine Publication 06.4) [Australia], p. 12-5 (para. 12.23) (if, *inter alia*, “the welfare of the population” so requires, it is within the power of the occupying power to alter, suspend or repeal existing laws or to promulgate new laws); Joint Doctrine Manual, Law of Armed Conflict at the Operational and Tactical Levels (2001, issued on authority of the Chief of Defence Staff) (B-GJ-005-104/FP-021) [Canada], p. 12-3 (section 1209, para. 2 (if, *inter alia*, “the welfare of the population” so requires, it is within the power of the occupant to alter, suspend or repeal existing laws, or to promulgate new laws))

¹⁸³ *Bochart v. Committee of Supplies of Corneux*, Belgium, Court of Appeal of Liège, 28 February 1920 [1919-1922] A.D. p. 462 (order made by the occupation authority was found to have been issued for the purpose of regulating and diminishing the exorbitant price of vegetables and was therefore held to be in conformity with Article 43 and valid); *City of Malines-v-Société Centrale Pour L’Exploitation du Gaz* (Brussels Court of Appeal, 25 July 1925) [1925-26] A.D. 475 (decree enacted by occupation authorities which had the effect of increasing the cost of supplying gas was justified by the necessity for providing for the needs of the population and therefore fell within the scope of measures to restore or ensure “l’ordre et la vie publics” which were permitted under Article 43); *L. v. N. (Olive Oil Case)*, Greece, Aegean Court of Appeal, Judgment No. 41 of 1948 15 I.L.R. 563 (upholding the validity of proclamation issued by occupation authority which ordered the “concentration” at certain points of olive oil to meet the needs of the population).

¹⁸⁴ Lauterpacht, *Oppenheim’s International Law*, Vol. II (n 174) 446-47

¹⁸⁵ Citing Military Government Law No. 1, Article II

of which was “utterly opposed to modern conceptions of the rule of law”.¹⁸⁶ The question whether an occupying state is “absolutely prevented” from leaving in place existing law in occupied territory as a result of the occupying state’s obligations under human rights treaties to which it is a party is discussed below in Chapter 5.

Schwenk refers to the occupant being justified in changing the law in the occupied territory as a result of necessity created either by the occupant’s military interest or by “the occupied country’s interest in the restoration of public order and civil life”.¹⁸⁷ This phrase “public order and civil life” is of course Schwenk’s translation of “*l’ordre et la vie publics*”, which Article 43 provides the occupant is obliged to take all the measures in his power to restore and ensure, as far as possible.

However, it should be borne in mind that, as Dinstein comments, the obligation to restore and ensure “*l’ordre et la vie publics*”, and that to respect the laws in force, are “two discrete obligations”.¹⁸⁸ Thus, when considering whether a particular objective might justify changing the existing law under the “*sauf empêchement absolu*” formula, it is not necessary to conclude that such an objective would fall within a proper translation of the enigmatic phrase “*l’ordre et la vie publics*”. Certainly, the subject matter of “*l’ordre et la vie publics*” is capable of justifying legislative change under the “*sauf empêchement absolu*” formula, provided that the threshold of absolute necessity

¹⁸⁶ Lauterpacht, *Oppenheim’s International Law*, Vol. II (n 174) 447. See also Mann, *The Present Legal Status of Germany*, (1947) 1 *International Law Quarterly* p. 314, who had earlier suggested that the repeal of “Nazi legislation” was permitted by the Hague Regulations because an occupying power was “absolutely prevented” from respecting such legislation (at p. 321). Similarly, Greenspan argues that an occupying state is entitled to abrogate “a law repugnant to human decency”, for example discriminatory laws based upon race, colour, creed or political convictions may be repealed (Greenspan, *The Modern Law of Land Warfare* (n 174) 224). See also Greenspan, *ibid*, p. 245 (note 114 and main text thereto), on the authority to reform penal laws which provide for racial discrimination, as a result of the combined effect of Articles 64 and 27 of the Geneva Convention (IV). See also Georg Schwerzenberger, *International Law as applied by International Courts and Tribunals*, Vol. II, *The Law of Armed Conflict* (Stevens & Sons Ltd, 1968), p. 195, who states that an exception from the rule requiring respect for the local law exists where a “civilised Occupying Power” occupies territory of an enemy which has “relapsed into a state of barbarism”. In such an exceptional situation, he states, “compliance with the standard of civilisation” may require the occupying state to legislate for the purpose of destroying the legal foundations of such a barbarous system and restoring “a minimum of civilised life” in the occupied territory (*ibid*). He cites the examples of the Allied occupation of Italy during the Second World War and that of Japan (*ibid*, note 22). Schwerzenberger formulates this exception in terms of “reassertion of the minimum requirements of the standard of civilisation” (*ibid*, p. 196, note 22 continued).

¹⁸⁷ Schwenk (n 160) 406

¹⁸⁸ Dinstein, *The International Law of Belligerent Occupation* (2009) (n 169) p. 90

is met. The “*sauf empêchement absolu*” formula, is capable of embracing situations where an occupying state is prevented from maintaining an existing law by an absolute necessity relating to the welfare of the population in the occupied territory.¹⁸⁹

However, the “*sauf empêchement absolu*” formula is not limited to permitting legislative change where the absolute necessity relates to the restoration and ensuring of “*l’ordre et la vie publics*”. Indeed, if it was so limited, it would not permit legislative change for military purposes, such as for the security of the occupying forces, contrary to the views of the many writers on the subject cited above.

Thus the “*sauf empêchement absolu*” formula is broad in scope (i.e. as to objectives), and certainly broader in scope than “*l’ordre et la vie publics*”, but it is subject to the relatively high threshold of absolute necessity.

The application of the absolute necessity threshold can be illustrated by the decision in *Al-Ja’bari-v-Al-Karim Al-’Awiwi*¹⁹⁰, which concerned an Order (Order No. 145) made by the Commander of the Israel Defence Forces occupying the West Bank authorising Israeli advocates to appear in proceedings before the civil courts of the West Bank, which of course had been governed by Jordan until its occupation by Israel in 1967. Under the pre-occupation Jordanian law, only Jordanian advocates registered with the Jordanian Bar Association could appear as counsel in the courts of the West Bank. The District Court of Hebron had refused to give effect to the Order or to permit the appearance of an Israeli advocate in civil proceedings. However, on appeal, the Court of Appeal of Ramallah (which it should be noted was a court of the occupied territory rather than an Israeli court) upheld the validity of the Order. The Court referred to Article 43 of the Hague Regulations and found that occupation authorities are permitted to amend and supplement laws which were in force in the occupied territory at the date of occupation, if there is an imperative need for such amending or additional legislation.¹⁹¹ The Court held that, on the assumption that the Court is competent to examine whether there is such an imperative need, the situation in the West Bank

¹⁸⁹ Schwenk (n 160) 407 also refers to the Allies at the end of World War II being permitted under Article 43 to change laws *inter alia* where it is “justified by necessity ... in the interest of the population...”.

¹⁹⁰ *Al-Ja’bari-v-Al-Karim Al-’Awiwi*, Court of Appeal of Ramallah, Judgment of 17 June 1968, (1971) 42 I.L.R. 484

¹⁹¹ *Ibid*, p. 486

necessitated the issue of the Order because, of the dozens of advocates in the West Bank, only a very small minority had agreed to practice, whilst the majority had withdrawn from practice leaving the inhabitants with no one to represent them in the courts.¹⁹² The Court also noted that Jordanian law required the involvement of advocates in certain circumstances, for example statements of claim in civil cases for amounts exceeding a certain amount were only receivable in the courts if they were signed by an advocate. Again, in relation to certain alleged offences it was required that an accused be represented by defence counsel. The Court then stated:

“... this Court considers that the refusal of Jordanian advocates in the West Bank to engage in their profession renders the issue of Order No 145 imperative to uphold law and for the orderly operation of the Law Courts in the West Bank Region, as well as to enable the local inhabitants to obtain the services of lawyers.”¹⁹³

The Court concluded that an imperative need therefore existed in the case of Order No. 145; that the occupation authorities were therefore competent to enact it, thus adding a new provision to the law in the occupied territory; and that Israeli advocates were therefore permitted to represent a party to a civil action, or an accused person in a criminal case.

As noted above, the test of (absolute) necessity represents a relatively high threshold. It is therefore not sufficient for a court to justify legislative change on the basis of “the needs of society changing over time” or some other such broader formula. The error of such an approach is illustrated by the case of *Christian Society for the Holy Places-v-Minister of Defence*, decided by the Israeli Supreme Court.¹⁹⁴ The factual background to the case was an industrial dispute between the petitioner-society, which operated a hospital at Bethlehem in the West Bank, and its employees. The responsible officer of

¹⁹² Ibid, p. 487. The Court held, based on an observation by von Glahn, that the courts in the occupied area were not competent to consider whether or not an imperative need existed that required additional or amending legislation (p. 486). However, the Court then held that, even if it proceeded on the assumption that it was competent to examine the question of such imperative need, such need existed.

¹⁹³ Ibid, p. 487

¹⁹⁴ *Christian Society for the Holy Places-v-Minister of Defence*, Supreme Court of Israel, sitting as the High Court of Justice, 14 March 1972, 52 I.L.R. 512

the Military Administration established by Israel sought to utilise a provision contained in a Jordanian labour law of 1960 under which an “arbitration council” (as it is described in the English translation of the judgment reproduced in the International Law Reports) was to be appointed composed of, *inter alia*, representatives of workers and employers selected by their respective organisations.¹⁹⁵ However, such organisations had yet to be established in Jordan so that the arbitration machinery was not in operation at the commencement of the occupation. The Israeli Regional Commander therefore enacted an Order amending the Jordanian labour law by providing that where workers’ and employers’ organisations did not exist, the workers and employer involved in an industrial dispute were to appoint their own representatives, and, if they did not do so, the responsible officer of the Israeli occupation authorities could make the appointment. The amendment made by the Israeli Regional Commander in effect gave the occupation authorities power to impose arbitration in respect of industrial disputes despite the fact that such a system had not

¹⁹⁵ The I.L.R. report does not set out the relevant provisions of Jordanian law. However, the (Jordanian) Labour Code of 1960 (Law No. 21 of 1960) is reproduced (in English) in 1960 Legislative Series-Jor. 1 (published by the International Labour Office (the permanent secretariat of the International Labour Organization)). Section 92 of the Code empowered the relevant Minister to appoint a “conciliation board” for promoting the settlement of industrial disputes. Section 92(2) provided that the board was to consist of a chairman appointed by the relevant Minister and “two or more members representing the employers and workers in equal numbers, who shall be chosen by the representatives of the employers’ and workers’ organisations”. It appears that under the Jordanian code these “conciliation boards” were indeed to carry out conciliation rather than arbitration. The purpose of conciliation is to encourage the parties to reach a compromise, whereas in arbitration the dispute is referred to an outside person or body to make a determination, in the form of an “award”: see Jean de Givry, ‘Prevention and Settlement of Labour Disputes, other than conflicts of rights’ (Ch. 14) in Otto Kahn-Freund and Bob Hepple (Eds), *International Encyclopedia of Comparative Law*, Vol. XV, Labour Law (Mohr Siebeck, Tübingen; Martinus Nijhoff Publishers, Leiden, 2014), section 14-15. Section 96(1) of the Code provides that the Minister may, in certain circumstances, refer a dispute to a conciliation board “for the purpose of an *amicable settlement*” (italics added). Section 97(1) of the Code places upon the board a duty to “endeavour to bring about an amicable settlement”. The Labour Code 1960 did not empower such a board to make an award, but merely required it, in the event that it was unable to bring about settlement, to send a report to the relevant Minister, including “*recommendations* for the settlement of the dispute” (italics added) (Section 97(3)). All of this is more consistent with conciliation than arbitration. However, under section 96(2) of the Code, where a conciliation board failed to settle a dispute, the relevant Minister was obliged to refer it “for decision” to an “industrial tribunal”, appointments to which were to be made from among the judiciary or persons eligible for appointment as judges (section 93(2)). Such an industrial tribunal had the duty to submit an “award” which is described in the Code as being “final” (section 98) and was binding on the parties (section 102). Proceedings before the industrial tribunal could therefore be regarded as a form of arbitration, unlike those before a conciliation board. On that basis, it can be said that the Israeli occupation authorities, through their amendments to the pre-occupation legislation, brought into operation in the West Bank a system which comprised both conciliation and arbitration, the latter commencing upon the failure of the former. The judgment of the majority in *Christian Society for the Holy Places* makes no reference to the industrial tribunals, only the “arbitration councils”, appointments to which were challenged by the petitioner in the particular case: see 52 I.L.R. p. 512, at p. 516.

come into operation in the occupied territory prior to the occupation.¹⁹⁶ Furthermore, the amendment in effect permitted the relevant Israeli officer to appoint a majority of the members of the “arbitration council” if one of the parties to the dispute was uncooperative, or indeed to appoint all the members of the council if both parties were uncooperative, whereas the Jordanian law had only permitted the relevant Minister to appoint the chairman of such a council. The petitioner-society challenged the appointments made by the responsible officer.

The Israeli Supreme Court, by a majority, upheld the validity of the Order amending the Jordanian law of 1960. In the judgment of the majority it was held that if the laws in force in occupied territory do not enable the occupation authority to perform the duty imposed on it with regard to the inhabitants (i.e. the duty to restore and ensure, as far as possible, “*l’ordre et la vie publics*”), that constitutes an “absolute prevention”, empowering it to change those laws.¹⁹⁷ However, the judgment does not explain why the duty of the occupation authorities to restore and ensure, as far as possible, “*l’ordre et la vie publics*” was thought to include a duty to provide compulsory arbitration of labour disputes, something which was not being afforded by government prior to the occupation.

More specifically on the question of necessity, the majority judgment does not identify why it was a necessity for the existing law to be amended. Indeed, the majority judgment does not even acknowledge that under Article 43 of the Hague Regulations a necessity must be established for legislative change.¹⁹⁸ The judgment makes some general statements about “the needs of society” changing as time passes and adapting legislation to “the needs of the time”.¹⁹⁹ However, referring to “needs” would appear

¹⁹⁶ Section 96(1) of the Labour Code of 1960 provides that where conciliation proceedings instituted by a “conciliation officer” have failed the relevant Minister “may, *either with the consent of both parties concerned or if he deems it necessary*, refer the dispute to a conciliation board for the purposes of an amicable settlement” (italics added) (1960 Legislative Series-Jor. 1, p. 32). Note also the references by Cohn J in his dissenting judgment to “obligatory arbitration” (52 I.L.R. 512, at p. 520). Strictly speaking, as indicated in the previous note, the occupation authorities would have the power to impose conciliation followed by obligatory arbitration, if the case was not settled by the conciliation.

¹⁹⁷ 52 I.L.R. 512, at p. 517

¹⁹⁸ In contrast, Cohn J, in his dissenting judgment, does acknowledge the limits of “absolute necessity” in amending the law (at p. 518). Subsequently, in the case of *Abu Aita-v-Commander of the Judea and Samaria Region* (1983) 13 IYBHR 348, at p. 357, the Supreme Court of Israel accepted that “unless absolutely prevented” under Article 43 should be interpreted as requiring necessity.

¹⁹⁹ 52 I.L.R. 512, at p. 514-15

to involve a lower threshold than “necessity” in that not all “needs” can be said to be a necessity. A lack of any necessity to amend the existing labour law in order to introduce a system of compulsory arbitration is suggested by the fact that, according to de Givry, a number of national systems, including “those of the highly industrialised countries”, “reject categorically the imposition of binding arbitration as a means of settling conflicts over interests” in labour disputes, and compulsory arbitration is “a source of considerable controversy” in such disputes because it involves the imposition of a settlement upon the parties without their consent; the infringement of managerial authority on the part of employers; and the deprivation of workers and unions of their right to strike.²⁰⁰ In the *Christian Society for the Holy Places* case, Sussman, Deputy President, giving the judgment of the majority, justified the decision in part by making an analogy between the manning of the “arbitration councils” and an occupying state’s obligation to ensure that the courts of law in the occupied territory are open to the population and functioning properly.²⁰¹ That such an analogy between courts and compulsory arbitration of labour disputes is inapposite is indicated by the fact that states such as the US and UK in which a system of courts of law is regarded as a necessity have nevertheless rejected compulsory arbitration of labour disputes.²⁰² In the absence of a necessity being established for the amendment of the Jordanian law of 1960, the *Christian Society for the Holy Places* case was, it is submitted, wrongly decided.

²⁰⁰ Jean de Givry, ‘Prevention and Settlement of Labour Disputes, other than conflicts of rights’ (Ch. 14) in Otto Kahn-Freund and Bob Hepple (Eds), *International Encyclopedia of Comparative Law*, Vol. XV, Labour Law (Mohr Siebeck, Tübingen; Martinus Nijhoff Publishers, Leiden, 2014), sections 14-126-128. De Givry states that the USA made use of compulsory arbitration during the Second World War but abolished it at the end of that conflict; that in the UK compulsory arbitration was introduced by legislation in 1971 but that this was repealed in 1974; and that in France compulsory arbitration was used “for a few years” before the Second World War (ibid, section 14-87). On the other hand, he states that Australia and New Zealand have long employed compulsory arbitration, and that it is also used by “many developing countries of Asia and Africa” (ibid, section 14-87). There is therefore a divergent approach between states, some employing compulsory arbitration in labour disputes and others not. This does not suggest that states in general have a necessity to legislate for compulsory arbitration of labour disputes.

²⁰¹ 52 I.L.R. p. 512, at p. 516, para. 9

²⁰² On the position in the US and UK, see n 200, above

Dinstein's "Litmus Test"

Dinstein points out that where an occupying power takes measures for the stated purpose of advancing the welfare of the population of the occupied territory, "professed humanitarian concern may camouflage a hidden agenda".²⁰³ Dinstein has argued that if an occupying power enacts a law in the occupied territory, "the decisive factor", or "litmus test", for assessing whether the motive for the legislation is a genuine or contrived concern for the welfare of the occupied population is whether the occupying power has enacted a similar law within its own territory.²⁰⁴ In its early form, Dinstein's theory was that if there is a similar (although not necessarily identical) law in the occupying state, "there can usually be no objection to the legislation under Article 43", but that if there is no such law in the occupying state "an objection is definitely in order".²⁰⁵

In enunciating this theory, Dinstein was echoing a point made in a dissenting judgment in the case of *Christian Society for the Holy Places-v-Minister of Defence*, decided by the Israeli Supreme Court, the facts of which have been described above. In essence, the Israeli Regional Commander amended the Jordanian Labour Code in order to give the occupation authorities power to set up "arbitration councils"²⁰⁶ in respect of industrial disputes under provisions in the Code which had not come into operation prior to the occupation. In his dissenting judgment, Cohn J pointed out that Israel itself had not enacted a law making obligatory in Israel arbitration in industrial disputes, and raised the argument that as long as "public order and civil life" in Israel remain without obligatory arbitration in respect of industrial disputes, the occupation authorities cannot claim that "public order and civil life" in the West Bank require such measures.²⁰⁷

Dinstein comments on the case that "Had the litmus test been resorted to ... the Court should have ruled against the Occupying Power" and that "in attempting to provide the

²⁰³ Dinstein, *The International Law of Belligerent Occupation* (2009) (n 169) 120

²⁰⁴ Ibid, pp. 120-23, citing his own earlier article, Y. Dinstein, 'The Legislative Power in the Administered Territories', (1972) 2 Tel Aviv University Law Review p. 505, pp. 511-12 (in Hebrew). For a relatively early statement by Dinstein of his theory in English, see Yoram Dinstein, 'The International Law of Belligerent Occupation and Human Rights', (1978) Vol. 8 Is YBHR p. 104 at pp. 112-13.

²⁰⁵ Yoram Dinstein, 'The International Law of Belligerent Occupation and Human Rights', (1978) Vol. 8 Is YBHR p. 104 at p. 113

²⁰⁶ On the correct translation for "arbitration council", see n 195, above.

²⁰⁷ 52 I.L.R. 512, at p. 520.

inhabitants of Bethlehem with a remedy unavailable in Tel Aviv, the actual order exceeded the bounds of necessity”.²⁰⁸

Dinstein’s “Litmus test” has however been criticised. Meron argues that the test proposed by Dinstein “can be useful only in the negative sense”, by which he means that if the legislative changes enacted by the occupying state supposedly for the benefit of the population of the occupied territory do not correspond to the law in force within the occupying state, “there may be an immediate case for suspecting the occupant’s *animus*”.²⁰⁹ Furthermore, Meron describes the test as “inconclusive” and cautions that one should be “wary” of using the test other than in this negative sense as a basis for suspecting the occupying state’s motives. More specifically, he warns that in practice the approach embodied in the test could be abused by an occupying power seeking to extend its laws gradually to the occupied territory as part of a strategy of “creeping annexation”.²¹⁰

Dinstein eventually accepted to a large degree Meron’s argument that the utility of the “litmus test” lies in its use in a negative sense, acknowledging that “[i]f the corresponding legislation is in place [within the occupying state], all that can be said is that prima facie the Occupying Power ought to enjoy the benefit of doubt”, whilst noting that “[o]ther considerations may then militate in the opposite direction”.²¹¹ However, it should be noted that in his revised statement of his “litmus test” theory Dinstein inaccurately paraphrases Meron’s argument:

“The principal reason [why the “litmus test” cannot be regarded as the ultimate test of lawfulness], as verbalized by Meron, is that the test can be *conclusive* ‘only in the negative sense’.”²¹² (italics added)

In fact, Meron says merely that the test “can be *useful* only in the negative sense” (italics added) and goes on to specifically state that the test is “inconclusive”. Dinstein

²⁰⁸ Dinstein, *The International Law of Belligerent Occupation* (2009), (n 169) 122-23

²⁰⁹ Theodor Meron, ‘Applicability of Multilateral Conventions to Occupied Territories’, (1978) 72 A.J.I.L. p. 542, pp. 549-50

²¹⁰ *Ibid*, p. 550

²¹¹ Dinstein, *The International Law of Belligerent Occupation* (2009), (n 169) 122

²¹² *Ibid*

by contrast holds the view that if corresponding legislation does not exist within the occupying state, “it is then *clear* that the measures enacted by the Occupying Power are invalid” (italics added).²¹³ In other words, Dinstein argues that if an occupying state enacts a law in occupied territory but has not enacted similar legislation in its own territory, the law promulgated in the occupied territory is definitely invalid.

It is submitted however that there could be circumstances where an occupying state enacts a law in occupied territory which has no equivalent within the occupying state but which is nevertheless lawful under the international law of occupation. This could be the case where conditions are materially different as between the occupied territory and the occupying state such that a necessity for the legislation can be said to exist in the occupied territory whilst there is no such necessity within the occupying state. It is submitted therefore that Dinstein’s approach on this point is too mechanistic, and indeed too simplistic.

A further reason for not using the “litmus test” as a basis for arguing that where a law has been enacted in the occupying state’s territory it is lawful for it to be enacted in the occupied territory is given by McCarthy, who makes the point that “differences in socioeconomic conditions between two states may mean that what may amount to sensible economic management in one may be ruinously detrimental to the other”.²¹⁴ Dinstein has accepted that in those circumstances there is “no justification” for the occupying power introducing into the occupied territory a law which it has enacted within its own territory.²¹⁵ Nevertheless, Dinstein concludes that “barring extreme circumstances revealing clearly that a similar legislation in both jurisdictions would be inappropriate”, or suggesting ulterior motives on the part of the occupying power, he is “confident that the litmus test ought to prove quite efficacious”.²¹⁶

²¹³ Ibid

²¹⁴ Conor McCarthy, ‘The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq’, (2005) Vol. 10 *Journal of Conflict and Security Law*, p. 43 at p. 63. Sassòli, in the context of discussing whether an occupying state may enact legislation in occupied territory for the purpose of complying with international human rights standards, also rejects the idea (which he attributes to Dinstein) that the proper test is whether a similar law exists in the occupying state’s territory: Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, (2005) Vol. 16 *E.J.I.L.* p. 661, at p. 677

²¹⁵ Dinstein, *The International Law of Belligerent Occupation* (2009), (n 169) 122

²¹⁶ Ibid

However, it is submitted that the question whether the occupying state has enacted within its own territory legislation similar to that proposed for occupied territory gives only an incomplete appreciation of the issues involved in the question whether there is a necessity for the proposed legislation to be enacted in the occupied territory.

Article 64, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949

The Hague Regulations are supplemented by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 (“the Geneva Convention”).²¹⁷ Of particular relevance for the subject with which we are concerned, Article 64 of the Geneva Convention provides in relation to legislation:

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

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

Article 64(1) thus provides that the penal laws of the occupied territory are to remain in force, subject to the exceptions that the occupying state may repeal or suspend such

²¹⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949. Reproduced in Adam Roberts and Richard Guelff (Eds.), *Documents on the Laws of War* (3rd Ed., 2000, Oxford University Press), at p. 299. Article 154 of the Convention provides that it shall be “supplementary” to Sections II and III of the Hague Regulations, as between states which are parties to both the Hague Regulations and the Convention.

laws if they constitute a threat to its security or an obstacle to the application of the Geneva Convention.

Article 64(2) has given rise to some controversy.²¹⁸ It will be noted that, whilst Article 64(1) provides that, subject to certain exceptions, the “penal laws” of the occupied territory are to remain in force, Article 64(2) refers to the Occupying Power being permitted, in certain circumstances, to enact “provisions”, rather than “penal laws”. Benvenisti argues that Article 64(2) “is not confined to penal laws”, “refers to ‘provisions’ in general” and “both lowers the threshold for resorting to lawmaking and also expands the scope of legislation way beyond the rather rigid ‘unless absolutely necessary’ formula of Article 43”.²¹⁹ Thus, Benvenisti states, Article 64 “does address – and indeed delineates - the occupant’s authority to legislate both penal and non-penal legislation”.²²⁰

When elaborating his theory of Article 64(2) in the first edition of his book on the law of occupation Benvenisti stated of Article 64 that “its relevance was lost on international scholars, and Article 43 of the Hague Regulations continued to provide the framework for discussing the occupant’s prescriptive powers”.²²¹ Since then, a number of writers have accepted Benvenisti’s interpretation that Article 64(2) permits the enactment of non-penal laws,²²² or have otherwise accepted that Article 64(2) applies to non-penal laws.²²³ We will consider below the question whether Article 64(2) of the Geneva Convention broadens the scope for an Occupying Power to enact non-penal provisions.

²¹⁸ See e.g. Jose Alejandro Carballo Leyda, ‘The Laws of Occupation and Commercial Law Reform in Occupied Territories: Clarifying a Widespread Misunderstanding’, (2012) 23 EJIL 179; Eyal Benvenisti, ‘The Laws of Occupation and Commercial Law Reform in Occupied Territories: A Reply to Jose Alejandro Carballo Leyda’, (2012) 23 EJIL 199; Jose Alejandro Carballo Leyda, ‘The Laws of Occupation and Commercial Law Reform in Occupied Territories: A Rejoinder to Eyal Benvenisti’, (2012) 23 EJIL 211.

²¹⁹ Eyal Benvenisti, *The International Law of Occupation* (2nd Edition, 2012), p. 101

²²⁰ *Ibid*

²²¹ Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press, 1993), p.106

²²² Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, (2005) 16 E.J.I.L. p. 661, at p. 669-70. However, c.f. Dinstein, *The International Law of Belligerent Occupation* (2009), (n 169) 111 who states that “logic” dictates that Article 64, including Article 64(2), should be construed to apply to civil laws “if only by analogy”. The Department of Defense [US], *Law of War Manual* (June 2015, Updated December 2016, Office of General Counsel, Department of Defense), pp. 789, § 11.11.2, also appears to accept that Article 64(2) applies to non-penal provisions.

²²³ Carsten Stahn, *The Law and Practice of International Territorial Administration, Versailles to Iraq and Beyond* (Cambridge University Press, 2008), p. 121

First we will consider what the ICRC Commentary on the Geneva Convention has to say on Article 64(2). The ICRC Commentary, when dealing with Article 64, does not state that Article 64(2) authorises an occupying state to enact non-penal provisions.²²⁴ The Commentary sets out the three grounds on which an occupying state may enact provisions under Article 64(2) and comments on each.²²⁵ First, in respect of the enactment of provisions essential to enable the occupying power to fulfil its obligations under the Convention, the Commentary gives the examples of child welfare, labour, food, hygiene and public health. Such a list of examples is not inconsistent with the idea that it is only penal provisions which Article 64(2) authorises an occupying state to enact as it is possible to envisage penal provisions being promulgated in each of these spheres, although the Commentary does not indicate whether such provisions may only be penal in nature.

Nevertheless, when dealing with the other two grounds on which provisions may be enacted under Article 64(2), the Commentary does indicate the nature of the provisions which may be enacted. In relation to the second ground, i.e. the enactment of provisions essential “to maintain the orderly government of the territory”, the Commentary states that the occupying state has the right to enact such provisions “in its capacity as the Power responsible for public law and order”. This phrase “public law and order” suggests that in the view of the authors of the Commentary it is penal provisions which may be enacted for the purpose of maintaining orderly government. If it is right that in enacting provisions for the purpose of maintaining orderly government the occupying state is acting in its capacity as the Power responsible for “public law and order”, such capacity would not cover the enactment of private law (or civil law) provisions. In relation to the third ground referred to in Article 64(2), i.e. the power to enact provisions which are essential to ensure the security of the occupying state, its forces and administration, the Commentary describes this power as the occupying state being “authorized to promulgate *penal provisions* for its own protection” (italics added). Thus, the Commentary only envisages the “security” limb

²²⁴ Jean S. Pictet (Ed.), *The Geneva Conventions of 12 August 1949, Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, Geneva, 1958), pp. 334-37

²²⁵ *Ibid*, p. 337

of Article 64(2) as permitting an occupying state to enact penal provisions. If “provisions” means “penal provisions” in relation to the “security” limb of Article 64(2), that suggests that “provisions” means “penal provisions” in relation to the other limbs of Article 64(2), given that the word “provisions” only occurs once in that paragraph.

To consider the question whether Article 64(2) of the Geneva Convention empowers an Occupying Power to enact non-penal provisions, it is important to identify the relevant rules of treaty interpretation.²²⁶ As a treaty provision, Article 64(2) must be interpreted according to the rules of treaty interpretation which form part of customary international law and are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969.²²⁷ Article 31(1) of the Vienna Convention provides that:

²²⁶ Missing from the debate between Carballo Leyda and Benvenisti in 2012, referred to above, was the identification of the relevant rules of treaty interpretation which should be applied in order to interpret Article 64(2). Carballo Leyda (Jose Alejandro Carballo Leyda, ‘The Laws of Occupation and Commercial Law Reform in Occupied Territories: Clarifying a Widespread Misunderstanding’, (2012) 23 EJIL 179, p. 183) commences his critique of Benvenisti’s interpretation, by launching into the *travaux préparatoires*, which of course has the status of being only a supplementary means of interpretation. He refers to only one rule of treaty interpretation: the customary norm reflected in Article 31.3(c) of the Vienna Convention to the effect that, when interpreting a treaty, any relevant rules of international law applicable in the relations between the parties shall be taken into account (Ibid, p. 186, note 38).

²²⁷ Article 4 of the Vienna Convention provides that that Convention applies only to treaties concluded by states after the Vienna Convention entered into force with regard to such states. The Geneva Convention (IV) was adopted in 1949, decades before the entry into force of the Vienna Convention on 27 January 1980, and therefore the Vienna Convention does not apply to it. However, Article 4 of the Vienna Convention also states that its provision for the non-applicability of the Convention to treaties concluded before the entry into force of the Convention is without prejudice to the application of any rules set forth in the Convention to which treaties would be subject under international law independently of the Convention. Furthermore, as the International Court of Justice has recognised, Articles 31 and 32 of the Vienna Convention reflect pre-existing customary international law. See Richard K. Gardiner, *Treaty Interpretation* (2nd Ed., 2015, Oxford University Press, Oxford), pp. 16-17; Anthony Aust, *Modern Treaty Law and Practice* (3rd ed., 2013, Cambridge University Press, Cambridge), pp. 8-11, p. 207. And see *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment*, [1994] I.C.J. Reports, p. 6 (referred to by Aust), at para. 41, in which the Court applied the customary international law rule of interpretation reflected in Article 31 to the interpretation of a treaty made in 1955; and *LaGrand Case (Germany v. United States of America), Judgment*, [2001] I.C.J. Reports p. 466, at p. 501 (para. 99), in which the Court applied “customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties” in order to interpret a provision (Article 41) of its Statute, which is annexed to and forms an integral part of the UN Charter of 1945. See also *Kasikili/Sedudu Island (Botswana v. Namibia), Judgment*, [1999] I.C.J. Reports, p. 1045 (referred to by Gardiner and Aust), at paras. 18 and 20, in which the Court applied the rule of interpretation reflected in Article 31 to an Anglo-German Treaty made in 1890. Neither of the parties to the latter case was a party to the Vienna Convention at the time judgment was given by the Court. In relation to Article 32 see *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment*, [2004] I.C.J. Reports, p. 12 (referred to by Gardiner), where the Court held that a provision of the Vienna Convention on Consular Relations of 1963 required to be interpreted “according to the customary rules of treaty

“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.”

Article 32 of the Vienna Convention provides that recourse may be had to the preparatory work of the treaty, as a “supplementary means of interpretation”, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

The importance of interpreting treaty provisions in their context

As can be seen, the rule of interpretation reflected in Article 31 requires, *inter alia*, that the terms of a treaty are to be interpreted in accordance with the ordinary meaning to be given to those terms “in their context”. As Aust has noted, “Any term can be fully understood only by considering the context in which it is employed”.²²⁸ The International Law Commission, in its Commentaries on the Draft Articles which became the Vienna Convention, stated that one of the three principles which is contained in the rule now to be found in Article 31(1) is that “the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose”.²²⁹

That a rule existed prior to the adoption of the Vienna Convention requiring that a treaty provision be interpreted in accordance with its ordinary meaning in its context is shown by the Advisory Opinion given by the International Court of Justice on

interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties” (para. 83, italics added).

²²⁸ Anthony Aust, *Modern Treaty Law and Practice* (3rd ed., 2013, Cambridge University Press, Cambridge), p. 210

²²⁹ International Law Commission, Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, Vol. II, p. 187 at p. 221 (Commentary on Draft Article 27(1))

Competence of the General Assembly for the Admission of a State to the United Nations.²³⁰ In that Advisory Opinion the Court stated:

“The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.”²³¹

What is the “context” for the purpose of Article 31? It is clear from Article 31(2) that the context of a term in a treaty includes the text of the treaty. This follows from the opening words of that paragraph which state that “The context for the purpose of the interpretation of a treaty shall comprise, *in addition to the text ...*” (italics added).²³²

Gardiner has usefully explained the roles played by context in treaty interpretation, stating that one of these roles is as “an aid to selection of the ordinary meaning and a

²³⁰ Competence of Assembly regarding admission to the United Nations, Advisory Opinion, [1950] I.C.J. Reports, p. 4. (This Advisory Opinion is cited by the International Law Commission in its Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, Vol. II, p. 187 at p. 221)

²³¹ *Ibid*, p. 8

²³² Article 31(2) of the Vienna Convention provides:

“The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”

The context for the purpose of the interpretation of a treaty as it is understood in Article 31 should be distinguished from the “historical context” of a treaty. As can be seen, Article 31(2) provides that the context for the interpretation of a treaty shall “comprise”, rather than “include”, the text and any agreement and/or instrument of the types specified in that paragraph. Moreover, Article 32 of the Vienna Convention categorises “the circumstances of its [the treaty’s] conclusion” as a “supplementary means of interpretation” to which recourse may be had in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. One of the International Law Commission’s Special Rapporteurs on the law of treaties, Sir Humphrey Waldock, explained that in the Draft Article which was the forerunner of Article 32 (Draft Article 71(2)), the (only slightly different) phrase “the circumstances surrounding its conclusion” was “intended to cover both the contemporary circumstances and the historical context in which the treaty was concluded”: see Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, Yearbook of the International Law Commission, 1964, Vol. II, p. 5 at p. 59. On that basis, recourse may be had to the “historical context” only as a supplementary means of interpretation in the circumstances set out in the rule embodied in Article 32. This may be contrasted with the “context” as it is defined in Article 31(2) and which is to be taken into account when applying the general rule of interpretation contained in Article 31(1).

modifier of any over-literal approach to interpretation”.²³³ The context, he further states, assists in identifying the ordinary meaning of a word if there are two or more possibilities.²³⁴ Interpreting a word in a treaty in its context involves “reading words in their immediate surroundings”, as well as looking at “the wording of surrounding provisions” and at “more remote elements” within the treaty text.²³⁵

An illustration of an international court determining the meaning of words in a treaty in accordance with their context is provided by the Advisory Opinion given by the Permanent Court of International Justice on the *Competence of the International Labour Organisation in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*.²³⁶ The Council of the League of Nations had requested the Court to give an Advisory Opinion on the question whether the competence of the International Labour Organisation (ILO) extended to international regulation of the conditions of agricultural workers. This question required the Court to interpret certain provisions contained in the Treaty of Versailles relating to the ILO.²³⁷ In its Advisory Opinion the Court stated:

“In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.”²³⁸

²³³ Richard K. Gardiner, *Treaty interpretation* (2nd Ed., 2015, Oxford University Press, Oxford), p. 197

²³⁴ *Ibid*, p. 198

²³⁵ *Ibid*, p. 197

²³⁶ *Competence of the International Labour Organisation in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion No. 2 (1922), Series B, p. 8. This Advisory Opinion was cited by the International Law Commission’s Special Rapporteur on the law of treaties, Sir Humphrey Waldock when discussing the forerunner of Article 31 of the Vienna Convention (Draft Article 70): see Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, Yearbook of the International Law Commission, 1964, Vol. II, p. 5 at p. 56. The Advisory Opinion was also cited by the International Law Commission in its commentary on the forerunner of Article 31 (Draft Article 27): see Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, Vol. II, p. 187 at p. 221

²³⁷ Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles on 28 June 1919, Part XIII, which is headed “Labour”. Article 387 established the ILO: “A permanent organisation is hereby established for the promotion of the objects set forth in the Preamble [to Section I of Part XIII]....”.

²³⁸ Advisory Opinion No. 2 (1922), Series B, p. 8, at p. 23

Part of the argument in the case turned on the presence of the French words “*industrie*” and “*industrielle*” in certain clauses in the French text of the relevant Part of the Treaty.²³⁹ After considering dictionary definitions of the words, the Court observed of the adjective “*industriel*” and “*industrielle*” that “while there can be no doubt that it is generally used in a special and restrictive sense, the question here is in what sense, reading the Treaty as a whole, it should be understood”.²⁴⁰ The Court noted that whilst the words “*industrie*” and “*industriel*” may be used in a restrictive sense, in opposition to agriculture, they may also be used in a more general sense to include agriculture.²⁴¹ The Court observed that in the present day the adjective was most commonly used in relation to “the arts or manufactures” and would ordinarily be understood in that way unless the context indicated that the word was to be interpreted otherwise. The Court declared that “the context is the final test” and that in the present instance the Court must consider the position in which these words are found and the sense in which they are employed in Part XIII of the Treaty.²⁴²

In relation to Article 412 of the Treaty, which provided for the formation of a panel of “*personnes compétentes en matières industrielles*” (persons of industrial experience) from which a Commission of Enquiry may be appointed to investigate any complaint that a Member of the Organisation was not securing the effective observance of any convention which it had ratified under Part XIII, the Court held that “[t]aking this phrase in connection with the rest of the Treaty, the natural inference would appear to be that the phrase *matières industrielles* was intended to include the industry of agriculture”.²⁴³ After addressing other clauses in which the word “*industrielle(s)*” appeared, the Court concluded that the competence of the ILO does extend to international regulation of the conditions of labour of persons employed in agriculture.²⁴⁴

²³⁹ Ibid, p. 33

²⁴⁰ Ibid, p. 35

²⁴¹ Ibid, p. 35

²⁴² Ibid, p. 35. As regards the position of the words in question, the Court noted that they did not appear at all in the Preamble to Section I of Part XIII, in which, in the Court’s view, the field of activity of the ILO was defined and in which the Court noted the “fundamental words” were (the broad formulation) “conditions of labour” (“*conditions de travail*”) (ibid, p. 37).

²⁴³ Ibid, p. 37

²⁴⁴ Ibid, pp. 37-39 and p. 43

Applying the relevant rules of treaty interpretation, Article 64(2) must therefore be interpreted in good faith in accordance with the ordinary meaning of the terms it contains in their context and in the light of the treaty's object and purpose. It has to be acknowledged that, looked at in the abstract and in the absence of any context, the ordinary meaning of the term "provisions" is broader than "penal provisions" and is capable of embracing non-penal provisions. However, the rule of interpretation reflected in Article 31 of the Vienna Convention requires that the word "provisions" be interpreted in accordance with its ordinary meaning *in its context*. As shown above, the context for the purpose of the interpretation of a treaty includes the text. The context for the purpose of interpreting Article 64(2) includes Article 64(1) and the articles surrounding Article 64.

A particularly important part of the context for the interpretation of Article 64(2) is Article 64(1). Article 64(1) provides that it is the "*penal laws*" (italics added) of the occupied territory which are to remain in force, subject to exceptions. Furthermore, Benvenisti himself states that Article 64(2) opens up a "large exception" to Article 64(1). If Article 64(2) is an exception to Article 64(1), that strongly suggests that the reference to "provisions" in Article 64 also refers to "penal laws" and does not embrace non-penal provisions. It would be illogical for an exception to be broader in scope than the rule to which it is an exception. In any event, whether Article 64(2) is seen as an exception, in the strict sense, to Article 64(1) or as supplementary to Article 64(1), it relates back to Article 64(1) – note the presence of the word "however" in Article 64(2). Thus, interpreting the word "provisions" in Article 64(2) in accordance with its ordinary meaning *in its context*, including Article 64(1), leads to the conclusion that "provisions" means "penal provisions".

That conclusion is underlined by the wider context of Article 64(2) within the Geneva Convention (IV). Article 64 falls within Section III (entitled "Occupied Territories") of Part III (entitled "Status and Treatment of Protected Persons") of the Convention. The succeeding articles to the end of Section III consists of Articles 65 to 78. Articles 65 to 77 deal with penal provisions or with the process for dealing with persons accused or convicted of breaching penal provisions (prosecution, trial, sentence, punishment etc). None of those Articles deal with non-penal provisions or with court proceedings in relation to non-penal provisions. The final article of Section III, Article 78, deals with

assigned residence or internment of protected persons for imperative reasons of security²⁴⁵, and can be regarded as quasi-penal in nature.

In any event, it can be seen that Article 64(2) is sandwiched between Article 64(1), which relates to penal laws only, and fourteen succeeding articles which relate to penal provisions. This, then, is the wider context of Article 64(2) within the convention.

It is noteworthy that Article 65 of the Geneva Convention provides that the “penal provisions” enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. Article 65 only applies to penal provisions. If Article 64(2) really empowered an Occupying Power to enact non-penal provisions, one would expect Article 65 (or another Article of the Convention) to provide that non-penal provisions enacted by the Occupying Power would also not come into force until they have been published and brought to the knowledge of the inhabitants of the occupied territory. Non-penal provisions can have an important impact on individuals. The absence of any provision, equivalent to Article 65, requiring the translation (where relevant) and publication of non-penal laws again suggests that Article 64(2) does not empower an Occupying Power to enact non-penal laws. Article 65 is again an important part of the context for the interpretation of “provisions” in Article 64(2).

It may also be noted that Article 67 of the Geneva Convention provides that the courts shall apply “only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence”. In Article 67 the phrase “provisions of law” clearly means “provisions of penal law” given the subsequent words “which were applicable prior to the offence”.²⁴⁶ This does not in itself entail that “provisions” in Article 64(2) means “penal provisions” since “provisions of law” in Article 67 has its own particular context in addition to the context which it shares with Article 64(2). Nevertheless, Article 67 clearly shows that on at least one occasion in

²⁴⁵ Section IV of Part III, which deals with Regulations for the Treatment of Internees, then commences.

²⁴⁶ “Provisions of penal law” in this context could perhaps include provisions of penal procedural law and provisions of the law of criminal evidence, as well as provisions of substantive penal law.

the Convention, quite apart from Article 64(2), the word “provisions” was employed to mean “penal provisions”.

In conclusion, when the word “provisions” contained in Article 64(2) is interpreted in its context, the better view is that it means “penal provisions”.

The travaux préparatoires to Article 64(2)

The Diplomatic Conference convened for the purpose of adopting international conventions for the protection of war victims took place at Geneva between 21 April and 12 August 1949. The draft conventions, including the draft convention on the protection of civilians, which had been approved by the XVIIth International Red Cross Conference held at Stockholm in August 1948²⁴⁷ were taken as the basis for discussion at the Diplomatic Conference.²⁴⁸

In the English language version of this “Stockholm Draft” of the Civilians Convention, Draft Article 55(2) (which was to become Article 64(2) of the Convention) empowered the occupying power to enact “provisions” for the purpose of ensuring the security of the occupying power’s forces and administration.²⁴⁹ However, the French language version of the “Stockholm Draft”, which is also stated to have been used as the basis of

²⁴⁷ Governments, as well as National Red Cross and Red Crescent Societies, were represented at the Conference (See Seventeenth International Red Cross Conference, Stockholm, August 1948, Report, pp. 3-15). Governments which were signatory to the existing Geneva Conventions of 1929 were invited to be represented at the Conference (ibid, p. 4).

²⁴⁸ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 1, p. 9, p. 45 and p. 113 (This is the official record of the Diplomatic Conference produced by the Swiss foreign ministry. Until 1979 the (Swiss) Federal Department of Foreign Affairs was called the “Federal Political Department”).

²⁴⁹ Ibid, Vol. I, p. 113, at p. 122. The full text of Article 55 of the “Stockholm Draft” as reproduced therein is as follows:

“The penal laws of the occupied Power shall remain in force and the tribunals thereof 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 intended to assure the security of the members and property of the forces or administration of the occupying Power, and likewise of the establishments used by the said forces and administration.”

discussion at the Diplomatic Conference at Geneva, referred to “dispositions pénales” (i.e. penal provisions).²⁵⁰

There is then a discrepancy between the English and French versions of Draft Article 55(2) of the “Stockholm Draft”. If, however, in the particular context, “provisions” in the English version is interpreted to mean “penal provisions”, the English and French language versions can be reconciled. Otherwise, it is difficult to see how the two versions can be read consistently.

Benvenisti sets out a certain narrative in relation to the drafting of Article 64(2) (as Draft Article 55(2) was to become) at the Diplomatic Conference. Specifically when discussing Article 64(2), he states that an inherent conflict between “powerful states, that saw themselves in the potential role of occupants” and “smaller, weaker countries that had no difficulty envisioning themselves as being occupied” resurfaced.²⁵¹ Again, specifically when discussing Article 64(2), he refers to “drafting processes of treaties that pit weak against strong”.²⁵² He states that the “protocols”, as he refers to the official record of the Diplomatic Conference, “reveal the frustration and distress of those representatives [of the “weaker states”] so clearly that they evoke the reader’s compassion”. Benvenisti states that when the UK representative introduced “the version (which, with minor modifications, ultimately prevailed) which referred to “provisions” (rather than “penal laws”)” the representatives of the smaller states were “alarmed”.²⁵³ Benvenisti then refers to the representative of the Netherlands as “obviously realizing that the new formula would also authorize non-penal lawmaking by the occupant, thus terminating whatever protection was granted by Article 43” and

²⁵⁰ Département Politique Fédéral, Berne, Actes de la Conférence Diplomatique de Genève de 1949, Tome I, p. 45, p. 111 and p. 120. The full text of Article 55 as it appears in the French-language version of the “Stockholm Draft” as reproduced therein is as follows:

“La législation pénale de la Puissance occupée demeurera en vigueur et ses tribunaux continueront à fonctionner pour toutes les infractions prévues par cette législation.

“La Puissance occupant pourra toutefois soumettre la population du territoire occupé à des dispositions pénales destinées à assurer la sécurité des membres et des biens des forces ou de l’administration d’occupation ainsi que des installations utilisées par elles.”

²⁵¹ Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press, 2nd ed., 2012), p. 98

²⁵² *Ibid*, p. 98

²⁵³ *Ibid*, p. 99

states that he “expressed his worry”.²⁵⁴ Benvenisti then quotes²⁵⁵ the following sentence made by the representative of the Netherlands, General Schepers:

“If Article 55 was adopted, what would remain of Article 43 of the Hague Regulations – since Article 135 of the Draft Convention laid down that that Convention would replace the Hague Convention in regard to the matters with which the former dealt?”²⁵⁶

Benvenisti actually omits from his rendering of this quotation the question mark at the end of it as it appears in the official record of the Diplomatic Conference. It has been restored here and underlines that this is a (rhetorical) question rather than a statement.

There are a number of problems with Benvenisti’s narrative. First, the UK had not yet introduced the amendment to which he refers (and which did indeed refer to “provisions”) at the time this discussion in Committee III took place on 19 May 1949. According to the official record produced by the Swiss foreign ministry, the UK’s amendment is dated 28 May 1949.²⁵⁷ Second, whilst at the meeting on 19 May the UK representative did in general terms suggest how Draft Article 55(2) should be amended, he did not use the word “provisions”.²⁵⁸ Third, the delegate of the Netherlands did not make any comment on the suggestion by the UK delegate in relation to Article 55(2), which was only one of a number of suggestions by different states’ delegates.²⁵⁹ Rather, in the passage quoted the Netherlands’ delegate was commenting on “Article 55”, which at that stage can only have been a reference to Draft Article 55 of the

²⁵⁴ Ibid, p. 99

²⁵⁵ Ibid, p. 99

²⁵⁶ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II.A, p. 672

²⁵⁷ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. III, p. 139, Annex No. 295

²⁵⁸ Ibid, p. 672. Mr Day (United Kingdom) stated that Draft Article 55(2) “should then say that the Occupying Power had the right to take such legislative measures as might be necessary to secure the application of the Convention and the proper administration of the territory.”

²⁵⁹ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II.A, pp. 670-72. As one would expect, when delegates in this debate wanted to refer to the amendment proposed by a particular state, or to the contribution of the delegate of a particular state, they identified the state to which they referred. It cannot be assumed that because the delegate of the Netherlands was speaking shortly after that of the UK (the delegate of the Netherlands was speaking after that of Australia, who spoke after that of the UK) that he must be referring to a proposal by the UK.

Stockholm Draft. Fourth, the word “provisions” appeared in the English-language version of the “Stockholm Draft” which pre-dated the Diplomatic Conference and which was used as the basis for discussion at the Conference, rather than being inserted at the Conference by the “powerful states which saw themselves in the potential role of occupants”. Fifth, the Netherlands’ delegate did not make any statement to the effect that Draft Article 55 of the Stockholm Draft, or the UK’s suggestion of 19 May, would authorise non-penal law-making, and to assume that “obviously” he realised that the new formula would authorise non-penal law-making begs the question and is unsatisfactory.

It is worth quoting what General Schepers said immediately after he posed the rhetorical question set out above:

“It was inadmissible that the new Convention should overrule an existing Convention of wider scope. Any possible misinterpretation must be avoided, for it was certain that the Occupying Power would be only too much inclined to adopt the interpretation most favourable to itself.”

Whilst it must be acknowledged that it is not entirely clear precisely what point General Schepers is here making, a plausible reading, and arguably the most likely given the language which he actually uses, is that he was expressing concern that, because Draft Article 135 of the Stockholm Draft provided that the new Civilians Convention would “replace” the Hague Regulations of 1907 in respect of the matters “treated” in the new Civilians Convention, it could be argued by an occupying state that Draft Article 55 (even though it relates to penal provisions) replaces Article 43 of the Hague Regulations (which requires respect for the law in general and not merely the penal law). The basis for such an argument would be that Draft Article 55 had “treated” the issue of respect for the existing law, albeit in a more partial way than Article 43 of the Hague Regulations, and that therefore under Draft Article 135, Draft Article 55 would replace Article 43. The counter-argument against such an argument might have been that if Draft Article 55 “treats” only the penal law then, under Draft Article 135, Draft Article 55 would have replaced Article 43 only in respect of penal law. However, General Schepers’ expressed concern related to the danger of “possible

misinterpretation” and of an occupying power adopting an interpretation which was most favourable to itself.

This reading of what General Schepers said accounts for what he states about it being inadmissible for the new Civilians Convention to overrule an existing convention of “wider scope”, on the basis that Draft Article 55 applied only to penal law but Article 43 of the Hague Regulations applies to respect for all law, penal and non-penal.

On this reading, General Schepers’ concern was not that Draft Article 55(2) would permit greater scope for non-penal law-making (as suggested by Benvenisti) but that the conjunction of a Draft Article 55 which applied only to penal provisions, and Draft Article 135, could be argued by an occupying state to have abrogated Article 43 of the Hague Regulations. While we cannot be certain that this reading is what General Schepers intended, it does indicate that it is very far from clear that Benvenisti’s reading of what General Schepers said is correct.

Furthermore, once it realised that the delegate of the Netherlands was commenting on Draft Article 55 of the Stockholm Draft and not the proposed UK amendment, it seems extremely doubtful that he was concerned about the possibility of the occupying state being empowered by Draft Article 55(2) to enact non-penal laws. The reason for this is that Draft Article 55(2) of the Stockholm Draft only permitted an occupying state to enact provisions intended to assure the security of the occupying state’s forces and administration. The scope for enacting non-penal provisions for the purpose of ensuring the security of the occupying state’s forces and administration is limited. It is to be expected that provisions enacted for the purpose of ensuring the security of the occupying state’s forces and administration will usually be penal in nature.

Furthermore, it would not have been obvious that the power to enact provisions for the limited purpose of ensuring the security of the occupying power’s forces and administration involved the power to enact non-penal laws.

We shall now proceed to consider the progress of the Diplomatic Conference after the meeting of Committee III on 19 May 1949. On 28 May 1949, the UK submitted its amendment to the Conference. The amendment involved the deletion of Draft Article 55 of the Stockholm Draft and its substitution by the following:

“The penal laws of the occupied territory shall remain in force unless they contravene the principles of this Convention or endanger the security of the Occupying Power. Subject to the same considerations, and to the necessity for securing the effective dispensation 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 subject the population of the occupied territory to provisions which are essential to ensure the application of this Convention and the orderly government of the territory, and to provisions intended to assure the security of the members and property of the forces or administration of the Occupying Power, and likewise of the establishments used by the said forces and administration.”²⁶⁰

Thus, under the terms of this proposed amendment Draft Article 55(2) would continue to permit the occupying power to enact “provisions”, as under the Stockholm Draft, but now the purpose for which such provisions could be enacted would not be limited to security and would include where it is essential to ensure the application of the Convention and the “orderly government” of the territory.

Committee III had referred Draft Article 55 to the Drafting Committee on 19 May 1949.²⁶¹ On 5 July 1949 Drafting Committee No. 2 adopted the following amendment in substitution for Draft Article 55 of the Stockholm text:

“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 menace to the security of the Occupying Power or an obstacle to the application of this Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of

²⁶⁰ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. III, p. 139, Annex No. 295

²⁶¹ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II.A, p. 672

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 this 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.”²⁶²

Whilst the wording is not identical, this version of Draft Article 55(2) contains the same fundamental elements as the amendment proposed by the UK: the occupying power is permitted to enact “provisions” for the same three purposes, namely (i) fulfilling obligations under the Convention; (ii) the maintenance of “orderly government”; (iii) ensuring the security of the occupying state’s forces and administration etc. This text by the Drafting Committee was adopted by Committee III on 8 July 1949, by 20 votes to 8.²⁶³

The minority on the Drafting Committee had proposed an alternative text for Draft Article 55 as follows:

“The penal laws of the occupied Power shall remain in force and its courts shall continue to act in respect of all offences covered by the said laws, except in cases where this constitutes a menace to the security of the Occupying Power.

“The Occupying Power may, however, subject the population of the occupied territory to (penal) provisions intended to assure the security of the members and property of the forces or administration of the Occupying Power, and likewise of the establishments used by the said forces and administration.”²⁶⁴

²⁶² Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. III, pp. 139-40, Annex No. 296 (Text of the Majority)

²⁶³ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II.A, p. 771

²⁶⁴ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. III, p.140, Annex No. 296

At its meeting on 8 July, Committee III rejected the text of the minority of the Drafting Committee by 16 votes to 9.²⁶⁵ It will be noted that in the rejected text of the minority of the Drafting Committee the word “penal” was placed in parenthesis before “provisions” in Draft Article 55(2). However, lest this be seen as evidence that Article 64(2) (as Draft Article 55(2) was to become) empowers an occupying state to enact non-penal provisions, the following points should be noted. First, the very fact that “penal” was placed in parenthesis in this proposed text suggests that in the view of those proposing it “provisions” in Draft Article 55(2) of the Stockholm Draft already referred to penal provisions only and the word in parenthesis was being added merely for the avoidance of doubt. Thus, the fact that “(penal)” does not appear before “provisions” in Article 64(2) does not entail that “provisions” embraces non-penal provisions.

Second, there were of course other differences between the text of the majority and the text of the minority.²⁶⁶ In particular, the text of the minority, unlike that of the majority, did not permit the occupying power to enact provisions essential to enable it to fulfil its obligations under the Convention or to maintain the orderly government of the territory. States may have rejected the text of the minority because of those differences rather than because they felt that Draft Article 55(2) should empower an occupying power to enact non-penal provisions. Indeed, if states who rejected the minority text accepted that “provisions” meant “penal provisions” already, as those behind the minority text apparently did, they may have felt free to reject the text of the minority in order to secure the right to enact provisions in order to fulfil obligations under the Convention and/or for the purpose of maintaining orderly government. For these reasons, the rejection of the text of the minority does not in and of itself prove that “provisions” in Article 64(2) embraces non-penal provisions.

²⁶⁵ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II.A, p. 771

²⁶⁶ See also Jose Alejandro Carballo Leyda, ‘The Laws of Occupation and Commercial Law Reform in Occupied Territories: Clarifying a Widespread Misunderstanding’, (2012) 23 EJIL 179, at p. 183

Subsequently, Committee III submitted a report to the Plenary Assembly of the Conference which included both a revised draft text for the Civilians Convention and a commentary thereon.²⁶⁷ In relation to Draft Article 55(2) the report stated:

“In the second paragraph [of Draft Article 55] the Committee have provided that in addition to promulgating penal provisions necessary to ensure its security, an Occupying Power may subject the population to provisions which are essential to enable it to fulfil its obligations under the Convention (e.g. in particular Articles 46, 49 and 50) and to maintain an orderly government.”²⁶⁸

It should be noted here that Committee III state that in the revised Draft Article 55(2) it has provided that an occupying state may promulgate “*penal* provisions” necessary to ensure its security (italics added). Whilst the Committee then goes on to refer to the power of an occupying state to enact “provisions” to enable it to fulfil its obligations under the Convention and to maintain orderly government, if “provisions” means “penal provisions” in relation to security measures then logically it means “penal provisions” in relation to measures to enable it to fulfil its obligations under the Convention and to maintain orderly government since “provisions” only occurs once in Article 55(2).²⁶⁹

Benvenisti also relies on the discussion which took place at the Diplomatic Conference regarding Draft Article 135, which became Article 154 of the Convention, in support of his argument. Draft Article 135 of the Stockholm Draft had provided that the new Civilians Convention “shall replace, in respect of the matters treated therein,” the Hague Conventions relating to the Laws and Customs of War of 1899 and 1907, in relations between the High Contracting Parties.²⁷⁰ In other words, the Civilians

²⁶⁷ Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, reproduced in Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II.A, at p. 812

²⁶⁸ Ibid, p. 833 (A point also noted by Jose Alejandro Carballo Leyda, ‘The Laws of Occupation and Commercial Law Reform in Occupied Territories: Clarifying a Widespread Misunderstanding’, (2012) 23 EJIL 179, at p. 184). See also p. 858. Regarding minor textual changes see also ibid, Vol.II.B, p.195 and p. 424

²⁶⁹ See also Jose Alejandro Carballo Leyda, ‘The Laws of Occupation and Commercial Law Reform in Occupied Territories: Clarifying a Widespread Misunderstanding’, (2012) 23 EJIL 179, at p. 184

²⁷⁰ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, p. 139

Convention would replace, *inter alia*, the Hague Convention of 1907 as regards the matters treated in the Civilians Convention. During the course of the Conference, Draft Article 135 was amended so that (now numbered Article 154) it stated that the Civilians Convention “shall be supplementary” to Sections II and III of the Regulations annexed to the Hague Conventions of 1899 and 1907, in the relations between the states which are parties to the Civilians Convention as well as being bound by the Hague Conventions.²⁷¹ Benvenisti states that the “last minute scrambling to reformulate Draft Article 135 would have been superfluous had it been clear that Article 64 was simply silent on non-penal legislation”.²⁷²

However, when one reads the record of the discussion of Draft Article 135 it emerges that the possibility of Draft Article 55 (Article 64) empowering an occupying power to enact non-penal legislation was not expressed to be one of the concerns which gave rise to the call for Draft Article 135 to be amended. On 19 May 1949, in Committee III, the representative of the Netherlands, General Schepers, raised concerns about Draft Article 135. He did this after the Committee had considered the draft Convention up to Draft Article 68 and in the official record his concerns and the subsequent discussions appear under the heading “Article 135 and Observations on the relation existing between the Hague Regulations of 1907 and the Civilians Convention”.²⁷³ General Schepers stated that, in view of the provision in Draft Article 135 to the effect that the Civilians Convention would replace, in respect of the matters treated therein, the Hague Convention, “[Draft] Article[s] 43 to 68 of the present Convention [i.e. the Civilians Convention] should, in particular, be compared with Articles 42 to 56 of the Hague Regulations”. General Schepers then stated:

“Article 43 of the Regulations makes the Occupying Power responsible for ‘ensuring, as far as possible, public order and safety’. That was a completely general stipulation which was only partially covered by the provisions of the Draft Civilians Convention. To what extent could the above obligation be

²⁷¹ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, p. 329

²⁷² Eyal Benvenisti, *The International Law of Occupation* (2nd Ed., 2012), p. 100

²⁷³ Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Section A, p. 675. See the Errata at Vol. III, p. 297 for the amendment of the heading.

carried out if one took into consideration the special provisions – especially those concerning labour – contained in Article 47 of the Draft?”²⁷⁴

He then stated that it would be impossible to submit within forty-eight hours “all the amendments that would be necessary to bring the text of the [draft Civilians Convention] into line with the Hague Regulations”. Finally, he suggested that the attention of the Drafting Committee should be drawn to the question, which was, he stated, “of considerable importance”.

It will be noted that General Schepers did not in that discussion of Draft Article 135 mention the possibility of Draft Article 55 (Article 64) empowering the enactment of non-penal provisions. It appears that the main point here being made by General Schepers is the danger that, as a result of Draft Article 135, the broad obligation contained in Article 43 of the Hague Regulations to ensure “public order and safety” may be replaced by provisions of the new Geneva Convention which only partially covered the same ground.²⁷⁵

Furthermore, it is not the case, as asserted by Benvenuti, that the “last minute scrambling to reformulate Draft Article 135 would have been superfluous had it been clear that Article 64 [then Draft Article 55] was simply silent on non-penal legislation”. Even if it is accepted that Draft Article 55(2) only permitted the enactment of penal provisions and not non-penal provisions, it could have been argued that Draft Article 135 of the Stockholm Draft would have resulted in Draft Article 55 replacing the broad

²⁷⁴ Ibid, Vol. II, Section A, p. 675

²⁷⁵ Additionally, General Schepers raises a specific concern related to the conflict between the obligation of an occupying state under Article 43 of the Hague Regulations to ensure “public order and safety” and the provisions concerning labour contained in Draft Article 47 of the draft Civilians Convention. Draft Article 47, as it was then worded, prohibited the compulsion of protected persons to serve in the occupying state’s combatant or auxiliary forces, and regulated the circumstances in which protected persons may be compelled to work. Among other things, it provided that protected persons could only be compelled to work if they were over 18 years of age and only to ensure the proper functioning of public utility services. It also prohibited the compulsion of requisitioned protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour: see Federal Political Department, Berne, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I, p. 121. General Schepers appears here to be making a separate point from the point he was making in the preceding sentence in the quotation set out above (in relation to Draft Article 135 and the replacement of general obligations) since this argument seems to assume that the obligation to ensure public order and safety may continue in effect but may be hampered by provisions in the new Geneva Convention such as Draft Article 47.

obligation contained in Article 43 of the Hague Regulations to respect the existing law “unless absolutely prevented” since Draft Article 55 would have “treated” the matter of legislation (albeit only partially).

For the above reasons, it is submitted that the discussion at the Diplomatic Conference in relation to Draft Article 135 does not support the argument that Article 64(2) empowered occupying states to enact non-penal legislation.

Given the above, the *travaux préparatoires* is of limited assistance in ascertaining whether Article 64(2) empowers an occupying state to enact non-penal provisions. Not once does one of the delegates state that Draft Article 55(2) empowers an occupying state to promulgate non-penal provisions, or that “provisions” in Draft Article 55(2) embraces non-penal provisions. Nevertheless, as noted, Committee III did indicate in its report to the Plenary Assembly that “provisions” means “penal provisions”.

Conclusion on Article 64(2)

In conclusion, when interpreted in accordance with the relevant rules of treaty interpretation, including the requirement to interpret words in their context, Article 64(2) of Geneva Convention (IV) does not broaden the scope for an occupying state to enact non-penal provisions. In any event, as shown above, Article 43 permits the occupying state to make changes to the law for the purpose of the welfare of the population of the occupied territory, provided that there is an absolute necessity for the change. Furthermore, as shown above, it had been recognised by courts in (former) occupied territory long before the Diplomatic Conference held at Geneva in 1949 that the occupying state was permitted to make legal changes for the purpose of the welfare of the population of the occupied territory.²⁷⁶

²⁷⁶ C.f. Eyal Benvenisti, ‘The Laws of Occupation and Commercial Law Reform in Occupied Territories: A Reply to Jose Alejandro Carballo Leyda’, (2012) 23 EJIL 199, at p. 207 and p. 210

The rule against institutional change

It has long been recognised that there are restrictions on the power of the occupying state to change the institutions of the occupied territory. Hall, writing in 1880, referred to the limitation upon the power of an occupant that “he must not as a general rule modify the permanent institutions of the country”.²⁷⁷ He indicates that this limitation gradually become established after the end of the Seven Years’ War.²⁷⁸ Writing after the First World War, Fauchille stated that an occupying state is not entitled to alter the institutions of the occupied state:

“As the situation of the occupant is eminently temporary, it must not change the institutions of the country.”²⁷⁹

Similarly, Lauterpacht states that because the occupying state is not the sovereign of the occupied territory, it has no right to make changes in the administration, other than those which are temporarily necessitated by the occupier’s interest in the maintenance and safety of its army and the realisation of the purpose of war.²⁸⁰ On the contrary, Lauterpacht states, the occupying state has “the duty of administering the country according to ... the existing rules of administration”. Lauterpacht gives the example of the conversion by Germany, whilst occupying Belgium during World War I, of the University of Ghent into a Flemish institution as an administrative change which “[t]here is no doubt ... was unlawful”.²⁸¹ The transformation of the University of Ghent into a Flemish institution was part of a strategy on the part of Germany to divide Belgium and win over the Flemish part of it.²⁸² Garner, in his account of that episode, refers to the occupying state being under a legal obligation to respect the existing institutions in the territory occupied except where their modification or abolition is

²⁷⁷ William Edward Hall, *International Law* (1880, The Clarendon Press, Oxford), pp. 395-96

²⁷⁸ *Ibid*, pp. 395-96

²⁷⁹ Fauchille, *Traité de droit international public* (1921), vol II, p.228 (in French): “*Comme la situation de l’occupant est éminemment provisoire, il ne doit pas bouleverser les institutions du pays.*” Author translation.

²⁸⁰ Lauterpacht, *Oppenheim’s International Law*, Vol. II (n 174) 437

²⁸¹ *Ibid*, p.437 at footnote 3

²⁸² James Wilford Garner, *International Law and the World War* (1920), pp.74-78

absolutely necessary for public order or military security, neither of which consideration, he concluded, applied in relation to the University of Ghent.²⁸³

Von Glahn states that an occupying state is “forbidden to change the internal administration of the area”.²⁸⁴ More specifically, von Glahn states, the occupying state “may not substitute a new indigenous governmental structure”. Von Glahn also cites the example of the German authorities in Belgium in the First World War transforming the University of Ghent into a Flemish institution and states that they were wrong to do so.

McNair and Watts similarly state that an occupying state “has no right to make even temporary changes in ... the administration of the country except in so far as it may be necessary for the maintenance of order, the safety of his forces and the realization of the legitimate purpose of his occupation”.²⁸⁵

Greenwood states that, because of the temporary nature of the occupying state’s authority in the occupied territory, it will be unlawful for the occupying state to attempt to make permanent changes in, or permanent reform of, the government or administrative structure of the occupied territory.²⁸⁶ By way of example, he states that an occupying state will exceed its powers if it attempts to create a new State, to change a monarchy into a republic or a federal government into a unitary one.²⁸⁷ He suggests that permanent changes in the constitution of the occupied territory are probably lawful only if they are *necessary* to enable the full implementation of the Hague Regulations and the Fourth Geneva Convention or other rules of international law.²⁸⁸ For Greenwood, making changes in the government of the occupied territory which “it might be impossible to undo after the occupation ends” is an indicator of permanent change which an occupying state has no authority to make.²⁸⁹ However, Greenwood

²⁸³ Ibid, pp.77-78

²⁸⁴ von Glahn, *The Occupation of Enemy Territory* (n 174) 96

²⁸⁵ McNair, Lord and Watts (n 174) 369

²⁸⁶ Christopher Greenwood, ‘The Administration of Occupied Territory in International Law’ in Emma Playfair (Ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Oxford University Press, 1992), p. 257

²⁸⁷ Ibid, p. 257

²⁸⁸ Ibid, p. 245

²⁸⁹ Ibid, p. 264. He gives the example that the creation of a structure of elected bodies with real power in a territory where no democratic structure existed previously “would be altering the existing form of

states that the occupying state may, for the duration of the occupation, suspend, bypass or vary the existing administrative structure where it is necessary to enable the occupant to meet the needs of its armed forces or to discharge its governmental duties under the Hague Regulations and the Fourth Geneva Convention.²⁹⁰

Dinstein states that the occupying state “is not allowed to shake the pillars of government in the occupied territory”.²⁹¹ He gives the example that the occupying state 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”.²⁹² Dinstein argues that “[c]hanging the configuration of political institutions” exceeds the powers of the occupying state because of the possibility that the population of the occupied state may “get used to” such structural changes, which then “may prove hard to eradicate when the occupation is terminated”.²⁹³ Dinstein refers to this as an “undisputed general principle”.²⁹⁴

Is it only “fundamental” institutions which are to be respected?

Some writers adopt a narrower approach to the rule that existing governmental and administrative institutions must be respected, defining the rule in terms of respect only for “fundamental” institutions. Feilchenfeld states that “Since a belligerent occupant is not a permanent sovereign, it is deemed to be beyond his competence to engage in permanent changes in regard to *fundamental* institutions.”²⁹⁵ Feilchenfeld expressly contrasts this approach with that of Fauchille (see above).²⁹⁶ However, Feilchenfeld cites no authority for the more narrow formulation of the rule such that it protects only fundamental institutions.

government in the territory in a way which it might be impossible to undo after the occupation ends” and states that this “smacks of a permanent change which the occupant has no authority to make”.

²⁹⁰ *ibid*, pp. 256-57

²⁹¹ Dinstein, *The International Law of Belligerent Occupation* (2009) (n 169) 124

²⁹² *ibid*

²⁹³ *ibid*, pp124-25

²⁹⁴ *ibid*, p..125. Dinstein refers however to the fact that states are not always consistent in applying this principle.

²⁹⁵ Feilchenfeld (n 174) 89. Italics added. Feilchenfeld acknowledges military and public order needs as exceptions to the rule requiring respect for (fundamental) institutions: *ibid*, at p. 90 (para. 331).

²⁹⁶ *ibid.*, at note 4

Stone (writing in 1954) states that “[t]he most widely approved line of distinction” in relation to the boundaries of an occupying state’s legislative power is that an occupying state, in view of its merely provisional position, “cannot make permanent changes in regard to fundamental institutions”, for example by changing a republic into a monarchy.²⁹⁷ Stone acknowledges however that it becomes increasingly difficult to determine with confidence which institutions are fundamental institutions.²⁹⁸ Furthermore, although he describes this approach as “[t]he most widely approved line of distinction” (as at 1954), he cites no other writers or other authority for it (although he could at least have referred to Feilchenfeld).

Stone also notes that it is “commonplace” that, on the distinction between sovereign and occupying state, the occupying state should not engage in changing the local political structure.²⁹⁹ He suggests however that this need not apply to “changes already in progress” so that the occupying state may allow change to continue rather than freezing the political structure at the moment of entry. Stone gives no examples of the sort of changes in the political structure which, if they were already in progress, might entitle an occupying state to permit them to continue.

Greenspan states that changes in “fundamental” institutions should be avoided “unless absolutely necessary”.³⁰⁰ However, Greenspan goes on to state that an occupying state may suspend or discontinue offices or departments “which he considers unnecessary or detrimental to his administration”, and that it may create new offices and departments.³⁰¹ Greenspan makes no suggestion that such changes in relation to offices and departments may be made only where it is absolutely necessary. It appears therefore that Greenspan does not regard offices or departments of state as “fundamental” institutions.

Greenspan acknowledges that in certain circumstances an occupying state may be “absolutely prevented” from respecting institutions of the occupied state.³⁰² He

²⁹⁷ Stone (n 174) 698

²⁹⁸ *ibid*

²⁹⁹ *ibid*

³⁰⁰ Greenspan, *The Modern Law of Land Warfare* (n 174) 224

³⁰¹ *ibid*, p.261

³⁰² *ibid*, p. 225

suggests that this will be the case where a war has been fought “on an ideological basis” against a totalitarian regime which has been toppled from power.³⁰³ In such circumstances, he suggests that the occupying state is entitled to eliminate the institutions upon which rested the totalitarianism of such an occupied state. Greenspan also states that Article 64 of the Geneva Convention provides an occupying state with authority to do away with institutions, including fundamental institutions, in the occupied territory which “conflict with” the operation of the principles of the Geneva Convention.³⁰⁴

McDougal and Feliciano (citing Greenspan) also argue that the occupying state’s competence to establish and operate processes of governmental administration in the occupied territory “does not extend to the reconstruction of the fundamental institutions of the occupied area”.³⁰⁵ They suggest that the requirement to respect fundamental institutions may be subject to the legitimate security interests of the occupying state and the reasonable demands of restoration and maintenance of *ordre public* and *vie publique*, thus entitling the occupying state for the duration of the occupation to suspend the application of certain aspects of the constitution of the occupied state. However, McDougal and Feliciano suggest, the principal thrust of the prohibition is “the active transformation and remodeling of the power and other value processes of the occupied country”.³⁰⁶

The better view is that the rule requiring respect for institutions protects the governmental and administrative structure in general, and not merely “fundamental” institutions. It appears to be widely accepted by writers that the conversion by Germany of the University of Ghent into a Flemish institution during World War I was illegal, yet it would appear to be a misuse of the word “fundamental” to describe universities as “fundamental” institutions.

³⁰³ Ibid

³⁰⁴ Ibid, p.227

³⁰⁵ Myers S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961), p.767

³⁰⁶ Ibid, p.768

Sassòli's theory that there is no specific norm prohibiting institutional change

One writer who denies that there is a specific rule which protects the institutions in occupied territory is Sassòli. who states:

“Most writers deal with possible changes to the institutions of the occupied country separately, as if they were regulated by a specific norm....In my opinion, except for the *lex specialis* on changes affecting courts, judges and public officials, the legal parameter is always Article 43 because local institutions of the occupied country are established by and operate under the law. Institutions and the constitutional order are only one aspect of ‘the laws in force in the country’.”³⁰⁷

However, Sassòli's assumption that institutions are established by law is not always correct. Some examples from the UK will suffice to illustrate the point. In the UK, the Prime Minister and Cabinet have not been established by any rule of statute or common law³⁰⁸ and the UK does not have a written constitution which could provide for the establishment of such institutions. The office of prime minister and the cabinet exist by virtue of constitutional conventions.³⁰⁹ It is important to note however that such constitutional conventions are not law. Dicey distinguished between two categories of rule which make up “constitutional law” as the term is used in England.³¹⁰ The first category are rules, including those enacted by statute or derived from the common law, which are “in the strictest sense ‘laws’” because they are enforced by the courts. The second category comprises conventions, which, he stated, “are not in reality laws at all since they are not enforced by the courts”.³¹¹ The UK Supreme Court, in its judgment in *R (on the application of Miller)-v-Secretary of State for Exiting the European Union*, confirmed that courts of law cannot enforce constitutional conventions, which it also

³⁰⁷ Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, (2005) 16 E.J.I.L. 661, at p. 671

³⁰⁸ Harry Street and Rodney Brazier, *de Smith's Constitutional and Administrative Law* (5th ed., Penguin/Pelican Books, 1985), p. 40

³⁰⁹ *Ibid*

³¹⁰ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* [1885] (10th Ed., 1959, Macmillan Education Ltd, Basingstoke), pp. 23-24

³¹¹ *Ibid*, p. 24

referred to as “political conventions”.³¹² The Court further held that the constitutional convention in question had not been converted by legislation into “a legal rule justiciable by the courts” and that policing of the scope and manner of operation of the constitutional convention in question does not lie within the constitutional remit of the judiciary “to protect the rule of law”.³¹³

Of course, under an occupation one would expect senior office holders such as prime minister and cabinet ministers to be removed from office if they have not already fled.³¹⁴ In such circumstances the office of prime minister and the cabinet would be in a state of suspense for the duration of the occupation. However, the point at issue here is whether there is a rule prohibiting an occupying state from permanently abolishing such institutions. An approach which assumes that institutions are protected from abolition by an occupying power only if they have been established by law leaves unprotected institutions such as the office of prime minister and the cabinet in the UK.

A further example of a UK institution which was not established by law is provided by the Criminal Injuries Compensation Board (CICB) which was established in 1964 to provide compensation to the victims of crimes of violence and which dealt with applications for such compensation submitted prior to 1 April 1994.³¹⁵ The CICB and the scheme it administered were not established by statute but under the royal prerogative.³¹⁶

³¹² *R (on the application of Miller)-v-Secretary of State for Exiting the European Union*, Supreme Court, UK [2017] UKSC 5, at paras. 141-46

³¹³ *Ibid*, paras. 148 and 151

³¹⁴ See e.g. Departments of the Army and Navy, United States Army and Navy Manual of Civil Affairs Military Government (October 1947) (Department of the Army Field Manual FM 27-5; Department of the Navy Manual OPNAV P22-1115), p. 11 (Section 9 c.(3)(c)), which states that following the institution of military government in occupied territory, the head of the national government and cabinet ministers will be removed from office.

³¹⁵ A statutory scheme was introduced by the Criminal Injuries Compensation Act 1995 and is administered by the Criminal Injuries Compensation Authority. See also Mary Baber (Home Affairs Section), Criminal injuries Compensation, Research Paper 95/64, House of Commons Library, 22 May 1995

³¹⁶ The origin and basis of the CICB and the scheme it administered are analysed in *R-v-Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 All ER 244 (House of Lords), in particular at p. 249 and p. 268. The scheme was codified in the Criminal Justice Act 1988, but the relevant provisions of that Act were not brought into force.

A final example of a UK institution which has not been established by law is provided by the Panel on Takeovers and Mergers which issues and administers the City Code on Takeovers and Mergers and supervises and regulates takeovers of certain types of companies. The Panel was established in 1968.³¹⁷ The basis of the Panel and its powers was analysed by the Court of Appeal (England and Wales) in 1986 in *R-v-Panel on Takeovers and Mergers ex parte Datafin plc*.³¹⁸ The Court found that the Panel was an unincorporated association, that it represented a form of “self-regulation” by the financial industry and that it possessed no statutory or common law powers.³¹⁹ Donaldson, MR described the Panel as performing its functions “without visible means of legal support”.³²⁰ Nevertheless, Donaldson, MR found that the Panel “exercises immense power” and Lloyd, LJ found that it “wields enormous power”.³²¹ The Court held that the Panel was performing a public duty and that, therefore, the Court had jurisdiction to entertain an application for judicial review in respect of its decisions.³²² Subsequently, in order to comply with the requirements of European law, the Companies Act 2006 set out functions and powers which the Panel was to have.³²³ It is clear however that the statute vests these functions and powers in the existing Panel.³²⁴ The 2006 Act does not establish a new panel. Thus it remains the case that the Panel has not been established by law.

It should also be noted that, although the idea that Article 43 of the Hague Regulations protects institutions and the idea that there is a free-standing rule of international humanitarian law protecting institutions are not necessarily mutually exclusive, Sassòli

³¹⁷ See The Panel on Takeovers and Mergers, *The Takeover Code* (Eleventh Edition, 2013), p. A1.

³¹⁸ [1987] 1 All ER 564

³¹⁹ *Ibid*, at p. 566-67

³²⁰ *Ibid*, p. 566

³²¹ *Ibid*, p. 567 and p. 582

³²² *Ibid*, p. 577, p. 587

³²³ See sections 942 to 965 of the Companies Act 2006. The Explanatory Notes to the Companies Act 2006 prepared by the Department of Trade and Industry state (at para. 1174) that the Act places the Panel within a statutory framework in order to fulfil the requirements laid down in the European Directive on Takeover Bids (2004/25/EC). In the interim period whilst the Companies Bill completed its passage through Parliament and prior to the relevant provisions entering into force, functions and powers were vested in the Panel by the Takeovers Directive (Interim Implementation) Regulations 2006, Statutory Instruments 2006 No. 1183.

³²⁴ Section 942 provides that “The body known as the Panel on Takeovers and Mergers (“the Panel”) is to have the functions conferred on it by or under this Chapter.” In other words, it is the existing Panel which is to have these functions. See also the Explanatory Notes to the Companies Act 2006 which state that the relevant Chapter of the Act “does not confer on the Panel the status of a statutory body. The Panel will remain an unincorporated body...” (para. 1181).

denies that there is any role for such a free-standing rule: he states that the legal limits to changes to institutions in an occupied state are “always” governed by Article 43. However, Sassòli’s denial of such a free-standing norm, coupled with his reasoning that change to institutions is governed by Article 43 *because* institutions are established by and operate under the law, would appear to entail that, where an institution is not established by law, Article 43 does not apply and the institution will not be protected from dissolution or change by an occupying power.

It might be argued that even if an institution is not established by law, it is nevertheless protected by Article 43 if powers, functions and/or duties are bestowed upon it by law. To illustrate this last point, we can again consider the example of the Panel on Takeovers and Mergers in the UK. It could perhaps be argued that once functions were bestowed on the Panel by law in 2006, if an occupying state had dissolved the Panel such state would not be respecting the pre-occupation law and would therefore be violating Article 43 of the Hague Regulations, notwithstanding the fact that the Panel had not been established by law. However, such an argument would not entail that institutions would always be protected by Article 43. For the first three and half decades of its existence the Panel was not vested with statutory functions and powers and, if one were to accept Sassòli’s argument that institutions are protected only by Article 43 (on the assumption that they are established by and operate under the law) and not by a specific norm, the Panel would not have been protected by any norm of international humanitarian law from dissolution by an occupying power during that time. As Sassòli indicates in the passage quoted above, his approach flies in the face of “most writers”, who deal with institutional change on the basis that it is governed by a specific norm.

Whereas writers such as Lauterpacht refer to a free-standing rule prohibiting institutional change by an occupying state and state that the rule is a consequence of the rule that the occupying state does not acquire sovereignty over the occupied state, Pictet states that Article 43 of the Hague Regulations of 1907 protects the institutions of the occupied state, as well as its laws, notwithstanding the wording of that provision which requires the occupying state to respect “the laws in force in the country” (unless

absolutely prevented). Pictet states that Article 43 “also protects the separate existence of the State, its institutions and its laws”.³²⁵

It will be noted that whereas Sassòli argues that Article 43 protects institutions *because* (he states) they are established by and operate under the law, Pictet argues that Article 43 protects institutions *as well* as laws. It seems clear that, where institutions are established by law, the requirement in Article 43 to respect the laws in force will also protect the existence of those institutions. However, the implication of Pictet’s approach is that Article 43 protects institutions even if they have not been established by law (as in the examples given above). Thus, whilst Sassòli’s approach leaves unprotected an institution which has not been established by law and is not otherwise governed by a specific law which refers to it, on Pictet’s approach Article 43 will offer protection to such an institution (subject to the “unless absolutely prevented” proviso) because on his view Article 43 protects institutions as well as laws. However, it has to be said that that approach goes beyond the words used in Article 43, which require respect for the “laws in force”. The better view is that there is a separate, free-standing rule of international humanitarian law which protects the existence of institutions in the occupied territory, as has been attested to by many writers, as shown above, including Hall, who was writing in 1880 and therefore before the Hague Regulations of 1899 and 1907 were drawn up.

Military manuals and respect for institutions

Military manuals have dealt with the protection of institutions in a variety of ways. The UK manual issued in 1958 stated that the occupying state “is not entitled, as a rule, to alter the existing form of government” or “to upset the constitution” of the territory occupied.³²⁶ Similarly, the UK manual issued in 2004 states that the occupying power “may not change the constitution ... except to the extent permitted under the law of

³²⁵ Jean S. Pictet (Ed.), *The Geneva Conventions of 12 August 1949, Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, 1958), p. 273.

³²⁶ The War Office, *The Law of War on Land, being Part III of the Manual of Military Law* (Issued by Command of the Army Council) (1958, Her Majesty’s Stationery Office, London), p. 143 (para. 511)

armed conflict”.³²⁷ The Canadian manual issued in 2001 contains very similar wording to that in the 1958 UK manual, stating that “Generally speaking, the occupant is not entitled to alter the existing form of government” or “to upset the constitution” of the occupied territory.³²⁸

Given that the UK is one of those states which do not have a written constitution, in the sense of not having a single constitutional document³²⁹, the references in the UK manuals to “the constitution” should not be understood as embracing only institutions which are contained within a written constitution. Thus, as regards the UK manuals at least, the injunctions not to upset or alter “the constitution” should be understood as prohibiting changes to institutions which have their basis in unwritten constitutional conventions or statutes as well as those specified in a written constitution.

It could be argued that the prohibition of changes to “the constitution” of occupied territory in military manuals protects only those institutions which are of such a level of importance that they can be regarded as part of the constitution, leaving less important institutions unprotected. Two points can be made in response to this. First, the UK and Canadian manuals referred to above do not expressly state that lesser, “non-constitutional”, institutions may be altered by the occupying power. Second, military manuals issued by other states make provision for the protection of institutions in terms which are broader than solely institutions which are constitutional in nature. In this regard, it is relevant to consider the Australian military manual.³³⁰ The Australian manual contains a provision similar to the 1958 UK manual and the Canadian manual and which states that “Generally speaking, the occupying power is not entitled to alter the existing form of government” or “to disregard the constitution” of the occupied territory.³³¹ It also states that the occupying power “may not change the constitution”

³²⁷ The Joint Service Manual of the Law of Armed Conflict (2004, promulgated as directed by the Chiefs of Staff) (Joint Service Publication 383), p. 278 (para. 11.11)

³²⁸ Joint Doctrine Manual, Law of Armed Conflict at the Operational and Tactical Levels (2001, Issued on Authority of the Chief of Defence Staff) (B-GJ-005-104/FP-021), p. 12-2 (section 1205)

³²⁹ It is sometimes said that the UK has a “partly written and partly unwritten” constitution, in the sense that some constitutional rules are contained in statute, whereas other such rules are unwritten constitutional conventions: see e.g. Philip Norton, *The Constitution in Flux* (1984, Basil Blackwell, Oxford), p. 4 (the UK’s constitution is “part written”) and p. 5 (“part written but uncodified”)

³³⁰ Australian Defence Doctrine Publication 06.4, Law of Armed Conflict (2006, issued by the Chief of the Defence Force)

³³¹ *Ibid*, p. 12-3 (para. 12.11)

of the occupied territory, “except to the extent permitted under the law of armed conflict (LOAC)”.³³² However, the Australian manual also states that the occupying state “should not alter fundamentally...the...administration”³³³, whilst recognising that,

“If an aspect of administration is degraded to the point where it cannot function, then the occupying power may put in place an effective system.”³³⁴

It seems reasonably clear that “administration” embraces lesser public institutions which may not be considered part of “the constitution” but are involved in administering the occupied territory. Thus the Australian manual is evidence of a rule which generally prohibits the occupying state from changing the institutions through which the occupied territory is administered, whether such institutions can be regarded as part of the territory’s constitution or not.

There is also state practice on the part of the USA which indicates that an occupying power is not permitted (subject to exceptions) to change public institutions whether they form part of the constitution of the occupied territory or not. The US Judge Advocate General’s School issued a text on the Law of Belligerent Occupation in 1944 which stated that the occupying power “has no right to make changes in institutions ... or administration other than those which are demanded by military necessity or public order and safety”.³³⁵ The passage quoted makes no mention of it being only institutions, or elements of administration, which form part of the constitution of the occupied territory which are protected by the principle there stated.

Admittedly, the US Army Field Manual on the Law of Land Warfare, issued in 1956, was strangely silent on the subject of the permissibility of the occupying power making changes to institutions of government in occupied territory.³³⁶ The US Army and Navy Manual of Civil Affairs Military Government, which was issued in 1947 and primarily

³³² Ibid, p. 12-3 (para. 12.12)

³³³ Ibid, p. 12-4 (para. 12.14)

³³⁴ Ibid, p. 12-4 (para.12.15)

³³⁵ Judge Advocate General’s School, Law of Belligerent Occupation (J.A.G.S. Text No. 11) (1944, Re-issued 1945), p. 37. This work indicates that the texts of the Judge Advocate General’s School had been prepared for instructional purposes.

³³⁶ Department of the Army [US], Field Manual No. 27-10, The Law of Land Warfare (18 July 1956), with Change No. 1 (15 July 1976), Chapter 6, Occupation

offers practical rather than legal guidance on the conduct of occupations, states that (subject to exceptions) “local ... institutions of government will be retained”, but gives as the rationale a practical one, “to avoid confusion and promote simplicity of administration”.³³⁷ However, that manual goes on to state that the military governor “may temporarily *discontinue or suspend* offices and departments which are unnecessary or detrimental to [military government]” (italics added).³³⁸ This would appear to acknowledge implicitly that the occupation authorities are not entitled to permanently abolish offices or departments of the local government, in which case it is also evidence that the law of occupation protects institutions of government which might not form part of the constitution, i.e. particular government departments or offices.

In any event, the US military manual issued in 2015 recognises that there are restrictions on the power of an occupying state to change institutions of government in occupied territory. The 2015 manual states:

“... in view of the provisional nature of belligerent occupation, the authority of the Occupying Power under occupation law has been interpreted as being subject to limitations on the ability of the Occupying Power *to alter institutions of government permanently or change the constitution of a country.*”³³⁹ (Italics added.)

It should be noted that “institutions of government” is potentially broader than the class of institutions which may be regarded as part of the constitution (written or unwritten) of an occupied territory. Thus the US manual of 2015 would appear to recognise restrictions on the power of the occupant to alter institutions of government which are not provided for in a written constitution (where applicable) or are not of such

³³⁷ Departments of the Army and Navy, United States Army and Navy Manual of Civil Affairs Military Government (October 1947) (Department of the Army Field Manual FM 27-5; Department of the Navy Manual OPNAV P22-1115), pp. 10-11 (Section 9.c.(2)). The stated exceptions were where such institutions “conflict with the aims of military government or are inimical to its best interests” (ibid).

³³⁸ Ibid, p. 11 (Section 9.c.(3)). The manual also states that “existing legislative bodies will usually be suspended” because supreme legislative power is vested in the military governor (ibid, p. 11, Section 9 c.(3)(b)).

³³⁹ Department of Defense [US], Law of War Manual (June 2015, Updated December 2016, Office of General Counsel, Department of Defense), p. 773

importance that they may be considered part of the occupied territory's unwritten constitution.

The economy and the rule against institutional change

Feilchenfeld, writing during the course of the Second World War, argued that the rule that an occupying power, because it does not acquire sovereignty, is required to respect fundamental institutions in the occupied territory entails that the occupying power has no right to transform a liberal economy into a communistic or fascist one, except so far as military or public-order needs should require individual changes.³⁴⁰ Logically, the same rule would apply to prohibit transformation in the opposite direction, for example where an occupying state sought to transform a socialist economy into a capitalist economy. There has been widespread agreement amongst writers that an occupying state is not entitled to change the economic system.³⁴¹

Debellatio

Historically, where a state conquered a foreign state, such that there was no further resistance, the conquering state was entitled under international law to annex the defeated state, thus acquiring sovereignty over the territory of that state.³⁴² This process was referred to as *debellatio*. However, the term *debellatio* also came to be used to refer to the situation where a state achieves the total defeat of another state,

³⁴⁰ Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace, Washington, 1942), p. 90

³⁴¹ Julius Stone (n 174) 699 who states that "Most Western writers would agree that the Occupant could not transform a liberal economy into a communistic one; and Soviet writers would no doubt be concerned about the reverse transformation" (albeit that Stone speculated that that principle, among others, was "likely ... to face a far more difficult future" than certain other rules of occupation law); Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (Yale University Press, 1961), pp. 767-68, citing Feilchenfeld and the principle referred to in the text above and suggesting that the principal thrust of the prohibition on change to fundamental institutions is "the active transformation and remodeling [sic] of the power and other value processes of the occupied country"; G.I.A.D. Draper, *The Red Cross Conventions* (Stevens & Sons Ltd, London, 1958), p. 39 (referring to the principle that "the minimum alteration should be made to the existing ... economy" of the occupied state); Lord McNair and A.D. Watts (n 174) 370 (endorsing Draper's view).

³⁴² See e.g. H. Lauterpacht (Ed.), *International Law, A Treatise by L. Oppenheim*, Vol. I (7th Ed., 1948, Longmans, Green & Co., London), pp. 518-25. Title could not be obtained by conquest whilst the conflict continued (p. 521).

overthrowing its government in the process, but does not annex the defeated state.³⁴³ In this latter scenario, according to one view, the victor state was not bound by the limitations which international law places upon an occupying state.

An example of the latter approach to *debellatio* is provided by the “occupation” of Germany by the Allies after the Second World War. After the unconditional surrender of the German armed forces, the UK, USA, USSR and France issued a declaration at Berlin on 5 June 1945 in which they declared that they “hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government...”.³⁴⁴ Clearly, this goes well beyond the powers possessed by occupying states under the law of occupation. The Declaration prefaced this assumption of supreme authority by referring to the unconditional surrender and to the fact that there was no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers. However, the Declaration went on to expressly state that this assumption of authority and powers “does not effect the annexation of Germany”.³⁴⁵

In *Grahame-v-The Director of Prosecutions* the Court of Criminal Appeal in the British Zone of Control in Germany endorsed the view that the Allied authorities possessed supreme authority over Germany.³⁴⁶ The Court held that the Control Council and the Zone and Sector Commanders were not restricted by the limitations placed on a belligerent occupant by the Hague Convention and Regulations.³⁴⁷ The Court reached that conclusion on the grounds that those authorities were not “mere *de facto* authorities set up by a belligerent occupant with limited powers”; there was no other German

³⁴³ Karl-Ulrich Meyn, ‘*Debellatio*’, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume I (North-Holland, 1992), p. 969-70

³⁴⁴ Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany, (1945) 39 A.J.I.L. Supplement, p. 171.

³⁴⁵ *Ibid*, p. 172

³⁴⁶ *Grahame-v-The Director of Prosecutions* (1947) 14 A.D. 228

³⁴⁷ *Ibid*, at p. 233. The Court also held that the legislation in question, which had been enacted by the Commandant of the British Sector of Greater Berlin, was authorised by a rule of customary international law having the same content as Article 43 of the Hague Regulations (*Ibid*, at p. 232).

Government; and those authorities were, for the time being, “the supreme organs of government in Germany”.³⁴⁸

The consequences of the *debellatio* doctrine are indicated in a letter from Sir Eric Beckett, the (chief) Legal Adviser at the Foreign Office to the UK Delegation at the Diplomatic Conference at Geneva in 1949, at which the Geneva Conventions were being negotiated.³⁴⁹ In that letter Sir Eric expressed his certainty that the Hague Convention of 1907 did not apply to Germany after unconditional surrender and stated that if the head of the Norwegian delegation, Professor Frede Castberg, continued to express doubts on the issue he should be informed that it was in fact the considered opinion of all the Allied powers occupying Germany that the Hague Convention did not apply after the unconditional surrender and that “...in fact, if this is not true half the action taken by the Allies in Germany would be illegal”.³⁵⁰

In his influential article on the subject, Jennings identifies subjugation or completed conquest as the basis for the Allies’ assumption of supreme authority over Germany.³⁵¹ Jennings argues that after the German unconditional surrender, the Allies would have been legally entitled to annex Germany and that, consequently, they were entitled to

³⁴⁸ Ibid. The Court also observed that “The Military Government of Germany is unprecedented in its nature”.

³⁴⁹ Letter dated 23 June 1949 from W.E. Beckett, Foreign Office to Miss Joyce Gutteridge, United Kingdom Delegation to the Diplomatic Conference on the Protection of War Victims, Hotel Beau-Rivage, Geneva, reproduced in annex to Cabinet Office Note dated 24 June 1949 entitled “Period During Which the Civilian Convention Should Operate” (UK National Archives, File WO 32/13613)

³⁵⁰ The head of the Norwegian Delegation had expressed doubts as to whether the Allied administration of Germany since May 1945 was from the legal standpoint different from belligerent occupation. Of course, Sir Eric may not have meant that literally half of the action taken by the Allies would have contravened the law of occupation if it were applicable, but may have been indicating that a substantial amount of such action would have been illegal.

³⁵¹ R. Y. Jennings, ‘Government in Commission’ (1946) 23 BYBIL 112, at p. 135 and p. 140. Jennings states that the Final Act of Unconditional Surrender does not itself confer title to supreme authority but provides the best possible evidence of the complete conquest which is an essential ingredient of title by subjugation: *ibid*, pp. 137-38. (The store which UK Government officials set by this article is indicated by the fact that the legal adviser to the UK Delegation at the Diplomatic Conference at Geneva in 1949 informed the chief legal adviser at the Foreign Office that when the head of the Norwegian delegation, Professor Frede Castberg, expressed doubt as to the situation in Germany post-May 1945 not qualifying as belligerent occupation, “I asked him if he had seen Mr. Jennings’ Article ‘Government in Commission’ in the British Year Book, and when he said he had not, gave him a brief summary of the conclusions Mr. Jennings had reached”: Letter dated 22 June 1949 from Miss Joyce A. C. Gutteridge, UK Delegation to Sir Eric Beckett, Foreign Office, reproduced in a Cabinet Office Note dated 24th June 1949 entitled “Period during which the Civilian Convention should operate” (UK National Archives, File WO 32/13613).)

assume the whole of the authority of the former government unaccompanied by annexation given that the former government had ceased to exist.³⁵² He concluded that the Allied occupation was therefore not a belligerent occupation within the meaning of Articles 42-56 of the Hague Regulations.³⁵³

It will be noted that Jennings' analysis is based on the assumption that the Allies would have been entitled to annex Germany. It was because the Allies were entitled to annex Germany, he argued, that they were entitled to take the lesser step of assuming all the authority of government without annexation. It is therefore necessary to consider whether annexation resulting from the use of force continues to be permissible. In the post-Charter world, the idea that one state is entitled to annex another state following conquest has increasingly been questioned. At an early stage, Lauterpacht expressed the opinion that as a result of the UN Charter and the General Treaty for the Renunciation of War, annexation following conquest was "probably" invalid where the

³⁵² Ibid, p. 137 and p. 141

³⁵³ Ibid, p. 140. See also Lauterpacht, *Oppenheim's International Law*, Vol. II (n 174) 602-03, who similarly concluded that the government of Germany by the Allied forces after the unconditional surrender was not in the nature of a belligerent occupation and was not subject to the rules of international law relating to the occupation of enemy territory. Lauterpacht characterised the Allied government of Germany as "temporary subjugation", a phrase which he uses to describe the position where a victor conquers its adversary, completely displaces its government and assumes the exercise of full sovereign powers over the conquered adversary, but expressly disclaims the intention of permanent annexation. This is essentially the same analysis as that put forward by Jennings. However, apparently riding two horses, Lauterpacht then also stated that the legal basis of the authority exercised by the Allies lay in the "unlimited power" which resulted from the unconditional surrender, which he asserts was "in essence, an armistice agreement" (pp. 602-03). He further stated that where there has been an unconditional surrender "there is no legal limit set to the victor's freedom of action" (except the implied obligation not to resume hostilities provided that the victor's conditions and orders are complied with) (p. 553). C.f. F.A. Mann, 'The Present Legal Status of Germany', (1947) 1 *International Law Quarterly* p. 314, who concluded that Germany was not under belligerent occupation by the Allies following the unconditional surrender (p. 334) but reached this conclusion on the basis that the "unique character of the circumstances" of Germany in 1945 sanctioned a "unique solution" which was "a new experiment". He suggested that the position of the Allied governments was probably that they were exercising "co-imperium", several states jointly exercising jurisdiction or governmental functions and powers in territory which does not belong to them (as opposed to condominium, where several states possess sovereignty over a territory which belongs to them jointly) (p. 330). Mann concluded that the Allies were justified in acting outside the constraints of belligerent occupation by the co-existence of three factors: the end of hostilities, the unconditional surrender and the disappearance of central government (pp. 322-23). Mann's analysis is not entirely satisfactory in that he neither bases his conclusion on this point on any existing rule of international law (as does Jennings), nor states that the "new experiment" was being carried out on the basis of a new rule of customary international law, or defines any such new rule. Indeed, the notion of an "experiment" appears to be inconsistent with the relative stability inherent in the concept of a rule. On subsequent developments, including the creation of the Federal Republic of Germany and the "German Democratic Republic", the relation to Germany of the former and the status of the latter, see F. A. Mann, 'Germany's Present Legal Status Revisited', (1967) 16 *I.C.L.Q.* 760.

annexing state has resorted to force in breach of its obligations.³⁵⁴ A number of other writers expressed similar views on the invalidity of title by means of annexation following conquest.³⁵⁵ However, long after the UN Charter entered into force a number of writers continued to assume that such annexation was permitted by international law. As late as 1997, we find in the Encyclopedia of Public International Law an entry by Bothe in which he states that the application of the law of belligerent occupation may end with the final defeat of the occupied state, when all its forces have surrendered and there is no government-in-exile purporting to continue the fight.³⁵⁶ “In this situation”, he states, “annexation would no longer be unlawful”.³⁵⁷ In another volume of the same encyclopaedia (published in 1992) Meyn, who argues that the continued existence of *debellatio* would be inconsistent with the prohibition on the use of force contained in Article 2(4) of the Charter, notes frankly that “[i]t is a matter of dispute” whether in the era of the United Nations *debellatio* can legally occur.³⁵⁸

³⁵⁴ H. Lauterpacht (Ed.), *International Law, A Treatise by L. Oppenheim*, Vol. I (7th Ed., 1948, Longmans, Green & Co., London), p. 525. Lauterpacht stated however that title by conquest was valid where the conquering state was not bound by the UN Charter or the General Treaty for the Renunciation of War. It may be noted that at the time he was writing UN membership was not near-universal as it is now. He also regarded title by conquest as valid title when although the conquering state is a party to the Charter, its resort to force was not unlawful in the particular case (ibid).

³⁵⁵ See e.g. M. Akehurst, *A Modern Introduction to International Law* (6th Ed., 1987, Allen and Unwin, London), pp. 148-50, who states that international law prohibits the acquisition of territory by force, whether the conquering state is an aggressor or not (albeit that he states that in either case the defect in title could be cured by recognition *de jure* by other states), citing Article 2(4) of the UN Charter and, as regards non-aggressors, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States adopted by the General Assembly in 1970. And see Karl-Ulrich Meyn, ‘Debellatio’, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I (North-Holland, 1992), p. 969, at p. 970, who argues that “it is most doubtful whether there is a place for [*debellatio*] because of the prohibition of the threat or use of force in Art. 2(4) of the United Nations Charter...”. See also Christopher Greenwood, ‘The Administration of Occupied Territory in International Law’, p. 244, in Emma Playfair (Ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Oxford University Press, 1992), at p. 241. C.f. J.G. Starke, *Introduction to International Law* (10th Ed., 1989, Butterworths, London), p. 572, who states that it is “not clear” how far the principle that a country which has been conquered and annexed ceases to exist in international law now applies where the annexed state was conquered in a war of aggression which is illegal under international law. Starke refers in this regard to the prohibition on the recognition of territorial acquisition resulting from aggression contained in Article 5 of the Definition of Aggression adopted by the UN General Assembly in 1974. (This text is retained largely unaltered in the subsequent edition: see I.A. Shearer, *Starke’s International Law* (11th Ed., 1994, Butterworths), p. 517)

³⁵⁶ M. Bothe, ‘Occupation, Belligerent’ in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume III (1997), p. 763, at p. 764. (See also D.P. O’Connell, *International Law*, Vol. I (2nd Ed., 1970, Stevens & Sons, London), p. 441, who noted that in practice, in the previous three centuries, changes in sovereignty following conquest had been affected by a treaty of cession, but that *debellatio*, as the “informal extinction of sovereignty”, remained a “theoretical possibility”.)

³⁵⁷ Ibid

³⁵⁸ Karl-Ulrich Meyn, ‘Debellatio’, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I (North-Holland, 1992), p. 969, at p. 970

The issue as to whether it may be lawful to annex territory following the use of force has now been clarified by the International Court of Justice. The Court held in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that there is a rule of customary international law rendering illegal territorial acquisition resulting from the threat or use of force.³⁵⁹ The Court referred, apparently by way of evidence for this customary rule, to General Assembly Resolution 2625 (XXV) of 24 October 1970 entitled ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States’ in which it was emphasised that “No territorial acquisition resulting from the threat or use of force shall be recognized as legal”. The Court also observed that the customary rule regarding the illegality of territorial acquisition resulting from the use of force is a “corollary” of the rules on the use of force which are incorporated in the UN Charter and which reflect customary international law.³⁶⁰

The existence of a rule of customary international law to the effect that territorial acquisition resulting from the use of force is illegal removes the basis of the argument that if an occupying state is legally entitled to annex territory, it is entitled to assume the whole of the authority of the former government unaccompanied by annexation. Consequently, *debellatio* can no longer be used by states as a means to evade the obligations imposed by the law of occupation.³⁶¹

Conclusion

As shown above, the law of occupation requires the occupying state to respect the existing law and institutions of the occupied territory, subject to limited exceptions. In particular, under Article 43 of the Hague Regulations the occupying state must leave the existing law in place unless it can show an absolute necessity for changing it.

³⁵⁹ [2004] I.C.J. Reports p. 136, at p. 171 (para. 87)

³⁶⁰ *Ibid*

³⁶¹ See also Gregory H. Fox, ‘The Occupation of Iraq’, (2005) Vol. 36 Georgetown Journal of International Law, p.195, at p. 294, who states that the illegality of annexation under Article 2(4) of the UN Charter renders “untenable” today the legal justification advanced by Jennings for the actions of the Allies in governing Germany after the unconditional surrender. Fox does not however mention the *Wall* case in support of this point.

Having looked at the rules of occupation law which require the occupying state to respect the laws and institutions, we will now examine the challenges to those rules.

Chapter 3

The Challenge from “Transformative Occupation” I: “Transformative Occupation” in practice in Iraq

In this chapter we will examine the challenge posed by the idea that occupying states should be freed of their obligations to respect the existing law and institutions so as to be permitted to engage in “transformational” or “transformative” occupations. We will consider this challenge by reference to the Iraq case study. In particular we will consider the damaging consequences of the CPA’s legislation on de-Ba’athification and on the dissolution of the Iraqi armed forces. We will also examine evidence of non-implementation of the CPA’s commercial laws during the occupation. In the following chapter we will continue our exploration of the challenge from “transformational” or “transformative” occupation by examining the CPA’s legislation in the field of human rights and whether it succeeded in transforming the human rights position in Iraq.

As noted above, during the occupation of Iraq by the US and UK and its aftermath, there was discussion by writers of the possibility of “transformational occupation” and “transformative occupation”. Scheffer’s notion of “transformational occupation” poses an obvious challenge to occupation law in that Scheffer is arguing for the revision of occupation law to permit it. Roberts’ idea of “transformative occupation” poses a challenge to occupation law in that he argues for the use of human rights law and Security Council authorisation in order to override occupation law.

In this chapter we will consider these proposals by looking *inter alia* at the two most infamous pieces of legislation enacted by the CPA – the Orders on de-Ba’athification and dissolution of the Iraqi armed forces, which the then U.N. Secretary-General, Mr Kofi Annan, described as “two disastrous orders”.³⁶² We will also look at the fate of certain CPA free-market-oriented reform proposals, including privatisation. Finally,

³⁶² Kofi Annan, with Nader Mousavizadeh, *Interventions, A Life in War and Peace* (Allen Lane, London, 2012), pp.355-56

we will look at the problem of CPA legislation not being implemented. In the following chapter we will continue consideration of proposals for “transformational occupation” and “transformative occupation” by examining the CPA’s legislation in the field of human rights.

In considering the CPA legislation on de-Ba’athification and the dissolution of the Iraqi Army, it is helpful to bear in mind the principal divisions within Iraqi society. As we have seen, Iraqi society is divided into three principal groups: Sunni Arabs, Shi’ite Arabs and Kurds. Although the majority of the population are Shi’ite Arabs, it was primarily the Sunni Arabs who had governed Iraq from the creation of the Iraqi state in 1921 until the occupation of the country by the US and UK in 2003.³⁶³

Legislation on de-Ba’athification

At the beginning of the occupation the US occupation forces abolished the Ba’ath Party by proclamation. On 16 April 2003 the Commander in Chief of US forces, General Tommy Franks, issued a ‘Freedom Message to the Iraqi people’ in which he stated:

“...I proclaim the following:

....The Arab Socialist Renaissance Party of Iraq (Hizb al-Ba’th al-Arabi al-Ishiraki al-Iraqi) is hereby disestablished.....”³⁶⁴

On 16 May 2003 the CPA Administrator, Mr Bremer, promulgated CPA Order Number 1, De-Ba’athification of Iraqi Society.³⁶⁵ Section 1(1) of the Order referred to the fact that the CPA had disestablished the Ba’ath Party of Iraq on 16 April 2003 and stated that the Order implemented that proclamation by eliminating the party’s structures and removing its leadership from positions of authority and responsibility in Iraqi society.

³⁶³ See e.g. Adeed Dawisha, *Iraq, A Political History from Independence to Occupation* (Princeton University Press, 2009), p. 71 and p. 244

³⁶⁴ General Franks, ‘Freedom Message to the Iraqi People’, 16 April 2003, reproduced in Stefan Talmon, *The Occupation of Iraq, Vol. II, The Official Documents of the Coalition Provisional Authority and the Iraqi Governing Council* (Hart Publishing, 2013), p. 795.

³⁶⁵ CPA Order No. 1, De-Ba’athification of Iraqi Society, promulgated 16 May 2003 (CPA/ORD/16 May 2003/01)

By this means, section 1(1) continued, the CPA “will ensure that representative government in Iraq is not threatened by Ba’athist elements returning to power and [sic] that those in positions of authority in the future are acceptable to the people of Iraq”.

Section 1(2) of the Order provided, *inter alia*, that full members of the Ba’ath Party within its four most senior ranks were thereby removed from their positions and banned from future employment in the public sector.³⁶⁶ In addition, section 1(3) provided that any individuals holding positions in the top three layers of management in every national government ministry, affiliated corporations and other government institutions (including by way of example universities and hospitals) who were found to be full members of the Ba’ath Party shall be removed from their employment.³⁶⁷ It was made clear in section 1(3) that those to be removed from the layers of management specified included those holding the more junior ranks of Party membership, as well as those found to be Senior Party Members.³⁶⁸ Section 1(6) empowered the CPA Administrator, or his designees, to grant exceptions to the foregoing provisions on a case-by-case basis.³⁶⁹

Subsequently, the CPA Administrator delegated authority for carrying out de-Ba’athification to Iraqi politicians in the Governing Council. On 4 November 2003 the CPA Administrator promulgated CPA Memorandum Number 7 (Delegation of Authority Under De-Baathification Order No. 1).³⁷⁰ Section 1(1) of the Memorandum provided that “The Governing Council is hereby empowered to carry out the de-Baathification of Iraqi society consistent with CPA Order No. 1, De-Baathification of Iraqi Society...”. The preamble to the Memorandum referred to the fact that the Governing Council had created a Higher National De-Baathification Commission

³⁶⁶ i.e. full members of the Ba’ath Party holding the ranks of ‘Udw Qutriyya (Regional Command Members), ‘Udw Far’ (Branch Member), ‘Udw Shu’bah (Section Member) and ‘Udw Firqah (Group Member) (together referred to as “Senior Party Members”)

³⁶⁷ Individuals holding positions in these top three layers of management in government and public sector were to be interviewed for possible affiliation with the Ba’ath Party.

³⁶⁸ The junior ranks being those of ‘Udw (Member) and ‘Udw ‘Amil (Active Member)

³⁶⁹ Further details of how the process of de-Ba’athification was to be carried out were set out in CPA Memorandum No. 1, Implementation of De-Ba’athification Order No. 1.

³⁷⁰ CPA Memorandum No. 7, Delegation of Authority under De-Baathification Order No. 1, promulgated 4 November 2003 (CPA/MEM/4 November 2003/7)

(hereafter “HNDC”).³⁷¹ Section 2(1) of the Memorandum provided that the Governing Council may further delegate the authority conferred under Section 1 of the Memorandum to the HNDC or other organisation established by the Governing Council.³⁷² The HNDC was required to provide monthly reports to the CPA Administrator and Governing Council describing the manner in which the authority delegated by the Memorandum had been exercised and including the names and positions of Iraqi citizens dismissed from positions of employment.³⁷³ The CPA Administrator was empowered to reinstate an employee who had been dismissed if he concluded that it was in the interests of the Iraqi people or that failing to reinstate the employee would be fundamentally unfair.³⁷⁴

The CPA’s de-Ba’athification legislation resulted in a very substantial number of former members of the Ba’ath Party being dismissed from their jobs. In December 2004 the Iraqi Government informed the UK Embassy in Baghdad that the effect of CPA Orders Nos. 1, 2 and 5 had been to remove an estimated 35,000 people from their posts, of whom 15,000 had eventually been permitted to return to work, with a further 8,000 applications for “rehabilitation” outstanding.³⁷⁵ The HNDC had removed a further 3,000 people from office.³⁷⁶ The Chilcot Inquiry found that the evidence suggested that “tens of thousands of rank and file Baathists” were subjected to de-Ba’athification.³⁷⁷

³⁷¹ See Governing Council Resolution No. 21 of 2003, 18 August 2003 reproduced in Talmon (n 364) 1130-31

³⁷² Section 3 of CPA Memorandum No. 7 rescinded CPA Order No. 5, Establishment of the Iraqi De-Baathification Council, which had established the Iraqi De-Baathification Council (Section 1(1)) to investigate, and advise the CPA Administrator on, certain specified matters in connection with de-Ba’athification (see Sections 3(1) and 3(2), respectively). On the final day of the occupation, 28 June 2004, the CPA Administrator promulgated CPA Order No.100, Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, the final Order of the CPA. Section 6(7) of Order No. 100 provided that all authority delegated under Memorandum No.7 shall be withdrawn and the Higher National De-Ba’athification Council, established pursuant to that authority, shall be abolished at such time as the Iraqi Interim Government issues an order establishing the Independent Iraqi De-Ba’athification Council.

³⁷³ Section 2(10), Memorandum No. 7

³⁷⁴ Section 2(7), Memorandum No, 7. The Administrator was required to consult the Governing Council before exercising this power.

³⁷⁵ Chilcot Report, Vol. 10, p. 35 (Section 11.1, paras. 172-73), citing eGram 452 Baghdad to FCO London, 4 December 2004, ‘Iraq: ‘Re-Ba’athification’ [sic]. A further 700 persons had been offered retirement (ibid).

³⁷⁶ Ibid

³⁷⁷ Chilcot Report, Vol. 10, p. 61 (Section 11.2, para. 23)

This was despite the fact that prior to the occupation there had been an awareness within the UK Government at least that many party members had joined the Ba'ath Party under duress or in order to be able to take a particular job in the public service. Thus, a briefing document prepared by the Defence Intelligence Service shortly before the occupation stated:

“To be a Ba'athist does not necessarily mean an individual is a hard core supporter of the regime. Most joined to advance their careers or under duress (mostly government employees). In every government department there is a hard-core, who have been responsible for security. They are responsible for the ‘disappeared’, are known by everybody and will be nervous. They will probably go on the run or try to hide among the populace.”³⁷⁸

The document continued:

“It will require detailed inside knowledge to identify the ‘bad apples’ in any organisation; it may not necessarily be the head of the organisation, it could be the number two or three, or someone even further down the hierarchy...”³⁷⁹

Similarly the UK Secretary of State for International Development, Ms Clare Short, informed the House of Commons shortly before the occupation that:

“... Iraq is like the former Soviet Union, where people had to join the Communist party if they wanted to be a teacher. Many member of the Ba'ath Party are not the real leaders of the regime, and they will need to remain in their jobs so as to continue to run their country.”³⁸⁰

³⁷⁸ Defence Intelligence Service, ‘Iraq Red Team – What Will Happen in Baghdad?’, 7 April 2003, enclosing ‘What Will Happen in Baghdad? A Bullet Brief by the DIS Red Team’, p. 3 (cited in Chilcot Report, Vol. 10, p. 4 (Section 11.1, para. 10)). There is some indication that this document may have been shared with the US Government as it is marked “UK SECRET, AUS/UK/US EYES ONLY”.

³⁷⁹ Ibid

³⁸⁰ Hansard, House of Commons Debates, 10 April 2003, Col. 444 (Vol. 403) (cited in Chilcot Report, Vol. 10, p. 4 (Section 11.1, paras. 145-48))

When the draft of Order No. 1 was being discussed, the UK adopted the approach that “the net should not be cast too wide” and that the Order should exclude the top three ranks of party members rather than the top four ranks.³⁸¹ It was envisaged that those in the fourth rank should be vetted to ensure that no rotten apples were kept on. The UK thinking was that

“... we do not want to create a large underground of disaffected Ba’athists who see no possible future for themselves in post-Saddam Iraq. And we have to balance the need to address popular anger at the past excesses of the Ba’ath party against the priority to get an effective public administration up and running”.³⁸²

However, as shown above, Order No. 1 as promulgated removed from their positions those within the top four ranks of party membership. This followed instructions from Washington.³⁸³

The Chilcot Inquiry found that extending de-Ba’athification down to the fourth level of membership increased the number of persons potentially affected from around 5,000 (i.e. those in the top three ranks) to around 30,000, and that limiting de-Ba’athification to the top three ranks “would have had the potential to be far less damaging to Iraq’s post-invasion recovery and political stability”.³⁸⁴

The de-Ba’athification legislation had a number of serious consequences. First, it deprived Iraq of the services of administrators and other public servants at a time when the occupying powers were attempting to get the government of the country up and running again after the end of military conflict. In a report to the U.N. Security Council dated 17 July 2003, the U.N. Secretary-General, Mr Kofi Annan, informed the Council that, in part because senior personnel had been dismissed under CPA Order Number 1 on de-Ba’athification, many ministries were left with “significantly reduced technical

³⁸¹ Telegram No. 2, FCO London to IraqRep, 14 May 2003, ‘Iraq: de-Ba’athification’ (cited in part in Chilcot Report, Vol. 10, p. 9 (Section 11.1, para. 39 and n. 26)

³⁸² Ibid

³⁸³ Chilcot Report, Vol. 10, p. 11 (Section 11.1, paras. 45-47) and telegram 655, UK Embassy, Washington to FCO, London, 14 May 2003, ‘Iraq: US Views’ (cited *ibid*, at note 30)

³⁸⁴ Chilcot Report, Vol. 10, p. 59 (Section 11.2, paras. 9-10)

and decision-making capacity”.³⁸⁵ Sir Jeremy Greenstock, who became UK Special Representative for Iraq in September 2003 gave evidence to the Chilcot Inquiry that he “met the consequences” of Order Number 1 when he arrived in Iraq to take up his post and that in his opinion de-Ba’athification had been taken too far:

“... in my view, de-Ba’athification in practice was taken too far for the sensible administration of Iraq, including in the professions, in the academic and legal and other professions and in the civil service, when we needed Iraq’s middle class to be performing its functions if we were to administer it properly.”³⁸⁶

Sir Jeremy indicates in his evidence that a vacuum was left in government where officials were removed from office under Order No. 1:

“What did not happen was to find people to run a government who were not Ba’athists, and that decree [Order Number 1] was issued before a clear route had been found to filling the posts necessary for the minimal government of Iraq.”³⁸⁷

Furthermore, Sir Jeremy suggested that this failure to fill the gap which the Ba’ath Party performed in Iraq through any other means “should have made [the CPA] think about the wisdom” of Order No. 1 “or the timing” of it.³⁸⁸ The Chilcot Inquiry found that Order No. 1 “made the task of reconstructing Iraq more difficult”, *inter alia*, “by reducing the pool of Iraqi administrators”.³⁸⁹

One of the sectors affected by de-Ba’athification was the teaching profession. Sir David Richmond, who was then the UK Special Representative in Iraq, reported to London in May 2004 that in the primary and secondary education sector 12,000

³⁸⁵ Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003), 17 July 2003, (U.N. Doc. S/2003/715), para. 68

³⁸⁶ Transcript of evidence of Sir Jeremy Greenstock, 15 December 2009, p. 73 and p. 74

³⁸⁷ *Ibid*, p.73

³⁸⁸ *Ibid*, pp. 73-74

³⁸⁹ Chilcot Report, Vol. 10, p. 59 (Section 11.2, para. 13)

employees had been dismissed under the de-Ba'athification legislation.³⁹⁰ Mr Bremer states in his memoir that “tens of thousands of teachers, who had been forced to join the party to be eligible to teach” had been deprived of their posts.³⁹¹ Mr Bremer also accepts that “Iraqi children were paying the price”.³⁹²

The second serious consequence of the CPA's de-Ba'athification legislation was that it increased grievance and unemployment amongst Sunnis and thereby increased support for the insurgency. Sir David Richmond, who was UK Deputy Special Representative in Iraq between September 2003 and March 2004, and later the UK Special Representative between March and June 2004, gave evidence to the Chilcot Inquiry that through August and September 2003 there had been a growing concern within the CPA that the Sunni community felt that they had been “marginalised”.³⁹³ Sir David diagnosed de-Ba'athification to be part of the cause.³⁹⁴ Sir David stated that the Sunnis “disproportionately lost out” through the process of de-Ba'athification and the disbanding of the Iraqi Army and that those policies together had a “huge effect on employment” in the Sunni provinces of Iraq.³⁹⁵

The Chilcot Inquiry found that another reason why Order No. 1 “made the task of reconstructing Iraq more difficult” was “by adding to the pool of the unemployed and disaffected, which in turn fed insurgent activity”.³⁹⁶ The Inquiry noted that de-Ba'athification “continued to be identified as a major Sunni grievance and a source of sustenance for the insurgency in Iraq” as late as 2007.³⁹⁷ The Inquiry also found that by the time of the first elections in Iraq after the invasion de-Ba'athification was identified as “a major political issue” because “it put a substantial barrier in the way of Sunni engagement with the political process”.³⁹⁸ Overall, the Chilcot Inquiry

³⁹⁰ Chilcot Report, Vol. 10, p. 31 (Section 11.1, para. 10), citing telegram 257 IraqRep to FCO London, 26 May 2004, 'Iraq: de-Ba'athification Update'. Up to that point, 4,600 had appealed successfully and it was anticipated that there would be a further 1,300 successful appeals by the end of May (ibid).

³⁹¹ L. Paul Bremer III (with Malcolm McConnell), *My Year in Iraq, The Struggle to Build a Future of Hope* (Simon & Schuster, 2006), p. 341

³⁹² Ibid

³⁹³ Transcript of evidence of Sir David Richmond, 26 January 2011, p. 52

³⁹⁴ Ibid, pp. 52-54

³⁹⁵ Ibid, p. 54

³⁹⁶ Chilcot Report, Vol. 10, p. 59 (Section 11.2, para. 13)

³⁹⁷ Chilcot Report, Vol. 10, p. 61 (Section 11.2, para. 23)

³⁹⁸ Chilcot Report, Vol. 10, p. 60 (Section 11.2, para. 21)

concluded that early decisions on the form of de-Ba'athification and its implementation "had a significant and lasting negative impact on Iraq".³⁹⁹

Part of the problem in relation to de-Ba'athification was that, as shown above, in Memorandum No. 7 the CPA Administrator delegated authority for carrying out de-Ba'athification to Iraqi politicians in the Governing Council, which in turn delegated it to the Higher National De-Baathification Commission (HNDC). The HNDC was presided over by Ahmed Chalabi who was, according to the evidence of Sir Jeremy Greenstock, "deeply anti-Ba'athist".⁴⁰⁰ The HNDC "took action to toughen the impact of de-Ba'athification".⁴⁰¹ Sir David Richmond gave evidence to the Chilcot Inquiry that whilst the CPA endeavoured to engage in an outreach policy in relation to the Sunni community (from around October 2003) and considered in that context whether de-Ba'athification could be made more flexible,

"De-Ba'athification we never really properly got to grips with because ... I think it was just allowed to be run by the Shia essentially, a mistake."⁴⁰²

The Chilcot Inquiry was critical of the delegation of implementation of de-Ba'athification to the Governing Council:

"The decision to hand over responsibility for implementation to a political body of this nature was, in the Inquiry's view, a mistake which left a critically important area of policy outside the control of the CPA, with damaging consequences."⁴⁰³

It should be noted that CPA Order Number 1 was promulgated prior to the adoption by the Security Council of Resolution 1483, which requested the UN Secretary-General to appoint a Special Representative for Iraq.⁴⁰⁴ Order Number 1 was therefore issued

³⁹⁹ Chilcot Report, Vol. 10, p. 61 (Section 11.2, para. 25)

⁴⁰⁰ Transcript of evidence of Sir Jeremy Greenstock, 15 December 2009, p.74

⁴⁰¹ Chilcot Report, Vol. 10, p. 60 (Section 11.2, para. 18)

⁴⁰² Transcript of evidence of Sir David Richmond, 26 January 2011, pp.55-57

⁴⁰³ Chilcot Report, Vol. 10, p. 60 (Section 11.2, para. 16)

⁴⁰⁴ CPA Order Number 1 was promulgated on 16 May 2003. Resolution 1483 was adopted on 22 May 2003. The Secretary-General appointed Mr Sergio Vieira de Mello as his Special Representative for Iraq on 27 May 2003 and Mr Vieira de Mello arrived in Iraq on 2 June 2003: see Report of the Secretary-

without the benefit of any input from the Special Representative for Iraq, who had yet to be appointed. Accordingly, Order Number 1 does not reflect adversely upon the UN Secretary-General's Special Representative for Iraq or upon the idea of UN administration of territory.

Legal analysis

As shown above, many writers attest to a rule of international humanitarian law that an occupying state may not make changes to institutions or to the administration of the occupied state. However, sometimes an analogy is made between de-Ba'athification and the de-Nazification implemented in Germany after the Second World War.⁴⁰⁵ Does the latter somehow provide a legal precedent? Stone states that it is "commonplace" that an occupant should not engage in changing the local political structure and that "de-Nazification" in Germany after the Second World War was not grounded on the occupation, but on the unconditional surrender.⁴⁰⁶ As noted above, after the unconditional surrender of the German armed forces, the UK, USA, USSR and France declared that they were assuming "supreme authority with respect to Germany, including all the powers possessed by the German Government...", an assertion of power going well beyond the powers possessed by occupying states under the law of occupation. However, as shown above, such an argument is no longer available to occupying states today. Thus, the US and UK in Iraq were constrained in relation to "de-Ba'athification" in a way in which they and the other Allies were, at least arguably, not in relation to "de-Nazification".

It is submitted therefore that the CPA legislation abolishing the Ba'ath Party, and arguably that removing officials and other public servants from their positions because of their membership of the Ba'ath Party, offends against the rule prohibiting institutional change unless those measures can be justified under a recognised exception to the rule. Writers who acknowledge the rule prohibiting institutional change also recognise certain exceptions to it. One exception to the rule which has

General pursuant to paragraph 24 of Security Council Resolution 1483 (2003), 17 July 2003, UN Doc. S/2003/715, para. 2.

⁴⁰⁵ See e.g. Transcript of evidence of Sir John Sawers, 10 December 2009, p. 67.

⁴⁰⁶ Julius Stone, *Legal Controls of International Conflict, A Treatise on the Dynamics of Disputes – and War – Law* (Stevens & Sons Ltd, 1954), p. 698 and note 21a

received broad support from writers is where changes are necessary for the safety of the occupying state's forces. The preamble to Order Number 1 invokes concerns of that very nature as part of the justification for the Order. The preamble refers to the CPA Administrator being "*Concerned* by the continuing threat to the security of the Coalition Forces posed by the Iraqi Ba'ath Party".⁴⁰⁷

However, it is noteworthy that among the various reasons for de-Ba'athification given by Mr Bremer in the witness statement which he submitted to the Chilcot Inquiry, and in his memoir, a necessity for de-Ba'athification for the safety of the occupying forces does not feature.⁴⁰⁸ Nor does such an alleged justification feature in the evidence given to the Chilcot Inquiry by Sir John Sawers, who was the UK Government's Special Representative for Iraq between May and July 2003, and his successor, Sir Jeremy Greenstock.⁴⁰⁹ Furthermore, it is relevant to note that we learn from Douglas Feith, US Under Secretary of Defense for Policy during the occupation, that General Franks, the commander of the US occupation forces, had attempted to delete from the 'Freedom Message' which he issued at the commencement of the occupation the passage

⁴⁰⁷ Fourth preambular paragraph (italics in original).

⁴⁰⁸ Statement by Ambassador Bremer, 18 May 2010, pp. 6-7. In his witness statement he refers to the following reasons: as a first step towards the goal of helping the Iraqis to establish responsible, representative government; to ensure that Ba'athist ideology did not seep into the public realm; and to block the appointment or promotion of individuals who had Ba'athist sympathies or loyalties or who expressed Ba'athist thought (ibid). In his memoir Mr Bremer describes being shown a draft order for the "De-Baathification of Iraqi Society" by the U.S. Under Secretary of Defense for Policy, Douglas Feith, on 9 May 2003 in Washington, prior to Mr Bremer's departure for Iraq and states that Mr Feith "had underscored the political importance of the decree", stating that "'We've got to show all the Iraqis that we're serious about building a New Iraq. And that means that Saddam's instruments of repression have no role in that new nation'" (L. Paul Bremer III (with Malcolm McConnell), *My Year in Iraq, The Struggle to Build a Future of Hope* (Simon & Schuster, 2006), p. 39). Other references in Mr Bremer's book to the rationale for CPA Order No. 1 include: to rid the Iraqi government of "the small group of true believers at the top of the party and those who had committed crimes in its name" (ibid); "to wipe the country clean of the Baath Party's ideology" (ibid) and that the removal of the Ba'ath Party's leadership from positions in government "was intended to ensure that the new representative government of Iraq was not threatened by Baathists returning to power" (ibid, p. 41).

⁴⁰⁹ See Transcript of evidence of Sir John Sawers, 10 December 2009. Sir John refers to the following reasons for de-Ba'athification: that "in several ... instances", including Baghdad University, the trade, health and foreign ministries and the Baghdad police, "the working level were in uproar" at being obliged to work for senior figures who were Ba'athists and who had tyrannised them under the previous regime, and they were refusing to cooperate on that basis (ibid, pp. 63-64 and p. 68); public opinion, citing an opinion poll which concluded that over 94 per cent of Iraqis expected some or all Ba'athists to be removed from their jobs, and that the occupying powers had to respect the views of the people (pp. 72-73); and that de-Ba'athification was a "vital point for the Iraqi political parties" (p. 67). Sir Jeremy Greenstock referred, by way of justification for Order No. 1, to "the Shia politicians in particular" being strongly against bringing ex-Ba'athists, particularly senior Ba'athists, into the new administration (Transcript of evidence of Sir Jeremy Greenstock, 15 December 2009, p. 73).

disestablishing the Ba'ath Party.⁴¹⁰ That does not suggest that he believed that dissolution of the Ba'ath Party would be necessary for the safety of his forces. For these reasons it appears doubtful that, as a matter of fact, the safety of the occupying states' forces provides a justification for the CPA's de-Ba'athification legislation.⁴¹¹

In summary, then, the de-Ba'athification legislation violated the rule that an occupying state may not make changes to institutions or to the administration of the occupied state. None of the recognised exceptions to that rule apply to justify the broad policy on de-Ba'athification contained in Order Number 1, or the broader policy which was pursued in practice.⁴¹²

It is perhaps worth making the point that in situations of occupation the occupying states commonly retain many of the officials of the indigenous administration.⁴¹³

Article 54(1) of the Geneva Convention (IV) provides that the occupying state may not

⁴¹⁰ Douglas J. Feith, *War and Decision, Inside the Pentagon at the Dawn of the War on Terrorism* (Harper, New York, 2009), pp. 418-19. Feith states that when he provided General Franks with the draft 'Freedom Message' Franks made one amendment – he crossed-out the sentence stating that the Ba'ath Party is "hereby disestablished". Feith states that "Franks said that the Baathists were a political party, and if we were going to promote democracy, we shouldn't be banning political parties" (at p. 418). Feith states that he told Defense Secretary Rumsfeld about the issue and that the sentence in question was re-instated (at p. 420).

⁴¹¹ C.f. Michael N. Schmitt and Charles H.B. Garraway, 'Occupation Policy in Iraq and International Law', (2004) Vol. 9 *International Peacekeeping: The Yearbook of International Peace Operations*, p. 27, at p. 36, who state that "[a]s a matter of law, security concerns justified the de-Ba'athification program because the party had previously demonstrated its propensity for repression, violence, and other abuses".

⁴¹² C.f. Gregory H. Fox, 'The Occupation of Iraq', (2005) 36 *Georgetown Journal of International Law*, p. 195, at p. 242 who states that "[i]t could be claimed that because the Ba'athist regime had functioned, at least in later years, as a virtual cult of personality surrounding Saddam Hussein, the CPA was "absolutely prevented" from working through Ba'athist ... personnel once Saddam and his close associates were driven from power....[T]his would be an argument for removing Ba'athist Party loyalists from positions of authority – as was done....". However, Fox goes on to conclude (at p. 295) that "virtually none of the de-Ba'athification measures and military, economic, and good government reforms finds support in the [Hague and Geneva] treaty texts", which suggests that in his view virtually none of the de-Ba'athification measures is consistent with the Hague Regulations and Geneva Convention (IV), although that is perhaps not entirely clear. Nor is it clear which de-Ba'athification measures in his view are lawful and which are not.

⁴¹³ See e.g. Gerhard von Glahn, *The Occupation of Enemy Territory, A Commentary on the Law and Practice of Belligerent Occupation* (1957), p. 132 ("The retention of large numbers of local and regional officials by occupying authorities has been a basic policy followed in almost all military occupations during recent wars".); Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press, 1959), p. 261 ("high-ranking political officers", such as cabinet ministers and heads of the principal political divisions, will usually be removed from office but "[s]ubordinate officials and those in local government will usually be retained in their posts".). See also Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), pp. 57-58

alter the status of public officials or judges in the occupied territories. However, Article 54(2) provides, *inter alia*, that this prohibition does not affect “the right of the Occupying Power to remove public officials from their posts”. The ICRC Commentary makes clear that that right is “the Occupying Power’s right to remove public officials from their posts *for the duration of occupation*” (italics added).⁴¹⁴ The Commentary states that that is a right of “very long standing”.⁴¹⁵ Lauterpacht similarly states that the occupying state may “*for the time of his occupation*” depose all Government officials (italics added).⁴¹⁶ It will be noted that where section 1(2) of CPA Order Number 1 provided that members of the Ba’ath Party within the top four levels of the Party hierarchy were removed from their positions, the removal from office was not expressed to be limited to the duration of the occupation. Moreover, section 1(2) goes on to state that such Senior Party Members are “banned from future employment in the public sector”. This clearly goes beyond the “Occupying Power’s right to remove public officials from their posts for the duration of occupation” as described in the ICRC Commentary. Thus, on this basis, Order Number 1 exceeded what was permissible under Article 54(2) of the Geneva Convention and therefore violated the obligations of the US and UK under Article 54(1).⁴¹⁷

Carcano has argued that Order No. 1 is “justified by the spirit, if not the letter” of Resolution 1483, given that that resolution contains references to conditions in which

⁴¹⁴ Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949, Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, 1958), p. 308

⁴¹⁵ Dinstein notes that “The decision is not likely to take place en bloc: usually, removal of officials will result from individual vetting”: see Dinstein (n 413) 59

⁴¹⁶ H. Lauterpacht, *International Law, A Treatise, By L. Oppenheim*, vol. II (7th ed., Longmans, Green & Co., 1952), p. 445. C.f. Gerhard von Glahn, *The Occupation of Enemy Territory, A Commentary on the Law and Practice of Belligerent Occupation* (1957), p. 135, who does not mention the question of the duration of the removal from office.

⁴¹⁷ c.f. David J. Scheffer, ‘Beyond Occupation Law’, (2003) 97 A.J.I.L. 842, at p. 854-55, who states that “if proven true” actions by the occupying powers to permanently remove certain Iraqi public officials and judges from their posts “may” invite civil liability or criminal culpability under occupation law. This is clearly a very weak conclusion (e.g. “may”). Furthermore, as regards the qualification “if proven true”, a weakness of this article by Scheffer is that he does not refer to or analyse any of the CPA legislation. Had he considered Order Number 1 he would have seen that the occupying powers did indeed permanently remove officials from their posts. C.f. also Eyal Benvenisti, *The International Law of Occupation* (2nd ed., 2012, Oxford University Press), at p. 259, who states that the removal of Ba’ath party members from government positions was “difficult to reconcile with the law of occupation...”. C.f. also Andrea Carcano, *The Transformation of Occupied Territory in International Law* (2015, Brill Nijhoff) at p. 215, who states that, in the light of Article 54 of the Geneva Convention, no objection can be made to Order No. 1 from a normative perspective.

the Iraqi people can “freely determine their own political future” and to a process leading to the establishment of an “internationally recognized, representative government of Iraq”. It has to be said that relying on the “spirit” of a Security Council resolution is not a very legalistic approach. Furthermore, even if one were to take such a non-legalistic approach, it is difficult to see how Resolution 1483 can have provided a legal basis for Order No. 1 given that that resolution was not adopted by the Security Council until a number of days after Order No. 1 had been promulgated and had entered into force.⁴¹⁸

Furthermore, Article 43 of the Hague Regulations provides that an occupying state shall take all the measures in his power to restore, and ensure, as far as possible, “l’ordre et la vie publics”, to use the phrase which appears in the authentic French text. As noted above, many writers have pointed out, the phrase “vie publics” is broader than the word “safety” employed in the official English translation and refers to the entire social and commercial life of the community. The occupying state is therefore obliged to take all the measures in his power to restore and maintain, as far as possible, public order and the entire social and commercial life of the community. Sir Jeremy Greenstock’s evidence that in his view “... de-Ba’athification in practice was taken too far for the sensible administration of Iraq”, including in the civil service and professions, “when we needed Iraq’s middle class to be performing its functions *if we were to administer it properly*” (italics added) indicates that the US and UK as the occupying states failed to fulfil their duty to restore and maintain “l’ordre et la vie publics”. Mr Bremer’s admission that “tens of thousands” of teachers were dismissed from their posts as a result of de-Ba’athification, and that “Iraqi children were paying the price”, similarly indicates that the US and UK failed in their duties under Article 43 of the Hague Regulations.

Moreover, the duty of an occupying state under Article 43 of the Hague Regulations has particular implications where the occupying state removes public officials from their posts. Because the occupying state must restore and maintain “l’ordre et la vie

⁴¹⁸ Order No. 1 was promulgated on 16 May 2003 and entered into force on that day. Resolution 1483 was not adopted until 22 May 2003. See also Michael N. Schmitt and Charles H.B. Garraway, ‘Occupation Policy in Iraq and International Law’, (2004) Vol. 9 International Peacekeeping: The Yearbook of International Peace Operations, p. 27, at p. 36, who state that “Since de-Baathification began before Resolution 1483’s adoption, its legality depends on occupation law.”

publics”, if it deposes public officials, it must appoint other officials in their place.⁴¹⁹ Sir Jeremy Greenstock’s evidence that “[w]hat did not happen was to find people to run a government who were not Ba’athists” and that Order Number 1 “was issued before a clear route had been found to filling *the posts necessary for the minimal government of Iraq*” (italics added) makes clear the failure of the US and UK, as occupying states, to appoint public servants to replace those dismissed as a result of de-Ba’athification and, in turn, indicates their failure to adhere to their duties under Article 43 of the Hague Regulations.

The mass dismissal of teachers under the de-Ba’athification legislation raises particular issues under the Geneva Convention (IV). Article 50(1) of the Geneva Convention provides that the Occupying Power shall “facilitate the proper working of all institutions devoted to the ... education of children”. The ICRC Commentary makes clear that this provision entails that the occupying authorities are bound to avoid interfering with the activities of such institutions, to actively support such institutions and to “encourage” them if the responsible authorities of the country fail in their duty. Amongst other things, the Commentary states, an occupying state must therefore refrain from requisitioning staff.⁴²⁰ In the case of the occupation of Iraq, the fact that many thousands of teachers were dismissed from their posts as a result of de-Ba’athification, and Mr Bremer’s admission that “Iraqi children were paying the price”, indicates that the US and UK, as occupying powers, breached Article 50(1) of the Geneva Convention (IV).

Clearly, the fact that the CPA Administrator delegated to the Governing Council the authority to carry out de-Ba’athification, under CPA Memorandum Number 7, did not remove the responsibility of the US and UK under international humanitarian law.⁴²¹

⁴¹⁹ H. Lauterpacht, *International Law, A Treatise, By L. Oppenheim*, vol. II (7th ed., Longmans, Green & Co., 1952), p. 445: “Since, according to Article 43 of the Hague Regulations, he has to secure public order and safety, he must temporarily appoint other functionaries in case those of the legitimate Government ... are deposed by him for the time of the occupation”.

⁴²⁰ Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949, Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, 1958), p. 286

⁴²¹ Article 47 of the Geneva Convention (IV) provides that protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory.

The US and UK continued to be occupying powers and retained their duties and responsibilities under international humanitarian law, for violation of which they were responsible in law.

Conclusion on de-Ba'athification

The example of the de-Ba'athification legislation in Iraq shows the damage which can be inflicted upon an occupied state where it acts outside the constraints of the law of occupation. This example suggests that occupying states should not be freed of their obligations under the law of occupation so as to be permitted to engage in “transformational” or “transformative” occupations.

Legislation dissolving the Iraqi Army

On 23 May 2003 the CPA Administrator promulgated CPA Order Number 2, Dissolution of Entities.⁴²² Section 1 of the Order provided that the entities (referred to as “Dissolved Entities”) listed in an Annex attached to the Order were thereby dissolved. These Dissolved Entities included the Army, Air Force, Navy and other regular military services; the Republican Guard and Special Republican Guard; certain specified paramilitaries, including the Saddam Fedayeen; the Ministry of Defence; and the Iraqi Intelligence Service. Section 2(1) of the Order provided that the assets of the Dissolved Entities were to be held by the Administrator of the CPA on behalf of the Iraqi people. Section 3(3) of the Order provided that any person employed by a Dissolved Entity in any form or capacity was dismissed with effect from 16 April 2003.

It should be noted that Order No. 2 was issued only a day after the Security Council adopted Resolution 1483, which requested the Secretary-General to appoint a Special Representative for Iraq, and before the Special Representative was appointed.⁴²³ It was

⁴²² CPA Order No. 2, Dissolution of Entities, promulgated 23 May 2003 (CPA/ORD/23 May 2003/02)

⁴²³ See paragraph 8 of Resolution 1483. Resolution 1483 was adopted on 22 May 2003. The Secretary-General appointed Mr Sergio Vieira de Mello as his Special Representative for Iraq on 27 May 2003 and Mr Vieira de Mello arrived in Iraq on 2 June 2003; see Report of the Secretary-General pursuant to paragraph 24 of Security Council Resolution 1483 (2003), 17 July 2003 (UN Doc. S/2003/715), para. 2. CPA Order No. 2 was promulgated on 23 May 2003.

therefore promulgated without the benefit of any input from the UN Secretary-General's Special Representative for Iraq.

One argument which has been made by Mr Bremer for disbanding the Iraqi Army is that it had "self-demobilized" when "thousands" of Shia conscripts deserted and returned home when it became clear that Iraq was losing the war.⁴²⁴ However, Sir Kevin Tebbit, who was Permanent Under Secretary at the UK Ministry of Defence during the occupation, gave evidence to the Chilcot Inquiry that he did not accept that argument because "the 10,000 officers" had not disappeared.⁴²⁵ Furthermore, the UK Secretary of State for Defence, Mr Geoffrey Hoon, gave evidence to the Chilcot Inquiry that, although many Iraqi soldiers had gone home, the Iraqi Army "could have been reconstituted relatively quickly".⁴²⁶

Legal analysis

As shown above, many writers attest to the existence of a rule whereby, subject to certain exceptions, the occupying state is not entitled to change the institutions of the occupied territory. The dissolution of the Iraqi Army violated that rule, unless it can be justified under one of the recognised exceptions to the rule or it can be shown that it was authorised by the Security Council.

Furthermore, even if one were to adopt the narrower formulation of the rule espoused by some writers whereby it is the fundamental institutions which an occupying state is prohibited from changing, it is submitted that the dissolution of the Iraqi Army falls foul of the rule, unless it can be justified under one of the recognised exceptions. This follows from the fact that one of the most basic functions of any state is to maintain armed forces in order to defend its people from attack by other states. A state's army is therefore one of its fundamental institutions.

⁴²⁴ Witness statement of Ambassador Bremer, 18 May 2010, p. 3

⁴²⁵ Quoted in Chilcot Report, Vol. 10, p. 96 (Section 12.1, para. 162), citing private hearing, 6 May 2010, p. 36

⁴²⁶ Transcript of evidence of Rt Hon Geoffrey Hoon, 19 January 2010, p. 161

As shown above, one exception to the rule prohibiting change to institutions relates to changes which are temporarily necessitated by the occupier's interest in the maintenance and safety of its army. However, this is not one of the reasons for the dissolution of the Army given by Mr Bremer in the statement which he submitted to the Chilcot Inquiry.⁴²⁷ Nor is it one of the reasons given by Mr Bremer in the memorandum which he sent to the US Secretary for Defense, Mr Donald Rumsfeld, on 19 May 2003, in which Mr Bremer stated that he was proposing to issue Order No.2 “[i]n the coming days”, and to which he attached a copy of the draft Order.⁴²⁸ Again, Mr Rumsfeld, when discussing the dissolution of the Iraqi Army in his memoirs, does not refer to the maintenance and safety of US or Coalition forces as a reason for the dissolution of the Army.⁴²⁹ Indeed, he states that he had originally wanted to retain the

⁴²⁷ Statement by Ambassador Bremer, 18 May 2010, pp. 3-4. Mr Bremer states there that the decision to dissolve the Army was based on: (i) the nature and role of the Iraqi Army under Saddam's rule - Saddam's use of the Army as a tool for the repression of the Iraqi people, including the Kurds and Shia; that the pre-war Army had included 300,000 enlisted men all of whom had been conscripted into the Army and the “vast majority” of whom were Shia, whilst the officer corps was almost as large and was composed almost entirely of Sunnis; (ii) the status of the Army after the fall of Baghdad – thousands of Shia draftees had “self-demobilized” when it became clear that Iraq was losing the war, deserting their posts and returning home; and (iii) the practical and political considerations about the structure of any future Iraqi army - that if elements of the former army had been recalled, the enlisted men who had gone home would not have returned voluntarily to serve under “brutal Sunnis [sic] officers”; looting had destroyed Iraq's military infrastructure; there were “decisive political arguments” against recalling the Army, including that Kurdish leaders made very clear to him that “reconstituting Saddam's army” would trigger “Kurdish secession from Iraq”, which he states would have provoked an immediate civil war; and that the Shia population had historic reasons to resent the idea of recalling the Army. He concluded that “the best course” open to the Coalition was to build a new, professional Iraqi army.

⁴²⁸ Memorandum dated 19 May 2003 from Paul Bremer to Secretary Rumsfeld with subject “Dissolution of the Ministry of Defense and Related Entities”, available at <http://www.dod.mil/pubs/foi/specialCollections/Rumsfeld/DocumentsReleasedToSecretaryRumsfeldUnderMDR.pdf>, pp. 553-58. The memorandum refers to a number of arguments for issuing the Order: (i) to carry forward “the de-Ba'athification effort”, “our de-Ba'athification campaign”; (ii) Mr Bremer believes the order “will generate a good deal of public support”; (iii) “it is a critical step in our effort to destroy the underpinnings of the Saddam regime...”; (iv) “it is a critical step in our effort ... to demonstrate to the Iraqi people that we have [destroyed the underpinnings of the Saddam regime], and that neither Saddam nor his gang is coming back”; (v) it is “necessary to show ... our determination to root out Saddamism” (the reason Mr Bremer gives in the concluding paragraph of the memorandum in which he summarises the rationale for issuing the draft order). It may be observed that there is no mention in the memorandum of the risk, if the existing Iraqi Army is retained, of Kurdish secession and possible consequent civil war, or of the possible loss of Shia cooperation, as reasons for issuing the proposed order. Nor is there any mention in the memorandum of the argument that the Army had “self-demobilised”. Mr Bremer acknowledges in the memorandum that the order will affect “large numbers of people”, noting that there were some 400,000 employees of the Ministry of Defence alone.

⁴²⁹ Donald Rumsfeld, *Known and Unknown, A Memoir* (Sentinel, 2011), pp. 516-19. Mr Rumsfeld refers to the following “downsides” to keeping the Army in the form in which the Coalition found it: it was controlled by Sunni officers; it had been an instrument of terror against many Shia and Kurds; it was bloated with senior officers, including 11,000 generals (compared with about 300 generals in the US Army), almost all of them Sunnis; corruption was deeply ingrained; and the Kurds and Shia would “vehemently oppose” any attempt to retain Saddam's army (ibid, p. 516). On the latter point he refers

Iraqi Army so that it might assist with security and reconstruction.⁴³⁰ On the facts, the maintenance and safety of the army of occupation does not therefore provide a legal justification for the dissolution of the Iraqi Army.

One issue to be considered is whether the UN Security Council authorised the occupying powers to dissolve the Iraqi Army. The day before Order No. 2 was enacted, the Security Council adopted Resolution 1483, the first of a series of resolutions to be adopted during the occupation. However, that resolution does not expressly authorise the occupying powers to dissolve the Iraqi Army.

The argument has been made that in Resolution 1483 the Security Council gave implied approval to the actions of the occupying powers in dissolving the Iraqi armed forces. In order to understand this argument it is necessary to take a step back in time to 8 May 2003 when the Permanent Representatives of the US and UK to the United Nations sent a joint letter to the President of the Security Council in which they stated that the US and UK, working through the CPA, would take certain action including,

“...assuming immediate control of Iraq institutions responsible for military and security matters and providing, as appropriate, for the demilitarization, demobilization, control, command, reformation, disestablishment, or reorganization 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.”⁴³¹

to the risk of alienating the vast majority of Iraqis by trying to keep and reconstitute the Army. Nevertheless, he concluded, prior to the desertion of many members of the Army, that the benefits of retaining the Army outweighed the risks. Prior to the US invasion he had concluded that after the end of hostilities the Iraqi Army should be retained in order to assist with security and reconstruction (ibid, p. 516). However, Mr Rumsfeld states, “the calculus changed” when many members of the Iraqi Army deserted during the course of the conflict (ibid, pp. 516-17). He states that the Iraqi Army, in Mr Bremer’s words, “disbanded itself” (ibid, p. 517). He states that at that point few, if any, of the arguments in favour of using the Army continued to be applicable, while most of the reasons against using it remained. Mr Rumsfeld does not refer to the threat of Kurdish secession and the possibility of consequent civil war when discussing the reasons for the decision to dissolve the Army.

⁴³⁰ Ibid, p. 516

⁴³¹ 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 (UN Doc. S/2003/538)

On 22 May 2003 the Security Council adopted Resolution 1483, in the preamble of which the Security Council stated that it was “noting” the letter of 8 May 2003 from the US and UK.⁴³² The question arises whether the fact that the Security Council noted this letter of 8 May 2003 entails that the Security Council authorised the US and UK to take the action referred to in the letter notwithstanding that some of the action referred to may otherwise be contrary to international humanitarian law. An alternative argument to be considered is whether, in noting the letter, the Security Council determined definitively that when the US and UK took such action they would not be violating international humanitarian law.

Sir Michael Wood, who was the Legal Adviser to the Foreign and Commonwealth Office during the occupation of Iraq, provided statements to the Chilcot Inquiry in which he addressed *inter alia* the duties and responsibilities of occupying powers and Resolution 1483.⁴³³ Sir Michael states in these statements that Resolution 1483 *inter alia* “endorsed the view that the activities mentioned in the letter of 8 May 2003 might lawfully be carried out under the law of occupation”.⁴³⁴ It should be pointed out that Sir Michael does not specifically refer to the disestablishment of institutions responsible for military and security matters, or to the dissolution of the Army, in that regard. However, given that the disestablishment of institutions responsible for military and security matters is one of the activities referred to in the letter of 8 May 2003, it might be argued that the argument made by Sir Michael regarding supposed Security Council endorsement of the legality of the activities referred to in the letter of 8 May 2003 would apply to the dissolution of the Iraqi Army.

Similarly, Lord Goldsmith, who was the UK’s Attorney General during the occupation of Iraq, stated in his evidence to the Chilcot Inquiry, in relation to Resolution 1483 that,

⁴³² Resolution 1483 (2003) (UN Doc. S/RES/1483 (2003))

⁴³³ Statement by Sir Michael Wood, 15 January 2010, pp. 7-9; The Rights and Responsibilities of Occupying Powers, Second Statement by Sir Michael Wood, 28 January 2010. Sir Michael also gave evidence to the Inquiry orally. However, although the Inquiry had intended to take evidence from him on legal issues in relation to the duties and obligations of occupying powers if time had permitted, in the event the Inquiry did not have time remaining to take his oral evidence on that issue and invited him to submit a note on the issue: see Transcript, 26 January 2010, Evidence of Sir Michael Wood, p. 1 and p. 68.

⁴³⁴ Statement by Sir Michael Wood, 15 January 2010, p. 9, para. 29; The Rights and Responsibilities of Occupying Powers, Second Statement by Sir Michael Wood, 28 January 2010, p. 3, para. 11

“...part of the framework of that was that there was a letter that was produced explaining what the coalition forces believed they were entitled to do, which effectively got the approval of the Security Council by the way it was referred to in the resolution.”⁴³⁵

Lord Goldsmith is therefore essentially making the same argument as that made by Sir Michael Wood in relation to supposed Security Council endorsement of the actions referred to in the letter of 8 May 2003. Again, it should be pointed out that Lord Goldsmith does not specifically refer to the dissolution of the Iraqi Army as being approved by the Security Council in this way, although the argument which he has referred to might be deployed to justify that action.

The document recording the advice given by Lord Goldsmith as Attorney General in June 2003 has been declassified and published by the Chilcot Inquiry.⁴³⁶ That document refers to the fact that in preambular paragraph 13 of Security Council Resolution 1483 the Council notes the letter of 8 May from the UK and US Permanent Representatives to the UN to the President of the Council, in which they described the actions which the occupying powers were taking and intended to take, and recognises the authorities under international law of the US and UK occupying powers.⁴³⁷ The document then records that:

“The Attorney considers that it can be argued on the basis of this paragraph that the Security Council has effectively endorsed the Coalition’s view that the catalogue of activities contained in the 8 May letter constitute legitimate activities for an occupying power. This endorsement by the Security Council therefore provides helpful, although not conclusive, clarification of the legitimate scope of activity of the Coalition.”⁴³⁸

⁴³⁵ Transcript, 27 January 2010, Evidence of the Rt Hon Lord Goldsmith QC, p. 230

⁴³⁶ Letter dated 9 June 2003 from Ms Cathy Adams, the Legal Secretariat to the Law Officers to Mr Huw Llewellyn, Legal Counsellor, Foreign and Commonwealth Office, ‘Iraq: Effect of Security Council Resolution 1483 on the Authority of the Occupying Powers’. The letter states in its opening paragraph “... I am writing to record the Attorney’s views’.

⁴³⁷ *Ibid*, pp. 1-2, para. 3

⁴³⁸ *Ibid*, p. 2, para. 3

The advice does not specifically refer to the dissolution of the Iraqi Army. The tentative nature of the advice may be noted (“can be argued”, “not conclusive”).

There is good reason to doubt that the dissolution of the Iraqi Army was authorised by the Security Council, or that its legality under occupation law was endorsed by the Security Council, on the basis of the way that the Council referred to the letter of 8 May 2003. First, it should be noted that in Resolution 1483 the Security Council merely states in the preamble that it is “noting” the letter of 8 May 2003 from the Permanent Representatives of the US and UK. It is submitted that “noting” is a neutral and non-committal word. As a matter of English usage, it is possible to “note” actions or statements by other entities or persons without approving of the actions or statements in question. It is therefore far from clear that the Security Council was approving or endorsing the legality of the actions referred to in the letter of 8 May 2003. The record of the Security Council meeting at which Resolution 1483 was adopted does not shed any light on the issue. No mention is made of the letter of 8 May 2003 by the Security Council members in their explanations of vote in relation to Resolution 1483.⁴³⁹

Second, even if one assumes for the sake of argument that the Security Council approved or endorsed the legality of the actions referred to in the letter of 8 May 2003, a careful reading of the letter shows that the dissolution of the Army does not fall within the actions referred to in the letter. As can be seen from the relevant passage set out above, the letter states that the US and UK, working through the CPA, will provide, as appropriate, for *inter alia* the reformation, disestablishment, or reorganization of “those institutions” (italics added), i.e. the institutions responsible for military and security matters of which they have assumed control, “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*” (italics added). Whilst the relevant passage of the letter might cover the dissolution of particular organisations such as the Special Republican Guard or the Saddam Fedayeen, it is clear that the dissolution of the Iraqi Army, Navy and Air Force does not fall within the relevant passage of the letter because it does not leave in place any of the institutions of which

⁴³⁹ See U.N. Security Council, 4761st Meeting, 22 May 2003 (U.N. Doc. S/PV.4761)

the US and UK assumed control and which “will be capable of defending Iraq’s sovereignty and territorial integrity”. As CPA Order Number 2 dissolved the entire Iraqi Army, and indeed the entirety of the Iraqi armed forces, none of the “Iraq institutions responsible for military and security matters” of which the US and UK assumed control remained to defend Iraq’s sovereignty and territorial integrity. Rather, it became necessary for the US and UK to create new institutions for that purpose. Thus, it cannot be said that by “noting” the letter of 8 May 2003 in the preamble to Resolution 1483 the Security Council approved the dissolution of the Iraqi Army, Navy and Air Force, or endorsed the view that that was lawful.

In conclusion, for the reasons stated above, the dissolution of the Iraqi Army by Order Number 2 violated the rule of international humanitarian law that the occupying state is not entitled to change the institutions of the occupied territory.

Consequences

The dissolution of the Iraqi Army produced serious, damaging consequences. First, it contributed to the insurgency. A number of contemporary historians identified the order dissolving the Army as one of the causes of the insurgency which confronted the occupying powers.⁴⁴⁰ Tripp refers to the order dissolving the Army as having “fateful consequences” and states that the order “put some 300,000 armed young men out of work at a stroke” and that “the adverse effects” of this order (and that on de-Ba’athification) “were to be felt for years to come”.⁴⁴¹ He further states that units of the old Iraqi Army, which were often based on the villages and localities from which they had been recruited, had reformed as guerrilla bands, using their military training and weapons against the occupying states.⁴⁴²

Furthermore, as a result of the Chilcot Inquiry we now know that it was also the assessment of the UK Secretary of State for Defence during the occupation, Mr

⁴⁴⁰ Charles Tripp, *A History of Iraq* (Cambridge University Press, 3rd ed., 2007), p. 282 and p. 287; Gareth Stansfield, *Iraq, People, History, Politics* (Polity, 2007), p. 168; Adeed Dawisha, *Iraq, A Political History from Independence to Occupation* (Princeton University Press, 2009), pp. 244-45.

⁴⁴¹ Charles Tripp, *A History of Iraq* (Cambridge University Press, 3rd ed., 2007), p. 282

⁴⁴² *Ibid*, p. 287

Geoffrey Hoon, that the dissolution of the Army contributed to the insurgency. Mr Hoon gave evidence to the Inquiry that:

“I think some of the security difficulties, particularly in and around Baghdad were the result of disaffected people, no longer receiving their salary, joining the insurgency and, indeed, putting their expertise to use in the sense that there was a clear suggestion to me that some of the attacks became more sophisticated as some military people became involved, or former military people, I should say.”⁴⁴³

Mr Hoon informed the Inquiry that in his view the dissolution of the Iraqi Army was a mistake and that,

“...I think that, to some extent, disbanding the army fuelled the insurgency in a way that made it much harder to contain.”⁴⁴⁴

Sir David Richmond, who was UK Deputy Special Representative in Iraq between September 2003 and March 2004, and later the UK Special Representative between March and June 2004, also expressed the view to the Chilcot Inquiry that the disbanding of the Army was one of the ways in which the occupying powers exacerbated the insurgency.⁴⁴⁵ Sir David told the Inquiry that he had been informed by the Governorate Coordinator for Al-Anbar province, Keith Mines, that in that province alone there were 30,000 people who had been without employment as a result of the disbanding of the security forces and the army (not counting conscripts).⁴⁴⁶

The Chilcot Inquiry concluded that disbanding the Iraqi Army automatically increased unemployment in Iraq and that Order No. 2 “was to have a long-term impact on the development of the insurgency in Iraq”.⁴⁴⁷ Furthermore, it is believed that the so-called

⁴⁴³ Transcript of evidence of Rt Hon Geoffrey Hoon, 19 January 2010, p. 161, and cited in Chilcot Report, Vol. 10, p. 98 (Section 12.1, para. 173)

⁴⁴⁴ Transcript of evidence of Rt Hon Geoffrey Hoon, 19 January 2010, p. 161

⁴⁴⁵ Transcript of evidence of Sir David Richmond, 26 January 2011, p. 74

⁴⁴⁶ Transcript of evidence of Sir David Richmond, 26 January 2011, p. 55

⁴⁴⁷ Chilcot Report, Vol. 10, p. 418 (Section 12.2, box)

“Islamic State of Iraq and Syria” (ISIS) mutated out of that insurgency and that officers and soldiers of the dissolved Iraqi Army ended up in ISIS (see further below).⁴⁴⁸

The second damaging consequence of the dissolution of the Iraqi Army was that it resulted in the establishment of an ineffective new army. A senior UK army officer gave evidence to the Chilcot Inquiry that as a result of the CPA’s decision to disband the Army, and the consequent need to build a new army from scratch, “the competence of commanders was in many cases way below that which you would expect of their rank”.⁴⁴⁹

In the statement which he provided to the Chilcot Inquiry, Mr Bremer claimed that the new Iraqi Army was “the country’s most respected institution”.⁴⁵⁰ Similarly, Mr Rumsfeld asserted that the new Iraqi army “is emerging as one of Iraq’s most effective institutions”.⁴⁵¹ However, it is doubtful that Mr Bremer or Mr Rumsfeld would have made such laudatory statements regarding the new Iraqi army following the events of 2014. In June 2014 the so-called “Islamic State of Iraq and Syria” (ISIS) captured Iraq’s second largest city, Mosul, after the Iraqi Army fled.⁴⁵² In November 2014, after ISIS had captured a swathe of Iraq’s territory, the Iraqi Prime Minister, Haider al-Abadi, removed 36 military commanders in order to promote professionalism and “combat corruption”.⁴⁵³ Mr al-Abadi acknowledged that “There are widespread accusations of corruption inside the military institutions”.⁴⁵⁴ The Iraqi Prime Minister

⁴⁴⁸ See e.g. Mark Thompson, ‘How Disbanding the Iraqi Army Fueled ISIS’, Time.com, 1 June 2015. Thompson also cites an expert as saying that more than 25 of the 40 most senior ISIS leaders were former members of the Iraqi armed forces. Furthermore, Thompson states that the dissolution of the Iraqi Army deprived the new Iraqi army of “some of its best commanders and troops”.

⁴⁴⁹ Lieutenant General Sir John Kiszely, Senior British Military Representative – Iraq from October 2004, quoted in Chilcot Report, Vol. 10, p. 98 (Section 12.1, para. 176), citing public hearing 14 December 2009, p. 11

⁴⁵⁰ Witness statement of Ambassador Bremer, 18 May 2010, p. 5

⁴⁵¹ Donald Rumsfeld, *Known and Unknown, A Memoir* (Sentinel, 2011), p. 519

⁴⁵² Patrick Cockburn, ‘Mosul emergency: Anarchy in Iraq as militants seize northern capital and free 1,200 prisoners in jail break’, *The Independent* (London), 10 June 2014, <http://www.independent.co.uk/news/world/middle-east/militants-seize-key-sections-of-iraqi-city-mosul-and-free-1000-people-in-prison-break-9520982.html?origin=internalSearch>. Site accessed: 30.01.15.

⁴⁵³ David D. Kirkpatrick, ‘In Shake-Up, Iraq Premier Replaces 36 Commanders’, *The New York Times*, 12 November 2014, http://www.nytimes.com/2014/11/13/world/middleeast/in-shake-up-iraqi-premier-replaces-36-military-commanders.html?_r=0. Site accessed: 30.01.15.

⁴⁵⁴ Raheem Salman, ‘Iraqi PM sacks 26 army commanders for incompetence and graft’, <http://uk.reuters.com/article/2014/11/12/uk-mideast-crisis-iraq-army-idUKKCN0IW23R20141112>. Site

subsequently revealed that there were 50,000 “ghost soldiers”, i.e. fictitious soldiers, in the Iraqi Army, the salaries for these fictitious soldiers being claimed by officers.⁴⁵⁵ According to media reports in 2014, Iraqi army officers invariably paid for their jobs, recouping the money through a variety of corrupt means, including through drawing the salaries of non-existent soldiers.⁴⁵⁶

Conclusion on legislation dissolving the Iraqi Army

The example of the legislation dissolving the Iraqi Army again shows the damage which can be inflicted upon an occupied state where it acts outside the constraints of the law of occupation. This example again suggests that occupying states should not be freed of their obligations under the law of occupation so as to be permitted to engage in “transformational” or “transformative” occupations.

accessed 27.01.15. The Prime Minister sacked 26 army commanders and retired a further 10, thus removing a total of 36.

⁴⁵⁵ Lewis Smith, ‘Iraqi army revealed to have 50,000 ‘ghost soldiers’ on its roll’, *The Independent* (London), 1 December 2014, <http://www.independent.co.uk/news/world/middle-east/iraqi-army-revealed-to-have-50000-ghost-soldiers-on-its-roll-9894533.html?origin=internalSearch>. Site accessed: 26.01.15.

⁴⁵⁶ Patrick Cockburn, ‘Iraq’s 50,000 ‘ghost soldiers’ analysis: This is further proof of army corruption’, *The Independent* (London), 1 December 2014, <http://www.independent.co.uk/news/world/americas/iraqs-50000-ghost-soldiersanalysis-this-is-further-proof-of-army-corruption-9896611.html?origin=internalSearch>. Site accessed: 26.01.15. Cockburn cites a retired four-star general who, when asked why the army disintegrated at Mosul, answered “corruption, corruption, corruption”. Cockburn further cites this retired general as saying that this corruption had become institutionalised during the process of the U.S. building a new Iraqi army after dissolving the old army in 2003. The US Department of Defense, Cockburn states, had insisted that supplies of food and other necessities be outsourced to private companies. According to the retired general, the Iraqi government would pay for food and other supplies for, for example, a battalion with a nominal strength of 600 soldiers but which in fact comprised only 200 men, the profits being shared between the officers and commercial companies concerned. Cockburn gives as another source of income for officers, the charging of tariffs on goods vehicles passing military checkpoints within Iraq. Cockburn states that officers will have paid highly for promotion. He puts the bribe for becoming a colonel at \$200,000 (£127,000) and that for becoming a divisional commander at \$2 million. He states that the money to pay these bribes would usually be borrowed and paid back out of (corrupt) earnings. Cockburn also cites an Iraqi politician as saying that Iraqi officers “are not soldiers, they are investors”. The fact that the Iraqi Prime Minister removed a substantial number of military commanders in order *inter alia* to “combat corruption”, and that he revealed that there were 50,000 “ghost soldiers” in the Iraqi Army, corroborates such journalistic sources.

CPA legislation in relation to the economy and privatisation of State-Owned Enterprises

As shown above, there has been widespread agreement amongst writers that an occupying state is not entitled to change the economic system, for example from a capitalist economy to a socialist economy or *vice versa*.

During the occupation the CPA enacted numerous pieces of legislation in relation to the economy, including a company law, a foreign investment law, trade liberalisation laws, banking laws and intellectual property laws.⁴⁵⁷ Much has been made of this legislation. McCarthy refers to a “reformation of Iraq’s economy by the CPA”.⁴⁵⁸ However, it is important to note that the CPA had to abandon a key element of its project to transform the Iraqi economy: the privatisation of its state-owned enterprises.

A report prepared jointly by the UN and World Bank some months into the occupation categorised Iraq’s economy as a centrally-planned economy in which public enterprises “dominated key sectors of the economy”.⁴⁵⁹ The report identified 192 state-owned enterprises (SOEs) and stated that they employed about 10 per cent of Iraq’s workforce, but that they were over-staffed.⁴⁶⁰

We know from the Chilcot Inquiry that the CPA prepared draft legislation providing for the privatisation of Iraq’s State-Owned Enterprises. Sir Michael Wood stated in a statement which he provided to the Inquiry that among the legal issues which arose

⁴⁵⁷ CPA Order No. 64, Amendment to the Company Law No. 21 of 1997, promulgated 3 March 2004 (CPA/ORD/29 February 2004/64); CPA Order No. 39, Foreign Investment, promulgated 19 September 2003 (CPA/ORD/19 September 2003/39); CPA Order No. 12, Trade Liberalization Policy, promulgated 8 June 2003 (CPA/ORD/7 June 2003/12); CPA Order No. 54, Trade Liberalization Policy 2004, promulgated 26 February 2004 (CPA/ORD/24 February 2004/54); CPA Order No. 40, Bank Law, promulgated 19 September 2003 (CPA/ORD/19 September 2003/40); CPA Order No. 94, Banking Law of 2004, promulgated 7 June 2004 (CPA/ORD/6 June 2004/94); CPA Order No. 80, Amendment to the Trademarks and Descriptions Law No. 21 of 1957, promulgated 26 April 2004 (CPA/ORD/26 April 04/80); CPA Order No. 81, Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law, promulgated 26 April 2004 (CPA/ORD/26 April 2004/81); CPA Order No. 83, Amendment to the Copyright Law, promulgated 1 May 2004 (CPA/ORD/29 April 2004/83). The legality of some of these Orders will be considered in Chapter 6 in the context of examining whether Security Council Resolution 1483 provided a legal basis for them.

⁴⁵⁸ Conor McCarthy, ‘The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq’, (2005) Vol. 10 Journal of Conflict and Security Law p. 43, at p. 51

⁴⁵⁹ United Nations/World Bank, Joint Iraq Needs Assessment (October 2003), p. 40 (para. 3.117)

⁴⁶⁰ *Ibid*, p. 41 (paras. 3.118 and 3.119)

during the occupation was “a draft CPA law on Iraqi Ownership Transformation (privatization)”.⁴⁶¹ Furthermore the Inquiry’s Report refers to the draft Order, stating that the CPA shared it with the UK in mid-October 2003.⁴⁶²

The CPA’s intention to privatise Iraq’s SOEs is evidenced by the CPA document ‘Achieving the Vision to Restore Full Sovereignty to the Iraqi People (An Overview)’, which was sent to members of the U.S. Congress on 23 July 2003.⁴⁶³ That document states in its main body (under “The Economy”) that “Iraq will need initially to” *inter alia* “Determine the future of state-owned enterprises”.⁴⁶⁴ Appended to the document are charts containing sectoral plans, including as regards the economy. Under the heading “Policy Towards SOEs” it is stated in the relevant chart that in “State 1” (August to October 2003) there would be “small-scale privatization/leasing of competitive SOEs”.⁴⁶⁵ In “State 2” (November 2003-January 2004) there were to be “Assessments of larger SOEs to determine suitability for privatization or shutdown”. In “State 3” (February 2004 onwards) a “Privatization Agency” was to be developed “to carry out SOE sales”.

That the US intended the privatisation of Iraq’s SOEs is also evidenced by the contract which the U.S. Agency for International Development (USAID) entered into on 24 July 2003 with the consultancy BearingPoint Inc. (formerly KPMG Consulting) for Technical Assistance for Economic Recovery, Reform and Sustained Growth in Iraq.⁴⁶⁶

⁴⁶¹ Second Statement by Sir Michael Wood, The Rights and Responsibilities of Occupying Powers, 28 January 2010, p. 5 (para. 20).

⁴⁶² Chilcot Report, Vol. 9, p. 143, box, citing telegram 108, FCO London to IraqRep, 24 October 2003, ‘Iraq: Privatisation Order’

⁴⁶³ CPA, ‘Achieving the Vision to Restore Full Sovereignty to the Iraqi People (An Overview)’, reproduced in U.S. Senate, Committee on Armed Services, Hearing 25 September 2003, ‘Ongoing Military Operations and Reconstruction Efforts in Iraq’ (S. HRG. 108-653) (U.S. Government Printing Office, Washington, 2004), at pp. 44-71, a copy having been entered in the record by Senator Edward Kennedy. Available at <https://www.govinfo.gov/content/pkg/CHRG-108shrg96500/pdf/CHRG-108shrg96500.pdf>. Last accessed: 19.04.19. Although the ‘Achieving the Vision’ document is undated, Senator Kennedy states that it is a “Working Document” dated 23 July 2003 (S. HRG. 108-653, at p. 43). Mr Bremer informed the Senate Committee that the ‘Achieving the Vision’ document was sent to Congress on 23 July but that it was formally reviewed and updated once a month and had been updated in August and September, although these versions had not been provided to Congress (S. HRG. 108-653, p. 113, p. 116 and p. 141).

⁴⁶⁴ ‘Achieving the Vision’, p. 6 (reproduced at S. HRG. 108-653, p. 50)

⁴⁶⁵ ‘Achieving the Vision’, Chart “Economy - 3” (reproduced at S. HRG. 108-653, p. 65)

⁴⁶⁶ Contract RAN-C-00-03-00043-00 between USAID and Bearing Point, Inc. signed 24 July 2003. Available at https://pdf.usaid.gov/pdf_docs/PDABZ046.pdf. Last accessed: 19.04.19.

That contract states that the services which Bearing Point was expected to provide included “Transactional Activities that create a competitive private sector” through *inter alia* “privatization of state-owned enterprises”.⁴⁶⁷

The contract required that, amongst other things, Bearing Point “will assess state-owned enterprises (SOEs) in Iraq in terms of their potential market value for sale as on-going concerns”.⁴⁶⁸ The contract also required Bearing Point to evaluate and recommend “the potential for liquidation or dissolution of specific firms or industries, as necessary”.⁴⁶⁹ Bearing Point was also required to make recommendations on the potential for specific firms or industries to be sold to “strategic investors”.⁴⁷⁰ Where strategic investment in a firm or industry was unlikely, Bearing Point was to discuss the feasibility of undertaking a “mass privatization” and the various options for its possible implementation.⁴⁷¹

The contract required that, based on the recommendations of Bearing Point, as approved by USAID, Bearing Point “will implement a privatization plan, focusing first if approved on strategic investors and on creating and supporting an institution responsible for undertaking privatization”.⁴⁷² The contract goes on to describe the privatization plan which Bearing Point is to implement (with USAID approval) as a “Comprehensive Privatization Program (CPP)”.⁴⁷³ The contract then states that Bearing Point “will implement USAID-approved recommendations to begin supporting the privatization of strategic industries and appropriate privatization of public utilities....”.⁴⁷⁴

⁴⁶⁷ *Ibid*, p. 4

⁴⁶⁸ *Ibid*, p. 6

⁴⁶⁹ *Ibid*

⁴⁷⁰ *Ibid*, pp. 6-7

⁴⁷¹ *Ibid*, p. 7

⁴⁷² *Ibid*, p. 7. The contract also states that Bearing Point should be aware that USAID expects to consult widely with relevant US government officials and within Iraq regarding the plan prepared by Bearing Point; that Bearing Point therefore needs to reflect the range of views available regarding “these potentially controversial matters” adequately in its initial recommendations and be prepared for policy direction to achieve differing goals (*ibid*).

⁴⁷³ *Ibid*, p. 84. The contract further provides that if changes to legislation are required, Bearing Point “will assist legislative reform specifically to allow for the privatization of State-owned industries and firms and/or establishing a privatization entity” (*ibid*, p. 7).

⁴⁷⁴ *Ibid*, p. 7. The contract states that the privatisation project will be divided into two phases (*ibid*, p.85). It is stated that the first phase was intended to last for no longer than one year and would seek to establish consensus, develop an approved base line and action plan for the Comprehensive

The phrase “strategic industries” is not here defined. However, Annex C of the contract contains a more detailed statement of work in relation to privatisation, partly duplicating what is stated in the main body of the contract in relation to privatisation but also expanding upon it. The sentence in Annex C which corresponds to that under consideration reads:

“The contractor [i.e. Bearing Point] will implement USAID-approved recommendations to begin supporting the privatization, especially those [sic] in the oil and supporting industries.”⁴⁷⁵

Reading the two sentences together suggests that the “strategic industries” are the “oil and supporting industries”. In any event, the latter sentence quoted evidences that the US Government was particularly keen to privatise the Iraqi oil industry. The contract directs Bearing Point to “aim for as many companies as possible to be included in SIS [Strategic Investor Sales] or in the MPP [Mass Privatization Program]”.⁴⁷⁶

This contract raises a number of concerns about whether the US was here seeking to advance its own commercial interests or Iraq’s interests. For example, the term of the contract which requires Bearing Point to make recommendations on the potential for specific firms or industries to be sold to “strategic investors”, raises the question whether it was intended that these “strategic investors” would be US investors. Again, the prioritising of “the oil and supporting industries” for privatisation raises the question whether this was to be done in the US interest or the Iraqi interest.

There has been a great deal of confusion on the subject of privatisation of Iraq’s state-owned enterprises. A number writers have assumed that the CPA proceeded with plans

Privatization Program and complete the initial drafting of the privatisation and securities laws. The second phase was intended to last for approximately two years, focusing on implementation of the Comprehensive Privatization Program action plan and a secure and regulated secondary trading capability. Bearing Point was required under the contract to provide senior advisors to forge a consensus on the design of the Comprehensive Privatization Program. One of the “Tangible Results” against which USAID was to judge Bearing Point under the contract was that within 180 days a completed plan for the Comprehensive Privatization Plan was to have been approved (ibid, pp. 89-90).

⁴⁷⁵ Ibid, p. 84

⁴⁷⁶ Ibid, p. 86

to privatise Iraq's state-owned enterprises. For example, McCarthy refers to the very high levels of unemployment in occupied Iraq and states that this had been "contributed to substantially" by the economic reforms which the CPA had introduced, "foremost among these, of course, being the privatisation of Iraq's formerly state-owned businesses, which were large, if inefficient, employers".⁴⁷⁷ Stahn refers to "CPA Order No. 39 on the conditions of privatisation" and states that Order No. 39 "boldly decreed Iraq's transition from a centrally planned economy (under which all national enterprises were under state ownership) to a market economy".⁴⁷⁸ He also assumes that the privatisation took place.⁴⁷⁹ In fact, whilst CPA Order 39, Foreign Investment provided that a foreign investor was entitled to make a foreign investment in Iraq on terms no less favourable than those which were applicable to an Iraqi investor (subject to exceptions),⁴⁸⁰ the UN/ World Bank Joint Needs Assessment makes clear that there was no legal or legislative framework under which Iraqi state-owned enterprises could be disposed of, and thus ownership of them could not be acquired by either Iraqis or foreign investors.⁴⁸¹ No doubt this was why the CPA subsequently prepared its draft Order on "Iraqi Ownership Transformation (Privatization)" (see above). Again, Anghie declares that "...all Iraqi industries, except for the oil industry, have been privatised; all this well prior to any official democratically elected Iraqi government being in place....".⁴⁸² He cites as authority an article from *The Economist* which actually reports the announcement of economic reforms, including privatisation, which had yet to be implemented.⁴⁸³

⁴⁷⁷ Conor McCarthy, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq', (2005) 10 *Journal of Conflict and Security Law* 43, at p. 56

⁴⁷⁸ Carsten Stahn, *The Law and Practice of International Territorial Administration, Versailles to Iraq and Beyond* (Cambridge University Press, 2008), p. 378

⁴⁷⁹ *Ibid*

⁴⁸⁰ CPA Order 39, Foreign Investment, promulgated 19 September 2003 (CPA/ORD/19 September 2003/39), section 4(1)

⁴⁸¹ United Nations/World Bank, Joint Iraq Needs Assessment (October 2003), p. 41 (para. 3.119): "privatization ... [is] complicated by: ... Absence of a legal or legislative framework under which state-owned assets can be disposed"

⁴⁸² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005), p. 285, citing 'let's all go to the yard sale; Iraq's economic liberalisation', *The Economist*, 27 September 2003, p. 44

⁴⁸³ The aforementioned article (see previous note) merely describes the announcement of a package of economic reforms under which *inter alia* "Investors in any field, except for all-important oil production and refining, would be allowed 100% ownership of Iraqi assets....". The article acknowledges that the reforms have yet to be carried through ("If carried through, the measures will represent the kind of wish-list that foreign investors ... dream of for developing markets.")

However, Mr Bremer makes clear in the statement which he provided to the Chilcot Inquiry that no such state-owned enterprises were privatised during the occupation. Mr Bremer declared in his statement that “the CPA did not privatize a single SOE”.⁴⁸⁴ In its Report the Chilcot Inquiry accepts that plans to privatise Iraq’s SOEs were abandoned.⁴⁸⁵

Why, then, did the CPA abandon its plans to privatise Iraq’s state-owned enterprises? In his statement to the Chilcot Inquiry Mr Bremer explained that the CPA did not proceed with privatisation because the SOEs employed over 500,000 people and the CPA decided that the consequences of privatising or closing the SOEs in the midst of a growing insurgency were “too risky”.⁴⁸⁶ Mr Bremer here represents this decision as purely a CPA decision and makes no reference to the opposition which the CPA encountered in relation to its privatisation plans.

However, Sir Jeremy Greenstock, who was the UK Government’s Special Representative for Iraq from September 2003 to March 2004, gave evidence to the Inquiry that he had put down a “veto” over “the disbanding of the public economy in Iraq”.⁴⁸⁷ Sir Jeremy stated that he had informed the CPA that the UK would not “go along with the disbanding of the public sector industries in Iraq” because that would create too much unemployment at a difficult period in Iraq.⁴⁸⁸ The Chilcot Report reveals that the UK Government had instructed its officials in Baghdad and Washington to raise with US officials its concerns about the draft Order on privatisation.⁴⁸⁹ The UK’s concerns included that privatised SOEs may not flourish and unemployment may increase; and that economic reform on the scale proposed should be decided upon by a representative Iraqi government. Furthermore, the Chilcot

⁴⁸⁴ Statement by Ambassador Bremer, 18 May 2010, p. 6.

⁴⁸⁵ Chilcot Report, Volume 9, pp. 537-38 (Section 10.4, para. 66) (CPA “shelved” privatisation). See also Vol.9, p. 148-49 (Section 10.1, para. 860-61), p.150 (Section 10.1, para. 873), p. 153 (Section 10.1, para. 888).

⁴⁸⁶ Statement by Ambassador Bremer, 18 May 2010, p. 6

⁴⁸⁷ Transcript of the evidence of Sir Jeremy Greenstock, 15 December 2009, p. 96. Available at <http://www.iraqinquiry.org.uk/media/42360/20091215-greenstock-final.pdf>. Last accessed: 9.11.15. Sir Jeremy, as the UK Special Representative for Iraq, was not part of the CPA: see *ibid*, pp. 50-56 and p. 62

⁴⁸⁸ *Ibid*. Sir Jeremy stated that that was the only formal veto he put down during his time as Special Representative for Iraq.

⁴⁸⁹ Chilcot Report, Vol. 9, pp. 143-44 (Section 10.1, para. 835 and box), citing telegram 108, FCO London to IraqRep, 24 October 2003, ‘Iraq: Privatisation Order’

Report states that the UK “had significant legal concerns about the legitimacy of the draft Order and the CPA’s authority to transfer ownership of Iraq state assets”.⁴⁹⁰ Here then we appear to have an affirmation, by one of the occupying powers in Iraq, of the principle that an occupying power may not privatise the state-owned enterprises belonging to the occupied state.

Furthermore, even the Iraqi politicians collaborating with the occupying powers in the Governing Council adopted a resolution calling for a halt to the privatisation of Iraq’s state-owned enterprises. On 4 November 2003 the Governing Council adopted a resolution stating that the Governing Council had decided:

“To halt all plans or activities aimed at privatizing State-owned enterprises and institutions, in order to carefully examine the state of these enterprises and institutions, then weigh the socio-economic and political repercussions of their privatization....”⁴⁹¹

There were also other free-market-oriented reforms which were abandoned by the CPA. The CPA’s ‘Achieving the Vision’ document had stated that policy work was in progress on “phasing out subsidies” and that the phased removal of subsidies (e.g. oil and electricity prices) would take place from February 2004 onwards.⁴⁹² However, Mr Bremer records in his memoir that following a re-assessment of the CPA’s economic plans it was decided that it would not be possible to proceed with what he describes as “controversial programs [sic] to cut energy and food subsidies”.⁴⁹³ Furthermore, the CPA did not proceed to abolish the Ministry of Planning. Sir John Sawers (UK Government’s Special Representative for Iraq between May and July 2003) gave

⁴⁹⁰ Chilcot Report, Vol. 9, p. 144. The Report states that a Legal Counsellor in the FCO (Mr Huw Llewellyn) had advised officials that “he did not consider that there was a basis either under occupation law or [Security Council] resolution 1483 for the proposed order” (ibid). Details of the advice are not given in the Report and nor is the document containing the advice disclosed.

⁴⁹¹ Governing Council Resolution No. 90 of 2003, 4 November 2003, text reproduced in Talmon (n 364) 1167. The Resolution continued that the Council’s Finance Committee was to follow up on this matter according to the financial needs of the State and “the economic criteria that should be adopted in this regard”.

⁴⁹² CPA, ‘Achieving the Vision to Restore Full Sovereignty to the Iraqi People (An Overview)’, p. 6 and chart Economy - 2

⁴⁹³ Ambassador L. Paul Bremer III with Malcolm McConnell, *My Year in Iraq, The Struggle to Build a Future of Hope* (Simon & Schuster, 2006), p. 270

evidence to the Chilcot Inquiry that he and the UK contingent within the CPA persuaded Mr Bremer to keep the Ministry of Planning in place “against his better judgment” because they saw the Ministry of Planning as playing the role that finance ministries play in many countries of co-ordinating government policy.⁴⁹⁴ The Governing Council indicated their own preference to leave Ministry of Planning in place by adopting a resolution, “[c]onsidering the current tasks being undertaken by the Ministry of Planning”, to amend its name slightly to “Ministry of Planning and Development Cooperation”.⁴⁹⁵

Conclusion on privatisation

The US had ambitious plans to privatise Iraq’s state-owned enterprises but had to abandon them in the face of opposition from the UK and Iraqi politicians in the Governing Council. The concerns of the UK were partly about the legality of privatisation but also about a possible increase in unemployment. The reference by the Governing Council to “the socio-economic and political repercussions” of privatisation suggests that it was also concerned about the possibility of increased unemployment and the possible political consequences of that, at a time of insurgency.

The fate of the US privatisation plans in Iraq indicates an important caveat to theories of “transformational” occupation: that an occupying state, no matter how powerful, does not in practice enjoy complete freedom of action in occupied territory. Pursuing a policy of closing down loss-making state-owned enterprises and privatising others which are over-manned may well result in substantial increased unemployment, which may in turn lead to social unrest and alienation. Such a scenario is difficult enough for a democratically-elected sovereign government undertaking economic restructuring. If, however, such a policy is pursued by an occupying power it is potentially explosive and may exacerbate any insurgency which there may be in the territory concerned.

In the following section we will consider the fate of those economic reforms which the CPA did succeed in enacting.

⁴⁹⁴ Transcript of evidence of Sir John Sawers, 10 December 2009, p. 88.

⁴⁹⁵ Governing Council Resolution No. 96 of 2003, reproduced in Talmon (n 364) 1169

The non-implementation of CPA legislation

A further reason to doubt theories of “transformational occupation” and “transformative occupation” is that whilst an occupying power might enact large amounts of legislation with the intention of changing the occupied state and its society, in reality it may find it difficult to get its legislation implemented. There is evidence that this was the case in occupied Iraq.

Chandrasekaran describes how the CPA came to enact a new traffic code for Iraq, in part based on the traffic code of the State of Maryland.⁴⁹⁶ The new traffic code was embodied in Order No. 86 and is 25 pages in length (including annex).⁴⁹⁷ In his book published in 2006, after the occupation, Chandrasekaran wrote that the Iraqis “disregarded the new traffic code” and that it was never distributed to police officers or announced to the public. After the end of the occupation Chandrasekaran interviewed a senior official of Iraq’s Ministry of the Interior, Mr Sabah Kadhim, and asked him what would happen to the new traffic code. Mr Kadhim replied:

“Our main concern is terrorism....You have to be practical. We haven’t reached the state where we can implement traffic laws. It’s great in theory, but in reality, we are not focusing on it. We have no resources to enforce it, and it’s not our priority.”⁴⁹⁸

Mr Kadhim continued:

“There is a question mark there....We will have to evaluate it. We need to enforce traffic laws in an Iraqi way. The Americans inside the Green Zone acted like they lived in New York, not in Baghdad. Good work is not going to bring good results unless you tailor it to a country’s concerns. Outside solutions won’t work here. It has to be an Iraqi solution. They should have let the Iraqis

⁴⁹⁶ Rajiv Chandrasekaran, *Imperial Life in the Emerald City, Inside Baghdad’s Green Zone* (2007, Bloomsbury Publishing Plc, London), pp. 262-68

⁴⁹⁷ CPA Order No. 86, Traffic Code, promulgated 20 May 2004 (CPA/ORD/19 May 2004/86)

⁴⁹⁸ Chandrasekaran (n 496) 268

develop these laws themselves rather than imposing laws imported from America.”⁴⁹⁹

There is evidence that this problem of CPA legislation not being implemented was not limited to the traffic code. As noted above, the U.S. Agency for International Development (USAID) entered into a contract with BearingPoint Inc. under which the latter would provide during the occupation technical assistance in relation to economic recovery and reform in Iraq. Part of this work was envisaged to include the modernisation of commercial laws. BearingPoint staff, including attorneys, became an integral part of the Office of General Counsel for the CPA. After the occupation, BearingPoint published a completion report for USAID.⁵⁰⁰ What that report has to say about the implementation of CPA laws is highly relevant to the issue which we are here considering. The report states that the CPA promulgated 32 Orders in relation to the commercial legal framework.⁵⁰¹ The report goes on to state that the BearingPoint team worked with Iraqi counterparts “to begin implementation” of CPA Orders in the areas of tax and customs, capital markets, company law (business registry) and the telecommunication regulatory authority. However, the report then states:

“No other CPA promulgated Order was actually implemented.”⁵⁰²

This is a highly significant statement. From the context, it appears that the report is here referring to the 32 CPA Orders in the sphere of commercial law, rather than the 100 CPA Orders which were enacted in total. That interpretation would appear to be confirmed by the fact that we know the Orders on de-Ba’athification and the dissolution of the Iraqi armed forces were implemented. Nevertheless, even on that basis, the statement quoted indicates that most of the 32 CPA orders in the field of commercial law were not actually implemented. It should be noted in that regard that this report was issued after the end of the occupation.

⁴⁹⁹ Ibid, p. 268

⁵⁰⁰ BearingPoint, Inc., ‘USAID, Iraq Economic Recovery, Reform & Sustained Growth, Completion Report’, Prepared for the U.S. Agency for International Development, Contract No. RAN-C-00-03-00043-00, 30 November 2004. Available at https://pdf.usaid.gov/pdf_docs/PDACA883.pdf. Last accessed: 18.04.19.

⁵⁰¹ Ibid, p. 58

⁵⁰² Ibid, p. 58

The BearingPoint report goes on to state:

“Although many laws have been promulgated, the biggest challenge that remains is actually implementing them, which to a very large extent, requires broad public consultation.”⁵⁰³

The report then proposes what that consultation should include: “reaffirming agreement for each initiative with a relevant Government of Iraq “champion” and key stakeholders”; developing and carrying out public consultations for each law, involving academic, legal, business and policy-making constituents; developing and carrying out a public education programme; and involving civil society groups, including legal associations, the Council of Judges, NGOs and the press in the legal initiatives. The need to reaffirm agreement for each legal initiative with a “Government of Iraq “champion””, presumably a minister or ministry, followed from the fact that the occupation had ended without the relevant laws having been implemented.

The above evidence shows that during the occupation the CPA enacted a large number of laws which were not implemented. This casts serious doubt on the very idea of “transformational” or “transformative” occupation. Many laws were being promulgated on paper but, because they were not being implemented, could not produce effects within society.

Conclusion

The examples of the legislation on de-Ba’athification and dissolution of the Iraqi armed forces show the damage which can be inflicted upon an occupied state where it engages in transformational occupation. These examples suggest that occupying states should not be freed of their obligations under the law of occupation so as to be permitted to engage in “transformational” or “transformative” occupations.

⁵⁰³ Ibid, p 59

The fate of the US plans to privatise Iraq's state-owned enterprises indicates an important caveat to theories of "transformational" occupation: that an occupying state, no matter how powerful, does not in practice enjoy complete freedom of action in occupied territory.

Furthermore, the evidence that during the occupation the CPA enacted a large number of laws which were not implemented casts serious doubt on the very idea of "transformational" or "transformative" occupation. Many laws were being promulgated on paper but, because they were not being implemented, could not produce effects within society.

Chapter 4

The Challenge from “Transformative Occupation” II: The CPA’s occupation legislation in the field of human rights

In the last chapter we began our examination of the challenge posed by the idea that occupying states should be freed of their obligations to respect the existing law and institutions so as to be permitted to engage in “transformational” or “transformative” occupations. In that chapter we considered the damaging consequences of the CPA’s legislation on de-Ba’athification and on the dissolution of the Iraqi armed forces, and we also examined evidence of non-implementation of the CPA’s commercial laws during the occupation. In this chapter we will continue our exploration of the challenge from “transformational” or “transformative” occupation by examining the CPA’s legislation in the field of human rights and whether it succeeded in transforming the human rights position in Iraq. It will be shown below that the available evidence and information suggests that the CPA’s legislation in the field of human rights did not transform the human rights position in Iraq.

As noted above, during the occupation of Iraq by the US and UK and its aftermath, there was discussion by writers of the possibility of “transformational occupation” and “transformative occupation”. Scheffer’s notion of “transformational occupation” poses an obvious challenge to occupation law in that Scheffer is arguing for the revision of occupation law to permit it. Roberts’ idea of “transformative occupation” poses a challenge to occupation law in that he argues for the use of human rights law and Security Council authorisation in order to override occupation law. In this chapter we will consider the efficacy of these proposals by looking at the legislation in the field of human rights which was enacted by the CPA.

As will be seen below, during the occupation of Iraq, the CPA enacted a large amount of legislation which was designed to radically improve the human rights situation in

Iraq. In this chapter we will examine that legislation and assess whether that legislation succeeded in transforming Iraq, from a human rights point of view.

Roberts defines “transformative occupations” as occupations “whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule”.⁵⁰⁴ On that basis an occupation will constitute a “transformative occupation” even if it completely fails to achieve its stated purpose of changing the occupied state. This chapter, as stated above, will consider whether the occupation of Iraq by the US and UK actually achieved the objective of transforming Iraq, in the human rights sphere. It will therefore consider, from a human rights point of view, whether the occupation of Iraq by the US and UK was a “transformative occupation” in what is arguably a more natural use of the phrase, i.e. an occupation which is transformative.

The article by Roberts mentioned above does not, despite its title and general subject matter, discuss any of the CPA’s human rights legislation and, indeed, refers to only four pieces of CPA legislation (Order No. 1, De-Ba’athification of Iraqi Society; Order No. 2, Dissolution of Entities, which dissolved *inter alia* the Iraqi armed forces; Order 39, Foreign Investment and Regulation 1, which set out the powers of the CPA including its power to legislate). Nor does that article discuss whether Iraq was transformed from a human rights point of view.⁵⁰⁵ In contrast, this chapter will discuss the CPA’s human rights legislation and will examine whether the human rights situation in Iraq was transformed by it.

As noted above, it will be shown below that the available evidence and information suggests that the CPA’s legislation in the field of human rights did not transform the human rights position in Iraq.

⁵⁰⁴ Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) 100 A.J.I.L. 580, at p. 580

⁵⁰⁵ Roberts does however catalogue the progress in establishing democracy in Iraq, noting that “...a remarkable degree of political transformation was achieved in Iraq” (Ibid, p. 616). However, he expresses reservations about the number of aspects of Iraqi society which the occupying powers attempted to transform in Iraq, including economic re-structuring, noting that “[t]he Iraqi case counsels caution about proposals for sudden and large-scale transformations” (Ibid, p. 621 and see also p. 615 regarding criticism of CPA Order No. 39, Foreign Investment).

Methodology

In essence, the approach taken in this chapter is to compare the human rights situation of Iraq in the years after the occupation with the human rights situation of Iraq in the years before the occupation, under the regime of Saddam Hussein, in order to make an assessment of the extent to which there has been a fundamental change in the enjoyment of human rights by the people of Iraq.

First the legislation enacted by the CPA in the field of human rights was identified by considering the entire collection of Orders, Regulations and Memoranda promulgated by the Administrator of the CPA.⁵⁰⁶ The pieces of legislation so identified were then examined in greater detail. The legislation in relation to the holding of democratic elections will not be considered in this chapter.⁵⁰⁷

Next, the human rights position in Iraq under the regime of Saddam Hussein was ascertained by considering concluding observations issued by the Human Rights Committee in relation to Iraq's compliance with the International Covenant on Civil and Political Rights; resolutions of the Commission on Human Rights⁵⁰⁸; reports by the Special Rapporteur on the situation of human rights in Iraq⁵⁰⁹; and reports by the non-governmental organisation, Amnesty International.⁵¹⁰

Finally, the human rights situation in Iraq in the years since the occupation was ascertained by examining the concluding observations made by the Human Rights Committee in relation to Iraq's periodic report under the International Covenant on

⁵⁰⁶ The CPA Regulations, Orders and Memoranda are available at <http://govinfo.library.unt.edu/cpa-iraq/regulations/index.html#>, an archive of US government web sites which have ceased operation and which is hosted by the U.S. Government Printing Office and the University of North Texas Libraries.

⁵⁰⁷ See CPA Order No. 92, The Independent Electoral Commission of Iraq, promulgated 31 May 2004; CPA Order No. 96, The Electoral Law, promulgated 15 June 2004; and CPA Order No. 97, Political Parties and Entities Law, promulgated 15 June 2004

⁵⁰⁸ The resolutions of the Commission on Human Rights on the situation of human rights in Iraq (1991-2003) are available at http://ap.ohchr.org/documents/sdpage_e.aspx?b=1&c=87&t=11

⁵⁰⁹ The reports submitted by the Special Rapporteur are available at http://ap.ohchr.org/documents/dpage_e.aspx?m=88

⁵¹⁰ Available at <https://www.amnesty.org>, by carrying out an advanced search against "Iraq" and the desired year.

Civil and Political Rights (ICCPR)⁵¹¹; the reports of the Working Group on the Universal Periodic Review of Iraq⁵¹²; reports by other treaty-based human rights bodies (the Committee against Torture and the Committee on Enforced Disappearances)⁵¹³; reports on human rights in Iraq by the UN Assistance Mission for Iraq (UNAMI) and the Office of the UN High Commissioner for Human Rights⁵¹⁴; and reports by the non-governmental organisations, Human Rights Watch and Amnesty International.

Context

Before examining the legislation enacted by the CPA in the field of human rights, in this section we will look at the context for this human rights legislation, including the possible motivation for it.

For some years leading up to the invasion and occupation of Iraq, human rights had been an increasingly important factor in foreign policy. The development of modern international human rights law took place after the Second World War but it began modestly and progress was often slow. The UN Charter of 1945 made a number of brief references to human rights without defining what they were.⁵¹⁵ An important milestone was achieved in 1948 when the UN General Assembly adopted the Universal Declaration of Human Rights, which proclaimed certain rights and freedoms to which all persons were to be entitled.⁵¹⁶ However, it was not until 1966 that most of the rights

⁵¹¹ International Covenant on Civil and Political Rights, adopted 16 December 1966, Vol. 999 U.N.T.S., p. 171 (No. 14668). The documents relating to Iraq's periodic reports to the Human Rights Committee, including the concluding observations by the Committee, are available via the web page on "Reporting Status for Iraq" maintained by the Office of the UN High Commissioner for Human Rights at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=IRQ&Lang=EN

⁵¹² The documents relating to the Universal Periodic Review of Iraq are available via a web page maintained by the Office of the UN High Commissioner for Human Rights at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/IQindex.aspx>

⁵¹³ The documents relating to Iraq's reports to both the Committee against Torture and the Committee on Enforced Disappearances, including the concluding observations of both bodies, is available via the web page on the "Reporting status for Iraq" maintained by the Office of the UN High Commissioner for Human Rights at:

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=IRQ&Lang=EN

⁵¹⁴ The United Nations Assistance Mission for Iraq (UNAMI) was established by the Security Council in Resolution 1500 (2003) of 14 August 2003 (para. 2). The reports are available at http://www.uniraq.org/index.php?option=com_k2&view=itemlist&layout=category&task=category&id=164&Itemid=650&lang=en&limitstart=0

⁵¹⁵ See in particular, the Preamble and Articles 1, 55-56, 62 and 68

⁵¹⁶ U.N. General Assembly Resolution, entitled 'Universal Declaration of Human Rights', adopted 10 December 1948 (U.N. Doc. A/811)

and freedoms proclaimed in the Universal Declaration were embodied in treaty law - the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which were adopted that year and entered into force in 1976.⁵¹⁷

Writing from a US perspective, Moyn argues that “human rights had failed to interest many people – including international lawyers-” in the 1940s or subsequent decades, until the 1970s.⁵¹⁸ For Moyn the “year of breakthrough” for human rights was 1977 when President Carter committed his administration to promoting respect for human rights abroad.⁵¹⁹ According to Moyn, President Carter’s explicit commitment to “human rights” in his inaugural address of that year “embedded [the phrase “human rights”] for the first time in popular consciousness and ordinary language”.⁵²⁰ Moyn concludes that, whatever the shortcomings of the human rights policy of the Carter Administration, the long term consequence was that “American foreign policy discussions were permanently altered, with new relevance for a ‘moral’ option that now referred explicitly to individual human rights”.⁵²¹

In the 1990s – the decade or so before the occupation of Iraq - “human rights” (in the broad sense) were prominent in international relations.⁵²² In 1993 the UN Security Council established an International Criminal Tribunal for the Former Yugoslavia to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of the Former Yugoslavia since 1 January 1991.⁵²³ In 1994 the Security Council established an International Criminal Tribunal for Rwanda for the purpose of prosecuting persons responsible for genocide and other serious violations of

⁵¹⁷ See e.g. Paul Sieghart, *The Lawful Rights of Mankind, An Introduction to the International Legal Code of Human Rights* (1985, Oxford University Press, Oxford), pp. 65-66

⁵¹⁸ Samuel Moyn, *The Last Utopia, Human Rights in History* (The Belknap Press of Harvard University Press, Cambridge, Mass., 2010), p. 7

⁵¹⁹ *Ibid*, pp. 155-56

⁵²⁰ *Ibid*, p. 155

⁵²¹ *Ibid*, p. 158

⁵²² In this sentence I am using “human rights” to cover not only human rights in the strict legal sense but also international humanitarian law and humanitarian intervention. Strictly, human rights law and international humanitarian law are distinct branches of international law, whilst the legality of the use of force by way of humanitarian intervention falls to be considered by the branch of international law governing the use of force, i.e. the *jus ad bellum*.

⁵²³ Security Council Resolution 827 (1993), 25 May 1993 (U.N. Doc. S/RES/827 (1993))

international humanitarian law in the territory of Rwanda during that year.⁵²⁴ In 1999, the US, UK and other NATO member states (without the authorisation of the Security Council) launched a bombing campaign against the Federal Republic of Yugoslavia (Serbia) with the objective of preventing a “humanitarian catastrophe” in Kosovo following conflict in that province, including massacres and forced displacement of Kosovar Albanians, and Serbia’s failure to agree to a proposed peace plan.⁵²⁵ After Yugoslavia agreed to withdraw its forces from Kosovo, and the suspension of airstrikes by NATO, the Security Council adopted a resolution which established a UN interim administration in Kosovo, the responsibilities of which included “protecting and promoting human rights”.⁵²⁶

A curious aspect of the occupation legislation enacted in Iraq in the field of human rights is that it was promulgated during the Administration of George W. Bush, which was often criticised regarding its own human rights record. The Bush Administration had, for example, authorised the CIA to use “enhanced interrogation techniques”, including most infamously “waterboarding”, on suspected terrorists.⁵²⁷ This raises the question as to what the US Government’s motive was for the enactment of human rights legislation in occupied Iraq.

⁵²⁴ Security Council Resolution 955 (1994), 8 November 1994 (U.N. Doc. S/RES/955 (1994))

⁵²⁵ BBC, ‘World: Europe, NATO bombs Serbia’, 25 March 1999, <http://news.bbc.co.uk/2/hi/europe/303126.stm>. Accessed: 24.07.18. BBC, ‘Build-up to conflict: Timeline’, 25 March 1999, http://news.bbc.co.uk/2/hi/special_report/1998/kosovo/269755.stm. Accessed: 24.07.18. The discussion within the Security Council regarding this use of force is contained in U.N. Security Council, 3988th Meeting, 24 March 1999 (U.N. Doc. S/PV.3988); U.N. Security Council, 3989th Meeting, 26 March 1999 (U.N. Doc. S/PV.3989)

⁵²⁶ Security Council Resolution 1244 (1999), 10 June 1999 (U.N. Doc. S/RES/1244 (1999)), operative para. 11(j); BBC, ‘World: Europe, NATO ends bombing’, 10 June 1999, <http://news.bbc.co.uk/2/hi/europe/365849.stm>. Accessed: 25.07.18.

⁵²⁷ Former President Bush has admitted authorising the CIA to use enhanced interrogation techniques, including waterboarding: see George W. Bush, *Decision Points* (2010, Virgin Books), p. 169. For details of the enhanced interrogation techniques and of their actual use, see Senate Select Committee on Intelligence, Report, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, 9 December 2014 (113th Congress, 2d Session, S. Report, 113-288), Executive Summary. The techniques included waterboarding, facial slaps, “walling” (slamming detainee against a wall), the use of diapers (detainee placed in diaper and not permitted to use toilet facilities), use of insects, cramped confinement, sleep deprivation, wall standing, stress positions, attention grasp and facial hold (ibid, pp. 36-37 of the Senate Committee’s report). These methods were approved verbally by the Attorney General on 24 July 2002 and (in the case of waterboarding) 26 July 2002 (ibid, pp. 36-37). Available at <https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf>. Last accessed: 14.10.18. See also Karen J. Greenberg and Joshua L. Dratel (Eds.), *The Torture Papers, The Road to Abu Ghraib* (2005, Cambridge University Press, Cambridge) for the text of internal government memoranda, including legal advice, relating to the interpretation by the Bush Administration of its legal obligations in relation to the prohibition of torture as they apply to interrogation techniques.

One interesting perspective on that question can be derived from the argument made by Kirsten Sellars in her book *The Rise and Rise of Human Rights*. Sellars wrote this book prior to the invasion and occupation of Iraq but it is worth considering her general thesis in relation to the human rights legislation enacted during the occupation of Iraq. In the book Sellars argues that human rights campaigns by the governments of the most powerful nations “are almost always triggered by domestic impulses” within those nations rather than by repression in other countries.⁵²⁸ Furthermore, she states that governments judge these campaigns by their success “on the home front”. In the human rights campaigns of the modern era, Sellars writes, “the benefactors have benefited more than ... the supposed beneficiaries”.⁵²⁹ Western governments, she writes, have repeatedly “reaped rewards” from the human rights cause, including by using it to provide a “sugar coating for potentially unpalatable foreign interventions”.⁵³⁰

Sellars traces the use made of human rights by various US administrations. For example she states that in the 1940s President Roosevelt “used human rights to win public support for entering the Second World War” in the face of the isolationism which had dominated US foreign policy since the First World War.⁵³¹ In January 1941, when seeking to persuade Congress to provide the UK with armaments by way of “Lend-Lease”, Roosevelt declared that the US was fighting for “a world founded upon four essential human freedoms”, freedom of expression, freedom of worship, freedom from want and freedom from fear.⁵³² “Freedom means the supremacy of human rights everywhere” he added.⁵³³ After the US entered the war following the Japanese attack on Pearl Harbour, the administration “mobilised” human rights in support of the war effort, making the argument that the war was being fought not only for national interest but for a higher purpose.⁵³⁴ Roosevelt declared that “[t]he essence of our struggle today is that man shall be free”.⁵³⁵ By May 1942 the Office of War Information was

⁵²⁸ Kirsten Sellars, *The Rise and Rise of Human Rights* (2002, Sutton Publishing Ltd, Stroud, Gloucestershire), p. xiii

⁵²⁹ *Ibid*, p. xiii

⁵³⁰ *Ibid*, p. xiii

⁵³¹ *Ibid*, p. x

⁵³² *Ibid*, p. x

⁵³³ *Ibid*, p. x

⁵³⁴ *Ibid*, p. x

⁵³⁵ *Ibid*, p. x

able to report that “[l]ess than one person in ten now wants to follow an isolationist policy” and that “[t]he Four Freedoms ... have a powerful and genuine appeal to seven persons in ten”.⁵³⁶ Sellars also refers to the example that when the Reagan Administration armed the “contras”, the guerrilla force which was attempting to overthrow the government of Nicaragua, it attempted to present this policy as a human rights campaign, including by grossly inflating the figure for political prisoners being held in Nicaragua.⁵³⁷

Sellars concludes that the “driving force” behind human rights initiatives by the US since the Second World War has been “the importance of having a positive national self-image and a sense of shared purpose”, something which, she states, politicians instinctively understand.⁵³⁸ She further comments that the “self-preoccupation” of the major powers explains the “fickleness” of their human rights campaigns. “Victims of repression abroad are the pretext for intervention, rather than the reason for it”, she states.⁵³⁹ Once such victims have “served their purpose”, little attention is paid to their situation subsequently.⁵⁴⁰

Although the book was published before the occupation of Iraq, Sellars’ theory provides a perspective on the human rights policy of the occupying powers in Iraq. Although the invasion by the US and its allies was ostensibly for the purpose of disarming Iraq of weapons of mass destruction⁵⁴¹, the military operation was entitled “Operation Iraqi Freedom”.⁵⁴² In his address to the nation upon the commencement of

⁵³⁶ Ibid, pp. x-xi

⁵³⁷ Ibid, pp. 149-52. (Although Sellars does not mention it, the International Court of Justice expressly rejected the protection of human rights as a legal justification for the conduct of the United States in Nicaragua: see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, [1986] I.C.J. Reports p. 14, at pp. 134-35 (para. 268))

⁵³⁸ Ibid, p. 194. Having said that, Sellars also states that the “human rights impulse” is not a “con trick”, that picture is “more complex and less calculated”, that heads of government believe that their role is “to promote virtue within the limits imposed by political practicalities”, and that when they speak about human rights “it is rarely an entirely empty gesture” (ibid, p. 196).

⁵³⁹ Ibid, p. 195

⁵⁴⁰ Ibid

⁵⁴¹ This was the purpose put forward by the US and UK to the UN Security Council: see Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351; Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/350

⁵⁴² See e.g. Patrick E. Tyler, ‘A Nation at War: the Attack; U.S. and British Troops Push into Iraq as Missiles Strike Baghdad Compound’, *The New York Times*, 21 March 2003, which refers to a meeting at

military operations, President Bush stated that the purpose of those operations was “to disarm Iraq, to free its people and to defend the world from grave danger”.⁵⁴³ He concluded the address by stating that “We will defend our freedom. We will bring freedom to others and we will prevail”. Viewed from the perspective of Sellars’ theory, it could be inferred that the Bush Administration raised human rights (“freedom”), at least in part, as a “sugar coating for a potentially unpalatable foreign intervention” and to create a “positive national self-image and sense of shared purpose” vis-à-vis the invasion and occupation.

However, it appears that, whilst the US may have raised the issue of human rights in part to increase popular support among the US population for the invasion of Iraq, it was also felt within the Bush Administration that a democratic Iraq which respected the human rights of its own citizens, would be less likely to attack other states or use weapons of mass destruction. This thinking is evidenced by the speech which President Bush made to the UN General Assembly in September 2002, in which he stated:

“... Liberty for the Iraqi people is a great moral cause and a great strategic goal. The people of Iraq deserve it. The security of all nations requires it.

“Free societies do not intimidate through cruelty and conquest, and open societies do not threaten the world with mass murder. The United States supports political and economic liberty in a unified Iraq.”⁵⁴⁴

It is also relevant that, although it is not her central thesis, Sellars notes that in the early stages of the development of modern human rights there was a strand of thinking which linked human rights to international peace. She states that even at the beginning of the

the White House on 19 March 2003 at which President Bush authorised the relevant military commanders to commence military action in Iraq, stating “For the peace of the world and benefit and freedom of the Iraqi people, I hereby give the order to execute Operation Iraqi Freedom. May God Bless the troops.”

⁵⁴³ President Bush’s address is reproduced in Office of the Press Secretary, ‘President Bush Addresses the Nation’, 19 March 2003. Available at <https://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html>. Accessed: 12.07.18.

⁵⁴⁴ U.N. General Assembly, *Official Records*, 57th Session, 2nd plenary meeting, 12 September 2002 (U.N. Doc. A/57/PV.2), Address by Mr George W. Bush, President of the United States of America (commences at p. 5), at p. 8

Second World War “many” believed that the lesson to be drawn from the rise of fascism was that “tyranny at home had created the conditions for military aggression abroad” and that the promotion of human rights would prevent the emergence of destabilising regimes and lay the foundation for international peace.⁵⁴⁵ Furthermore, Sellars notes of US officials working on post-war planning for the United Nations from 1942 onward: that “[l]ike many others, they believed that dictatorship led to aggression; *ergo*, future peace must be built on human rights.”⁵⁴⁶ Thus, when President Bush raised this idea that human rights (in Iraq) would lead to international peace and security, he was articulating an idea which was not new.

The strategy of the US in promoting human rights in order to advance US security can also be regarded as falling within Sellars’ argument about US human rights campaigns originating from a domestic impulse. To put it another way, to the extent that US promotion of human rights in Iraq was motivated by an attempt to advance US security, it was motivated by US self-interest.

Third World Approaches to International Law

In the Introduction (Chapter 1) we briefly looked at “Third World Approaches to International Law” (“TWAIL”). Here we consider the views of TWAIL scholars in connection with our continued examination of possible motives for the CPA’s legislation in the field of human rights.

Mutua has identified an “instrumentalist” approach to human rights in which governments, in particular those of Western democracies, selectively and inconsistently deploy human rights in order to pursue their national interests, including strategic, political, security and economic interests.⁵⁴⁷ Among examples he gives of instrumentalism in human rights is the use of human rights by the Reagan administration in its struggle against Communism.⁵⁴⁸ More generally, he states:

⁵⁴⁵ Sellars (n 528) ix-x

⁵⁴⁶ *Ibid*, p. xi

⁵⁴⁷ Makau Wa Mutua, ‘The Ideology of Human Rights’, (1996) 36 *Virginia Journal of International Law* 589, at pp. 599-601, 646-53

⁵⁴⁸ *Ibid*, p. 649

“The United States has frequently used human rights as a weapon of its foreign policy, but that use has rarely been principled. The invocation of human rights has variously been used to justify access to markets or resources vital to the United States....”⁵⁴⁹

In a similar vein, Kennedy argues that in some contexts human rights may legitimate more injustice than it eliminates and that this is particularly likely where human rights discourse has been incorporated into the foreign policy processes of the great powers.⁵⁵⁰ Interventions legitimated by human rights vocabulary, he suggests, are more likely to follow political interests than emancipatory objectives.⁵⁵¹ Kennedy also states that human rights can and has been used “to legitimate war”.⁵⁵²

It could be inferred that an “instrumentalist” approach to human rights was at work in the enactment by the CPA of its human rights legislation in Iraq, with that legislation making the occupation of Iraq (during which the CPA enacted legislation which on the face of it would benefit US commercial interests⁵⁵³) more palatable vis-à-vis US public opinion and the international community and advancing US security interests in accordance with the theory expounded by President Bush in his September 2002 speech to the UN General Assembly (see above).

Anghie, although he does not refer to the CPA’s human rights legislation, either in general terms or by reference to specific pieces of legislation, argues that the “War Against Terrorism”, as conducted in Iraq, involved a “new imperialism” which deployed human rights not only as an argument for invasion but, after invasion had

⁵⁴⁹ Ibid, p. 650. He gives as an example of the latter the U.S.-led military defeat of Iraq in 1991, following Iraq’s invasion of Kuwait, although it is not clear that access to resources was the sole or dominant purpose for the liberation of Kuwait.

⁵⁵⁰ David Kennedy, ‘The International Human Rights Movement: Part of the Problem?’, (2002) 15 Harvard Human Rights Journal p. 101, at p. 119

⁵⁵¹ Ibid, p. 119

⁵⁵² Ibid, p. 124

⁵⁵³ E.g. CPA Order No. 39, Foreign Investment, promulgated 19 September 2003 (CPA/ORD/19 September 2003/39), which facilitated foreign, including US, investment in Iraq and enabled foreign investors, including US investors, to own shares in Iraqi companies; and CPA Order No. 64, Amendment to the Company Law No. 21 of 1997, promulgated 3 March 2004 (CPA/ORD/29 February 2004/64), which formally amended the Iraqi companies law to permit foreign, including US, investors to own shares in Iraqi companies: see further Chapter 6, below.

been completed, as an argument for “transformation”.⁵⁵⁴ He also refers to the US use of “intervention, transformation and tutelage”.⁵⁵⁵ International human rights law, he continues, was used “as a proxy for the law of the United States” and “stands for the norms that must be achieved in order to bring about a ‘civil state’ thus, supposedly bringing about international stability”.⁵⁵⁶

What Angie has to say about international human rights law being a proxy for the law of the United States is apparently a reference to Anghie’s reading (related earlier in the same chapter) of a particular passage in the Bush Administration’s National Security Strategy of September 2002. The relevant passage in the Strategy is as follows:

“America must stand firmly for the nonnegotiable demands of human dignity: the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property.

“These demands can be met in many ways. America’s constitution has served us well. Many other nations, with different histories and cultures, facing different circumstances, have successfully incorporated these core principles into their own systems of governance.”⁵⁵⁷

Anghie’s interpretation of this passage is that it refers to many other nations with different histories and cultures having successfully incorporated “the core principles of the American Constitution” into their own systems of government.⁵⁵⁸ However, a careful reading of the passage in question shows that the core principles being referred to are not “the core principles of the American Constitution” but certain basic

⁵⁵⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005, Cambridge University Press, Cambridge), p. 303

⁵⁵⁵ *Ibid*, p. 301

⁵⁵⁶ *Ibid*, p. 303

⁵⁵⁷ The National Security Strategy of the United States of America, 17 September 2002, p. 3. Available at <https://www.state.gov/documents/organization/63562.pdf>. Accessed: 08.10.18.

⁵⁵⁸ Anghie (n 554) 285, citing The National Security Strategy of the United States of America, 17 September 2002, Part II. Anghie states there: “...in referring to the core principles of the American Constitution, President Bush argues that ‘Many other nations, with different histories and cultures, facing different circumstances, have successfully incorporated these core principles into their own systems of governance’”

principles, including the rule of law and free speech, which the Strategy refers to as the “nonnegotiable demands of human dignity” and which the document states have been incorporated by many nations into their system of governance. It is also significant that the document expressly acknowledges that these demands of human dignity “can be met in many ways”, which suggests an acceptance that the way in which these principles have been given effect in the US Constitution is not the only way. For these reasons, Anghie’s argument that international human rights law was being used as a proxy for the law of the United States is not convincing.

Angie’s statement to the effect that the US regarded the norms of international human rights law as what must be achieved in occupied Iraq in order to bring about a “civil state” and international stability is apparently based upon the fact that President Bush’s National Security Strategy included supporting “moderate and modern government, especially in the Muslim world to ensure that the conditions and ideologies that promote terrorism do not find fertile ground in any nation”.⁵⁵⁹ The Strategy does not actually define “moderate and modern government” to include human rights law and it is therefore not clear that human rights law was envisaged to be embraced within that term. In any event, President Bush’s September 2002 speech to the UN General Assembly (see above) – which Anghie does not refer to - is evidence of thinking within the Bush Administration that a democratic Iraq which respected human rights would not pose a threat to other states, thus leading to greater international security.

Anghie goes on to argue that the “War Against Terrorism” reproduced the “civilizing mission”.⁵⁶⁰ Indeed, he states with specific reference to Iraq that the large-scale use of force to “conquer” a territory “as a prelude to attempting to civilize and liberate its people by recreating them in the image of the conqueror is one of the defining aspects to colonialism over many centuries”.⁵⁶¹ The use of the language of the “civilizing mission” and “colonialism” seems somewhat exaggerated in so far as it is intended to describe the CPA’s human rights legislation. In general, the legislation cannot be characterised as an attempt to “civilize the people” but rather was an attempt to get the

⁵⁵⁹ Ibid, p. 277, citing President George W. Bush, The National Security Strategy of the United States of America, 17 September 2002, Part III (at p. 6)

⁵⁶⁰ Ibid, p. 309

⁵⁶¹ Ibid, pp. 284-85

agents of the Iraqi state to respect the human rights of the people. In so far as the suggestion that the US was attempting to “recreate the Iraqi people in the image of the conqueror” is based on the premise that international human rights law was being used as a proxy for US law, it is doubtful for the reason given above. Furthermore it is relevant to note that it was a sovereign Iraqi government which undertook to respect and ensure the rights contained in the ICCPR, Iraq having become a party to the ICCPR in 1971 under President Ahmad Hassan al-Bakr. That fact may not provide a legal basis for the CPA’s human rights legislation (see below) but it does help to distinguish the situation in Iraq from the “civilizing mission” as practised in the time of the European empires.⁵⁶²

Human rights and neoliberalism

The CPA enacted a body of legislation in the field of human rights whilst also promulgating laws to liberalise the economy. This combination of legislation on human rights and laws aimed at economic liberalisation can be seen as a manifestation of the phenomenon whereby, as described by Moyn, since the 1970s human rights has been the “companion”, indeed the “powerless companion”, of neoliberalism.⁵⁶³

However, as Moyn concludes, whilst human rights law does not contain provisions for distributive equality⁵⁶⁴, human rights has not directly “aided and abetted” neoliberalism to establish and maintain itself.⁵⁶⁵ In any event, whatever “accommodating

⁵⁶² The use of the word “colonialism” also seems inapt in the case of occupied Iraq given that under modern international law the US and UK did not obtain sovereignty over Iraq and nor did they claim to have done so or permanently transfer part of their population into Iraq.

⁵⁶³ Samuel Moyn, *Not Enough, Human Rights in an Unequal World* (The Belknap Press of Harvard University Press, Cambridge, Mass., 2018), pp. 8, 192, 216. And see also President George W. Bush, The National Security Strategy of the United States of America, 17 September 2002, which committed his administration to champion human rights abroad and to “promote ... economic freedom beyond America’s shores” (Part II, at pp. 3-4, and VI, at p. 17).

⁵⁶⁴ Moyn, *Not Enough, Human Rights in an Unequal World* (n 563) 3 and 60 (regarding the Universal Declaration of Human Rights), 111 (regarding the International Covenant on Economic, Social and Cultural Rights (ICESCR)), 176, 213, 216, 217. Moyn distinguishes between “equality” (or “distributive equality” or “material equality”), which concerns how far individuals are from one another in the share of income they receive, and “sufficiency”, which involves each individual receiving a certain minimum of income (ibid, p. 3). The Universal Declaration and ICESCR, he states, contain “sufficiency” provisions (i.e. economic and social rights) but no provisions for distributive or material equality (ibid, 3, 60, 111, 213, 217). Moyn explains that “equality” as he uses the term does not necessarily involve absolute equality of material outcomes, but some ceiling on inequality is required (ibid, 4). Moyn also distinguishes distributive equality from “status equality” norms (in relation to, for example, gender or race) which are found in human rights treaties (ibid, 9, 213, 215).

⁵⁶⁵ Ibid, pp. xi, 175, 187, 192, 216

relationship”⁵⁶⁶ human rights may be thought to have with neoliberalism, human rights law continues to have an important role to play in the protection of civil and political rights, as Moyn himself acknowledges.⁵⁶⁷

Legislation enacted by the CPA in the field of human rights

Below we will examine legislation enacted by the CPA in the field of human rights. It is important to note that under the TAL, CPA legislation continued in force after the end of the occupation until rescinded or amended by legislation.⁵⁶⁸

Criminal justice legislation

The occupation authorities in Iraq enacted a number of pieces of legislation in the criminal justice field which contained provisions relating to human rights. On 10 June 2003 the CPA Administrator enacted CPA Order No. 7, Penal Code⁵⁶⁹ which contained a number of provisions relevant to human rights:

- (i) Section 3(2) of the Order prohibited “torture and cruel, degrading or inhuman treatment or punishment”. This formula is in effect the same as that employed in Article 7 of the International Covenant on Civil and Political Rights of 1966 (ICCPR) (except that the order of the words “inhuman” and “degrading” has been reversed).⁵⁷⁰ It is understood that the existing Iraqi Penal Code provided that torture was an offence, at least

⁵⁶⁶ Ibid, p. 10

⁵⁶⁷ Ibid, pp. 175, 217

⁵⁶⁸ TAL, Article 26(C). Some amendments were made to CPA Orders in anticipation of the end of occupation: see CPA Order No. 100, Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, promulgated 28 June 2004 (CPA/ORD/28 JUNE 2004/100). That Order also rescinded a number of Orders, including CPA Order No. 62, Disqualification from Public Service, referred to in the main text below. The TAL itself contained a catalogue of “fundamental rights”: see the TAL, Chapter Two

⁵⁶⁹ CPA Order No. 7, Penal Code, promulgated 10 June 2003 (CPA/ORD/9 June 2003/07)

⁵⁷⁰ The USA, UK and Iraq were all parties to the ICCPR at the time of the occupation, having ratified it on 8 June 1992, 20 May 1976 and 25 January 1971, respectively. See also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 which requires States Parties to take measures to prevent both acts of torture and cruel, inhuman or degrading treatment or punishment (see in particular Articles 2(1) and 16 thereof). However, at the time of the occupation Iraq was not a party to the Convention against Torture, and did not accede to it until 7 July 2011. The USA ratified the Convention on 21 October 1994 and the UK ratified it on 8 December 1988.

where it was inflicted for the purpose of compelling the person in question to make a confession or statement or to provide information or to withhold information, and that cruel treatment by a public official or agent which caused loss of esteem or dignity or physical pain was also an offence.⁵⁷¹ However, the existing Iraqi Penal Code made no express mention of inhuman or degrading treatment of punishment. Section 3(2) therefore filled that gap.

- (ii) Section 3(1) of Order No. 7 suspended capital punishment. This went beyond the requirements of the ICCPR, Article 6 of which permits States Parties to continue to impose the death penalty for “the most serious crimes”, subject to certain qualifications and limitations.⁵⁷² Section 3(1) could be seen as a step towards the abolition of the death penalty, as provided for in the Second Optional Protocol to the ICCPR.⁵⁷³ It appears that the suspension of capital punishment was the result of UK influence upon the CPA. Sir John Sawers, the UK Government’s Special Representative for Iraq between May and July 2003, gave evidence before the Chilcot Inquiry that the UK pressed the CPA Administrator not to apply the death penalty during the occupation, overcoming a contrary view

⁵⁷¹ Penal Code (Third Edition), Law No. 111 of 1969 [Iraq], Paragraph 333 (torture); Paragraph 332 (cruel treatment). Section 2(1) of CPA Order No. 7 provided that the Third Edition of the Penal Code 1969 with amendments was to apply, with the exception that Paragraphs 200 and 225 were suspended. An English translation of the Penal Code (Third Edition) is available at the web site of the UN High Commissioner for Refugees: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=52d3b0314>. Retrieved 11.01.18.

⁵⁷² See Article 6(2) of the ICCPR. Article 6(5) of the ICCPR prohibits the imposition of the death penalty for crimes committed by persons below the age of 18 and the carrying out of the death penalty on pregnant women.

⁵⁷³ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Adopted by UN General Assembly Resolution 44/128 of 15 December 1989, Vol. 1642 United Nations Treaty Series, p. 414. Neither Iraq nor the USA were party to the Second Optional Protocol at the time of the occupation. The UK had ratified the Second Optional Protocol on 10 December 1999.

coming from the US.⁵⁷⁴ The UK, unlike the US, had abolished the death penalty at home.⁵⁷⁵

- (iii) Section 4 of Order No. 7 provided that all police, prosecutors and judges, as well as all other persons undertaking public duties or holding public office, must, in exercising their official functions, apply the law impartially, and that no person will be discriminated against on the basis of sex, race, colour, language, religion, political opinion, national, ethnic or social origin, or birth. This covers some of the ground marked out by Article 26 of the ICCPR, which provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law, and that in that respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It will be noted however that whilst Article 26 requires that the law shall prohibit “any” discrimination and guarantee to “all persons” protection against discrimination “on any ground”, the list of bases of discrimination set out being purely illustrative (“such as”), the prohibition on discrimination contained in section 4 of Order No. 7 is narrower, being limited to the list of bases of discrimination there set out, which is therefore exhaustive rather than illustrative. Furthermore, the list of prohibited bases of discrimination

⁵⁷⁴ Transcript of evidence of Sir John Sawers, 10 December 2009, p. 89: “... on the death penalty, the advice he [Mr Bremer, the CPA Administrator] was getting from American quarters was to follow the Iraqi wish to reconstitute the death penalty during the course of the coalition. I persuaded him that that was an issue that would cause a real problem for the UK and that we weren’t prepared to go along with it, and he accepted that and the death penalty was never implemented during the period of coalition control within Iraq”. Sir John gave the death penalty as an example of one of the areas where UK officials were able to exert influence with the CPA Administrator during the occupation.

⁵⁷⁵ Murder (Abolition of Death Penalty) Act 1965 [UK] (abolition of death penalty for murder); s. 11(2), Criminal Damage Act 1971 [UK] (abolition of capital offence of setting on fire etc Her Majesty’s ships, dockyards etc); s. 36, Crime and Disorder Act 1998 [UK] (abolition of death penalty for treason and piracy); s. 21(5), Human Rights Act 1998 [UK] (abolition of death penalty for military offences). The UK ratified Protocol No. 6 to the ECHR, done at Strasbourg, 28 April 1983, which requires the abolition of the death penalty (other than in respect of acts committed in time of war or of imminent threat of war), on 20 May 1999 and it entered into force for the UK on 1 June 1999. The UK ratified Protocol No. 13 to the ECHR, done at Vilnius, 3 May 2002, which requires the abolition of the death penalty in all circumstances, on 10 October 2003 and it entered into force for the UK on 1 February 2004.

contained in section 4 omits a number of bases referred to in Article 26: “other [i.e. non-political] opinion”, “property” and “other status”.⁵⁷⁶

- (iv) Section 2(1) suspended Paragraph 200 of the Iraqi Penal Code, which among other things made it an offence for a former member of the Ba’ath Party to become a member of any other political or party organisation or to work for such an organisation. Such an offence would appear to violate the right to freedom of association contained in Article 22 of the ICCPR. The suspension of this provision of the Penal Code could therefore be argued to have brought about a cessation, for the time being at least, of a violation of the right to freedom of association.

- (v) Section 2(1) also suspended Paragraph 225 of the Iraqi Penal Code, which made it an offence to publicly insult the President. Such an offence is likely to inhibit criticism of the President and therefore would appear to violate the right to freedom of expression contained in Article 19(2) of the ICCPR. The suspension of this provision of the Penal Code could therefore be argued to have permitted greater exercise of the right to freedom of expression. However, the CPA was not entirely consistent in the approach which it adopted to these issues in that Order No. 7 did not suspend Paragraph 226 of the Penal Code, which made it an offence to insult publicly the National Assembly, the government, the courts, the armed forces or “any other constitutional body” or “the public authorities or official” or “semi-official agencies or departments”, or Paragraph 229 of the Code which made it an offence to insult “an official or other public employee or council or official body in the execution of their duties or as a consequence of those duties”. Again, Order No. 7 did not suspend Paragraph 227 of the Code, which made it an offence to publicly insult a foreign state, or its head of state or representative in Iraq. Rather, Section 2(2) of Order No. 7 merely provided that legal proceedings may be brought in respect of those offences only with the written permission of the CPA

⁵⁷⁶ There is one basis of discrimination which is contained in section 4 but does not appear in Article 26: “ethnic” origin. However, as noted above, the list contained in Article 26 is purely illustrative and therefore Article 26 requires protection against discrimination on ground of ethnic origin.

Administrator. The position therefore was that the CPA permitted uninhibited public criticism of President Saddam Hussein, who was in hiding at the time Order No. 7 was promulgated⁵⁷⁷, but held out the possibility of prosecution of anyone who insulted any public official or public employee who was carrying out functions during the occupation, or who insulted any public authority, council or official body which was operating during the occupation, or who publicly insulted, for example, the US, the UK, the U.S. President, the CPA Administrator or the UK Special Representative in Iraq. It is submitted that such possibility had the potential to have an inhibiting effect on the right to freedom of expression. Such inconsistency of approach on the part of the CPA also raises the question whether the CPA's real objective in suspending Paragraph 225 was to advance the right to freedom of expression, or to further its own political objectives.

Subsequently, the CPA enacted Memorandum No. 3 (Revised), Criminal Procedures, the purpose of which was stated to be to implement Order No. 7 by establishing procedures for applying the criminal law in Iraq, recognising that the effective administration of justice must consider, *inter alia*, "the need to modify aspects of Iraqi law that violate fundamental standards of human rights".⁵⁷⁸ The preamble to the Memorandum refers to "the deficiencies of the Iraqi Criminal Procedure Code with regard to fundamental standards of human rights". The Memorandum made a number of amendments to Iraq's pre-occupation Law on Criminal Proceedings of 1971.⁵⁷⁹ In particular, Section 3(b) of the Memorandum amended the Law of 1971 to require that:

- (i) before questioning an accused an examining magistrate must inform the accused that (a) he or she has the right to remain silent and no adverse

⁵⁷⁷ Saddam Hussein was captured on 14 December 2003. He was subsequently tried and on 30 December 2006 was executed.

⁵⁷⁸ CPA Memorandum No. 3 (Revised), Criminal Procedures, promulgated 27 June 2004, Section 1 (Purpose)

⁵⁷⁹ Law on Criminal Proceedings, No. 23 of 1971 [Iraq], an English translation of which is available on the website of the UN High Commissioner for Refugees at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=52d3b3224>, accessed: 14.02.18. Among the amendments made by Memorandum No. 3, Section 3(d)(ix) of the Memorandum suspends Arts 285-93 of the Law of 1971, which set out the procedures for implementing the death penalty.

inference may be drawn from the decision of the accused to exercise that right; and (b) he/she has the right to be represented by an attorney, and if he/she is unable to afford such representation, the Court will provide an attorney at no expense to the accused;⁵⁸⁰

- (ii) before questioning an accused, an examining magistrate or investigator must determine whether the accused desires to be represented by an attorney; and that, if the accused desires to be so represented, the examining magistrate or investigator shall not question the accused until he/she has retained an attorney or one has been appointed by the Court.⁵⁸¹

Quite apart from these amendments to the existing Iraqi criminal procedure code, the Memorandum also contained a number of free-standing provisions⁵⁸², including Section 4, which provided that at the time at which an Iraqi law enforcement officer arrests an individual, the officer shall inform that individual of his/her right to remain silent and to consult an attorney.

As can be seen, a number of the provisions contained in Memorandum No. 3 (Revised) related to the right to remain silent. Although the occupying powers take different approaches to the “right to remain silent” in their domestic law, the Human Rights Committee regards it as protected by the ICCPR. The US has enshrined in its Constitution the rule that no person shall be compelled in any criminal case to be a witness against himself.⁵⁸³ The UK, in contrast, permits a Court to draw adverse inferences from the silence of an accused.⁵⁸⁴ The Human Rights Committee has concluded that the UK legislation which permits the drawing of adverse inferences from the silence of an accused person “violates various provisions in Article 14 of the

⁵⁸⁰ Section 3(b) of Memorandum No. 3, inserting new sub-paragraph (b) into Paragraph 123 of the Law on Criminal Proceedings of 1971

⁵⁸¹ Section 3(b) of Memorandum No. 3, inserting new sub-paragraph (c) into Paragraph 123 of the Law on Criminal Proceedings of 1971

⁵⁸² Sections 5 and 6 deal with procedures in respect of persons detained by the Multi-National Force and will not be considered here.

⁵⁸³ The Constitution of the United States of America, Amendment V

⁵⁸⁴ SS. 34-38, Criminal Justice and Public Order Act 1994 (1994, Ch. 33) [United Kingdom], these provisions of the Act applying to England and Wales only; Criminal Evidence (Northern Ireland) Order 1988 (S.I. 1988 No. 1987, N.I. 20) [Northern Ireland]

Covenant”.⁵⁸⁵ Although, the Committee was not specific as to which rules contained within Article 14 were violated by such legislation, it seems most likely that the Committee had in mind Article 14(2), which provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law; and Article 14(3)(g), which provides that in the determination of a criminal charge against him, everyone is entitled not to be compelled to testify against himself or to confess guilt; as well as, possibly, the right to a fair hearing contained in Article 14(1). In any event, it is apparent that, although the “right to remain silent” is not referred to as such Article 14 of the ICCPR, the Human Rights Committee regards it as protected by that Article. On this basis, the provisions on the “right to remain silent” contained in Memorandum No. 3 would, if implemented, help to respect and ensure the rights of accused persons under Article 14 of the ICCPR.

As can also be seen above, a number of provisions contained in Memorandum No. 3 (Revised) relate to the right to be represented by an attorney. Article 14(3)(b) of the ICCPR provides that in the determination of any criminal charge against him, everyone is entitled to communicate with Counsel of his own choosing. Again, therefore, the provisions relating to the right to be represented by an attorney contained in Memorandum No. 3 would, if implemented, help to respect and ensure the rights of an accused person under Article 14 of the ICCPR.

A further free-standing provision contained in Memorandum No. 3 (Revised) is Section 7(2) which provided that all accused persons appearing before any Iraqi Court shall have the right to representation by an attorney of their choice; and that where an accused person is not able to afford the services of an attorney, the Court will provide him/her with a suitably qualified attorney at no expense to the accused. The Law of 1971 had already provided that the Court of Felonies was to appoint a lawyer for a defendant who did not have one.⁵⁸⁶ However, it will be noted that Section 7(2) of the

⁵⁸⁵ Human Rights Committee, Comments of the Human Rights Committee on the fourth periodic report of the United Kingdom of Great Britain and Northern Ireland, Adopted 27 July 1995, CCPR/C/79/Add.55, published 27 July 1995, pp. 3-4 (para. 17), cited in Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases, Materials, and Commentary* (3rd Ed., 2013, Oxford University Press), p.504 (para. 14.181)

⁵⁸⁶ Paragraph 144(A), Law on Criminal Proceedings, No. 23 of 1971

Memorandum makes provision for this in all of Iraq's criminal courts.⁵⁸⁷ Article 14(3)(d) of the ICCPR provides that an individual being tried on criminal charge is entitled to defend himself through legal assistance of his own choosing, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him if he does not have sufficient means to pay for it.

Order No. 53, Public Defender Fees, empowered the Council of Judges, notwithstanding any other provision of law, to establish a new schedule of fees to be paid to attorneys appointed by the Court to defend accused persons.⁵⁸⁸ The preamble referred to the CPA Administrator recognising "the fundamental human right and indispensability to justice of representation at court by competent criminal defense Counsel" and the necessity of adequate compensation to procure such counsel. Order No. 53 can be regarded as furthering the entitlement, under Article 14(3)(d) of the ICCPR, of an accused person without sufficient means to have legal assistance assigned to him without payment.

Order No. 69, Delegation of Authority to Establish the Iraqi National Intelligence Service, authorised the Governing Council to establish a new Iraqi National Intelligence Service (INIS) by enacting a statute adopting the Charter for INIS, the substance of which had previously been discussed between the CPA and Governing Council and the proposed provisions of which are set out in Appendix A to the Order.⁵⁸⁹ Article 7 of the Charter provides that the Service (i.e. INIS) will conduct its activities in accordance with the fundamental freedoms and human rights contained in and protected by the Law of Administration for the State of Iraq for the Transitional

⁵⁸⁷ The Law of 1971 referred to three penal courts: the Court of Felony (which had jurisdiction to rule in felony cases), the Court of Misdemeanour (which had jurisdiction in cases of misdemeanours and infractions) and the Court of Cassation (which had jurisdiction to review rulings given in relation to felonies, misdemeanours and other offences stipulated by law) (Ibid, Paragraphs 137-38).

⁵⁸⁸ CPA Order No. 53, Public Defender Fees, promulgated 18 January 2004, Section 1

⁵⁸⁹ CPA Order No. 69, Delegation of Authority to Establish the Iraqi National Intelligence Service, promulgated 1 April 2004, Section 1(1). The Charter gave the INIS the authority to collect intelligence, and conduct related intelligence activities regarding, serious organised crime, narcotics production and trafficking, terrorism and insurgency as well as threats to the national security of Iraq, espionage and proliferation of weapons of mass destruction (Article 4). Furthermore, the Charter empowered the INIS to provide intelligence support and coordination to Iraqi law enforcement authorities (Article 12), as well as requiring it to provide intelligence support and coordination to Iraqi military forces in furtherance of national security (Article 11). For these reasons, the legislation establishing the INIS can be conveniently dealt with under the head of criminal justice, whilst acknowledging that its role extends beyond crime.

Period (the TAL), and in the permanent Constitution when adopted. It is of particular relevance to note in this regard that Article 15(J) of the TAL provided that torture, and cruel, inhuman or degrading treatment shall be prohibited under all circumstances.

Prisons

The CPA also enacted legislation concerning the prison system. CPA Memorandum No. 2, Management of Detention and Prison Facilities set out the standards to be applied in the Iraqi prison system under the authority of the Ministry of Justice.⁵⁹⁰ The Memorandum required that all prisons within Iraq shall, “to the greatest extent practicable”, operate in accordance with the standards set out in the Memorandum until otherwise directed.⁵⁹¹ “Any and all” existing Iraqi prison regulations were suspended by the Memorandum.⁵⁹²

Memorandum No. 2 made no express reference to human rights but a number of its provisions were relevant to the human rights of prisoners. Section 11(8) of the Memorandum provided that corporal punishment, punishment by placing a prisoner in a dark cell, and “all cruel, inhuman or degrading punishments” shall be completely prohibited as punishments for disciplinary offences. Additionally, a number of provisions would, if implemented, prevent individuals being subjected to enforced disappearance, or secret detention, within the Iraqi prison system:

- (i) Section 3(1) provided that in every place where persons are imprisoned, there shall be kept a bound registration book with numbered pages in which details of, *inter alia*, the identity of each prisoner received, and of the authority for his/her commitment, must be entered.
- (ii) Section 3(2) provided that “No person shall be received in an institution without a valid commitment order, the details of which shall have been entered in the register”.

⁵⁹⁰ CPA Memorandum No. 2, Management of Detention and Prison Facilities, promulgated 8 June 2003, Section 1(1)

⁵⁹¹ *Ibid*, Section 1(2)

⁵⁹² *Ibid*, Section 1(2)

- (iii) Section 18(3) of the Memorandum provided that every prisoner shall have the right immediately to inform his/her family of his/her imprisonment or transfer to another institution.
- (iv) The Memorandum also required that prisoners be allowed to communicate with their families at regular intervals, both by correspondence and by receiving visits, under necessary supervision.⁵⁹³
- (v) The Memorandum also provided that access shall be granted to the International Committee of the Red Cross whenever sought, at a mutually agreed time, and that its delegates shall be permitted to interview all detainees in private.⁵⁹⁴
- (vi) In the case of persons who have been arrested or imprisoned by reason of a criminal charge against them, and who are detained in police or prison custody, but who have not yet been tried and sentenced (“untried prisoners”), the Memorandum provides that each such person shall be permitted “immediately” to inform his family of his detention and shall be given “all reasonable facilities for communicating with” his family and friends, and for receiving visits from them, subject only to such restrictions and supervision as are necessary “in the interests of the administration of justice and of the security and good order of the institution”.⁵⁹⁵

Order No. 98, Iraqi Ombudsman for Penal and Detention Matters, made provision for the appointment of an Ombudsman to whom complaints may be made about the conduct of a “detaining authority” and who has the power to investigate such complaints.⁵⁹⁶ The Preamble to the Order referred to the necessity of an independent

⁵⁹³ Ibid, Section 14(1)

⁵⁹⁴ Ibid, Section 14(5)

⁵⁹⁵ Ibid, Section 30(13)

⁵⁹⁶ CPA Order No. 98, Iraqi Ombudsman for Penal and Detention Matters, promulgated 27 June 2004, Sections 2(1), 4 and 5. “Detaining authority” included the personnel of the Multinational Force in Iraq, as well as Iraqi personnel and contracted personnel, employed, engaged in, supervising or commanding criminal or security custody in Iraq, with respect to persons held in such custody for any period (Section 1(1)). This does not include Multinational Force detention of its own personnel. The power to appoint

means of investigating complaints of abuse and acting in accordance with UNSCR 1483 “to promote the protection of human rights”. However, no human rights norms are referred to in the operative part of the Order and indeed, there is no reference to human rights in the operative part of the Order. Under section 14 the Ombudsman is required to report where he/she finds that the conduct which is the subject matter of the complaint falls within one or more of certain specified categories, including that it is contrary to law; is unreasonable, unjust, oppressive or improperly discriminatory; or is otherwise wrong. There is no express mention of the violation of human rights in the list of types of conduct on which the Ombudsman is required to report where it is found. Nevertheless, violation of human rights norms could be regarded as falling under the head of conduct which is “contrary to law” or which is “otherwise wrong”. However, the omission of any express reference to human rights violations means that the text of the Order does not guide the Ombudsman to consider the possibility of such violations when considering a complaint in relation to particular conduct. The lack of any express mention of human rights violations in the list of types of conduct in respect of which the Ombudsman is required to report, or elsewhere in the operative sections of the Order, must therefore be regarded as a deficiency on the part of the CPA, particularly given that, according to the Preamble, in enacting the Order the CPA Administrator was “acting ... to promote the protection of human rights”.

Order No. 99, Joint Detainee Committee established a Joint Detainee Committee composed of representatives of the Multinational Force, the Iraqi Interim Government and the States exercising custody over detainees (the US and UK).⁵⁹⁷ The Order states that its purpose is to provide a mechanism for facilitating the partnership between the Multinational Force and the Iraqi Interim Government on all matters relating to the management of, and the formulation of policy regarding, security internees and criminal detainees in the custody of the Multinational Force in Iraq.⁵⁹⁸ The Order further states that it is designed to ensure that detention operations comport with applicable law and “human rights standards”.⁵⁹⁹ Included among the functions of the

the Ombudsman was vested in the “Head of Government”, on the recommendation of the Minister of Justice (Section 2(1)). Prior to 30 June 2004, “Head of Government” meant the CPA Administrator, and thereafter referred to the prime minister of the Iraqi government (Section 1(5)).

⁵⁹⁷ CPA Order No. 99, Joint Detainee Committee, promulgated 27 June 2004, Section 2

⁵⁹⁸ Section 1

⁵⁹⁹ Ibid

Committee was responsibility for monitoring, and if necessary proposing standards and safeguards for, the conditions and “rights” of detainees, including processes for determining initial detention decisions and reviewing such decisions.⁶⁰⁰ The word “rights” would appear to embrace human rights as well as other legal rights.

Independence of the Judiciary

The CPA Administrator also enacted legislation designed to restore the independence of the judiciary in Iraq, in particular Order No. 35, Re-establishment of the Council of Judges.⁶⁰¹ The CPA Administrator noted in the preamble to that Order that,

“...prior to the changes made by the former regime, Iraq had a functioning Council of Judges that administered the judicial and prosecutorial systems to insure that judges and public prosecutors were appointed from among persons enjoying the highest reputation for fairness and integrity and of recognized competence of law, and that the judicial system exercised its authority in accordance with the rule of law....”

The preamble also declared that “a key to the establishment of the rule of law” is a judicial system which is staffed by capable persons and which is “free and independent from outside influences”.

The Order re-established the Council of Judges and stated that it was charged with the supervision of the judicial and prosecutorial systems of Iraq.⁶⁰² It was expressly stated that:

“The Council shall perform its functions independently of the Ministry of Justice”⁶⁰³

and that:

⁶⁰⁰ Section 3(2)

⁶⁰¹ CPA Order No. 35, Re-establishment of the Council of Judges, promulgated 18 September 2003

⁶⁰² Ibid, Section 1

⁶⁰³ Ibid, Section 1

“The Council shall perform its duties and responsibilities independently of any control, oversight, or supervision by the Ministry of Justice.”⁶⁰⁴

The Order suspended provisions of Iraqi law, specifically the Law of Judicial Organisation (Law No. 160 (1979)) and the Law of Public Prosecution (Law No. 159 (1979)), to the extent that they conflicted with provisions of the Order.⁶⁰⁵

The Order provided for the membership of the Council, which was to include the Chief Justice of the Supreme Court, who was to be President of the Council, the Deputy Chief Justices of the Supreme Court, the Presidents of the Appellate Courts, and a number of other officials, including the Director-General of the Office of Public Prosecution.⁶⁰⁶

The duties of the Council were to include: (i) to provide administrative oversight of all judges, excluding those of the Supreme Court, and all public prosecutors; (ii) to investigate allegations of professional misconduct and incompetence in respect of members of the judiciary (including judges of the Supreme Court) and public prosecutors, and where appropriate to take disciplinary or administrative measures, which could include removal from office; (iii) to nominate capable persons as required to fill judicial vacancies and vacancies for public prosecutor, and to recommend their appointment; (iv) to promote, advance, upgrade and transfer judges and prosecutors; (v) to assign or re-assign judges and prosecutors to hold specific posts.⁶⁰⁷ The Council was also to have such other duties as may be determined by law.⁶⁰⁸

The Law of Administration for the State of Iraq for the Transitional Period (commonly referred to as “the TAL”) also contained provisions in relation to the independence of the judiciary. These are contained within Chapter Six, which is entitled “The Federal Judicial Authority”. Article 43(A) declared:

⁶⁰⁴ Ibid, Section 6(1)

⁶⁰⁵ Ibid, Section 6(1)

⁶⁰⁶ Ibid, Section 2(1)

⁶⁰⁷ Ibid, Section 3(1). The Council was to appoint a Disciplinary and Professional Standards Committee from among its members to investigate and make decisions on allegations of misconduct and incompetence by judges and prosecutors, with a right of appeal to the Council itself (see Section 5).

⁶⁰⁸ Ibid, Section 3(2)

“The judiciary is independent, and it shall in no way be administered by the executive authority, including the Ministry of Justice. The judiciary shall enjoy exclusive competence to determine the innocence or guilt of the accused pursuant to law, without interference from the legislative or executive authorities.”

Article 43(C) provides that the National Assembly shall establish an independent and adequate budget for the judiciary.

Article 45 of the TAL provides that a “Higher Juridical Council” shall be established and that this shall “assume the role of the Council of Judges”, which as we have seen was established under Order No. 35. The Higher Juridical Council was to be composed of the Presiding Judge of the Federal Supreme Court (who was to preside over the Council), the presiding judge and deputy presiding judges of the federal Court of Cassation, the presiding judges of the federal Courts of Appeal and the presiding judge and two deputy presiding judges of each regional court of cassation.⁶⁰⁹ The Higher Juridical Council was given the task of supervising the federal judiciary and administering its budget.⁶¹⁰ The Council was also given a role in the appointment of judges to the Federal Supreme Court: the Council was required to nominate a number of candidates for each vacancy on that Court, the Presidency Council⁶¹¹ making the appointment from among the candidates nominated by the Higher Juridical Council.⁶¹² The Higher Juridical Council also had the responsibility of appointing judges to the other federal courts, including courts of first instance, the Central Criminal Court of

⁶⁰⁹ TAL, Article 45. In the absence of the Presiding Judge of the Federal Supreme Court, the presiding judge of the federal Court of Cassation was to preside over the Council.

⁶¹⁰ Ibid, Article 45

⁶¹¹ The Presidency Council consisted of the President of the State and two Deputies (Ibid, Article 36(A)). The function of the Presidency Council was to represent the sovereignty of Iraq and “oversee the higher affairs of the country” (Ibid). The executive authority during the “transitional period” (i.e. the period from 30 June 2004 until the formation of an elected Iraqi Government pursuant to a permanent constitution) consisted of the Presidency Council, the Council of Ministers and the Prime Minister (Ibid, Article 35).

⁶¹² Ibid, Article 44(E). The Higher Juridical Council was to nominate between 18 and 27 candidates to fill the initial 9 vacancies on the Federal Supreme Court. The Council was to nominate these candidates in consultation with the regional judicial councils. The Presidency Council was to appoint the members of the Court and name one of them as Presiding Judge. The Higher Juridical Council was to follow the same procedure thereafter, nominating three candidates for each subsequent vacancy arising in the Federal Supreme Court by reason of death, resignation or removal. If an appointment was rejected, the Higher Juridical Council was to nominate a new group of three candidates.

Baghdad; Courts of Appeal; and the Court of Cassation.⁶¹³ These arrangements for judicial appointments offered the prospect of avoiding political appointments to the judiciary.

The TAL also protected the independence of the judiciary by placing restrictions upon the removal of judges from office. Article 47 provided that no judge or member of the Higher Juridical Council could be removed unless he was convicted of a crime involving moral turpitude or corruption or suffered permanent incapacity. Removal required a recommendation from the Higher Juridical Council, a decision by the Council of Ministers and the approval of the Presidency Council.⁶¹⁴ The independence of the judiciary was further protected by the rule that the salary of a judge could not be reduced or suspended for any reason during his period of service.⁶¹⁵

The CPA Administrator enacted Memorandum No. 12, Administration of Independent Judiciary which was designed to implement CPA Order No. 35 and Chapter Six of the Law of Administration for the State of Iraq for the Transitional Period.⁶¹⁶ To fully understand the Memorandum it is important to note that for the purposes of the Memorandum “Council of Judges” is defined to mean the Council of Judges established by Order No. 35 “or its successor organization as provided by the Law of Administration for the State of Iraq for the Transitional Period”, i.e. the Higher Juridical Council referred to above.⁶¹⁷ The reason for these alternate meanings was presumably that whereas the Memorandum came into force on 8 May 2004, the TAL was not intended to come into operation until 30 June 2004, and therefore the Higher Juridical Council was not intended to be established prior to 30 June 2004.

Memorandum No. 12 provided that the “Council of Judges” (from 30 June 2004, the Higher Juridical Council) and Court of Cassation were each to be allocated their own

⁶¹³ Ibid, Article 46(A). The federal judicial branch included existing courts outside the Kurdistan Region, but not those in the Kurdistan Region (Ibid). Thus, under the TAL the Higher Juridical Council had no role in appointing judges to the existing courts in the Kurdistan Region. Additional federal courts could be established by law (Ibid).

⁶¹⁴ Ibid, Article 47. A judge accused of such a crime was to be suspended from his work in the judiciary pending adjudication of the charge.

⁶¹⁵ Ibid, Article 47

⁶¹⁶ CPA Memorandum No. 12, Administration of Independent Judiciary, promulgated 8 May 2004, Section 1

⁶¹⁷ Ibid, Section 2

budget by the Ministry of Finance, money being reallocated from the budget of the Ministry of Justice as appropriate.⁶¹⁸ The Memorandum also provided that all employees who work for or are primarily associated with the Courts and who were currently employed by the Ministry of Justice shall, no later than 1 June 2004, become employees of “the Council of Judges” or of the Court of Cassation, as appropriate.⁶¹⁹ All interests in property, real tangible or otherwise, which was primarily used for or associated with the Courts and judiciary, and which was assigned to the Ministry of Justice, were, no later than 1 June 2004, to be assigned to “the Council of Judges” or the Court of Cassation, as appropriate.⁶²⁰ Such property was to include, but was not limited to, furniture, motor vehicles, office equipment, libraries and housing for judges and prosecutors.

The Memorandum also amended Iraqi law, albeit in a highly imprecise way, so that references to “the Ministry of Justice” or “the Minister of Justice” shall be construed to refer to “the Council of Judges” or its President; or the Court of Cassation or its Chief Judge; or the Supreme Federal Court or its Presiding Judge, as appropriate, where this is “necessary and proper” in the light of Order No. 35 or the Law of Administration for the State of Iraq for the Transitional Period, or “where otherwise necessary and proper to maintain the independence of the judiciary”.⁶²¹ It is submitted that this is an extremely imprecise method of amending existing law and one that could not engender certainty. The proper approach, assuming that the occupying powers were entitled to make such amendments, would have been to methodically go through the Iraqi laws and determine in respect of each reference to the Ministry or Minister of Justice, whether there needed to be an amendment, and if so what precisely the amendment should be, and then to set out the amendments in the amending legislation. The Memorandum gives to the Courts the task of deciding what references to the Ministry of Justice and Minister of Justice mean: the Courts are given sole jurisdiction to adjudicate disputes in connection with this imprecise amendment.⁶²²

⁶¹⁸ Ibid, Section 3. This was to be done by 1 June 2004. For the year 2004, the Ministry of Finance was to determine, in consultation with the Council, the Court of Cassation and the Ministry of Justice, the amount of the budget of the Ministry of Justice for 2004 which was to be reallocated to the Council and the Court of Cassation (Ibid).

⁶¹⁹ Ibid, Section 4

⁶²⁰ Ibid, Section 5

⁶²¹ Ibid, Section 7

⁶²² Ibid, Section 7

The Memorandum required the Ministry of Justice, “the Council of Judges”, the Court of Cassation, the Ministry of Finance and all other relevant government institutions to “cooperate to the greatest possible extent” in effectuating the Memorandum and Order No. 35.⁶²³

Freedom of Assembly

A substantive piece of legislation enacted by the CPA in the human rights field was Order No. 19, Freedom of Assembly, promulgated on 10 July 2003. Section 2 of this Order suspends a number of provisions of the Iraqi Penal Code (Paragraphs 220-222) which were stated to “unreasonably restrict the right to freedom of expression and the right of peaceful assembly”. Most notable among the provisions suspended was Paragraph 222 of the Code which provides, *inter alia*, that organising or participating in a gathering which is intended to “influence the affairs of the public authorities” is an offence. Clearly, a prohibition on gatherings intended to influence public authorities was a serious violation of the right of peaceful assembly contained in Article 21 of the ICCPR and the right to freedom of expression contained in Article 19(2) of the ICCPR.

Having suspended restrictions on the right of peaceful assembly imposed by the pre-occupation law, Order No. 19 established new pre-conditions for, and restrictions on, the exercise of the right. In particular, Section 4 of the Order provided that a march, assembly, meeting or gathering on a roadway, public thoroughfare or other public place would be unlawful unless notice in writing had been given to an “Approving Authority” 24 hours prior to its commencement.⁶²⁴ An “Approving Authority” was the Coalition Force Commander, or a Divisional or a Brigade Commander.⁶²⁵ The Approving Authority was then required, within 12 hours of receipt of such notice of assembly, to inform the organisers of the march or meeting of the maximum number of authorised participants.⁶²⁶ Section 3(2) of the Order provided that it was unlawful for

⁶²³ Ibid, Section 8

⁶²⁴ The notice was required to specify certain details: location, the maximum number of persons participating, the names and addresses of the organisers, its route and the time of inception and duration.

⁶²⁵ Section 3(1), Order No. 19, Freedom of Assembly, promulgated on 10 July 2003

⁶²⁶ Section 3(2)

any group, organisation or individual to conduct or participate in any march, assembly, meeting or gathering on roadways unless limited to such numbers as will not unreasonably obstruct pedestrian or vehicular traffic, as determined by the Approving Authority. The Order further provided that any individual violating the Order was liable to be detained, arrested, prosecuted and, if convicted, sentenced to up to one year in prison.⁶²⁷

Other restrictions put in place by Order No. 19 included that;

- (i) it was unlawful for any person, group or organisation to conduct or participate in any march, meeting etc on roadways, public thoroughfares or other public places in more than one specific area of, or location in, any municipality on any given day, unless acting under the authority of an Approving Authority⁶²⁸;
- (ii) it was unlawful for any march, meeting etc held on roadways, public places etc to continue for longer than 4 hours⁶²⁹;
- (iii) it was unlawful for any march, meeting etc held on roadways, public thoroughfares or other public places to be held within 500 metres of any CPA or Coalition Force facility⁶³⁰;
- (iv) it was unlawful for any group, organisation or individual to conduct or participate in any march, meeting etc on a roadway or public thoroughfare (though not on other public places) during “peak traffic periods”, unless authorised by the Approving Authority for the area in question.⁶³¹ Unless otherwise set by the CPA or municipality, “peak traffic periods” were declared to be 0730 hours to 0900 hours, and from 1630 hours to 1800 hours, between Saturday and Thursday, except national holidays.⁶³²

⁶²⁷ Section 7

⁶²⁸ Section 3(1)

⁶²⁹ Section 3(3)

⁶³⁰ Section 3(3)

⁶³¹ Section 5

⁶³² Ibid

Section 1 of the Order (entitled “Purpose”) declared that the Order, and by implication the restrictions on peaceful assembly contained within it, was “necessary to protect public health, welfare and safety”.⁶³³ It continued that “[t]he public health, welfare and safety of the community” require that the movement of traffic on roadways be conducted with the minimum of disruption.⁶³⁴ It was further stated that un-restricted demonstrations and picketing on roadways may cause disruption of police, emergency and relief services, as well as injury to participants and bystanders.⁶³⁵ The practice of “multiple demonstrations on the same day in different locations in municipalities” was also singled out as one which “may unreasonably deprive the citizens of police, emergency and relief services”.⁶³⁶

The Human Rights Committee has stated that the right of peaceful assembly guaranteed in Article 21 of the ICCPR is “a fundamental human right that is essential for public expression of one’s views and opinions and indispensable in a democratic society”.⁶³⁷ However, the right of peaceful assembly is not absolute. Article 21(2) of the ICCPR recognises that restrictions may be placed on the right in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others, provided that such restrictions are imposed in conformity with the law and are “necessary in a democratic society”. Thus, public health and safety referred to by way of justification in Order No. 19 reflect permissible justifications for restrictions on the right of peaceful assembly recognised in Article 21(2) of the ICCPR. Reference could also have been made in Order No. 19 to “the rights and freedoms of others”, which is recognised in Article 21(2) as a further justification for restrictions. Such justification could be particularly pertinent to the ban on marches etc on roadways during peak traffic periods. Any restriction on the exercise of the right of peaceful assembly “must conform to the strict tests of necessity and proportionality”.⁶³⁸

⁶³³ Section 1(2)

⁶³⁴ Section 1(2)(a)

⁶³⁵ Section 1(2)(b)

⁶³⁶ Section 1(2)(c)

⁶³⁷ *Denis Turchenyak v. Belarus*, Human Rights Committee, views adopted 24 July 2013, CCPR/C/108/D/1948/2010, para. 7.4

⁶³⁸ *Sekerko v. Belarus*, Human Rights Committee, views adopted 28 October 2013, CCP/C/109/D/1851/2, para. 9.6

In so far as the restrictions imposed by Order No. 19 on the right of peaceful assembly were necessary for the protection of the aims set out in Article 21(2) (the protection of public health, public safety, public order, the rights and freedoms of others etc) they were therefore potentially justifiable. More specifically, the Human Rights Committee has held that a requirement to notify the authorities in advance of an intended demonstration in a public place, as stipulated in Order No. 19, is potentially compatible with Article 21, where the requirement is for the purpose of the aims set out in Article 21(2) (protection of public health, public safety etc).⁶³⁹ Whether in a particular case a decision of an “Approving Authority” under Order No. 19 as to the maximum number of authorised participants was compatible with Article 21 depends upon whether such decision complied with the necessity and proportionality tests. When a State Party imposes restrictions on peaceful assembly with the aim of reconciling an individual’s right to assembly and the general concerns set out in Article 21(2), “it should be guided by the objective to facilitate the right, rather than seeking unnecessary or disproportionate limitations to it”.⁶⁴⁰

Establishment of new Ministry of Human Rights

At the institutional level, the CPA established a new government ministry to promote human rights. On 22 February 2004, the CPA Administrator promulgated Order No. 60, section 1(1) of which established a Ministry of Human Rights.⁶⁴¹ Section 2 of this Order set out a number of functions for this new Ministry, including a general duty to “work to establish, through appropriate programs, services, initiatives, and studies, conditions conducive to the protection of human rights and fundamental freedoms in Iraq, and the prevention of human rights violations in Iraq”.⁶⁴² The Ministry of Human Rights was also given the duty to provide advice to legislators on whether proposed legislation is consistent with international human rights law, including the obligations

⁶³⁹ *Kivenmaa v. Finland*, Human Rights Committee, views adopted 31 March 1994, CCPR/C/50/D/412/1990, para. 9.2 (requirement to notify police 6 hours before commencement)

⁶⁴⁰ *Denis Turchenyak v. Belarus*, Human Rights Committee, views adopted 24 July 2013, CCPR/C/108/D/1948/2010, para. 7.4

⁶⁴¹ CPA Order No. 60, Ministry of Human Rights, promulgated 22 February 2004

⁶⁴² Section 2(1)

which Iraq had assumed in the international human rights treaties which it had ratified.⁶⁴³

The right to freedom of expression

The CPA also enacted legislation in the media field which sought to protect and promote freedom of expression. Order No. 65 established an Iraqi Communications and Media Commission, responsible for the licensing and regulating of the telecommunications, broadcasting, information services and other media in Iraq.⁶⁴⁴ Section 3(2) of Order No. 65 provided that the Commission shall be guided by *inter alia* Article 19 of the ICCPR regarding freedom of expression and attendant duties and responsibilities.

The CPA also promulgated Order No. 66, which established the Iraqi Media Network as the public service broadcaster for Iraq.⁶⁴⁵ The purposes of the Order included the creation of “an open forum that respects and promotes human rights and freedoms, notably the right to freedom of expression, in which views can be debated and where information, opinions and criticism circulate without interference”.⁶⁴⁶ Section 7(3) of the Order provides that the public service broadcaster “shall encourage respect for and promote fundamental human rights and freedoms, including freedom of expression, democratic values and institutions, and the culture of public dialogue”.

Freedom of expression was also referred to in Order No. 14, Prohibited Media Activity, the preamble stating that the CPA Administrator was “[c]ommitted to creating an environment in which freedom of speech is cherished and information can be exchanged freely and openly”.⁶⁴⁷ Section 2 of the Order provided that media organisations are prohibited from broadcasting or publishing *inter alia* material which incites or advocates violence for certain specified purposes, or which incites civil

⁶⁴³ Section 2(6)

⁶⁴⁴ CPA Order 65, Iraqi Communications and Media Commission, promulgated 20 March 2004, Section 3(1)

⁶⁴⁵ CPA Order No. 66, Iraq Public Service Broadcasting, promulgated 20 March 2004, Section 3(1)

⁶⁴⁶ *Ibid*, Section 1(2)

⁶⁴⁷ CPA Order No. 14, Prohibited Media Activity, promulgated 10 June 2003

disorder, rioting or damage to property.⁶⁴⁸ However, these prohibitions pursue a legitimate aim. Article 19(3) of the ICCPR states that the exercise of the right to freedom of expression carries with it “special duties and responsibilities” and that it may therefore be subject to certain restrictions, including those necessary for the protection of public order (*ordre public*), or of public health, or for respect of the rights of others. The prohibition of broadcasting or publishing material which incites violence, civil disorder or property damage falls within the rubric of restrictions which are necessary for the protection of public order or of public health or for respect of the rights of others.

More debateable is section 2(e) of the Order which prohibited media organisations from broadcasting or publishing material which advocates the return to power of the Iraqi Ba’ath Party and even material which makes statements that purport to be on behalf of that Party. The argument could perhaps be made that the Iraqi Ba’ath Party and its members were precluded from relying on the ICCPR as a result of Article 5(1) of the ICCPR which provides that “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein....”.

The CPA Administrator was empowered under Order No. 14 to authorise on-site inspections of Iraqi media organisations, without notice, in order to ascertain compliance with the Order and to seize any prohibited materials and production equipment, and to seal off operating premises.⁶⁴⁹ Persons broadcasting or publishing prohibited material in violation of the Order, or attempting to do so, were liable to detention, arrest, prosecution and, on conviction, imprisonment for up to one year, or a fine.⁶⁵⁰ Where any media organisation was found to be in breach of the Order, the CPA

⁶⁴⁸ Section 2 provided: “Media organizations are prohibited from broadcasting or publishing original, re-broadcast, re-printed or syndicated material that: (a) incites violence against any individual or group, including racial, ethnic or religious groups and women; (b) incites civil disorder, rioting or damage to property; (c) incites violence against Coalition Forces or CPA personnel; (d) advocates alterations to Iraq’s borders by violent means; (e) advocates the return to power of the Iraqi Ba’ath Party or makes statements that purport to be on behalf of the Iraqi Ba’ath Party.”

⁶⁴⁹ Section 3(2)

⁶⁵⁰ Section 5(1)

Administrator was empowered to withdraw its license, close its operation, confiscate its property, and/or seal its premises.⁶⁵¹

Furthermore, Section 4 of the Order provided that where any media activity “poses an imminent threat” to the security of Coalition Forces or CPA personnel or a “significant and immediate threat to public order”, the Commander of Coalition Forces may take “direct action” to prevent or defeat the threat. The compatibility of such direct military action with Article 19 of the ICCPR would depend on whether it meets the necessity and proportionality tests. If such action results in the death of civilians, the right to life contained in Article 6 of the ICCPR would also be engaged.

Past human rights abuses

A number of Orders enacted by the CPA contained provisions which addressed past human rights abuses, or referred to such abuses by way of apparent justification:

- (i) Order No. 1, De-Ba’athification of Iraqi Society and Order No. 5, Establishment of the Iraqi De-Baathification Council referred in their preambles to the fact that the Iraqi people had suffered “large scale human rights abuses” over many years at the hands of the Ba’ath Party.⁶⁵² The de-Ba’athification legislation has already been considered above where it was noted that it has been criticised for having been applied to excessive numbers of people, including teachers. It is doubtful that most of the teachers to whom it was applied, for example, were involved in such human rights abuses. The preambles to these Orders also referred to other putative justifications for the legislation including “the continuing threat to the security of the Coalition Forces posed by the Iraqi Ba’ath Party”.
- (ii) Order No. 62, Disqualification from Public Office empowered the CPA Administrator to disqualify an individual from participating in elections as a candidate for, or holding, public office, at any level, on a range of grounds

⁶⁵¹ Section 5(2)

⁶⁵² CPA Order No. 1, De-Ba’athification of Iraqi Society, promulgated 16 May 2003; CPA Order No. 5, Establishment of the Iraqi De-Ba’athification Council, promulgated 25 May 2003

including where the individual concerned is reasonably suspected of having committed, participated in, ordered or permitted war crimes, genocide, crimes against humanity, atrocities or “gross violations of human rights”.⁶⁵³ Any laws or regulations which were inconsistent with the provisions of this Order were suspended to the extent of such inconsistency.⁶⁵⁴

- (iii) Order No. 82, Iraqi National Foundation for Remembrance, which established the Iraqi National Foundation for Remembrance with a remit to memorialise the victims of atrocities perpetrated by the previous regime, including by funding proposals for monuments, memorials and historical and artistic exhibitions and other programs to educate and inform the public, and by seeking to raise private funding for a national memorial museum in Baghdad to document, study and present publicly the history of such atrocities.⁶⁵⁵ The purpose of this memorialisation is stated in the Order to be so that current and future generations of Iraqis will understand and remember the period of Iraqi history in question and “take those steps necessary to preserve an open and democratic government which protects human rights, fundamental freedoms and dignity”.⁶⁵⁶ The preamble to the Order refers to the Iraqi people having long suffered from “terrible abuses of their fundamental freedoms and human rights” and states that “accounting publicly for the past atrocities and educating the Iraqi people about them will serve as a crucial safeguard against future abuses of fundamental freedoms and human rights”.

- (iv) Order No. 91, Regulation of Armed Forces and Militias within Iraq, which established a framework for the transition and reintegration into Iraqi society of certain armed groups.⁶⁵⁷ Shortly before enacting the Order, the CPA had announced that it had completed negotiations with 9 political parties for the transition and reintegration of the armed groups under their

⁶⁵³ CPA Order No. 62, Disqualification from Public Office, promulgated 26 February 2004, Section 1(1)(e)

⁶⁵⁴ Ibid, Section 2

⁶⁵⁵ CPA Order No. 82, Iraqi National Foundation for Remembrance, promulgated 28 April 2004, Sections 1 and 2

⁶⁵⁶ Ibid, Section 1

⁶⁵⁷ CPA Order No. 91, Regulation of Armed Forces and Militias Within Iraq, promulgated 7 June 2004

authority.⁶⁵⁸ Under Order No. 91 an armed force or militia which was participating in the political process could apply for “Residual Element” status.⁶⁵⁹ “Qualified Members” of such “Residual Elements” could be transitioned and reintegrated into Iraqi society by one of three processes, as appropriate: (a) entry of individuals into the Iraqi Armed Forces or other Iraqi security forces; (b) retirement (on the same pension which they would have received had they served in the Iraqi Armed Forces); (c) reintegration (which might involve education benefits, job training and placement).⁶⁶⁰ Of particular relevance for present purposes, the definition of “Qualified Member” is a member of a “Residual Element” who meets certain qualifications, one of which is that he must not have violated “Iraq’s recognized principles of human rights”.⁶⁶¹

Having examined the legislation enacted by the CPA in the field of human rights, we will now look at the human rights position in Iraq prior to the occupation.

The human rights position prior to the occupation

In order to assess the extent to which legislation enacted during the occupation led to an improvement in the enjoyment of human rights in Iraq, it is necessary to consider the human rights position prior to the occupation.

⁶⁵⁸ The parties were the Kurdistan Democratic Party (KDP), Patriotic Union of Kurdistan (PUK), Iraqi Islamic Party, Supreme Council of the Islamic Revolution in Iraq/Badr Organisation, Iraqi National Accord (INA), Iraqi National Congress (INC), Iraqi Hezbollah, the Iraqi Communist Party and Dawa: see CPA News Release, ‘Armed Forces and Militia Agreement Announced’, For release on 5 June 2004. Available at http://govinfo.library.unt.edu/cpa-iraq/pressreleases/20040604a_MNFI.html. Accessed: 02.02.18. This news release noted that the agreement covered about 100,000 armed individuals, and that most of these groups and individuals were part of the resistance against the Ba’athist former regime.

⁶⁵⁹ Order No. 91, Section 4(1)-(3). “Armed Force” was defined as “an organized group of individuals bearing firearms or weapons” and included “government forces and Militias” (Section 1(2)). In order to attain the status of “Residual Element”, a “Transition and Reintegration Plan” had to be accepted by the commander, head or leader of the Armed Force or Militia concerned and by the CPA Administrator (or, after the end of the occupation, by a Transition and Reintegration Implementation Committee) (Section 4(2)).

⁶⁶⁰ Ibid, Section 4(7)

⁶⁶¹ Ibid, Section 1(7). The member must also not have engaged in terrorist activities or violated the laws of war.

A useful starting point for ascertaining the human rights position in Iraq prior to the occupation is the comments made by the Human Rights Committee established by the ICCPR following its consideration of the periodic reports submitted by Iraq, as required by the ICCPR.⁶⁶² At the time of commencement of the occupation, the most recent report by Iraq was submitted to the Committee in 1996. The Committee made its concluding observations on this report in November 1997.

In the concluding observations which it adopted in November 1997, the Human Rights Committee noted with grave concern “reports from many sources concerning the high incidence of summary executions, arbitrary arrests and detention, torture and ill-treatment by members of security and military forces, disappearances of many named individuals and of thousands of people in northern Iraq and in the Southern Marshes, and forced relocations”.⁶⁶³ The Committee also expressed its regret at a “lack of transparency” on the part of the Iraqi Government in responding to the Committee’s questions about these reports.

The Committee also noted with great concern the increase in the categories of crime punishable with the death penalty, including non-violent and economic crimes. The Committee concluded that the provisions concerned were incompatible with Iraq’s obligation to protect the right to life under the ICCPR and recommended that Iraq abolish the death penalty for all but the most serious crimes, as required by Article 6(2) of the ICCPR, as well as giving consideration to the total abolition of the death penalty.⁶⁶⁴ The Committee also expressed its deep concern that Iraq had resorted to the infliction of cruel, inhuman and degrading punishments, such as amputation and branding, which were incompatible with Article 7 of the ICCPR.⁶⁶⁵ The Committee

⁶⁶² Details of the reporting cycles under the ICCPR applicable to Iraq, and the documents relating thereto, are available on the web site of the Office of the High Commissioner for Human Rights: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=IRQ&Lang=EN . Site accessed: 05.02.18.

⁶⁶³ Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Iraq, published 19 November 1997, CCPR/C/79/Add.84, p. 2 (para. 8)

⁶⁶⁴ Ibid, p. 3 (para. 10). The Committee also recommended the suspension without delay, and repeal, of a provision which imposed the death penalty where a person had evaded military service several times, in violation of Article 6(2) (ibid, para. 11).

⁶⁶⁵ Ibid, para. 12

stated that the imposition of such punishments should cease immediately and that the enactments which provided for such punishments should be revoked without delay.

The Committee was also critical of restrictions on the right to freedom of expression. The Committee expressed its concern at “severe restrictions on the right to express opposition to or criticism of the Government or its policies”.⁶⁶⁶ More specifically, the Committee expressed concern regarding the fact that the law imposes life imprisonment and, in certain circumstances, death for the offence of insulting the President of the Republic. The Committee stated that the restrictions on freedom of expression “effectively prevent the discussion of ideas or the operation of political parties in opposition to the ruling Ba’ath Party” and constituted a violation of Article 19 of the ICCPR, as well as impeding the exercise of the rights to freedom of peaceful assembly and association contained in Articles 21 and 22. The Committee concluded that penal legislation which imposed restrictions on the rights to freedom of expression, peaceful assembly and association should be amended so that they comply with Articles 19, 21 and 22 of the ICCPR.⁶⁶⁷

The Committee also expressed concern about restrictions, prohibitions and censorship imposed on the establishment and operation of independent broadcasting media, and on the dissemination and broadcasting of foreign media, which were not in conformity with Article 19(3) of the ICCPR.⁶⁶⁸ The Committee stated that legislation dealing with the press and other media should be amended so as to comply with Article 19 of the ICCPR.⁶⁶⁹

Other issues referred to by the Committee included the fact that the Revolutionary Command Council was not elected by universal and equal suffrage, and the incompatibility of this with Article 25(a) and (b) of the ICCPR⁶⁷⁰; the fact that the Revolutionary Command Council had the power to issue laws, decrees and decisions which were not subject to independent scrutiny or review to ensure their compliance with the ICCPR, and the need for individuals whose rights may have been violated by

⁶⁶⁶ *Ibid*, p. 4 (para. 16)

⁶⁶⁷ *Ibid*

⁶⁶⁸ *Ibid*, p. 5 (para. 17)

⁶⁶⁹ *Ibid*

⁶⁷⁰ *Ibid*, p. 5 (para. 18)

such laws, decrees or decisions to have an effective remedy as required by Article 2(3) of the ICCPR⁶⁷¹; the situation of the members of religious and ethnic minorities, including the Kurds and the Shi'ite people of the Southern Marshes, which were the subject of discrimination in Iraq⁶⁷²; family and inheritance laws and their incompatibility with the principle of gender equality under Articles 2(1), 3, 23 and 26 of the ICCPR⁶⁷³; reports of arbitrary restrictions on freedom of movement within Iraq and the freedom to leave the country, in breach of Article 12 of the ICCPR⁶⁷⁴; the use of special courts which did not afford all of the procedural guarantees contained in Article 14 of the ICCPR, in particular the right of appeal, in criminal cases⁶⁷⁵; and reports of difficulties faced by non-governmental organisations in relation to their establishment and functioning⁶⁷⁶.

In April 2002 the Commission on Human Rights adopted a resolution on the “Situation of human rights in Iraq”.⁶⁷⁷ This was one of a series of resolutions on the subject adopted by the Commission, and was the last such resolution to be adopted prior to the start of the invasion of Iraq by the US and UK in March 2003. The resolution of April 2002 stated, *inter alia*, that the Commission on Human Rights,

“... *Strongly condemns:*

- (a) The systematic, widespread and extremely grave violations of human rights and of international humanitarian law by the Government of Iraq, resulting in an all-pervasive repression and oppression sustained by broad-based discrimination and widespread terror;
- (b) The suppression of freedom of thought, expression, information, association, assembly and movement through fear of arrest, imprisonment, execution, expulsion, house demolition and other sanctions;

⁶⁷¹ Ibid, p. 5 (para. 19)

⁶⁷² Ibid, p. 5 (para. 20)

⁶⁷³ Ibid, p. 4 (para. 13)

⁶⁷⁴ Ibid, p. 4 (para. 14)

⁶⁷⁵ Ibid, p. 4 (para. 15)

⁶⁷⁶ Ibid, p. 6 (para. 21)

⁶⁷⁷ Commission on Human Rights, resolution 2002/15, Situation of human rights in Iraq, 19 April 2002

- (c) The repression faced by any kind of opposition, in particular the harassment and intimidation of and threats against Iraqi opponents living abroad and members of their families;
- (d) The widespread use of the death penalty in disregard of the provisions of the International Covenant on Civil and Political Rights and the United Nations safeguards;
- (e) Summary and arbitrary executions, including political killings and the continued so-called clean-out of prisons, the use of rape as a political tool, as well as enforced or involuntary disappearances, routinely practised arbitrary arrests and detention, and consistent and routine failure to respect due process and the rule of law;
- (f) Widespread, systematic torture and the maintaining of decrees prescribing cruel and inhuman punishment as a penalty for offences;⁶⁷⁸

It is clear from this resolution that the Commission on Human Rights was of the view that the Iraqi Government at that time was responsible for the violations of human rights referred to in the passage quoted, including the widespread and systematic use of torture; the widespread use of the death penalty in violation of the ICCPR; enforced “disappearances”; and suppression of freedom of expression and the right of peaceful assembly.

As it was put by the Special Rapporteur on the situation of human rights in Iraq, Mr Andreas Mavrommatis, there was no culture of human rights in Iraq. On the eve of the 2003 war, the Special Rapporteur summed up the position as follows:

“Although Iraq is a country with a rich past and an enviable history and an almost unparalleled ancient civilization with a sophisticated population, the years of one-party authoritarian regime have resulted in the lack of a human

⁶⁷⁸ Ibid, para. 3

rights culture and functioning democratic institutions. The situation is compounded by the absence of independent and effective mechanisms that would protect individual rights and freedoms.”⁶⁷⁹

Further evidence of the human rights position in Iraq prior to the occupation can be found in reports issued by the non-governmental organisation, Amnesty International. In November 1999 Amnesty International issued a report which stated that “gross human rights violations are systematically taking place in Iraq”, including arbitrary arrest and detention, torture, extrajudicial and judicial executions after unfair summary trials, “disappearances” and forcible expulsions on the basis of ethnic origin (non-Arabs).⁶⁸⁰ The report noted that the majority of victims of human rights abuses were Shi’a Muslims, in Southern Iraq and in some districts of Baghdad, and Kurds in Northern Iraq.⁶⁸¹ The report described the following human rights violations:

- (i) “Thousands” of people had been arbitrarily arrested and detained in recent years because they were suspected of involvement in political opposition to the regime or they were related to persons involved in opposition.⁶⁸² Such persons were not informed of the reason for their arrest.⁶⁸³
- (ii) The “vast majority” of political detainees were held incommunicado with no access to lawyers or family members and their families not being informed of their whereabouts.⁶⁸⁴

⁶⁷⁹ Report submitted by the Special Rapporteur, Andreas Mavrommatis, Situation of Human Rights in Iraq, Addendum, 4 March 2003, E/CN.4/2003/40/Add.1, p. 5 (para. 17)

⁶⁸⁰ Amnesty International, ‘Iraq, Victims of Systematic Repression’, November 1999 (MDE 14/10/99), p.2. The forcible expulsions were principally of Kurds who were expelled from the Kirkuk area to the Kurdish-controlled region of Iraq, Kirkuk being important for its strategic location and oil fields (ibid, pp. 20-21). According to the report, since 1997 at least 91,000 Kurds had been reportedly expelled from the Kirkuk area to the Kurdish-controlled region (as at May 1999) (ibid, pp. 20-21). Thousands of Arabs from other parts of Iraq were then re-settled in the Kirkuk area (ibid).

⁶⁸¹ Ibid, p. 3

⁶⁸² Ibid, p. 8 and pp. 10-11

⁶⁸³ Ibid, p. 8

⁶⁸⁴ Ibid, p. 2 and pp. 8-9

- (iii) The death penalty was being used “on a massive scale” and was being applied to a wide range of criminal and political offences.⁶⁸⁵ The report states that although the Iraqi Government rarely released statistics on the death penalty, there were (apparently unofficial) reports of “hundreds” of executions being carried out each year, amounting to “[t]housands” of people having been executed “over the last few years”.⁶⁸⁶ Amnesty International itself had received the names of “hundreds” of persons executed.⁶⁸⁷ The report also states that because of the secrecy surrounding the use of the death penalty, in many cases it was impossible to determine whether the reported executions were judicial or extrajudicial in nature.⁶⁸⁸ Among those judicially executed were political prisoners who had been convicted under Article 156 of the Iraqi penal code, which relates to membership of a party or organisation which has the aim of changing the system of government.⁶⁸⁹
- (iv) “[H]undreds of thousands” of Kurds and Shi‘a Muslims had “disappeared” since the beginning of the 1980s.⁶⁹⁰
- (v) Torture was used “systematically” against detainees in Iraqi prisons and detention centres.⁶⁹¹ Detainees were “routinely” tortured.⁶⁹²
- (vi) Under decrees issued by the Revolutionary Command Council in 1994, judicial punishment amounting to torture or to cruel, inhuman or degrading punishment was introduced for a range of offences.⁶⁹³ Such punishments

⁶⁸⁵ *Ibid*, p. 2. The report noted that since the end of the Gulf War in 1991, decrees had been enacted which prescribed the death penalty for offences which did not have lethal or other extremely grave consequences, for example car theft (RCC Decree 13/92); the smuggling of cars out of Iraq (RCC decree 95/94); and theft committed by a government employee (RCC Decree 114/94) (*ibid*, p. 15).

⁶⁸⁶ *Ibid*, p. 2 and p. 15

⁶⁸⁷ *Ibid*, p. 15

⁶⁸⁸ *Ibid*, pp. 2-3 and p. 15

⁶⁸⁹ *Ibid*, p. 15

⁶⁹⁰ *Ibid*, p. 3

⁶⁹¹ *Ibid*, pp. 11-12

⁶⁹² *Ibid*, p. 2

⁶⁹³ *Ibid*, p. 12

included the amputation of the right hand, for a first offence, or left foot, for a second offence.⁶⁹⁴

This then was the human rights position of Iraq prior to the occupation. It was this situation which the Coalition Provisional Authority sought to alter radically with its legislation in the field of human rights.

The human rights position after the occupation

Having looked at the human rights position in Iraq prior to the occupation, we shall now examine the human rights situation in Iraq since the occupation.

Again, a useful starting point for ascertaining the human rights position in Iraq after the occupation is the concluding observations of the Human Rights Committee in relation to Iraq's periodic report submitted under the ICCPR. Iraq's next periodic report to the Human Rights Committee after the occupation was submitted in October 2013⁶⁹⁵ – the Committee welcomed submission of the report “albeit 13 years late”.⁶⁹⁶ The Committee adopted its concluding observations in November 2015.⁶⁹⁷

The Committee addresses a variety of human rights issues in its report, some of which are not matters on which the CPA legislated during the occupation, for example female genital mutilation; early, “temporary” and forced marriages; legislative provisions which permit polygamous marriages and which are discriminatory against women; the fact that “honour killings” of women remain a serious problem, and that the Iraqi Penal Code provided for “honourable motives” to be a mitigating factor in respect of murder; the fact that the Penal Code provided that it was a defence to a charge of rape for the offender to marry the victim; the fact that marital rape was not a crime (outside the Kurdistan Region) and the statement by the Iraqi Government in its periodic report that

⁶⁹⁴ Ibid, p. 12

⁶⁹⁵ Iraq, Fifth periodic report to Human Rights Committee, [16 October 2013] (published, 12 December 2013), CCPR/C/IRQ/5

⁶⁹⁶ Human Rights Committee, Concluding observations on the fifth periodic report of Iraq, 3 December 2015, CCPR/C/IRQ/CO/5, p. 1 (para. 2)

⁶⁹⁷ Ibid, p. 1 (para. 1)

persons in Iraq have the right to change their religion “but only to Islam”.⁶⁹⁸ Here we are concerned with, and will focus on, those issues in respect of which the CPA did promulgate legislation. The point here is to consider whether the legislation which the CPA did enact in the human rights sphere brought about lasting change in Iraq, i.e. change which endured beyond the occupation and to the present day, rather than to consider whether there are other human rights issues on which the CPA could have legislated but did not.

Below we shall examine the human rights situation in Iraq after the occupation under a number of headings – torture, the death penalty, enforced disappearance and the use of secret prisons and so on. This will be done by looking at the concluding observations of the Human Rights Committee, and those of other human rights treaty bodies, as well as reports by UNAMI/OHCHR and non-governmental organisations.

Torture and ill-treatment

As shown above, during the occupation the CPA had enacted legislation which prohibited torture and cruel, degrading or inhuman treatment or punishment.⁶⁹⁹ However, as will be shown below, there is evidence that years after the end of the occupation the Iraqi State has continued to be responsible for the widespread torture, and other serious ill-treatment, of detainees.

The Human Rights Committee, in 2015, expressed concern at allegations that:

- (i) torture and ill-treatment were “often practised by the police, mainly as a means to elicit confessions”;

⁶⁹⁸ Ibid, paras. 13-16, 25-26 and 37. For “honourable motives” as a mitigating excuse, see Paragraph 128 of the Penal Code. For the defence to the charge of rape where the offender marries the victim, see Paragraph 398 of the Penal Code. Iraq’s Fifth periodic report, in explaining the safeguards for religious belief provided by Iraq’s Constitution of 2005, refers to “the right to change one’s religion, but only to Islam” (para. 155).

⁶⁹⁹ See main text above dealing with Order No. 7, Section 3(2), and Memorandum No. 2, Section 11(8)

- (ii) confessions extracted under duress had been used as evidence in court, despite the prohibitions in domestic law, and that allegations by defendants in that regard had not been adequately investigated;
- (iii) “many women” detained in custody, particularly women detained on terrorism-related charges, had been subjected to rape and sexual assault; and
- (iv) a number of deaths in custody had been the result of torture or ill-treatment.⁷⁰⁰

Although the Committee refers here to “allegations”, by expressing its concern at these allegations it indicates that it is treating them as credible.

The Committee also noted with concern the “low number of investigations carried out” vis-à-vis the number of complaints of torture and ill-treatment registered.⁷⁰¹ The Committee also expressed concern regarding information that Iraq’s criminal legislation did not adequately ensure that acts covered by the internationally recognised definition of torture were fully criminalised.⁷⁰² The recommendations of the Committee included that the Iraqi Government should “take more vigorous steps to prevent torture and ill-treatment” and to ensure that all such cases are promptly, independently and fully investigated, and that those responsible are brought to justice.⁷⁰³ Other recommendations on this issue included that the Iraqi Government should ensure that confessions obtained in violation of Article 7 of the ICCPR are not accepted in evidence by the Courts in any circumstances; and that the Government should amend its Criminal Code so that it includes a definition of torture which is consistent with Article 7 of the ICCPR and other international norms.⁷⁰⁴

Similarly, the Committee against Torture, when making concluding observations on Iraq’s initial report under the Convention against Torture in August 2015, expressed

⁷⁰⁰ Human Rights Committee, Concluding observations on the fifth periodic report of Iraq, 3 December 2015, p. 6 (para. 29)

⁷⁰¹ Ibid, pp. 6-7 (para. 29)

⁷⁰² Ibid, p. 6 (para.29)

⁷⁰³ Ibid, p. 7 (para. 30)

⁷⁰⁴ Ibid

concerns regarding the use of torture in Iraq.⁷⁰⁵ The Committee stated that, despite Iraq's assurances that the practice of torture in Iraq was not systematic in nature, the Committee,

“remains deeply concerned by reports of routine and widespread use of torture and ill-treatment of suspects in police custody, as well as in pretrial detention centres run by the Ministry of the Interior and the Ministry of Defence, primarily to extract confessions or information to be used in criminal proceedings”.⁷⁰⁶

The Committee against Torture also stated that it was concerned about allegations of torture and ill-treatment, “including rape and other forms of sexual abuse, against women in custody – mostly Sunni Muslims - , who are frequently detained for allegedly “covering up” for their husbands or other male family members”.⁷⁰⁷ The Committee also expressed concern at reports that complaints of torture and ill-treatment are “rarely investigated” and commented that this “creates a climate of impunity”.⁷⁰⁸ The Committee further expressed concern that, “despite the Committee’s questions”, the Iraqi Government had failed to provide figures for the number of complaints of torture and ill-treatment and for any investigations and prosecutions in respect of such complaints during the reporting period in question.⁷⁰⁹ Nor had the Iraqi Government provided to the Committee information on any sentences and criminal or disciplinary sanctions imposed on offenders. The Committee therefore declared that, in the absence of this information, it found itself unable to assess whether Iraq had been complying with the obligation contained in Article 12 of the Convention against Torture to carry out a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed.⁷¹⁰

⁷⁰⁵ Iraq acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 7 July 2011, some 7 years after the end of the occupation by the US and UK.

⁷⁰⁶ Committee against Torture, Concluding observations on the initial report of Iraq, 7 September 2015, CAT/C/IRQ/CO/1, para. 15. The Committee adopted the concluding observations at its meetings on 11-12 August 2015.

⁷⁰⁷ Ibid

⁷⁰⁸ Ibid, para. 21

⁷⁰⁹ Ibid

⁷¹⁰ Ibid

Further evidence of torture and ill-treatment in Iraq has been provided by non-governmental organisations. In 2005 Human Rights Watch published a report in which it stated that “the abuse of detainees by the Iraqi police and intelligence forces has become routine and commonplace”.⁷¹¹ The organisation had interviewed 90 current and former detainees in Iraq between July and October 2004, of whom 72 alleged that they had been tortured or ill-treated whilst in detention.⁷¹² Human Rights Watch observed that some at least of the persons interviewed continued to have visible injuries which appeared to be consistent with the type of treatment which they alleged.⁷¹³ The report also cited information provided by Iraqi investigating judges to Human Rights Watch regarding individual cases which supported the organisation’s observations regarding the nature and scope of the abuse being inflicted by the Iraqi police.⁷¹⁴

The 2005 report by Human Rights Watch noted that medical evidence of torture was generally unavailable largely because of the substantial delays by the police in bringing detainees before a judge for the first time, by which time the physical evidence of torture is no longer present and, consequently, judges will not generally refer the detainee for medical examination because it would be futile.⁷¹⁵ Thus Human Rights Watch found that relative to the many reports of torture it received, and to the number of cases it documented, the level of referrals by judges to the relevant forensic medical examination institute for verification or otherwise of torture allegations was “very low”.⁷¹⁶ Furthermore, the report stated, even where judges did refer detainees for medical examination, the police would delay implementation of the judge’s order, by which time much of the physical evidence of torture would have disappeared.⁷¹⁷

⁷¹¹ Human Rights Watch, ‘The New Iraq?, Torture and ill-treatment of detainees in Iraqi custody’, January 2005, Vol. 17, No. 1(E), p. 4. Available at <https://www.hrw.org/sites/default/files/reports/iraq0105.pdf>

⁷¹² Ibid, p. 11

⁷¹³ Ibid, p. 13 and p. 40

⁷¹⁴ Ibid, p. 13

⁷¹⁵ Ibid, pp. 72-74. The report earlier referred to the requirement in Iraqi law that defendants must be brought before an investigating judge within 24 hours of arrest (ibid, p. 20, citing Article 123, Code of Criminal Procedure [Iraq]). In contrast, the report refers to a “practice” of holding detainees “for several weeks, and in some cases for several months” before they are brought before a court for the first time (ibid, p. 73).

⁷¹⁶ Ibid, p. 72

⁷¹⁷ Ibid, p. 72, citing information supplied by a forensic doctor at the Medico-Legal Institute in Baghdad, who stated that there was an average delay of 20 days between the issuing of a referral order and its implementation.

Among the 90 current and former detainees interviewed by Human Rights Watch were 54 detainees who were interviewed at the Central Criminal Court in Baghdad, a majority of whom said that torture and ill-treatment during interrogation were routine.⁷¹⁸ The report states that “accounts of their treatment at the hands of the police were consistent to a high degree”.⁷¹⁹ Methods of torture or ill-treatment complained of included kicking, slapping, punching; beatings all over the body using hosepipes, wooden sticks, iron rods and/or cables; and, in some cases, subjection to electric shocks, including by electric wires being attached to the ears or genitals.⁷²⁰ The specialised police agencies operated by the Ministry of the Interior were reported by detainees to use the foregoing methods and, in addition, suspending detainees from the wrists for prolonged periods with the hands tied behind the back; and keeping detainees blindfolded and/or handcuffed for several days.⁷²¹

The report notes that many of Iraq’s police officers held the same office under the previous regime, at which time torture was the norm.⁷²² Human Rights Watch argued that it must be made clear to police officers that such abuses were no longer acceptable and would be punished.⁷²³ The organisation stated that the current Iraqi government had failed to make this clear to police officers.

In subsequent years Human Rights Watch continued to document the use of torture in Iraq. In 2010 Human Rights Watch interviewed 42 former detainees who had been held by the Iraqi army at a detention facility at the former Muthanna airport in West Baghdad.⁷²⁴ More than 430 detainees were being held at the Muthanna facility.⁷²⁵ They were accused of aiding and abetting terrorism.⁷²⁶ Human Rights Watch described the former detainees’ accounts as credible and consistent and noted that most of a group of around 300 former detainees (which included the 42 interviewed) from the

⁷¹⁸ Ibid, pp. 39-40

⁷¹⁹ Ibid, p. 40

⁷²⁰ Ibid, p. 40

⁷²¹ Ibid, p. 4

⁷²² Ibid, p. 3

⁷²³ Ibid

⁷²⁴ Human Rights Watch, ‘Iraq: Detainees Describe Torture in Secret Jail’, 27 April 2010. Available at <https://www.hrw.org/news/2010/04/27/iraq-detainees-describe-torture-secret-jail> . Accessed: 12.04.18.

⁷²⁵ Ibid

⁷²⁶ Ibid

Muthanna facility were observed by Human Rights Watch to display fresh scars and injuries.⁷²⁷ The document subsequently issued by Human Rights Watch stated that “All the detainees interviewed described the same methods of torture employed by their Iraqi interrogators”.⁷²⁸ The methods of torture described by the former detainees included, being hung upside down by the legs whilst interrogators kicked, whipped and beat the detainee; asphyxiation by means of a plastic bag being placed over the head, often until the detainee passed out; and electric shocks to the genitals and other parts of the body.⁷²⁹ The detainees interviewed also stated that some of their number had been subjected to other forms of torture including sodomisation with broom sticks and pistol barrels; the rape of younger detainees and other forms of sexual abuse, including detainees being forced to rape other detainees; whipping with heavy cables; the pulling out of fingernails and toe nails; the burning of detainees with acid and cigarettes; the smashing of teeth; and threats to rape wives, mothers, sisters or daughters unless confessions were signed.⁷³⁰

Again, in 2011 Human Rights Watch reported that it had interviewed more than a dozen former detainees of the Camp Honor detention centre who had described similar methods of torture employed during interrogation including beatings; hanging of detainees upside down for hours at a time; administration of electric shocks to the body, including to the genitals; repeated asphyxiation by means of placing a plastic bag over the head of a detainee until he passes out; and threats to rape a female relative unless a confession was signed.⁷³¹

Reports by Amnesty International also evidence widespread torture and ill-treatment in Iraq, even in recent years. In 2015 Amnesty International submitted a report to the Committee against Torture which stated that torture and other ill-treatment is “widespread in practice” in Iraq, including the Kurdistan Region of Iraq, and that it is

⁷²⁷ Ibid

⁷²⁸ Ibid

⁷²⁹ Ibid. The particular method of suspending detainees upside down was to place the legs between two metal bars, one behind the calf, the other against the shin. The Human Rights Watch document states that all the detainees interviewed had “terrible scabs and bruising on their legs”.

⁷³⁰ Ibid.

⁷³¹ Human Rights Watch, ‘Iraq: Secret Jail Uncovered in Baghdad’, 1 February 2011

“often” used to coerce “confessions” from detainees.⁷³² The report also stated that Amnesty International had continued to gather reports of torture and other ill-treatment by government forces, “notably of Sunni men” detained under anti-terrorist legislation. The report noted that deaths in custody, “apparently” caused by torture, continued to be “a persistent phenomenon in Iraq”.⁷³³ Moreover, the report stated, allegations of torture are “seldom investigated” and the persons responsible for torture or other ill-treatment of detainees are “very rarely brought to justice”.⁷³⁴ Furthermore, the report states, “[i]n general” no action is taken to independently and impartially investigate whether deaths in custody were the result of torture and to prosecute the persons responsible.⁷³⁵ As the report puts it, “[I]mpunity therefore remains rife”.⁷³⁶

An earlier report published by Amnesty International in 2013 suggests that the systematic use of torture under the former regime of Saddam Hussein had a “brutalizing effect on Iraqi society” and created in the Iraqi criminal justice system a “confession culture”, including a reliance on torture to obtain confessions, which continued to the current time.⁷³⁷ This is an indication of the difficulty of the task which faced the CPA in its efforts to eradicate the use of torture by the Iraqi authorities, as well as of the failure of the occupation to transform the practice of the Iraqi police. This 2013 report by Amnesty International also refers to the use of torture and other ill-treatment against detainees by the Iraqi security forces being “systemic”.⁷³⁸ It was in part because “torture remains rife” and continued to be committed with impunity that Amnesty International concluded that, in 2013, “Iraq remains mired in human rights abuses”.⁷³⁹

⁷³² Amnesty International, ‘Iraq, Submission to the United Nations Committee against Torture, 55th Session, 27 July to 14 August 2015’ (MDE 14/1896/2015), p. 5

⁷³³ *Ibid*, p. 6

⁷³⁴ *Ibid*, p. 8

⁷³⁵ *Ibid*, p. 8

⁷³⁶ *Ibid*, p. 8

⁷³⁷ Amnesty International, ‘Iraq: A Decade of Abuses’, March 2013 (MDE 14/001/2013), p. 12. The report also refers to “the pervasive nature of the ‘confession culture’ that dominates the approach of the police and security forces to obtaining information as a basis for prosecuting suspects before the Courts” (*ibid*, p. 8).

⁷³⁸ *Ibid*, p. 19

⁷³⁹ *Ibid*, p. 7. In addition to torture, the report refers at this point to the fact that thousands of Iraqis were being detained without trial or serving prison sentences after unfair trials, and the numbers of persons being executed (*ibid*).

The 2013 report by Amnesty International also noted the considerable difficulties faced by detainees, in the context of challenging “confessions” allegedly extracted under torture, in proving that they had been tortured, including that medical examinations, if carried out at all, were “usually” conducted months after the alleged torture, by which time the physical evidence of torture was likely to have healed.⁷⁴⁰ Medical examinations, the report stated, were “rarely, if ever” conducted in the immediate aftermath of interrogation when physical evidence of torture is likely to be clearly identifiable.⁷⁴¹

Amnesty International had described in 2012 “[c]ommonly reported methods” of torture in Iraq: “suspension by the limbs for long periods, beatings with cables and hosepipes, electric shocks, breaking of limbs, partial asphyxiation with plastic bags, and rape or threats of rape”.⁷⁴² There is an obvious consistency between this list and the methods of torture described by Human Rights Watch based on the interviews conducted by that organisation (see above).

Torture was also discussed during the course of the Universal Periodic Review of Iraq in November 2014. The delegation of Iraq informed the Working Group on the Universal Periodic Review that over 516 cases of torture and ill-treatment during 2008-14 had been documented.⁷⁴³ During the review, various states made recommendations to Iraq in relation to addressing torture. France called upon Iraq to bring an end to the practice of torture.⁷⁴⁴ The Czech Republic and Costa Rica recommended that Iraq take further measures to prevent torture.⁷⁴⁵ Norway, Austria and Spain called upon Iraq to investigate all allegations of torture and ill-treatment.⁷⁴⁶ Serbia, Austria, Uruguay, Paraguay, Sierra Leone, the UK, the Czech Republic, Bulgaria, Tunisia and France recommended that Iraq become a party to the Optional Protocol to the Convention

⁷⁴⁰ Ibid, p. 41

⁷⁴¹ Ibid, p. 45

⁷⁴² Amnesty International, ‘Amnesty International Report 2012, The State of the World’s Human Rights’, 2012 (POL 10/001/2012), p. 182

⁷⁴³ Report of the Working Group on the Universal Periodic Review, Iraq, 12 December 2014, A/HRC/28/14, p. 9, para. 77

⁷⁴⁴ Ibid, p. 20, para. 127.119

⁷⁴⁵ Ibid, p. 14, para. 127.23; p. 20, para. 127.120

⁷⁴⁶ Ibid, p. 20, paras. 127.121-127.123

against Torture.⁷⁴⁷ Uruguay recommended that confessions obtained through torture or other illegal means should not be admitted in evidence.⁷⁴⁸ Netherlands, Spain and Norway recommended that Iraq permit a visit by the Special Rapporteur on the question of torture to take place.⁷⁴⁹

The regular reports issued by the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI) also evidence the use of torture by the Iraqi authorities, including both early and more recent reports. For example, a report published in 2006 states that the Human Rights Office of UNAMI had continued to receive “information pointing to torture and other cruel, inhumane or degrading treatment” in detention centres administered by the Ministry of the Interior or security forces throughout Iraq.⁷⁵⁰ Again, in a report issued in 2007 UNAMI stated that it remained “gravely concerned at continuing reports of the widespread and routine torture or ill-treatment of detainees”, in particular those held in pre-trial detention in Ministry of the Interior facilities, including police stations.⁷⁵¹ The report continued:

“Several such cases were documented during the reporting period, where UNAMI was able to interview and examine victims of physical abuse shortly following their release or following their conviction and transfer to a Ministry of Justice prison. A number of those interviewed by UNAMI still bore injuries which were consistent with the type of torture alleged. In addition to routine beatings with hosepipes, cables and other implements, the methods cited included prolonged suspension from the limbs in contorted and painful positions for extended periods, sometimes resulting in dislocation of the joints; electric shocks to sensitive parts of the body; the breaking of limbs; forcing detainees to sit on sharp objects, causing serious injury and heightening the risk of infection; and severe burns to parts of the body through the application of

⁷⁴⁷ *Ibid*, p. 8, para. 62; p. 14, paras. 127.9-127.10, 127.19-127.20, 127.22-127.23; p. 15, paras. 127.24 and 127.26; p. 20, para. 127.119

⁷⁴⁸ *Ibid*, p. 20, para. 127.124

⁷⁴⁹ *Ibid*, p. 18, paras. 127-79-127.80; p. 20, para. 127.121

⁷⁵⁰ UN Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 November – 31 December 2006, p. 19 (para. 85)

⁷⁵¹ UN Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 April – 30 June 2007, p. 23 (para. 64)

heated implements. Some of these abuses are documented through photographic evidence.”⁷⁵²

More recently, the Human Rights Office of UNAMI and the Office of the UN High Commissioner for Human Rights (OHCHR) published a report in 2017 which stated that UNAMI/the OHCHR continued to receive a number of complaints from individuals alleging that they had been tortured and subjected to other ill-treatment during the course of investigations in order to obtain confessions from them.⁷⁵³ The report recommended, *inter alia*, that the Government of Iraq fully implement the Convention against Torture, and ensure that all allegations of torture and other cruel, inhuman or degrading treatment or punishment are promptly, thoroughly, impartially and independently investigated and that perpetrators are charged and tried according to law.⁷⁵⁴

It is clear from the evidence above that the occupation of Iraq by the US and UK did not transform Iraq as regards the widespread use of torture and other ill-treatment by police and security forces.

The death penalty

As shown above, during the occupation the CPA Administrator promulgated legislation to suspend the death penalty in Iraq.⁷⁵⁵ However, once the occupation ended, the Iraqi Government moved quickly to reintroduce the death penalty.

In its periodic report of 2013 the Iraqi Government informed the Human Rights Committee that the infliction of the death penalty had resumed in 2005, under the terms of Order No. 3 of 8 August 2004, which had been enacted by the Council of Ministers.⁷⁵⁶ The Iraqi Government asserted in the report that the use of the death

⁷⁵² Ibid

⁷⁵³ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq, January to June 2017, p. 6

⁷⁵⁴ Ibid, p. iv

⁷⁵⁵ See main text above dealing with Order No. 7, section 3(1)

⁷⁵⁶ Iraq, Fifth periodic report, 16 October 2013, CCPR/C/IRQ/5, published 12 December 2013, p. 21 (para. 80)

penalty was restricted to the most serious crimes but argued that this is a “fairly ambiguous term”.⁷⁵⁷ According to statistics provided in the report, in the period 2005-11, a total of 318 persons were executed in accordance with the death penalty, with 124 persons being subjected to the death penalty in the year 2009 alone.⁷⁵⁸ According to a report by Amnesty International, a further 129 people were hanged in 2012, giving a total of 447 persons judicially executed between August 2004, when the death penalty was re-instituted, and 2012.⁷⁵⁹ The Amnesty International report states that “the new Iraq is one of the world’s leading executioners”.⁷⁶⁰

The Human Rights Committee in its concluding observations of 2015 expressed a number of concerns about the use of the death penalty in Iraq. In particular, referring to its previous recommendations in 1997 (see above), it stated that “the Committee remains concerned that domestic law punishes with the death penalty crimes that do not meet the threshold of the “most serious crimes” within the meaning of article 6(2) of the Covenant”.⁷⁶¹ The Committee also stated that it was further concerned about reports of cases in which the death penalty had been imposed on the basis of confessions extracted under duress or torture, or following trials which did not comply with the standards required by Article 14 of the ICCPR.

The Committee also expressed its concern at reports of “the great number of cases in which the death penalty is imposed and the frequency of its application”.⁷⁶² The Committee recommended that Iraq give due consideration to abolition of the death penalty and accession to the Second Optional Protocol to the ICCPR, which requires State Parties to abolish the death penalty within their jurisdiction.⁷⁶³ In the alternative, the Committee recommended that, if the death penalty is retained, Iraq should take all necessary measures to ensure, *inter alia*, that it is applicable only to the most serious crimes. The Committee also stated that Iraq should ensure that, if imposed at all, the

⁷⁵⁷ Ibid, p. 20 (para. 76)

⁷⁵⁸ Ibid, p. 22 (para. 84), citing Annual status report on prisons, Ministry of Human Rights, 2011

⁷⁵⁹ Amnesty International, ‘Iraq: A Decade of Abuses’, March 2013 (MDE 14/001/2013), p. 7 and p. 48

⁷⁶⁰ Ibid, p. 7

⁷⁶¹ Human Rights Committee, Concluding observations on the fifth periodic report of Iraq, p. 6 (para. 27)

⁷⁶² Ibid

⁷⁶³ Ibid, para. 28

death penalty is never imposed in violation of the ICCPR, including in violation of its fair trial procedures.⁷⁶⁴

Iraq's use of the death penalty was also discussed during the Universal Periodic Review of Iraq in November 2014. Many states called upon Iraq to introduce a moratorium on the use of the death penalty: Sierra Leone, Spain, Australia, Germany, Greece, France, the UK, Montenegro, Norway, Costa Rica, Algeria, Austria, Portugal, Belgium and Slovenia.⁷⁶⁵ Many of those states recommended that such a moratorium should be established with a view to abolition of the death penalty: Sierra Leone, Germany, Greece, France, the UK, Norway, Portugal, Belgium and Slovenia.⁷⁶⁶ Estonia also urged Iraq to abolish the death penalty.⁷⁶⁷ In addition, a number of states (Chile, Paraguay, Portugal, Sierra Leone, Spain, Australia and Austria) recommended that Iraq become party to the Second Optional Protocol to the ICCPR, which requires States Parties to abolish the death penalty.⁷⁶⁸ Other states recommended that Iraq reduce the number of offences punishable by the death penalty⁷⁶⁹, or consider doing so⁷⁷⁰. Iraq's formal response to the recommendations for a moratorium on and abolition of the death penalty, and that that it become a party to the Second Optional Protocol, was that it did not accept them.⁷⁷¹ Nevertheless, Iraq formally accepted the recommendations that it consider reducing the number of offences punishable by the death penalty, and that it reduce the number of such offences.⁷⁷²

⁷⁶⁴ Ibid

⁷⁶⁵ Report of the Working Group on the Universal Periodic Review, Iraq, 12 December 2014, A/HRC/28/14, p. 14, para. 127.6; p. 20, paras. 127-109-127.115

⁷⁶⁶ In addition, Italy, Namibia, Latvia, Mexico and Turkey recommended that Iraq *consider* a moratorium on the death penalty with a view to its abolition (ibid, p. 19, para. 127.107; p. 20, paras. 127.108-127.109).

⁷⁶⁷ Ibid, p. 12, para. 117. Israel recommended that Iraq *consider* abolishing the death penalty (ibid, p. 20, para. 127.116).

⁷⁶⁸ Ibid, p. 14, paras 127.3-127.9. Uzbekistan recommended that Iraq *consider the possibility* of becoming party to the Second Optional Protocol (ibid, p. 14, para. 127.2). Article 1(2) of the Second Optional Protocol to the ICCPR requires each State Party to take all necessary measures to abolish the death penalty within its jurisdiction. Under Article 2(1) of the Protocol, no reservation to the Protocol is permissible except one providing for application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

⁷⁶⁹ Switzerland (ibid, p. 20, para. 127.118)

⁷⁷⁰ Montenegro (ibid, p. 20, para. 127.117)

⁷⁷¹ Report of the Working Group on the Universal Periodic Review, Iraq, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 17 March 2015, A/HRC/28/14/Add.1, pp. 2, 5

⁷⁷² Ibid, pp. 5-6

It appears that during 2015-17 the Iraqi Government has become increasingly secretive about the number of persons being sentenced to the death penalty and details of executions. The 2017 report by the Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI) and the Office of the UN High Commissioner for Human Rights (OHCHR) stated that since 2015 the Ministry of Justice had not responded to repeated requests from UNAMI/OHCHR for information regarding implementation of the death penalty, including the number of persons sentenced to death and the time and place of execution.⁷⁷³ UNAMI/OHCHR found it necessary to reiterate to the Government of Iraq that death sentences and judicial executions are a matter of public interest and that this requires that such decisions be implemented in a transparent manner with full public disclosure.⁷⁷⁴ The report also noted that “sometimes” executions were reported on the Facebook account of the Minister of Justice or on the Ministry of Justice web site and that in this way it was announced that 14 persons were executed in June 2017 but that no details were given of the identity of the individuals executed or the offences for which they were sentenced.⁷⁷⁵ In a report published in 2016 UNAMI/OHCHR stated that since 2015 the Ministry of Justice had instructed its officials not to communicate information to UNAMI/OHCHR regarding death sentences implemented in Iraq.⁷⁷⁶ There is an obvious parallel here with the secrecy practised by the regime of Saddam Hussein in relation to implementation of the death penalty (see above).

The Iraqi government has latterly resorted to mass executions, with 42 persons being hanged on a single day in September 2017 and a further 38 being executed on a single day in December 2017.⁷⁷⁷

⁷⁷³ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq, January to June 2017, p. 10

⁷⁷⁴ Ibid

⁷⁷⁵ Ibid

⁷⁷⁶ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq, July to December 2016, p. 24

⁷⁷⁷ See ‘UN rights wing ‘appalled’ at mass executions in Iraq’, 15 December 2017, available at <https://news.un.org/en/story/2017/12/639662-un-rights-wing-appalled-mass-execution-iraq> . Accessed: 31.05.18

Enforced disappearance and secret detention

As shown above, during the occupation the CPA enacted legislative provisions which if implemented would prevent people being subjected to enforced disappearance, or secret detention, within the Iraqi prison system.⁷⁷⁸ However, as will be shown below, years after the end of the occupation enforced disappearances and secret detention have continued to be practised in Iraq.

Secret prisons have been used by Iraqi security services to hold detainees. Human Rights Watch has revealed and/or documented a number of such secret prisons:

- (i) In April 2010 a secret prison was revealed at the former Muthanna airport, in West Baghdad.⁷⁷⁹ It held more than 430 detainees, who had no access to their families or lawyers.⁷⁸⁰ Human Rights Watch stated of the detainees that “[f]or months, nobody knew their whereabouts”.⁷⁸¹
- (ii) In February 2011 Human Rights Watch revealed that more than 280 detainees were being held at a secret detention site within a military base called Camp Justice, in North West Baghdad.⁷⁸²

⁷⁷⁸ See main text above dealing with Memorandum No. 2

⁷⁷⁹ See Ned Parker, ‘Secret prison revealed in Baghdad’, *The Los Angeles Times*, 19 April 2010, available at <https://www.latimes.com/archives/la-xpm-2010-apr-19-la-fg-iraq-prison19-2010apr19-story.html>

⁷⁸⁰ Human Rights Watch, ‘Iraq: Detainees Describe Torture in Secret Jail’, 27 April 2010, available at <https://www.hrw.org/news/2010/04/27/iraq-detainees-describe-torture-secret-jail>. Last accessed: 12.04.18. (An Amnesty International report notes that the detainees were “mostly Sunni Muslims from the Mosul area who security forces had detained in late 2009”: Amnesty International, ‘Iraq: A Decade of Abuses’, March 2013 (MDE 14/001/2013), p. 17.)

⁷⁸¹ Ibid

⁷⁸² Human Rights Watch, ‘Iraq: Secret Jail Uncovered in Baghdad’, 1 February 2011, citing interviews and classified government documents which Human Rights Watch had obtained, available at <https://www.hrw.org/news/2011/02/01/iraq-secret-jail-uncovered-baghdad>. Accessed: 10.04.18. The secret detention centre at Camp Justice was under the control of the 56th Brigade of the Army (“the Baghdad Brigade”) and the Counter-Terrorism Service (ibid). The secret prison at Muthanna was being run by the 54th Brigade of the Iraqi Army, with the assistance of the 56th Brigade (ibid). “Several government sources” informed Human Rights Watch that both the 54th and 56th Brigade were under the authority of the then Iraqi prime minister, Nouri al-Maliki, through the Office of the Commander in Chief of the Armed Forces, and did not report to the Defence Minister or Chief of Staff of the army (ibid). The two Brigades were commonly referred to by the police and army as “Maliki’s forces”. The Counter-Terrorism Service reported to the prime minister through the same Office (ibid).

- (iii) In May 2012 Human Rights Watch described a series of waves of mass arrests by the Iraqi government between October 2011 and March 2012 and revealed that those arrested were detained at various facilities including the Camp Honor prison (see above under “Torture and ill-treatment”), which the government had previously declared (in March 2011) that it had closed down, and two secret prisons which were also in the “Green Zone” of Baghdad.⁷⁸³ Human Rights Watch stated that “hundreds of detainees” had been held for “months” as a result of these mass arrests and that the government refused to disclose the names of persons arrested or where they were being held. Following these mass arrests, detainees’ family members informed Human Rights Watch that they had not been able to find out the whereabouts of their detained family member despite repeated requests to the authorities. Human Rights Watch stated that in those cases where the authorities had disclosed where detainees were being held, security forces hindered or prevented access to detainees’ family members or lawyers.

In 2015 the Human Rights Committee, in its concluding observations on the consideration of Iraq’s fifth periodic report under the ICCPR, expressed its concern at allegations that persons had been held in “secret detention”.⁷⁸⁴ The Committee noted the denial by the Iraqi Government of the existence of secret detention facilities but stated that it nevertheless remained concerned at these allegations of secret detention. The Committee was, in effect, indicating that it was not convinced by the Government’s denial that it utilised secret detention facilities.

⁷⁸³ Human Rights Watch, ‘Iraq: Mass Arrests, Incommunicado Detentions’, 15 May 2012, citing numerous interviews with victims, witnesses, family members and government officials, available at <https://www.hrw.org/news/2012/05/15/iraq-mass-arrests-incommunicado-detentions> . Accessed: 13.04.18. The Human Rights Watch report describes two principal waves of mass arrests. First, in October and November 2011: arrests of persons claimed by the authorities to be Ba’athists or Saddam Hussein loyalists plotting against the government. The report states that three government officials told Human Rights Watch that almost 1,500 people were arrested in the October/November 2011 wave of arrests. Second, in March 2012: arrests, often in predominantly Sunni neighbourhoods, ahead of an Arab League summit which was to be held in Baghdad that month. Detainees and their families were variously told that this was a “precautionary” measure carried out to avoid terrorist attacks and/or other criminal activity and/or any “embarrassing” public protests during the summit (ibid).

⁷⁸⁴ Human Rights Committee, Concluding observations on the fifth periodic report of Iraq, 3 December 2015, CCPR/C/IRQ/CO/5, p. 7 (para. 33)

In October 2015, the Committee on Enforced Disappearances in its concluding observations on the report submitted by Iraq in June 2014 under the International Convention for the Protection of All Persons from Enforced Disappearance expressed its concern at “allegations of a situation of widespread disappearances in significant parts of the State party’s territory, many of which may be qualified as enforced disappearances and some of which occurred after the Convention’s entry into force”.⁷⁸⁵ Furthermore, the Committee expressed concern at allegations making reference to “numerous cases of enforced disappearance reportedly perpetrated in the State party since 2003 by State officials or by militias acting with the authorization, support or acquiescence of State officials”.⁷⁸⁶ The Committee also expressed its regret at not having received from the Iraqi Government information on reports of enforced disappearances received after 2003, investigations carried out and the outcome thereof.⁷⁸⁷ The Committee made a range of recommendations to address the situation.

The Committee on Enforced Disappearances also noted what it described as the “assertion” by the Iraqi Government that there are no secret detention facilities but stated that it was “concerned at allegations that secret detention has actually been used, even in recent years”.⁷⁸⁸ The Committee was therefore not convinced by the assertion of the Iraqi Government that there were no secret detention facilities in Iraq. Further, the Committee expressed concern at allegations that in some instances the right of persons deprived of liberty to immediately inform their families of imprisonment or transfer to another institution had not been complied with and officials had failed to keep accurate records of deprivations of liberty.⁷⁸⁹ It will be recalled that both of these obligations had been provided for in legislation enacted by the CPA during the occupation.

The Committee against Torture also had something to say about reports of the use of secret detention by Iraq when it made its concluding observations on Iraq’s initial

⁷⁸⁵ Committee on Enforced Disappearances, Concluding observations on the report submitted by Iraq under Article 29(1) of the Convention, 13 October 2015, CED/C/IRQ/CO/1, p. 2 (para. 6). Iraq acceded to the International Convention for the Protection of All Persons from Enforced Disappearance of 2006 on 23 November 2010. The Convention entered into force on 23 December 2010.

⁷⁸⁶ *Ibid*, p. 4 (para. 19)

⁷⁸⁷ *Ibid*, p. 4 (para. 19)

⁷⁸⁸ *Ibid*, p. 6 (para. 28)

⁷⁸⁹ *Ibid*

report under the Convention against Torture in August 2015. What the Committee against Torture had to say is worth quoting in full:

“The Committee remains concerned at information pointing at a consistent pattern whereby alleged terrorists and other high-security suspects, including minors, are arrested without any warrant, detained incommunicado or held in secret detention centres for extended periods of time, during which they are severely tortured in order to extract confessions. According to allegations received by the Committee, the detention facility at the former Al-Muthanna military airport in West Baghdad, which was uncovered in 2011, is still open and continues to operate secretly under the control of the 54th and 56th Brigades of the army....”⁷⁹⁰

Further evidence of secret detention and enforced disappearances at the hands of the Iraqi state can be found in the report submitted by Amnesty International to the Committee against Torture in 2015. That report states that the Iraqi security authorities “commonly” hold suspects, particularly those suspected of terrorism-related offences, incommunicado for weeks or months after their arrest.⁷⁹¹ Such detainees, the report states, have no access to legal advice or their families and are “totally cut off from the outside world”. Furthermore, “[i]n many cases, incommunicado detention has amounted to enforced disappearance”.⁷⁹² The report states that detainees are “regularly” held in “secret facilities” which are not even open to inspection by the Office of Public Prosecution.⁷⁹³ The report also relates that members of the Iraqi High Commission for Human Rights informed Amnesty International in September 2014 that, despite repeated requests, they had not been permitted to visit detainees held in interrogation and detention centres or prisons operated by the Ministry of Justice, the Ministry of the Interior or the Ministry of Defence.

⁷⁹⁰ Committee against Torture, Concluding observations on the initial report of Iraq, 7 September 2015, CAT/C/IRQ/CO/1, para. 16

⁷⁹¹ Amnesty International, ‘Iraq, Submission to the United Nations Committee against Torture, 55th Session, 27 July to 14 August 2015’ (MDE 14/1896/2015), p. 6

⁷⁹² *Ibid*, p. 6

⁷⁹³ *Ibid*, p. 6

An earlier report published by Amnesty International in 2013 stated that “many” detainees held by Iraqi security forces had been subjected to enforced disappearance and held in secret or unacknowledged prisons where they were subjected to torture or other ill-treatment.⁷⁹⁴

There is also reason to believe that there have been enforced disappearances at the hands of armed groups acting in support of the Iraqi security forces. The 2016 report published by UNAMI/OHCHR refers to a number of reports of enforced disappearances which it had received⁷⁹⁵, including:

- (i) Up to 1,200 people who were fleeing from conflict reportedly abducted over a number of months in 2015 at a checkpoint which was operated by militia at Razzaza, south of Fallujah in Anbar. An earlier report by UNAMI states that it is believed that the uniformed armed men at the checkpoint were members of Popular Mobilisation Unit(s) (PMU), also known as Popular Mobilisation Forces (PMF), armed groups which act in support of the Iraqi security forces, having been formed following the seizure of Iraqi territory by ISIS and the collapse of the Iraqi Army in that territory.⁷⁹⁶
- (ii) At least 80 men and boys from al-Sejar, al-Fallujah district, Anbar who were reportedly abducted by armed groups operating in support of the Iraqi security forces on 27 May 2016.
- (iii) Approximately 600 men and boys from Saqlawiya, Anbar reportedly abducted in June 2016 by “forces reportedly associated with the PMFs”. The UNAMI report further states that on 5 September 2016 Iraq’s Ministry for Foreign Affairs informed UNAMI/OHCHR that 707 people from

⁷⁹⁴ Amnesty International, ‘Iraq: A Decade of Abuses’, March 2013 (MDE 14/001/2013), pp. 16-17

⁷⁹⁵ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq, July to December 2016, p. 22.

⁷⁹⁶ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 November 2015 - 30 September 2016, Baghdad, 30 December 2016, p. 19. On the formation of the PMU see *ibid*, p. 4, in particular note 8.

Saqlawiya (in the words of the report) “were still considered as missing persons”.

Independence of the Judiciary and fair trial

As shown above, the CPA enacted legislation which was designed to guarantee the independence of the judiciary.⁷⁹⁷ Furthermore, as shown above, the CPA legislated to require judges to apply the law impartially.⁷⁹⁸ However, the Human Rights Committee, in its concluding observations of 2015, stated that it was concerned at reports which indicated that “in practice, the judiciary is neither fully independent nor impartial”.⁷⁹⁹

In addition, the Committee was also concerned at allegations that judges, court officials and lawyers had been threatened, intimidated and subjected to physical attacks, “particularly, by non-state actors”, the implication being that non-state actors were not alone responsible for such threats, intimidation and physical attacks.

During the Universal Periodic Review of Iraq in November 2014, a number of states recommended that Iraq reform its judiciary to ensure its independence. Austria recommended that Iraq “[e]nsure the independence of the judiciary”, including by investigating allegations of corruption.⁸⁰⁰ France called upon Iraq to “[g]uarantee access of all Iraqis to equitable judicial proceedings”.⁸⁰¹ Botswana recommended that Iraq reform and strengthen the judiciary to effectively address issues of impunity and victim redress.⁸⁰² Germany called upon Iraq to “[r]eform the judicial system to guarantee its neutrality and independence” and assure access to justice for persons belonging to minorities and vulnerable groups.⁸⁰³

⁷⁹⁷ See main text above dealing with Order No. 35, Memorandum No. 12 and Ch. Six of the Law of Administration for the State of Iraq for the Transitional Period

⁷⁹⁸ See main text above dealing with Order No. 7, Section 4

⁷⁹⁹ Human Rights Committee, Concluding observations on the fifth periodic report of Iraq, 3 December 2015, CCPR/C/IRQ/CO/5, para. 35

⁸⁰⁰ Report of the Working Group on the Universal Periodic Review, Iraq, 12 December 2014, A/HRC/28/14, p. 21, para. 127.142

⁸⁰¹ Ibid, p. 22, para. 127.143

⁸⁰² Ibid, p. 22, para. 127.145

⁸⁰³ Ibid, p. 22, para. 127.146

In a 2016 report UNAMI/OHCHR stated that “judicial capacity” to uphold international and constitutional fair trial standards remained “weak”.⁸⁰⁴ The report noted that judges rarely investigated allegations that confessions were obtained by torture or other ill-treatment, treating such confessions as admissible evidence and convicting defendants in reliance on such confessions in violation of international law.

As shown above, the CPA also promulgated legislation which amended Iraqi criminal procedure law, including as regards access to legal representation, with the aim of making it compatible with human rights law.⁸⁰⁵ However, after the occupation, defendants were frequently denied access to a lawyer. A report published by Human Rights Watch in 2005 stated that officials in detention centres “routinely” denied defence counsel access to detainees and that it appeared to be “the exception rather than the rule” for detainees to be able to consult their lawyer.⁸⁰⁶

The Human Rights Committee stated in 2015 that it was concerned at reports that violations of fair trial guarantees contained in Article 14 of the ICCPR, including that of access to counsel, “occur frequently in practice, particularly in terrorism cases”.⁸⁰⁷

The Committee against Torture in its concluding observations of August 2015 also referred to reports that “detainees are frequently deprived of timely access to a lawyer” and expressed concern at allegations regarding the failure adequately to inform detained persons about their rights.⁸⁰⁸

As noted above, the report submitted by Amnesty International to the Committee against Torture in 2015 stated that the Iraqi security authorities “commonly” hold suspects, in particular those suspected of terrorism offences, incommunicado for weeks or months after their arrest and without access to a lawyer. The report notes that such

⁸⁰⁴ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq, July to December 2016, p. 22. The report covers the period 1 July to 31 December 2016.

⁸⁰⁵ See main text above dealing with Memorandum No. 3 (Revised) and Order No. 53

⁸⁰⁶ Human Rights Watch, ‘The New Iraq?, Torture and ill-treatment of detainees in Iraqi custody’, January 2005, Vol. 17, No. 1(E), p. 5

⁸⁰⁷ Human Rights Committee, Concluding observations on the fifth periodic report of Iraq, 3 December 2015, CCPR/C/IRQ/CO/5, para. 35

⁸⁰⁸ Committee against Torture, Concluding observations on the initial report of Iraq, 7 September 2015, CAT/C/IRQ/CO/1, para. 14

periods of incommunicado detention without access to legal advice fall “during the initial period of interrogation”.⁸⁰⁹

A report published by Amnesty International in 2013 states that detainees who are suspected of terrorism offences are “frequently” held incommunicado and denied access to a lawyer.⁸¹⁰ The report indicates that this is particularly likely to be the case where such detainees are being held in detention facilities controlled by the Ministry of Interior and the Ministry of Defence.⁸¹¹ The report also cites a report by the Ministry of Human Rights which stated that in a majority of cases which the Ministry monitored in 2011 the detainee’s lawyer was not present during the initial interrogation phase conducted at the security forces’ detention facility.⁸¹²

In 2016 UNAMI/OHCHR gave the following damning indictment in relation to access to legal representation in the Iraqi criminal justice system:

“Defendants were rarely given the opportunity to present a defence, many accused never having the opportunity to meet with a lawyer, or to have a lawyer present at any time during the investigation or pre-trial processes, most appearing in court without defence counsel. In cases where the court appointed a lawyer to act on behalf of the defendant, no adjournment would be granted to the defence counsel to confer with the defendant or to prepare a defence. Access to lawyer in criminal proceedings remained limited and the quality of representation remained poor.”⁸¹³

This sorry state of affairs is a far cry from the intention behind the CPA’s legislation in relation to access to legal representation. What is said in the passage just quoted concerning the lack of legal representation in court, and, in cases where a defence lawyer is appointed, the failure to grant adjournments in order to permit defence

⁸⁰⁹ Amnesty International, ‘Iraq, Submission to the United Nations Committee against Torture, 55th Session, 27 July to 14 August 2015’ (MDE 14/1896/2015), p. 6

⁸¹⁰ Amnesty International, ‘Iraq: A Decade of Abuses’, March 2013 (MDE 14/001/2013), p. 32

⁸¹¹ Ibid

⁸¹² Ibid

⁸¹³ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq, July to December 2016, p. 22

counsel to confer with the defendant or to prepare a defence, is also relevant to what UNAMI/OHCHR stated (quoted above) about judicial capacity to uphold fair trial standards being weak.

In 2017 UNAMI and the OHCHR stated that they continue to be concerned regarding complaints that access to lawyers is being denied to detainees in investigation proceedings and that “[o]n occasions that access to lawyers was permitted, this was usually during the trial phase when the court would appoint a lawyer to act on behalf of the accused after investigations had been completed.”⁸¹⁴

Freedom of Expression

As shown above, during the occupation the CPA promulgated legislation in the media field which sought to protect and promote freedom of expression in Iraq.⁸¹⁵ However, the Human Rights Committee in 2015 stated that it was concerned at allegations that “journalists and media workers have been subjected to attacks and intimidation by both State and non-State actors, as well as prevented by security forces from covering stories”.⁸¹⁶ Among the recommendations of the Committee was that Iraq should “guarantee that officials avoid any interference with the legitimate exercise of the right to freedom of expression”.⁸¹⁷

In 2017 UNAMI/OHCHR reported that respect for and protection of the right to freedom of expression was “under constant threat” during the relevant reporting period (January to June 2017).⁸¹⁸ They had received several reports of the intimidating, threatening, beating, abducting and killing of journalists.⁸¹⁹ UNAMI/OHCHR stated that they had received reports that media professionals were allegedly subjected to

⁸¹⁴ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq, January to June 2017, p. 4

⁸¹⁵ See main text above dealing with Order No. 65 and Order No. 66

⁸¹⁶ Human Rights Committee, Concluding observations on the fifth periodic report of Iraq, 3 December 2015, para. 39

⁸¹⁷ Ibid, para. 40

⁸¹⁸ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq, January to June 2017, p. xi

⁸¹⁹ Ibid

attacks by Iraqi security forces (as well as by armed groups and unidentified perpetrators) while reporting on public demonstrations.⁸²⁰ UNAMI/OHCHR also referred to an incident on 24 January 2017 in which a female reporter and a male photographer were allegedly beaten by soldiers from the Iraqi Army's 11th Division to prevent them from reporting on the bombing of al-Nhada Zone in central Baghdad.⁸²¹

There is evidence of further violations of freedom of expression in relation to the mass protests which began on 1 October 2019 (see below, under '*The right to peaceful assembly*'). The UN Assistance Mission for Iraq (UNAMI) states in its report on the initial phase of the protests (1 to 9 October 2019):

“UNAMI documented a series of measures which appeared to be aimed at repressing coverage of the October demonstrations, including attacks against media outlets, orders not to film or cover the demonstrations, arbitrary arrest of journalists, harassment, intimidation, illegal confiscation of equipment, deleting video footage or photographs, and the blocking of internet and social media.”⁸²²

The report provides further details, including the following:

- (i) Five raids of satellite television channels in central Baghdad which were covering the demonstrations were documented.⁸²³ The report states that in respect of each raid “witnesses consistently described the men as ‘wearing black uniforms without identifiable insignia and covered faces’”.⁸²⁴ The report further states that all of the raids took place on the same date (5 October) and that in each case the armed men entered the relevant building, assaulted staff members, ransacked the premises, stole hard drives and computers and set fire to the building. The report states that these accounts are supported by video evidence which had been viewed by UNAMI.

⁸²⁰ Ibid, p. 18

⁸²¹ Ibid, p. 19

⁸²² Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, 'Demonstrations in Iraq, 1-9 October 2019', p. 7

⁸²³ Ibid, p. 7

⁸²⁴ Ibid, p. 7

- (ii) The report states that “[m]ultiple and consistent accounts from journalists and media workers” in different parts of Iraq included “credible allegations” of arbitrary arrest, threats, intimidation and harassment.⁸²⁵ The report further states that “[j]ournalists interviewed by UNAMI in different parts of the country provided consistent accounts of security forces ordering them not to film the demonstrations and arresting them or beating them if they did”.⁸²⁶ The report gives the specific example of a correspondent and cameraman being arrested and detained on 2 October because they were broadcasting live. The report notes that several journalists reported that as a result of fear of arrest and other serious consequences, they relocated within Iraq, stopped their work on the demonstrations or self-censored.

- (iii) The report states that several journalists reported being stopped by members of the security forces and ordered to delete footage of the demonstrations under threat of arrest and/or confiscation or destruction of camera equipment.⁸²⁷

- (iv) The report states that the Government blocked social media from 2 October.⁸²⁸ The Government did not restore access to social media throughout Iraq until 21 November.⁸²⁹ The report further states that the Government blocked the internet entirely from 3 October to 9 October and thereafter permitted access only between 8am and 3pm each day.⁸³⁰

The report notes that “[t]hese accounts suggest coordinated actions to suppress information on the demonstrations”.⁸³¹ Among the conclusions of the report were that measures including the intimidation and harassment of journalists, attacks against media outlets and the blocking of the internet and social media “seem to have been

⁸²⁵ Ibid, p. 7

⁸²⁶ Ibid, p. 7

⁸²⁷ Ibid, p. 7

⁸²⁸ Ibid, p. 8

⁸²⁹ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, ‘Demonstrations in Iraq – 2nd Update, 5 November – 9 December 2019’, p. 7

⁸³⁰ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, ‘Demonstrations in Iraq, 1-9 October 2019’, p. 8

⁸³¹ Ibid, p. 8

used as tools” *inter alia* “to repress reporting ... around peaceful expressions of dissent” and that these measures limited not only freedom of expression “but also contribute to a climate of intimidation and fear – leading to a reduction in democratic space”.⁸³²

In a subsequent report, relating to the continuation of the protests between 25 October and 4 November 2019, UNAMI stated that on 24 October, the day before the resumption of the protests, the Ministry of the Interior had “announced a strict prohibition on live coverage of the demonstrations”; that on 25 October Dijlah TV was reportedly “blocked” by the Communications and Media Commission because it had broadcast live footage of the protests; and that, also on 25 October, Al Sharqiya News Television was “jammed” by an unknown source.⁸³³

In a further report, covering the continued demonstrations in the period between 5 November and 9 December 2019, UNAMI stated that its preliminary findings indicated that “serious human rights violations and abuses continue to be committed” including violations of the right to freedom of expression.⁸³⁴ The report stated that UNAMI had received reports of “security forces preventing journalists from reporting on demonstrations, including through violent means”.⁸³⁵ The report gives the specific example of a Dijlah TV correspondent and cameraman being reportedly beaten with batons by security forces in Najaf on 27 November.

The right to peaceful assembly

As shown above, during the occupation the CPA enacted legislation designed to enable Iraqis to exercise the right of peaceful assembly.⁸³⁶

⁸³² Ibid, p. 10

⁸³³ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, ‘Demonstrations in Iraq – update, 25 October – 4 November 2019’, p. 6

⁸³⁴ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, ‘Demonstrations in Iraq – 2nd Update, 5 November – 9 December 2019’, p. 8

⁸³⁵ Ibid, p. 7

⁸³⁶ See main text above dealing with Order No. 19

The Government of Iraq, in its periodic report of 2013 noted that “Various groups, such as women, the families of detainees and religious minorities, held peaceful demonstrations in 2011, but such activities by homosexuals are prohibited since their sexual practices, being contrary to the teachings of the Islamic sharia, constitute a punishable offence under Iraqi law”.⁸³⁷ The Human Rights Committee, in its concluding observations on Iraq’s report, referred to this comment in the report and stated that it “regrets the lack of clarity on the right of homosexuals to hold peaceful demonstrations”.⁸³⁸ The Committee stated that it observed “the diversity of morality and cultures internationally” but reiterated that “they must always be subject to the principles of universality of human rights and non-discrimination”. The Committee concluded on this point that Iraq should take the measures necessary to ensure that persons of homosexual orientation can fully enjoy all the human rights contained in the ICCPR, including the right to peaceful assembly.⁸³⁹

It could have been added that the Human Rights Committee has itself held, in an individual complaint against another State Party to the ICCPR, that banning an assembly on the basis of the chosen subject which it was to address is “one of the most serious interferences with the freedom of peaceful assembly”.⁸⁴⁰ Therefore, the prohibition by the Iraqi Government of peaceful demonstrations by homosexuals because such demonstrations would have addressed the position of homosexuals is a serious interference with the right of peaceful assembly. Furthermore, the Committee has stated, in relation to the issue of whether a restriction on the right of peaceful assembly is “necessary in a democratic society”, that a “cornerstone” of a democratic society is “free dissemination of information and ideas, including information and ideas contested by the Government or the majority of the population”.⁸⁴¹ Thus, banning demonstrations because the subject matter is contested by the government concerned,

⁸³⁷ Iraq, Fifth periodic report, 16 October 2013, English translation published 12 December 2013, para. 177

⁸³⁸ Human Rights Committee, Concluding observations on the fifth periodic report of Iraq, 3 December 2015, para. 11

⁸³⁹ *Ibid*, para. 12

⁸⁴⁰ *Nikolai Alekseev-v-Russian Federation*, Human Rights Committee, Views adopted 25 October 2013, CCPR/C/109/D/1873/2009, para. 9.6

⁸⁴¹ *Vladimir Kirsanov v. Belarus*, Human Rights Committee, Views adopted 20 March 2014, CCPR/C/110/D/1864/2009, para. 9.8

or the majority of the population cannot be said to satisfy the test of being “necessary in a democratic society”.

In 2016 UNAMI/OHCHR stated that “Iraqis continued to hold public gatherings and demonstrations in various places throughout the country, most of which passed off peacefully”.⁸⁴² However, the report noted that there were a number of instances where the security forces used “heavy-handed, and at times possibly disproportionate, responses” to such assemblies. In 2017 UNAMI/OHCHR stated that respect for and protection of the right to peaceful assembly was “under constant threat” throughout the reporting period (January to June 2017).⁸⁴³ They continued that “[m]any Iraqis did not enjoy the freedom to peaceful assembly”.⁸⁴⁴ UNAMI/OHCHR also stated that they had received reports that protesters were allegedly subject to attacks by Iraqi security forces (as well as by armed groups and unidentified perpetrators) while participating in public demonstrations.⁸⁴⁵

From October 2019 there was a sharp deterioration in respect for the right of peaceful assembly. On 1 October 2019 there began a series of mass protests in Iraq, which Iraqi security forces attempted to disperse with live ammunition, resulting in large number of protesters being killed.⁸⁴⁶ An Iraqi government committee which had been charged by the prime minister with investigating the deaths of protesters, reported that 149 protesters were killed in the first week of the protests as a result of the security forces using excessive force, including live ammunition.⁸⁴⁷

⁸⁴² Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq, July to December 2016, p. xx

⁸⁴³ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on Human Rights in Iraq, January to June 2017, p. xi

⁸⁴⁴ Ibid

⁸⁴⁵ Ibid, p. 18

⁸⁴⁶ Those taking part in the demonstrations were reportedly protesting, principally, about unemployment, poor public services, corruption and the political system which had been in place since the occupation by the US and UK: see e.g. BBC, ‘The Iraq protests explained in 100 and 500 words’, 2 December 2019, available at <https://www.bbc.com/news/world-middle-east-50595212>

⁸⁴⁷ See BBC, ‘Iraq troops used excessive force against protesters, official inquiry finds’, 22 October 2019, available at <https://www.bbc.com/news/world-middle-east-50138127>. According to the report of the Committee, about 70 per cent of the deaths were caused by bullet wounds to the head or chest (ibid). The Committee also found that 8 security personnel had been killed. The Committee found that there were no official orders from the supreme authorities to the security forces to open fire on protesters or use live ammunition.

According to figures released by the Iraq High Commission for Human Rights (IHCHR), at least 460 protesters were killed in October and November 2019⁸⁴⁸ and, by 7 February 2020, 526 protesters had been killed since October 2019.⁸⁴⁹ The Human Rights Office of the UN Assistance Mission for Iraq (UNAMI) has published figures for the number killed in the protests which are of a similar order to those released by the IHCHR: at least 424 deaths between 1 October and 9 December 2019.⁸⁵⁰

In its report on the first phase of the protests (1 to 9 October 2019), UNAMI concluded that its interim findings indicated that “serious human rights violations and abuses have been committed in the context of the demonstrations in Iraq”.⁸⁵¹ The report continued:

“While dynamics of the demonstrations differed according to the location – the number of dead, the extent and scale of injuries inflicted on demonstrators, all suggest that Iraqi security forces have used excessive force against demonstrators in Baghdad and elsewhere in Iraq.”⁸⁵²

⁸⁴⁸ Michael Safi, ‘Pro-Iran militia supporters converge on Baghdad protests’, *The Guardian*, 5 December 2019 (citing figures from the Iraq High Commission for Human Rights), available at <https://www.theguardian.com/world/2019/dec/05/pro-iran-militia-supporters-converge-on-baghdad-protests>

⁸⁴⁹ France 24, ‘Nearly 550 killed in Iraq protest violence: commission’, 7 February 2020 (citing figures from the Iraq High Commission for Human Rights), available at <https://www.france24.com/en/20200207-nearly-550-killed-in-iraq-protest-violence-commission>

⁸⁵⁰ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, ‘Demonstrations in Iraq – 2nd Update, 5 November – 9 December 2019’, p. 2, n. 4. This figure includes deaths of members of the Iraqi security forces. The total appears to comprise 170 deaths in the period 5 November-9 December 2019 (ibid, p. 2), together with “at least 97 deaths” in the period 25 October-4 November 2019 (see Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, ‘Demonstrations in Iraq – update, 25 October – 4 November 2019’, p. 2) and “at least 157 deaths” during the period 1-9 October 2019 (see Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, ‘Demonstrations in Iraq, 1-9 October 2019’), p. 2. The figure of 157 deaths in the initial period is taken from the Investigative Committee report released on 22 October 2019 (ibid, p. 2, n. 1). The UNAMI report in respect of the period 5 November-9 December 2019 states that the figure of 170 deaths in respect of that period “should be considered preliminary” because “contrary to practice in the past, the Government did not permit UNAMI to obtain official hospital statistical data concerning demonstrations related casualties or visit hospitals to interview victims” (UNAMI, Human Rights Special Report, ‘Demonstrations in Iraq – 2nd Update, 5 November – 9 December 2019’, p. 2).

⁸⁵¹ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, ‘Demonstrations in Iraq, 1-9 October 2019’), p. 9

⁸⁵² Ibid

An updated report by UNAMI in respect of demonstrations in the period 5 November to 9 December 2019 stated that UNAMI’s preliminary findings indicate that “serious human rights violations and abuses continue to be committed, including violations of the rights to life, physical integrity, liberty and security of person, freedom of peaceful assembly and freedom of expression”.⁸⁵³

As noted above, whilst CPA Order No. 19, Freedom of Assembly had placed a number of conditions and restrictions on freedom of assembly, including a requirement of advance written notice and a limit as to maximum duration, that piece of legislation envisaged that violations of such conditions or restrictions were to be dealt with by a legal process involving detention, arrest and prosecution, rather than by the use of live ammunition to disperse the demonstration in question.⁸⁵⁴

Human rights violations in the context of the conflict with “Islamic State”, including extrajudicial killings

The Office of the UN High Commissioner for Human Rights despatched a mission to Iraq primarily to investigate alleged human rights abuses committed by “Islamic State in Iraq and the Levant” (ISIL), the investigation being carried out between December 2014 and February 2015.⁸⁵⁵ In addition to its investigation into the actions of ISIL, the mission obtained information from “multiple credible sources” regarding alleged violations of human rights law and international humanitarian law by the Iraqi security forces and associated armed groups in their efforts to defeat ISIL.⁸⁵⁶ The report by the Office of the UN High Commissioner for Human Rights concluded that “[i]t is reasonable to conclude” that the Iraqi security forces and associated armed groups

⁸⁵³ Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, ‘Demonstrations in Iraq – 2nd Update, 5 November – 9 December 2019’, p. 8. See also Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, ‘Demonstrations in Iraq – update, 25 October – 4 November 2019’, which stated, in relation to protests during the period 25 October to 4 November 2019, that UNAMI’s latest preliminary findings indicated that “serious human rights violations and abuses continued to occur during demonstrations, particularly with respect to life and freedom of expression – and resulting from failure to fully comply with international norms and standards on the use of force” (at p. 6).

⁸⁵⁴ See Section 7 (Penalties), CPA Order No. 19, Freedom of Assembly

⁸⁵⁵ See Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups, 27 March 2015, A/HRC/28/18

⁸⁵⁶ Ibid, para. 50

“carried out extrajudicial killings, torture and abductions and forcibly displaced a large number of people, often with impunity”.⁸⁵⁷ The incidents detailed in the report include alleged massacres of Sunni civilians.⁸⁵⁸

The Human Rights Committee, in its concluding observations of November 2015, whilst condemning the “grave crimes under international law perpetrated by the so-called Islamic State in Iraq and the Levant (ISIL) and affiliated groups”, also expressed concern regarding reports of human rights violations committed by Iraqi security forces and affiliated armed groups against civilians in the context of the armed conflict with ISIL, including extrajudicial killings, torture and indiscriminate attacks.⁸⁵⁹

To the extent that the dissolution of the Iraqi army by the CPA Administrator (see above) during the occupation contributed to the formation and growth of ISIL subsequently, it can be said that the legislation dissolving the Iraqi army undermined the CPA’s efforts to improve the human rights situation in Iraq.

Conclusion

It has been shown above that during the occupation of Iraq, the CPA enacted a substantial amount of legislation in the field of human rights. This legislation *inter alia* prohibited torture and cruel, degrading or inhuman treatment or punishment; suspended the death penalty; aimed at preventing prisoners from being subjected to enforced disappearance or secret detention within the Iraqi prison system; provided for legal representation for accused persons; sought to restore the independence and impartiality of the judiciary; created a framework for the exercise of the right to peaceful assembly; and sought to protect and promote freedom of expression.

⁸⁵⁷ Ibid, para. 50. And see paras. 52-61

⁸⁵⁸ For example, on 22 August 2014 militia and Iraqi police allegedly attacked the Musab Ibn Umair mosque in Imam Weis village, killing 34 civilians at Friday prayers (ibid, para. 54); and the mission received “multiple allegations” that on 26 January 2015 militia and Iraqi security forces executed at least 70 Sunni civilians at different locations in Barwana in Diyala Governorate (ibid, para. 55).

⁸⁵⁹ Human Rights Committee, Concluding observations on the fifth periodic report of Iraq, 3 December 2015, p. 4 (para. 19), citing A/HRC/28/18, para. 78. The grave crimes committed by ISIL were said to include killings, torture, rape, enslavement, abductions, recruitment of children and forced marriages. The Committee also noted with concern the report of the Office of the UN High Commissioner for Human Rights which concluded that ISIL may have committed genocide against the Yezidi community, as well as crimes against humanity and war crimes.

It is acknowledged that there are challenges in ascertaining with certainty what has been going on inside Iraq from a human rights point of view. As we have seen above, the Human Rights Committee and other treaty-based human rights bodies often refer to “reports” or “allegations” regarding various categories of human rights violations, albeit that these bodies do so in such a way that they indicate that they are giving a degree of credence to such reports.

Nevertheless, as seen above, both Human Rights Watch and the UN Assistance Mission for Iraq (UNAMI) not only interviewed alleged victims of torture but witnessed injuries on such persons which were consistent with the torture alleged. Furthermore, numerical data on the large numbers of protesters killed in the mass demonstrations which began in October 2019 has been provided by official sources within Iraq – the government committee which had been charged by the Iraqi prime minister with investigating the deaths of protesters (as regards 149 protesters killed in the first week) and the Iraq High Commission for Human Rights (as regards the larger number of deaths over a period of months). As noted above, the committee investigating deaths of protesters in the initial period found that the death of 149 protesters was the result of the security forces using excessive force, including live ammunition.

The available evidence and information, referred to above, suggests that the CPA’s legislation in the field of human rights did not transform the human rights position in Iraq. There was improvement in some areas, for example there is evidence (referred to above) that after the occupation some groups were able to exercise the right to peaceful assembly at least some of the time. However, the evidence and information referred to above suggests that in the years since the occupation serious and widespread human rights abuses have continued to take place. In particular, it appears that torture and ill-treatment of detainees were widespread even a decade after the end of the occupation; substantial numbers of persons have been subjected to secret detention in secret prisons and substantial numbers have been subjected to enforced disappearance; and accused persons have frequently been denied legal representation. As noted above, in 2015 the Human Rights Committee expressed its concern at reports which indicated that “in practice, the judiciary is neither fully independent nor impartial”.

What might explain the apparent failure of the CPA's human rights legislation to transform the human rights position in Iraq? One factor may be the divisions within Iraqi society, including that between the Sunni minority and Shi'ite majority, and the presence of armed groups, including those drawn from members of the Sunni community, which have engaged in physical conflict. Recognising these facts, however, does not explain the willingness of Iraqi police officers or other members of the Iraqi security forces to resort to the use of torture or secret detention. Furthermore the Sunni community was not the cause of the mass demonstrations which began in October 2019 and resulted in the security forces gunning down demonstrators: those protests were predominantly Shi'ite.⁸⁶⁰

In considering possible explanations for the failure of the CPA's human rights legislation to transform the human rights position in Iraq, it is relevant to examine the views of Mutua, who offers a pessimistic prognosis for attempts by Western states to impose the current corpus of human rights upon non-Western societies. Mutua employs a "Savages-Victims-Saviors" metaphor to describe the "human rights movement", which he defines as the collection of norms, processes and institutions which traces its immediate ancestry to the U.N. Universal Declaration on Human Rights.⁸⁶¹ In Mutua's analysis, institutionally, the "saviors" include the U.N., Western states and international NGOs, all of which, along with senior Western academics, he states, constructed the "Savages-Victims-Saviors" prism.⁸⁶² However, he states that

⁸⁶⁰ See e.g. Patrick Cockburn, 'Iraq protests: Anti-Iran sentiment at boiling point as demonstrators torch consulate and death toll soars', *The Independent* (London), 28 November 2019, who notes that "Anti-government protests that started on 1 October now in large part resemble a general uprising by the Shia majority in southern and central Iraq" and that "The fact that demonstrations are all in the Shia heartlands and not in Sunni or Kurdish areas makes them particularly threatening to the Shia ruling elite". Available at <https://www.independent.co.uk/news/world/middle-east/iraq-protests-baghdad-consulate-death-toll-iran-middle-east-latest-a9223986.html>. It has been suggested by a number of journalists that many Sunnis support the protests but are reluctant to take part physically for fear of being accused of supporting extremism or terrorism, and punished accordingly: see e.g. Adnan Abu Zaeed, 'Sunnis support protests in Iraq, yet fear involvement', *Al-Monitor*, 15 October 2019, available at <https://www.al-monitor.com/pulse/originals/2019/10/iraq-protests-sunni-mosul.html>, who also noted that "Protests in Iraq this month have strikingly witnessed no participation in Sunni provinces, as the nine governorates involved have been Shiite"; and Azhar Al-Rubaie, 'Cautious of the street, Iraqi Sunnis become online cadres for protests', *Middle East Eye*, 5 October 2019, available at <https://www.middleeasteye.net/news/online-activism-iraq>.

⁸⁶¹ Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', (2001) 42 *Harvard International Law Journal* 201, at p. 201 and note 1 thereto

⁸⁶² *Ibid*, pp. 237-41 and p. 202

ultimately the “savior” is the human rights corpus, which he describes as “a set of culturally based norms and practices that inhere in liberal thought and philosophy”.⁸⁶³ The “Savages-Victims-Saviors” approach, as described by Mutua, rejects cross-fertilisation of cultures and involves “the transformation by Western cultures of non-Western cultures into a Eurocentric prototype and not the fashioning of a multicultural mosaic”.⁸⁶⁴ Mutua argues that the human rights corpus, although well-meaning, is “fundamentally Eurocentric”, and indeed is “essentially European”, and “falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions”.⁸⁶⁵ Mutua calls for a rejection of the “Savages-Victims-Saviors” approach.⁸⁶⁶ Moreover, Mutua argues that the “efforts to universalize an essentially European corpus of human rights through Western crusades cannot succeed”.⁸⁶⁷ He calls for a “genuine cross-contamination of cultures to create a new multicultural human rights corpus”.⁸⁶⁸ He argues that, as currently constituted and deployed, the human rights movement (i.e. the norms, processes and institutions which trace their ancestry to the U.N. Universal Declaration on Human Rights) “will ultimately fail because it is perceived as an alien ideology in non-Western societies”.⁸⁶⁹

It should be recalled that there is of course a contrary point of view regarding the argument that the current corpus of human rights, rather than being universal, represents Western concepts which the West is seeking to impose on other cultures. Higgins, for example states:

“It is sometimes suggested that there can be no fully universal concept of human rights, for it is necessary to take into account the diverse cultures and political systems of the world. In my view this is a point advanced mostly by

⁸⁶³ Ibid, p. 204

⁸⁶⁴ Ibid, p. 205

⁸⁶⁵ Ibid, p. 204 and p. 243. Mutua also writes that “... the human rights movement is located within the historical continuum of Eurocentrism as a civilizing mission, and therefore as an attack on non-European cultures” (ibid, p. 210) and that “The historical pattern is undeniable. It forms a long queue of the colonial administrator, the Bible-wielding Christian missionary, the merchant of free enterprise, the exporter of political democracy, and now the human rights zealot. In each case the European culture has pushed the “native” culture to transform. The local must be replaced with the universal – that is, the European.” (ibid, p. 218).

⁸⁶⁶ Ibid, p. 243, p. 244, p. 245

⁸⁶⁷ Ibid, p. 243

⁸⁶⁸ Ibid, p. 245

⁸⁶⁹ Ibid, p. 208

states, and by liberal scholars anxious not to impose the Western view of things on others. It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards. The non-universal, relativist view of human rights is in fact a very state-centred view and loses sight of the fact that human rights are *human* rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned. I believe, profoundly, in the universality of the human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know that they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe that there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development. They are as keenly felt by the African tribesman as by the European city-dweller, by the inhabitant of a Latin American shanty-town as by the resident of a Manhattan apartment.”⁸⁷⁰

It should also be recalled that the Vienna Declaration on Human Rights, adopted by consensus by the representatives of 171 states in 1993, declared that all human rights are universal.⁸⁷¹

In any event, Mutua’s theory does not provide a convincing explanation for the apparent failure of the CPA’s human rights legislation in Iraq. The main thrust of Mutua’s argument appears to be that there is a conflict between the human rights

⁸⁷⁰ Rosalyn Higgins, *Problems and Process, International Law and How We Use It* (1994, Oxford University Press, Oxford), at pp. 96-97. Footnotes omitted. Italics in original.

⁸⁷¹ World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993 (U.N. Doc. A/CONF.157/23). Section I, Para. 1 states that the “universal nature” of the human rights and freedoms “is beyond question”. Section 1, Para. 5 states that “All human rights are universal, indivisible and interdependent and interrelated”. Para. 5 goes on to state that “While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”. Details of the number of states participating in the World Conference and the method of adoption of the Vienna Declaration are given at <https://www.un.org/en/development/devagenda/humanrights.shtml>. As indicated in the Introduction (Chapter 1), above, this thesis is not seeking to advance a relativist, rather than universalist, approach to human rights, but rather its purpose is to ascertain the limits upon the legislative power of the state in military occupation of the territory of another state.

corpus in its current form (described by Mutua as an “essentially European corpus of human rights”) and the culture and cultural practices of non-Western societies. In Mutua’s “Savages-Victims-Saviors” metaphor, culture is the “savage”.⁸⁷² Mutua states:

“... when human rights norms target a deviant state, they are really attacking the normative cultural fabric or variant expressed by that state. The culture, and not the state, is the actual savage. From this perspective, human rights violations represent a clash between the culture of human rights and the savage culture.”⁸⁷³

Mutua argues that the culture of a society “represents the accumulation of a people’s wisdom and thus their identity”.⁸⁷⁴

However, the human rights legislation of the CPA was not concerned with the cultural practices of the Iraqi people. Furthermore, the use of torture by the police to obtain “confessions”, and the use of secret detention and enforced disappearance by the security forces, for example, cannot be regarded as an aspect of the culture of a society (even if, according to Amnesty International, there was a “”confession culture” *within the Iraqi police or the Iraqi criminal justice system*, involving reliance upon the use of torture to obtain “confessions”). It seems doubtful that the use of torture by police to obtain “confessions”, or the use of secret detention and enforced disappearance,

⁸⁷² Makau Mutua, ‘Savages, Victims, and Saviors: The Metaphor of Human Rights’, (2001) 42 Harvard International Law Journal 201, at pp. 220-21. And see Mutua’s discussion of female genital mutilation as an example of culture as “savage”, at pp. 225-27. Mutua argues for rejection of the “Savages-Victims-Saviors” approach and for a new approach in which a particular cultural practice is not assumed *ab initio* to violate human rights and “cultural pluralism” is respected “as a basis for finding common universality on some issues” (ibid, pp. 244-45). Referring to the example of female genital mutilation, he outlines an approach which first investigates the “social meaning and purposes” of the practice, in addition to its effects, and then examines the conflicting positions on the practice in the society in question (ibid, p. 245). He states that “[r]ather than demonizing and finger-pointing, under the tutelage of outsiders and their local supporters, the contending positions would be carefully examined and compared to find ways of either modifying or discarding the practice without making its practitioners feel shameful of their culture and of themselves” (ibid, p. 245). Mutua appears to envisage that this new approach will take the form of *intra*-cultural dialogue: immediately after describing the new approach, as just described, he states that the “Savages-Victims-Saviors” approach “leaves no room for a deliberative *intra*-cultural dialogue and introspection” (ibid, p. 245).

⁸⁷³ Ibid, pp. 220-21

⁸⁷⁴ Ibid, p. 220

represent part of “the accumulation of a people’s wisdom”. Moreover, whilst Mutua argues for a new, multicultural human rights corpus, any statement of human rights worthy of the name, including any such new multicultural code, would prohibit the use of torture by police to obtain “confessions”.⁸⁷⁵ For these reasons it seems doubtful that there is a conflict between, on the one hand, human rights norms prohibiting the use of torture by the police and the use of secret detention and, on the other, the culture of society in Iraq.

It might nevertheless be argued that Mutua offers a potential explanation for the apparent failure of the CPA’s legislation in relation to the rights to freedom of expression and freedom of assembly, about which rights he expresses scepticism because they imply or suggest “Western-style liberal democracy”.⁸⁷⁶ One may surmise that those rights are among those norms which Mutua regards as essentially European and the universalisation of which through “Western crusades” he believes cannot succeed.

However, the fact that, in the context of the mass protests in Iraq which began in October 2019, the leading cleric of Shia Islam in Iraq, Grand Ayatollah Sistani, has affirmed and defended the right to protest⁸⁷⁷, does not suggest that the rights to freedom

⁸⁷⁵ Even Mutua appears to accept that certain norms from the existing human rights corpus should apply in Third World states because he recognises that the work of international NGOs in relation to violations of civil and political rights by Third World leaders is “appropriate, necessary and welcome” (ibid, at p. 217), which would only appear to make sense if some of the existing human rights norms are appropriate for Third World states. Mutua also makes clear that the article under discussion is not a “wholesale rejection of the idea of human rights” (ibid, at p. 207).

⁸⁷⁶ Ibid, p. 223

⁸⁷⁷ Sermon of 25 October 2019. English translation available at <https://en.shafaqna.com/120858/ayatollah-sistani-calls-for-commitment-to-the-peaceful-demonstrations-in-iraq/> (web site of the Shia News Association), in which the Grand Ayatollah is quoted as stating *inter alia* that “We remind the security forces that peaceful demonstrations [sic] is a legal right of people if they do not undermine the public order”. Original Arabic text available at <https://www.sistani.org/arabic/archive/26351/> (Google offers the following English translation of the relevant sentence: “We remind the security forces that peaceful demonstrations that do not violate public order is a right guaranteed by the constitution to citizens....”). In his sermon of 15 November 2019, Grand Ayatollah Sistani declared his support for the mass protests then underway in Iraq: “... the supreme religious authority clarifies its position on the current protests ... (First) To support the protests, affirmation of a commitment to their safety and freedom from any form of violence”: see <https://www.sistani.org/arabic/archive/26359/> (translated by Google). See also Nabil Ahmed, ‘Iraq Protests boosted By Sistani’s Support on Eve of Iran Unrest’, 17 November 2019, at <https://en.radiofarda.com/a/iraq-protests-boosted-by-sistani-s-support-on-eve-of-iran-unrest/30276555.html>, which states that the Grand Ayatollah stated in his 15 November 2019 sermon that he clarifies his position of “supporting the protests....”. (Radio Farda is the Persian language

of assembly and freedom of expression are, *per se*, inconsistent with Iraqi culture, given that the majority of Iraq's population is Shi'ite.⁸⁷⁸ The actions of the Iraqi security services in gunning down protesters do not therefore appear to amount to an expression of Iraqi culture.

More generally, Mutua's suggestion that the current human rights norms will ultimately fail because they are perceived as an "alien ideology" in non-Western societies requires evidence that the norms are indeed perceived as an "alien ideology" in non-Western societies. In particular, any suggestion that the current corpus of human rights norms is perceived by Iraqi society as an "alien ideology" would require evidence to substantiate it.

Kennedy has identified a series of questions, or concerns, about international human rights which had been raised by people, including himself, "who worry that the human rights movement might, on balance and acknowledging its enormous achievement, be

broadcast service of Radio Free Europe/Radio Liberty, which is funded by the US Congress.) Grand Ayatollah Sistani also condemned attacks upon the protesters in his sermon of 29 November 2019: see 'Iraq top cleric al-Sistani Condemns attacks on peaceful protesters...', 29 November 2019, at <https://english.alarabiya.net/en/News/middle-east/2019/11/29/Iraq-top-cleric-al-Sistani-condemns-attacks-on-peaceful-protesters->, which quotes Grand Ayatollah stating "Attacks against peaceful protesters are forbidden". Similarly the BBC, 'Iraq unrest: PM Abdul Mahdi to resign after bloodiest day in protests', 29 November 2019 states that "The ayatollah [Sistani] said attacks on peaceful protesters were "forbidden"....": available at <https://www.bbc.com/news/world-middle-east-50600495>. The sermon of 29 November 2019 is available in the original Arabic at <https://www.sistani.org/arabic/archive/26361/>. The sermon of 29 November 2019 also refers to peaceful demonstrators' "right to demand reform" (according to the Google translation). The mass protests in Iraq which began in October 2019, and Grand Ayatollah Sistani's affirmation of the right to protest, would appear to support a universalist, as opposed to a relativist, approach to human rights, at least as regards the rights to freedom assembly and freedom of expression.

⁸⁷⁸ One area where freedom of assembly might conflict with Iraqi culture is the denial by the Iraqi Government of the right of homosexuals to hold peaceful demonstrations (see main text above). The Iraqi Government justified this on the basis that the sexual practices of homosexuals are contrary to the teachings of the Islamic sharia. Mutua notes that religion is a factor in the culture of a society (Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', (2001) 42 Harvard International Law Journal 201, at p. 220). Mutua therefore offers an explanation for the failure to uphold the right to freedom of assembly on the part of homosexuals. Mutua also offers an explanation for continued human rights violations in Iraq in relation to certain areas on which the CPA did not legislate, such as female genital mutilation, apostasy and Iraqi legislation permitting polygamous marriages which is discriminatory against women. However, because the CPA did not legislate in those areas, they are not relevant to the issues discussed in this chapter and are therefore not considered in this chapter (see main text above).

more part of the problem in today's world than part of the solution".⁸⁷⁹ One of the concerns listed by Kennedy is that "Human Rights Promises More than It Can Deliver".⁸⁸⁰ One aspect of this concern is that, he states, many general criticisms of law's tendencies to "overpromise" are applicable "in spades" to human rights, including that "[t]he gap between law in the books and law in action, between legal institutions and the rest of life, hollows promises of emancipation through law".⁸⁸¹ It should be noted that Kennedy acknowledges that the questions or concerns which he lists, including that one, are merely hypotheses and that, to his knowledge, none of them has been proven.⁸⁸²

Part of the explanation for the apparent failure of the CPA's human rights legislation on human rights to transform the human rights situation in Iraq appears to lie in the failure to provide human rights training to Iraqi police officers. After the commencement of the occupation, on 2 May 2003 the Office for Reconstruction and Humanitarian Assistance (ORHA), the forerunner of the CPA, called on Iraqi police officers to return to work.⁸⁸³ However, shortly thereafter an assessment of the Iraqi police was carried out by an international team of policing experts (the International Police Assistance Team), attached to the CPA Ministry of Interior Office, which found that the Iraqi police "displays the results of" *inter alia* "absence of an understanding/appreciation of human rights" and that its "approach to human rights" was "totally unsuited to modern policing requirements".⁸⁸⁴ The report produced by the International Police Assistance

⁸⁷⁹ David Kennedy, 'The International Human Rights Movement: Part of the Problem?', (2002) 15 Harvard Human Rights Journal p. 101, at p. 101. On p. 102 he refers to these questions as "concerns" and "potential costs".

⁸⁸⁰ *Ibid*, p. 116

⁸⁸¹ *Ibid*, p. 117

⁸⁸² *Ibid*, p. 101

⁸⁸³ Coalition Provisional Authority – Interior Ministry, 'Iraq Police: An Assessment of the Present and Recommendations for the Future', 30 May 2003, p. 11, available at <https://webarchive.nationalarchives.gov.uk/20171123122822/http://www.iraqinquiry.org.uk/media/226757/2003-05-30-report-cpa-interior-ministry-iraq-police-an-assessment-of-the-present-and-recommendations-for-the-future.pdf>, citing ORHA Announcement on Return to Work of the Police, 2 May 2003.

⁸⁸⁴ Coalition Provisional Authority – Interior Ministry, 'Iraq Police: An Assessment of the Present and Recommendations for the Future', 30 May 2003, p. 4. The International Police Assistance Team comprised 15 policing experts, from the US, UK, Canada and Denmark (*ibid*, p. 6). It appears that it was originally known as the Police Assessment Team, including at the time the initial assessment of the Iraqi police was carried out (see *ibid*, p. 6).

Team also referred to “the ignorance of human rights ... displayed by the Iraqi police”.⁸⁸⁵

The International Police Assistance Team made a series of recommendations including implementation of a three-week training course for all Iraqi police officers, entitled “Transition and Integration Program (TIP)”, the purpose of which was in part to introduce and improve knowledge of human rights.⁸⁸⁶ The TIP training programme for existing police officers commenced in late June 2003, with 150 officers graduating on 16 July 2003.⁸⁸⁷ New recruits to the police started undergoing academy training in late November 2003.⁸⁸⁸

However, less than two weeks before the end of the occupation, the UK prime minister, Mr Blair, informed President Bush that,

“... only 7,000 of the 80,000 police are Academy trained: 62,000 have no training...”⁸⁸⁹

In the years following the occupation there were, in the context of human rights violations, repeated calls, including by the UN Assistance Mission for Iraq (UNAMI), for the Iraqi police, and the security forces more generally, to receive adequate training, including as regards human rights.⁸⁹⁰

⁸⁸⁵ Ibid

⁸⁸⁶ Coalition Provisional Authority – Interior Ministry, ‘Iraq Police: An Assessment of the Present and Recommendations for the Future’, 30 May 2003, p. 20 and Annex E (pp. 47-48). The course included 32 hours on human rights standards (ibid, p. 48).

⁸⁸⁷ Chilcot Report, Vol. 10, p. 113 (Section 12.1, para. 258)

⁸⁸⁸ Chilcot Report, Vol. 10, pp. 114-115 (Section 12.1)

⁸⁸⁹ Chilcot Report, Vol. 7, p. 388 (Section 9.2, paras.1098-1099), quoting from Note from Mr Blair to President Bush, sent under cover of letter dated 16 June 2004 from Sir Nigel Sheinwald (Mr Blair’s Foreign Policy Adviser) to Dr Condoleezza Rice (US National Security Advisor).

⁸⁹⁰ UN Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 July-31 August 2006, p.1 (para. 4) (law enforcement agencies in need of further training); UN Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 September-31 October 2006, p.2 (para. 8) (calling for “senior management training, including human rights training” for the security forces); UN Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 April-30 June 2007, p. 9 (para. 18) (under the heading “Protection of Human Rights” and sub-heading “Extra-judicial executions, targeted and indiscriminate killings”, “UNAMI ... urges the Government of Iraq to make every effort to implement policies aimed at achieving the proper vetting and training of its law enforcement personnel...”); UN Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 July-31 December 2007, pp. 5-6 (para. 13(g)) (“Based on its assessment of the human rights situation in Iraq, UNAMI makes the following recommendations: **Recommendations to the Government of Iraq** ... (g) Implement policies aimed at achieving the proper vetting and training of

In connection with an examination of the failure by the occupying powers to provide human rights training to most of Iraq's police officers by the end of the occupation, it is worth considering another of the concerns postulated by Kennedy, namely that "Human Rights Views the Problem and the Solution Too Narrowly", one aspect of which is that human rights actors may see the mere establishment of rules and institutions as sufficiently addressing the human rights problem in question.⁸⁹¹ Against the sub-heading 'Foregrounding form', Kennedy writes:

"The strong attachment of the human rights movement to the legal formalization of rights and the establishment of legal machinery for their implementation makes the achievement of these forms an end in itself. Elites in a political system – international, national – which has adopted the rules and set up the institutions will often themselves have the impression and insist persuasively to others that they have addressed the problem of violations with an elaborate, internationally respected and 'state of the art' response."⁸⁹²

The fact that the CPA enacted extensive legislation on human rights but failed to provide human rights training to most Iraqi police officers by the end of the occupation could be regarded as an example of "foregrounding form", in the sense of prioritising the enactment of rules but not the necessary practical action of training police officers. However, it is not an example of "viewing the solution too narrowly" in that the CPA was aware of the need to provide human rights training to Iraq's police officers, having

law enforcement personnel....") (emphasis in original); UN Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 January-30 June 2008, pp. 3-4 (para. 10(g)) (reiterating the recommendation made in the previous report); Human Rights Office, United Nations Assistance Mission for Iraq (UNAMI), Human Rights Special Report, 'Demonstrations in Iraq, 1-9 October 2019' (suggesting that some casualties among demonstrators may have arisen from a lack of training in the security forces, particularly of those members who may not have had experience of policing large public gatherings; and recommending that it be ensured that all law enforcement officials receive appropriate training, focusing on the management of demonstrations, the avoidance of escalation and violence, and the protection of human rights). See also Human Rights Watch, 'The New Iraq?, Torture and ill-treatment of detainees in Iraqi custody', January 2005, Vol. 17, No. 1(E), p. 11 (recommending that the international donor community provide human rights training as an integral component of all capacity building and training programmes involving the police, and recommending that such training should include a component designed to stop the use of torture and other cruel, inhuman, and degrading treatment as an interrogation technique or punishment)

⁸⁹¹ David Kennedy, 'The International Human Rights Movement: Part of the Problem?', (2002) 15 Harvard Human Rights Journal p. 101, at pp. 109-110

⁸⁹² Ibid, p. 110

been advised to do so by the International Police Assistance Team, and had at least commenced training for existing officers which included human rights training.⁸⁹³

Another possible explanation for the apparent failure of the CPA's human rights legislation to transform the human rights situation in Iraq is that Iraqi state agents, such as police officers, may not have respected or heeded the legislation because it was enacted by occupying powers, rather than an Iraqi government, and was thus a foreign imposition.

The example of the CPA's human rights legislation in Iraq illustrates the practical constraints which an occupying power may come up against when it seeks to legislate in order to bring about change in a society. The enactment of legislation does not of itself change the culture within state institutions or the behaviour of state agents such as police officers. As noted above, the non-governmental organisation Amnesty International found that in the Iraqi criminal justice system there was a "confession culture", involving a reliance on torture to obtain "confessions", which existed under the regime of Saddam Hussein and continued after the occupation.

From a human rights point of view, therefore, one cannot credibly speak of a "transformational" or "transformative" occupation in Iraq. Indeed, when one considers the experience in Iraq following the CPA's human rights legislation, talk of "transformational" or "transformative" occupation looks positively naïve.⁸⁹⁴ Far from

⁸⁹³ See main text above and see also Coalition Provisional Authority – Ministry of the Interior, Police Training Plan, November 2003 (extracts declassified and published by the Chilcot Inquiry), available at <https://webarchive.nationalarchives.gov.uk/20100919030826/http://www.iraqinquiry.org.uk/transcripts/declassified-documents.aspx>, which states, under "Mission Statement", that "[t]raining programs will be developed and delivered in a manner consistent with the principles of democratic policing through an educational philosophy that is based on international human rights standards" (p. 2). The document goes on to state that "[t]he Coalition and the Iraqi Ministry of Interior are committed to the extensive capacity building and development necessary to instill [sic] the knowledge base and appreciation for human rights necessary for development of a professional, sustainable and acceptable police service that is grounded in the principles of policing in a free society" and that these competencies would be achieved through the vetting of existing personnel along with "on-going extensive retraining" (p. 3).

⁸⁹⁴ Roberts showed at least some insight regarding the fact that transformative occupations may not always be successful, referring to the "checkered history of transformative interventions" (Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights* (2006) 100 A.J.I.L. 580, at p. 618). He also states that "... there are historically well-founded doubts about the extent to which foreign armed forces, arriving suddenly in a society with deep-seated problems, are really capable of bringing about fundamental change in that society" (p. 622). Nevertheless, he refers to "the special and important case of transformative occupation" (p. 622), states that "[t]he need for

being a “transformational” or “transformative” occupation, the occupation of Iraq by the US and UK was merely the start of a very long process as regards Iraq’s progress in the human rights sphere. The experience in Iraq in relation to occupation legislation in the field of human rights calls into question the idea of “transformational” or “transformative” occupation and suggests that the challenge which it poses to occupation law is not viable.

foreign military presences with transformative political purposes is not going to disappear” (p. 618) and suggests legal mechanisms by which such transformative occupations may lawfully be pursued. (resolutions from the UN Security Council “or other major international body”; human rights law and “evolving custom”) (p. 580, pp. 600-01, p. 620, p. 621, p. 622).

Chapter 5

The Challenge from International Human Rights Law

In the previous chapters we examined the challenge posed by the idea that occupying states should be freed of their obligations to respect the existing law and institutions so as to be permitted to engage in “transformational” or “transformative” occupations. As part of that examination, in the last chapter we looked at the CPA’s legislation in the field of human rights and considered whether it succeeded in transforming the human rights position in Iraq. This chapter also relates to human rights. However, in this chapter we will look at the challenge to the rules of occupation law which require an occupying state to respect the existing law and institutions posed by the applicability of human rights treaties in occupied territory. Whereas the last chapter looked at the practical outcome of the CPA’s human rights legislation, this chapter is necessarily legalistic given the issues with which it deals. In the next chapter we will examine the challenge posed by the idea that the Security Council may authorise a departure from, or override, the rules which require respect for existing laws and institutions. There is a possible link between that chapter and human rights in that Security Council resolutions might be used to promote human rights in occupied territory.

In this chapter, it will be seen that the issue of the applicability of human rights treaties in occupied territory is more complex than writers have recognised.

As shown above, the international law of belligerent occupation requires an occupying state, subject to limited exceptions, to respect the existing law and institutions of the occupied territory. A potential challenge to this requirement is posed by decisions by international courts on the applicability of human rights treaties in occupied territory. This chapter will consider what we have learnt from the occupation of Iraq as regards this potential challenge from human rights law. More specifically, we will consider what light the occupation of Iraq sheds on the issue whether international human rights

law requires an occupying power to change pre-occupation laws in occupied territory. We will consider this issue in relation to three specific questions:

1. whether the obligations of an occupied state (as opposed to those of the occupying power) under a human rights treaty provide a legal basis for an occupying state to change the pre-occupation law in occupied territory;
2. whether the obligations of an occupying power under the International Covenant on Civil and Political Rights⁸⁹⁵ (ICCPR) may require it to amend pre-occupation law in occupied territory; and
3. whether the European Convention on Human Rights⁸⁹⁶ (ECHR) requires an occupying power which is a state party to it to change pre-occupation laws in occupied territory which are incompatible with the rights set out in the Convention.

Methodology

In relation to the question whether the obligations of an occupied state (as opposed to those of the occupying power) under a human rights treaty provide a legal basis for an occupying state to change the pre-occupation law, we will first examine relevant legislation enacted by the CPA in Iraq. It will be seen that a number of pieces of human rights legislation enacted by the CPA expressly refer by way of justification to Iraq's human rights obligations or to the fact that Iraq is a party to one or more human rights treaties. We will then carry out a legal analysis of the question whether the fact that Iraq, the occupied state, was a party to the ICCPR could provide a legal justification for the US, as occupying power, to depart from the pre-occupation law.

In relation to the question whether the obligations of an occupying power under the ICCPR may require it to alter pre-occupation law in occupied territory, we will

⁸⁹⁵ International Covenant on Civil and Political Rights, adopted by the UN General Assembly on 16 December 1966, Vol. 999 U.N.T.S., p. 171 (No. 14668).

⁸⁹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome, 4 November 1950

examine the detailed legal analysis offered by the US Government in the aftermath of the occupation of Iraq in which it denied that its obligation under the ICCPR were applicable in occupied territory. In order to assess the arguments put forward by the US Government, relevant case law of the International Court of Justice will be considered. The *travaux préparatoires* to the relevant article of the ICCPR will then be examined, given the differing views expressed regarding the *travaux* by the US Government, the International Court and scholars. The *travaux préparatoires* to Article 2 of the ICCPR was identified using the guide prepared by Bossuyt.⁸⁹⁷ Each document identified was then examined after a digital copy was obtained by entering its U.N. document number on the U.N. Official Document System.⁸⁹⁸ Occasionally, where a copy of the relevant document was not available on the U.N. Official Document System, a digital copy was obtained via the “U.N. Human Rights Treaties *Travaux Préparatoires*” database maintained by the University of Virginia, School of Law.⁸⁹⁹ Finally, the practice arising out of Iraq on this question will be placed in a wider context by the examination of subsequent state practice, including in relation to the Occupied Palestinian Territory, and in particular certain resolutions of the General Assembly regarding human rights in that territory. As part of that examination, the legal significance of these resolutions for the interpretation of Article 2 of the ICCPR will be considered.

In relation to the question whether the ECHR requires an occupying power which is a state party to it to change pre-occupation laws, the judgment of the Grand Chamber of the European Court of Human Rights in *Al-Skeini v. The United Kingdom*, which arose out of the occupation of Iraq, will be examined in detail.

The legal context

A number of writers have argued that an occupying power is entitled to repeal or change pre-occupation laws in occupied territory which violate international human

⁸⁹⁷ Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (1987, Martinus Nijhoff Publishers, Dordrecht), p. 73 (“Documentation on article 2”)

⁸⁹⁸ <https://documents.un.org/prod/ods.nsf/home.xsp>

⁸⁹⁹ <https://hr-travaux.law.virginia.edu/international-conventions/international-covenant-civil-and-political-rights-iccpr>

rights law.⁹⁰⁰ Sassòli, for example, argues that an occupying state is under an obligation to repeal local legislation which is in breach of international human rights standards and that such a state has a “strong argument” that it is “absolutely prevented” under Article 43 of the Hague Regulations from leaving such legislation in force.⁹⁰¹ Such an argument is based on the assumption that an occupying state’s obligations under a human rights treaty apply in territory which it occupies.

It has long been recognised by writers that human rights treaties continue to apply in time of armed conflict, except to the extent that states lawfully derogate from their obligations thereunder.⁹⁰² That the ECHR continues to apply in armed conflict (except to the extent that a derogation is made) is indicated by the fact that Article 15 of the ECHR permits a state party to take measures derogating from its obligations “[i]n time of war or other public emergency threatening the life of the nation”.⁹⁰³ The corresponding provision contained in the ICCPR, Article 4, provides that derogations may be made “[i]n time of public emergency which threatens the life of the nation”. Although that provision does not expressly mention war, the International Court of Justice has confirmed, in its Advisory Opinion on the *Legality of the Threat or Use of*

⁹⁰⁰ Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, (2005) 16 E.J.I.L. p. 661, at p. 676; Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) 100 A.J.I.L. 580, at p. 588 and p. 601; Yoram Dinstein, *The International Law of Belligerent Occupation* (2009), p. 114 (at least as regards non-derogable human rights norms contained in treaties); Eyal Benvenisti, *The International Law of Occupation* (2nd ed., 2012, Oxford University Press), p. 75 and pp. 102-03. Carcano argues that an occupying power may *suspend* an existing law in occupied territory in order to comply with the occupying power’s own human rights obligations (p. 331). Carcano also proposes, as an “interpretative development” of the law, a “narrowly construed” exception to Article 43 whereby the existing law in occupied territory could be changed to reflect “universally recognized human rights-standards entrenched in customary international law” (e.g. torture) (Andrea Carcano, *The Transformation of Occupied Territory in International Law* (2015, Brill Nijhoff) pp. 253-54). He notes that not all human rights norms are universally agreed or have evolved into customary international law. However, Carcano emphasises that he does not endorse “human rights-based transformative occupation”, which he states “remains forbidden under the law of occupation” (ibid, p. 254).

⁹⁰¹ Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, (2005) 16 E.J.I.L. p. 661, at p. 676

⁹⁰² Gerhard von Glahn, ‘The Protection of Human Rights in Time of Armed Conflicts’, (1971) Vol. 1 Israel Yearbook on Human Rights, p. 208, at p. 213 and p. 214 (including as regards the ICCPR); Morris Greenspan, ‘The Protection of Human Rights in Time of Warfare’, (1971) Vol. 1 Israel Yearbook on Human Rights, p. 228, at p. 229 (including as regards the ECHR and the ICCPR); A.H. Robertson, *Human Rights in the World* (1972, Manchester University Press, Manchester), pp. 175-80 (regarding the ICCPR and ECHR); Christopher Greenwood, ‘Rights at the Frontier – Protecting the Individual in Time of War’, in Barry Rider (Ed.), *Law at the Centre*, The Institute of Advanced Legal Studies at Fifty (1999, Kluwer Law International Ltd, London), p.277 at p. 279 (regarding the ECHR and ICCPR).

⁹⁰³ Greenwood, ‘Rights at the Frontier’ (n 902) 279

Nuclear Weapons, that the ICCPR continues to apply in time of war except to the extent that a derogation is made.⁹⁰⁴ Both Article 4 of the ICCPR and Article 15 of the ECHR provide that there are certain rights contained in each convention from which no derogation is permitted, for example the prohibition on torture and inhuman or degrading treatment or punishment contained in Article 7, ICCPR and Article 3, ECHR. These non-derogable rights will continue to apply in armed conflict.

However, a separate, though related, question is whether the obligations of a state party to a human rights treaty apply outside of the territory of that state party. More specifically, and of particular relevance for present purposes, is the question whether a state party's obligations under a human rights treaty apply in the territory of another state which it is occupying during armed conflict. In that regard it is relevant to recall that, as shown above, a state which occupies the territory of another state does not, by virtue of going into occupation, acquire sovereignty over it.

In order to determine whether the obligations of states parties under a human rights treaty apply outside of their national territory it is of course necessary to consider the terms of the treaty concerned, in particular any provision of the treaty which defines the scope of application of the treaty. In the case of the ICCPR, Article 2(1) provides that each state party undertakes to respect and to ensure "to all individuals within its territory and subject to its jurisdiction" the rights recognised in the ICCPR. In contrast, the ECHR provides, in Article 1, that the contracting parties shall secure "to everyone within their jurisdiction" the rights and freedoms contained in the ECHR, there being no reference to "territory". As regards Article 2 of the ICCPR, there has been a division among writers as to whether states parties are obliged to ensure the rights set out in the Covenant to persons who are outside of their territory. Some writers have taken the view that a state party is obliged only to ensure the rights to an individual who is both within the territory and subject to the jurisdiction of the state concerned.⁹⁰⁵

⁹⁰⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, International Court of Justice, [1996] I.C.J. Reports, p. 226, at p. 240 (para. 25). See Greenwood, 'Rights at the Frontier' (n 902) 279, note 4.

⁹⁰⁵ See e.g. Egon Schwelb, 'Some aspects of the International Covenants on Human Rights of December 1966', in Asbjörn Eide and August Schou (Eds.), *International Protection of Human Rights, Proceedings of the Seventh Nobel Symposium, Oslo, September 25-27, 1967* (1968, Interscience/Almqvist & Wiksell, Stockholm), p. 103 at p. 109; A.H. Robertson, *Human Rights in Europe* (2nd Ed., 1977, Manchester University Press), p. 33; J.G. Merrills and A.H. Robertson, *Human Rights in Europe, A Study of the*

Other writers have argued that the phrase “within its territory and subject to its jurisdiction” should be read disjunctively so that a state party is obliged to ensure the rights to an individual if he/she is either within the state’s territory or is subject to its jurisdiction.⁹⁰⁶

From around the beginning of the 21st Century there has been a succession of decisions in which international courts have held that the obligations of an occupying state under international human rights conventions to which it is a party apply in the territory which it occupies. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice held that, where an occupying power is a state party:

- (i) the International Covenant on Civil and Political Rights (ICCPR) is applicable in respect of acts done by an occupying power in occupied territory;⁹⁰⁷
- (ii) an occupying power, in the exercise of the powers available to it, is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR);⁹⁰⁸ and
- (iii) the Convention on the Rights of the Child (CRC) is applicable within occupied territory.⁹⁰⁹

In its judgment in the *Armed Activities on the Territory of the Congo* case the International Court of Justice held that the ICCPR, the African Charter on Human and Peoples’ Rights, the Convention on the Rights of the Child and the Optional Protocol

European Convention on Human Rights (4th Ed., 2001, Manchester University Press, Manchester), pp.27-28; Dietrich Schindler, ‘Human Rights and Humanitarian Law: Interrelationship of the Laws’, (1982) Vol. 31 American University Law Review p. 935, at p. 939

⁹⁰⁶ See e.g. Thomas Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’, in Louis Henkin (Ed.), *The International Bill of Rights, The Covenant on Civil and Political Rights* (1981, Columbia University Press, New York), p. 72 at p. 74; Theodor Meron, ‘Extraterritoriality of Human Rights Treaties’, (1995) Vol. 89 A.J.I.L. p. 78, at p. 79

⁹⁰⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, International Court of Justice, [2004] I.C.J. Reports, p. 136, at p. 180 (para. 111)

⁹⁰⁸ *Ibid*, p. 181 (para. 112)

⁹⁰⁹ *Ibid*, p. 181 (para. 113)

thereto on the Involvement of Children in Armed Conflict were applicable to the acts and omissions of the Ugandan armed forces in the Democratic Republic of the Congo.⁹¹⁰ The Court found that Uganda had violated provisions of these instruments including those on the right to life contained in Article 6(1) of the ICCPR and Article 4 of the African Charter, and certain provisions of the Convention on the Rights of the Child, and of its Optional Protocol, relating to the recruitment of children into armed forces.⁹¹¹ The evidential basis relied upon by the Court for these findings included evidence that Ugandan troops were directly involved in the killing of civilians in the occupied Ituri district; that Ugandan troops “stood by” and failed to prevent the killing of civilians of one ethnic group by another in the occupied territory; that the Ugandan forces failed to prevent recruitment of children as child soldiers in the occupied territory; and that children from the occupied territory were transferred to training camps run by the Ugandan armed forces for military training.⁹¹²

Thus, in the *Armed Activities* case the Court held there to be violations of the obligations of a state party under the ICCPR, not only in respect of the acts of its own forces in territory which it occupies, but also in respect of its omission to prevent acts by third parties in the occupied territory.

It should be noted, however, that neither the *Wall* case nor the *Armed Activities* case was concerned with the question whether a state party to the ICCPR is obliged to amend the existing legislation in territory which it occupies in order to make it compliant with the ICCPR. It remains to be seen how the Court would deal with that question.

Even before these developments in the case law of the International Court of Justice, the European Court of Human Rights had held that the European Convention on Human Rights was applicable to the actions of an occupying power in occupied territory, at least where a Contracting Party occupied territory of another Contracting Party. In *Loizidou v. Turkey* the Court applied the Convention to the actions of Turkish

⁹¹⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, International Court of Justice, [2005] I.C.J. Reports, p. 168, at pp. 243-44 (para. 217)

⁹¹¹ *Ibid*, p. 244 (para. 219)

⁹¹² *Ibid*, p. 239 (para. 206); pp. 240-41 (para. 209); p. 241 (para. 210)

troops occupying the northern part of Cyprus and to the actions and policies of the so-called “Turkish Republic of Northern Cyprus” established there.⁹¹³ The background to the case was Turkey’s occupation in July 1974 of the northern part of the territory of the Republic of Cyprus which, like Turkey, is a Contracting Party to the Convention, and the purported establishment of the “Turkish Republic of Northern Cyprus” as an independent state in November 1983. The Applicant was the owner of various plots of land in northern Cyprus but had been denied access to this land.⁹¹⁴ On several occasions she was prevented by Turkish troops from gaining access to the land.⁹¹⁵ Turkey denied that it was responsible for the treatment received by the Applicant and claimed that its armed forces were acting exclusively in conjunction with and on behalf of the authorities of the allegedly independent “TRNC”.⁹¹⁶ In its judgment on the preliminary objections raised by Turkey, the Court held:

“Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”⁹¹⁷

⁹¹³ *Loizidou v. Turkey*, European Court of Human Rights (Grand Chamber), Judgment (Merits), 18 December 1996, Application No. 15318/89

⁹¹⁴ *Ibid*, paras. 12-14

⁹¹⁵ *Ibid*, para. 54

⁹¹⁶ *Ibid*. Turkey further argued that the “TRNC” was a democratic and constitutional state which was politically independent of all other sovereign states, including Turkey; that it had been established by the Turkish Cypriot people in the exercise of their right to self-determination, rather than by Turkey; that the Turkish armed forces were present in northern Cyprus with the consent of the “TRNC”; that neither the Turkish Government nor the Turkish armed forces exercised any governmental authority in northern Cyprus; that there are political parties and democratic elections in northern Cyprus and that the constitution of the “TRNC” was drafted by a constituent assembly and approved in a referendum (*ibid*, para. 51). The Court in its judgment set out UN Security Council Resolution 541 (1983) in which the Security Council declared the purported secession of northern Cyprus to be “legally invalid” and called upon all states not to recognise the “TRNC”, as well as statements and declarations by the Council of Europe, European Communities and Commonwealth in a similar vein (*ibid*, paras. 19-23). The Court concluded that “...the international community does not regard the “TRNC” as a State under international law” and that “the Republic of Cyprus has remained the sole legitimate Government of Cyprus ...” (*ibid*, paras. 44 and 56)

⁹¹⁷ *Loizidou v. Turkey (Preliminary Objections)*, European Court of Human Rights (Grand Chamber), Judgment (Preliminary Objection), 23 March 1995, Application No. 15318/89, para. 62

In its judgment on the merits, the Court reiterated this test and applied it, holding that it was obvious from the large number of troops which Turkey had deployed in northern Cyprus – armed forces in excess of 30,000 personnel stationed throughout the occupied area - that Turkey was exercising “effective overall control” over that part of the island and that, therefore, Turkey was responsible for the policies and actions of the “Turkish Republic of Northern Cyprus”; that individuals affected by those policies or actions therefore came within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention; and that Turkey’s obligation to secure to the applicant the rights and freedoms contained in the Convention therefore extended to northern Cyprus.⁹¹⁸ Accordingly, the Court held that the continuous denial of the applicant’s access to her real property in northern Cyprus since 1974 and resultant loss of control over it, which the Court held to be an interference with the peaceful enjoyment of possessions in violation of Article 1 of Protocol No. 1 to the Convention, fell within Turkey’s “jurisdiction” within the meaning of Article 1 of the Convention and was thus imputable to Turkey.⁹¹⁹

Subsequently, the European Court of Human Rights has applied provisions of the European Convention on Human Rights to the acts and omissions of an occupying state which was party to the Convention in occupied territory outside of the area of the Council of Europe, more specifically in Iraq. In *Al-Skeini v. The United Kingdom*, the Grand Chamber of the European Court of Human Rights held that the UK had violated the procedural obligation under Article 2 (the right to life) of the European Convention on Human Rights to carry out an adequate and effective investigation into the deaths of certain persons who were shot by UK soldiers, or otherwise died as a result of the

⁹¹⁸ Judgment (Merits), 18 December 1996, paras. 52 and 56. Details of the occupying forces are given at para. 16. The Court further stated that it was not necessary to determine whether Turkey was actually exercising detailed control over the policies and actions of the authorities of the “TRNC” (para. 56). The Court expanded on the rationale for this approach in the subsequent judgment in *Cyprus v. Turkey*, in which it stated that Turkey’s responsibility was not confined to the acts of its own soldiers and officials in northern Cyprus but was also engaged in respect of the acts of the local administration “which survives by virtue of Turkish military and other support” (European Court of Human Rights (Grand Chamber), Application No. 25781/94, Judgment, 10 May 2001, (2001) Vol. IV Reports of Judgments and Decisions, p. 1, at p. 25 (para. 77)).

⁹¹⁹ *Ibid*, paras. 57 and 63

actions of UK soldiers, in Iraq during the occupation of that country by the US and UK.⁹²⁰

The precise basis on which the European Court held in *Al-Skeini* that the Convention was applicable in Iraq will be considered further below, as will the implications of the judgment in that case for the power of an occupying power to legislate in occupied territory.

Before examining the questions posed earlier in this chapter, we will consider two preliminary issues: (i) what role the concept of *lex specialis* plays in relation to the relationship between the international law of armed conflict (international humanitarian law), including the law of occupation, and international human rights law; and (ii) the fact that certain human rights form part of customary international law and that some of those rights possess the status of *jus cogens*.

Lex specialis and the relationship between the international law of armed conflict and international human rights law

There is a principle of interpretation ‘*lex specialis derogat legi generali*’ (special law derogates from general law), which is commonly stated to have the effect that a special (i.e. more specific) rule prevails, or has priority, over a general rule.⁹²¹ The principle

⁹²⁰ Judgment, 7 July 2011. Application No. 55721/07. The relatives of the first, second, third and fourth applicants were shot by UK soldiers; the fifth applicant’s relative drowned after allegedly being forced into a river by UK soldiers at gunpoint: see paras. 33-62.

⁹²¹ See Michael Akehurst, ‘The Hierarchy of the Sources of International Law’, (1974-1975) 47 B.Y.B.I.L. 273, at p. 273; Joost Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law* (2003, Cambridge University Press, Cambridge), p. 385; Anthony Aust, *Modern Treaty Law and Practice* (3rd Ed., 2013, Cambridge University Press, Cambridge), p. 221; Malcolm N. Shaw, *International Law* (8th ed., 2017, Cambridge University Press, Cambridge), p. 92. The principle is also formulated as ‘*generalia specialibus non derogant*’ (‘general provisions cannot derogate from specific provisions’, or ‘the specific prevails over the general’): see Sir Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other points’ (1957) 33 B.Y.B.I.L. 203 at p. 236-38; Lord McNair, *The Law of Treaties* (1961, Oxford University Press), p. 219; Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim’s International Law* (9th ed., 1992), Vol. I, Parts 2 to 4, p. 1280. C. Wilfred Jenks, ‘The Conflict of Law-Making Treaties’, (1953) 30 B.Y.B.I.L. 401, comments on the principles for resolving conflicts between norms, such as *the lex specialis* and *lex posterior* principles, that “[n]one of these principles has any absolute validity or can be applied automatically and mechanically to any particular class of case” (at p. 453) but “they must be weighed and reconciled in the light of the circumstances of the particular case” (at p. 436). Similarly, Aust states that the *lex specialis* principle, as with certain other supplementary means of interpretation, should not be followed slavishly and is no more than a *possible* aid to interpretation (Anthony Aust, *Modern Treaty*

has been explained as a (rebuttable) “presumption that the authority [which in the case of a treaty is the states parties] laying down a general rule intended to leave room for the application of more specific rules which already existed or which might be created in the future”, the presumption being rebuttable on proof of contrary intention.⁹²²

Jenks traces the principle back to Grotius.⁹²³ Grotius stated:

“Among agreements ..., that should be given preference which is most specific and approaches most nearly to the subject in hand; for special provisions are ordinarily more effective than those that are general”.⁹²⁴

Similarly, the rationale for the principle that special law has priority over general law has been stated to be that “special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law”.⁹²⁵

It has long been recognised that the law of armed conflict is *lex specialis* in relation to situations of armed conflict.⁹²⁶ The U.S. military manual on the law of war issued in

Law and Practice, at pp. 220-21). Anja Lindroos, ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*’, (2005) 74 *Nordic Journal of International Law* 27, at p. 65, argues that international tribunals “seem to have applied the [*lex specialis*] maxim rather loosely, and very little can be said of its normative content” and that “it is a widely formulated tool of judicial reasoning that leaves much discretion to the decision-maker”. Lindroos notes that international tribunals applying the maxim “have not generally required that there be a clear conflict between two provisions” and that “[i]t is sufficient that the provisions overlap to some extent” (at p. 65).

⁹²² Michael Akehurst, ‘The Hierarchy of the Sources of International Law’, (1974-1975) 47 *B.Y.B.I.L.* 273, at p.273

⁹²³ C. Wilfred Jenks, ‘The Conflict of Law-Making Treaties’, (1953) 30 *B.Y.B.I.L.* 401, at p. 446

⁹²⁴ Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, Book II, Ch. XVI, sec. xxix, translated by Francis W. Kelsey in *The Classics of International Law*, publications of the Carnegie Endowment for International Peace, Washington, Vol. Two (The Translation), Book I (Clarendon Press, Oxford, 1925), p. 428

⁹²⁵ International Law Commission Study Group on ‘The Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report, adopted 17 July 2006, Conclusion (7), reproduced in *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, p. 176, at p. 178. The Report further suggests that the application of special law may also often create “a more equitable result” and it may often better reflect the intent of the legal subjects (*ibid*). See also the detailed analytical study prepared by the Study Group, which notes that “... special rules are better able to take account of particular circumstances”: see ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission (Finalised by Martti Koskeniemi), 13 April 2006 (U.N. Doc. A/CN.4/L.682), p. 36, para. 60

⁹²⁶ See C. Wilfred Jenks, ‘The Conflict of Law-Making Treaties’, (1953) 30 *B.Y.B.I.L.* 401, at p. 446, who notes that a “clear illustration” of the applicability of the *lex specialis* principle is afforded by

2015, when discussing the law of war as the *lex specialis* governing armed conflict, notes that “[t]he law of war has been developed with special consideration of the circumstances of war and the challenges inherent in its regulation by law”.⁹²⁷ It is also relevant to bear in mind that, as Greenwood states,

“The detailed code [of the laws of war] which has emerged over time has been the product of carefully negotiated compromises between considerations of military necessity and the preservation of humanitarian values. It also reflects experience – not just of states, but also of the Red Cross movement – in a wide range of conflicts.”⁹²⁸

There are, therefore, good reasons for the law of armed conflict to be regarded as *lex specialis* in the circumstances in which it applies.

The International Court of Justice has recognised that the law of armed conflict is *lex specialis* in relation to the regulation of the conduct of hostilities in armed conflict, whilst at the same time holding that international human rights law is simultaneously applicable. In the *Nuclear Weapons* case, it had been argued by some states that the ICCPR was directed to the protection of human rights in peacetime and that loss of life in hostilities was governed by the law of armed conflict.⁹²⁹ Rejecting that view, the Court held that the ICCPR continued to be applicable in time of war, except to the extent that certain of its provisions are derogated from under Article 4. The Court therefore held that in principle the right not to be arbitrarily deprived of life contained in Article 6 of the ICCPR applies in hostilities. However, the Court recognised that the

“instruments relating to the laws of war which, in the absence of evidence of a contrary intention or other special circumstances, must clearly be regarded as a *leges speciales* in relation to instruments laying down peace-time norms concerning the same subjects”.

⁹²⁷ Department of Defense Law of War Manual [United States of America], June 2015 (Updated December 2016), promulgated by the Office of General Counsel, Department of Defense, p. 10, para. 1.3.2.1

⁹²⁸ Greenwood, ‘Rights at the Frontier’ (n 902) 285. Greenwood argues that it is therefore a mistake to imagine that the very general provisions of a human rights treaty can “trump” the more detailed and specific provisions of the laws of war (ibid). At the same time, Greenwood argues against the proposition that human rights law is necessarily applicable only in time of peace and that with the outbreak of war human rights law must yield to the *lex specialis* of the law of war (at p. 279). Rather, Greenwood calls for a “fruitful interaction” between human rights law and the laws of war (at p. 293).

⁹²⁹ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Reports, p. 226, at p. 239, para. 24

law of armed conflict is *lex specialis* in relation to the regulation of the conduct of hostilities in the course of armed conflict and ruled that the test of what is an arbitrary deprivation of life in the course of hostilities is to be determined by the law of armed conflict, as the applicable *lex specialis*.⁹³⁰ The Court did not adopt the approach that the law of armed conflict as a whole, as *lex specialis*, overrides the entirety of human rights law during armed conflict.⁹³¹ Nevertheless, in the words of the ILC Study Group on the Fragmentation of International Law, although both human rights law and the law of armed conflict “applied concurrently, or within each other”, the law of armed conflict, with its “more relaxed standard of killing”, “set aside” the standard which would normally apply under human rights law (i.e. under Article 6, ICCPR).⁹³² The ILC Study Group characterised this as the Court having “created a systemic view of the law” in which human rights law and the law of armed conflict related to each other.⁹³³ As Pauwelyn points out, the Court used the *lex specialis* (the law of armed conflict) to interpret, rather than overrule, a more general norm (Article 6, ICCPR), the *lex*

⁹³⁰ Ibid, at p. 240, para. 25. C.f. William A. Schabas, ‘*Lex Specialis?* Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*’, (2007) 40 Israel Law Review 592, at 612, who argues that defining the law of armed conflict as the *lex specialis* which governs violations of the right to life in time of armed conflict is “inadequate” on the basis that human rights law requires that any deprivation of life is only permissible if it pursues a legitimate purpose, and that the waging of aggressive war cannot meet that test. For a critique of the use of the *lex specialis* principle to govern the inter-relationship between the law of armed conflict and human rights law see Nancie Prud’homme, ‘Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship’ (2007) 40 Israel Law Review 356

⁹³¹ See Anja Lindroos, ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*’, (2005) 74 Nordic Journal of International Law 27, who states that in the *Nuclear Weapons* case “The ICJ ... was reluctant to state that one area of law could override another as *lex specialis* and be generally considered the special law”; that “...the Court was careful to note that human rights continue to apply and are not categorically set aside by the laws of armed conflict” (at 43); and that “... it was not accepted that the norms of humanitarian law could override the human rights law” (at 65). More generally Lindroos notes that in the actual application of the *lex specialis* maxim, international tribunals “have usually considered the relation of two specific norms” (at 65). See also ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission (Finalised by Martti Koskenniemi), 13 April 2006 (U.N. Doc. A/CN.4/L.682), p. 57, para. 104, which states that the Court was careful to point out that human rights law continued to apply in armed conflict and that humanitarian law only affected one aspect of it, i.e. “the relative assessment of “arbitrariness””.

⁹³² ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission (Finalised by Martti Koskenniemi), 13 April 2006 (U.N. Doc. A/CN.4/L.682), p. 53, para. 96

⁹³³ Ibid, p. 57, para. 104. The Report emphasises the importance of the principle of “systemic integration”, “the process ... whereby international obligations are interpreted by reference to their normative environment (“system”)”, which is embodied in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires that in the interpretation of a treaty account is to be taken of “any relevant rules of international law applicable in the relations between the parties”: see pp. 206-44, in particular p. 208, para. 413 and p. 243-44, paras. 479-80.

specialis and the *lex generalis* being “applied side by side, the *lex specialis* playing the greater role of the two”.⁹³⁴ This is not the classic use of the *lex specialis* principle, as described in the opening paragraph of this section, whereby a special rule prevails, or has priority, over a general rule.⁹³⁵

In the *Wall* case the Court affirmed that the protection offered by human rights conventions does not cease in time of armed conflict, except through the effect of provisions for derogation contained in such conventions.⁹³⁶ The Court summarised the position as regards the application of international humanitarian law and human rights law as follows:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”⁹³⁷

⁹³⁴ Joost Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law* (2003, Cambridge University Press, Cambridge), p. 410. See also Anja Lindroos, ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*’, (2005) 74 *Nordic Journal of International Law* 27, at p. 65, who concludes, on the basis of the *Nuclear Weapons* case and other cases, that “...determining a rule to be *lex specialis* does not mean the exclusion of the normative environment, but modification of certain rules to the extent provided by the special rule.”.

⁹³⁵ Pauwelyn states that in addition to its role as a rule to resolve conflicts between norms, *lex specialis* is also used in other cases (such as in the *Nuclear Weapons* case) to “interpret away” an apparent conflict, *lex specialis* being invoked as a more specific norm to “supplement” a more general rule without contradiction or overruling (ibid).

⁹³⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Reports, p. 136 at p. 178, para. 106

⁹³⁷ Ibid. C.f. William A. Schabas, ‘*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*’, (2007) 40 *Israel Law Review* 592, at 597, who criticises the Court’s approach to the relationship between international humanitarian law and human rights law. Noting that the Court dealt with the *Wall* case on the basis that both international humanitarian law and human rights law were applicable to the case, i.e. the third category outlined by the Court in the passage quoted in the main text to this note, but that the Court referred to humanitarian law as *lex specialis*, Schabas argues that “*lex specialis* is not invoked if both bodies of law are applicable”. Schabas contends that “[m]ore properly” the *lex specialis* principle “should” relate to the Court’s second category, and not the third, and that “[w]hen international humanitarian law applies exclusively, we are in the presence of *lex specialis*”. This argument reflects Schabas’ premise that the role of the *lex specialis* principle is to assist in “resolving conflicts in laws” and that “[i]t is an unnecessary concept when two legal norms do not clash” (at 597).

The Court then stated that in order to answer the question put to it, which related to the occupation of Palestinian territory, the Court would have to take into account both human rights law and international humanitarian law, the latter of which the Court described as *lex specialis*. Hampson observes in relation to this analysis that,

“It is clear that *lex specialis* is not being used to displace [human rights law]. It is rather an indication that human rights bodies should interpret a human rights norm in the light of [the law of armed conflict/international humanitarian law].”⁹³⁸

In the *Armed Activities* case, the Court affirmed the analysis of the relationship between international human rights law and international humanitarian law which it had expounded in the *Wall* case.⁹³⁹ Furthermore, it is noteworthy that the Court held that Uganda’s obligation as an occupying power to take all the measures in its power to restore and ensure, as far as possible, public order and safety in the occupied territory, while respecting, unless absolutely prevented, the laws in force in the Democratic Republic of the Congo, as required by Article 43 of the Hague Regulations, included *inter alia* “the duty to secure respect for the applicable rules of international human rights law”.⁹⁴⁰ Thus the Court tied the occupying state’s duty to secure respect for international human rights law into its duty under the law of armed conflict to restore and ensure public order and safety.

In conclusion, then, the International Court of Justice, whilst it recognises that the law of armed conflict, including the law of occupation, is *lex specialis* in the circumstances in which it applies, nevertheless does not apply the *lex specialis* principle in a simple or mechanistic way such that the relevant rule of the law of armed conflict simply prevails over the relevant rule of human rights law. Rather, the Court seeks to “weave”⁹⁴¹ in

⁹³⁸ Françoise Hampson and Ibrahim Salama, Working paper on the relationship between human rights law and international humanitarian law, 21 June 2005 (Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights) (U.N. Doc. E/CN.4/Sub.2/2005/14), p. 15 (para. 57)

⁹³⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, [2005] I.C.J. Reports, p. 168, at pp. 242-43, paras. 215-17

⁹⁴⁰ *Ibid*, at p. 231, para. 178

⁹⁴¹ Quentin-Baxter, in a relatively early paper on the relationship between humanitarian law and human rights law, written long before the International Court of Justice gave the judgments under discussion here, employed as a metaphor for that relationship that of “threads of different colours” weaving a cloth, “a pattern in which the two contribute to a whole but in which it is important never to lose sight

together the relevant rules of these two branches of international law as part of an approach which can be characterised as “systemic integration”, the relevant rule from one branch being interpreted in the light of the relevant rule from the other.

As noted above, in neither the *Wall* case nor the *Armed Activities* case was the Court concerned with the question whether a state party to the ICCPR is obliged to amend existing legislation in territory which it occupies in order to make it compliant with the ICCPR. It remains to be seen how in a future case involving that question the Court might make use of the concept of *lex specialis* in order to deal with the conflict or potential conflict between human rights law and the duty contained in Article 43 of the Hague Regulations to respect the existing law. Given the Court’s approach in the cases discussed in this section, it seems unlikely that the Court would simply apply the *lex specialis* principle in its classic form such that the norm requiring respect for the existing law in occupied territory as *lex specialis* simply prevails over applicable norms of human rights law which might normally require amendment of laws. Nevertheless, it is to be expected that in any such future case the Court would recognise the rule requiring respect for existing law in occupied territory as *lex specialis*. Logically, one would then expect that particular weight would be attached to that norm, given its *lex specialis* status, during the process of “systemic integration”. It is submitted that the attachment of such weight would be appropriate.⁹⁴²

Of course, before engaging in the process of interpreting, in the light of the *lex specialis* norms of the law of occupation, the terms of a human rights treaty as they apply to an occupying power in relation to occupied territory, it is first necessary to determine whether the occupying power’s obligations under the particular human rights treaty apply in the occupied territory. That question will be considered later in this chapter.

of the separate identity of humanitarian law”: R. Quentin-Baxter, ‘Human Rights and Humanitarian Law – Confluence or Conflict?’, (1980) 9 Australian Year Book of International Law 94, at p. 94. He argued for this metaphor for the relationship between humanitarian law and human rights law in preference to that of two streams joining one another, because when such streams merge, you can no longer identify the waters of each.

⁹⁴² It would be appropriate to take into account the *lex specialis* rule requiring respect for the existing law, as part of the process of “systemic integration”, when interpreting, in the context of an occupation, the meaning of the obligation contained in Article 2(1) of the ICCPR “to respect and to ensure” the rights recognised in the Covenant, and the obligation contained in Article 2(2) to take the necessary steps, in accordance with the Covenant (including by implication Article 2(1)), to adopt such legislative or other measures as may be necessary to give effect to those rights.

Having examined the role which the concept of *lex specialis* plays in relation to the relationship between the international law of armed conflict and international human rights law, we will now examine the second of the preliminary issues referred to above, namely the fact that certain human rights form part of customary international law and that some of those rights possess the status of *jus cogens*.

Human rights norms in customary international law and *jus cogens*

Later in this chapter we will consider whether obligations under human rights treaties (specifically the ICCPR and ECHR) may require an occupying state to amend the pre-occupation law in occupied territory. Before doing so, we will here consider whether obligations under human rights norms in customary international law may require an occupying state to amend pre-occupation law. In this context we will also consider the fact that certain human rights norms in customary international law are also rules of *jus cogens*.

Certain human rights norms, including the prohibition of torture and of slavery, form part of customary international law, quite apart from the obligations of states under human rights treaties.⁹⁴³ The applicability of such customary international law norms

⁹⁴³ See e.g. Paul Sieghart, *The Lawful Rights of Mankind, An Introduction to the International Legal Code of Human Rights* (1985, Oxford University Press, Oxford), p. 60, who notes that there are only four human rights which one can say "with some confidence" are protected under customary international law: freedom from slavery, freedom from genocide, freedom from racial discrimination and freedom from torture. See also Oscar Schachter, 'International Law in Theory and Practice' (General Course in Public International Law), (1982-V) Vol. 178 *Recueil des Cours* (Collected Courses of the Hague Academy of International Law), at p. 336, who states that examples of rights which have a "strong claim to the status of customary law" are slavery, genocide, torture, mass murders, prolonged arbitrary imprisonment and systematic racial discrimination. Schachter distinguishes those rights from the rights to freedom of expression, belief, association and assembly, and the right to political participation, which he states it is hard to conclude form part of customary law because, *inter alia*, a great many states do not accord these rights to their citizens (*ibid*, at p. 337). Schachter states that the list of human rights in customary international law is not closed and suggests that more rights will attain the status of customary international law (*ibid*, p. 338). See also the American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (adopted 14 May 1986) (1987, American Law Institute Publishers, St. Paul, Minn.), Vol. 2, p. 161, § 702, which states that a state will violate customary international law if it engages in (i) genocide; (ii) slavery or the slave trade; (iii) the murder or causing the disappearance of individuals; (iv) torture, or other cruel, inhuman, or degrading treatment or punishment; (v) prolonged arbitrary detention; (vi) systematic racial discrimination; or (vii) a consistent pattern of gross violations of internationally recognised human rights. Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989, Oxford University Press, Oxford) accepts the list of customary norms set out in the (Third) Restatement produced by the American Law

in occupied territory does not depend upon the particular terms of a human rights treaty. Consequently such norms would appear to be binding upon occupying powers in occupied territory, so that, for example, the occupying state would be prohibited by customary international human rights law from engaging in torture in occupied territory, quite apart from its obligations under the law of armed conflict.⁹⁴⁴

However, it is not clear that the human rights norms in customary international law require a state to amend or repeal laws. Certainly, human rights treaties contain provisions which require states parties to amend their law and not merely to refrain from action which violates the rights contained within the treaty in question. For example, Article 1 of the ECHR requires states parties to “secure” the rights and freedoms set out in the Convention, which has been interpreted not merely to require

Institute “as far as it goes” but believes that it is perhaps “somewhat too cautious”, especially concerning due process guarantees (at pp. 95-96). Meron suggests that other rights in customary international law include the right of self-determination, the right to humane treatment of detainees contained in Article 10, ICCPR and the prohibition of retroactive penal measures contained in Article 15, ICCPR, and that the core of a number of due process guarantees contained in Article 14, ICCPR “have a strong claim to customary law status” (ibid, at pp. 96-97). Meron also suggests that because of the continued development of human rights, the list of rights in customary international law “should be regarded as essentially open-ended” and that “[m]any other rights will be added in the course of time” (ibid, at p. 99). See also Bertrand G. Ramcharan, ‘The Law-Making Process: From Declaration to Treaty to Custom to Prevention’, in Dinah Shelton (Ed.), *The Oxford Handbook of International Human Rights Law* (2013, Oxford University Press, Oxford), p. 509 (para. 3.2), who cites with approval the (Third) Restatement produced by the American Law Institute, but adds that, in light of subsequent legal developments, “one could probably add” forced disappearances, systematic gender discrimination, and ethnic cleansing to the list of acts prohibited under customary international law. Malcolm N. Shaw, *International Law* (8th Ed., 2017, Cambridge University Press, Cambridge), p. 217, states that human rights which have become part of customary international law “would certainly include” the prohibition of torture, genocide and slavery and the principle of non-discrimination. Brownlie noted that whilst the vast majority of authoritative writers would now recognise that the fundamental principles of human rights form part of customary international law, “they would not necessarily agree on the identity of the fundamental principles”: see Ian Brownlie, *Principles of Public International Law* (7th ed., 2008, Oxford University Press, Oxford), p. 562 (James Crawford, *Brownlie’s Principles of Public International Law* (9th Ed., 2019, Oxford University Press, Oxford), p. 618 has retained this text substantially unaltered.) In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, [2012] I.C.J. Reports, p. 422, the International Court of Justice stated that in its opinion “the prohibition of torture” is part of customary international law (at p. 457 (para. 99)).

⁹⁴⁴ Article 32 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 provides that the states parties are prohibited from taking any measure of such character as to cause *inter alia* the physical suffering of protected persons in their hands, and expressly provides that that prohibition applies to torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, and to any other measures of brutality. Article 31 of the Geneva Convention provides that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties”. Article 27 of the Geneva Convention provides that protected persons are entitled, in all circumstances, to *inter alia* respect for their persons, and that they shall at all times be humanely treated, and shall be protected especially against, *inter alia*, all acts of violence or threats thereof.

the states parties to refrain from interference with the right in question, but in addition as imposing positive obligations on states parties, including to amend legislation.⁹⁴⁵ Again, in Article 2(1) of the ICCPR each state party undertakes “to respect and to ensure” the rights recognised in the Covenant. Whilst the obligation to “respect” requires states parties to refrain from violating those rights, e.g. to refrain from practising torture, the obligation “to ensure” encompasses the obligation to take positive steps, including enactment of legislative changes.⁹⁴⁶ Furthermore, Article 2(2) of the ICCPR specifically requires states parties to take the necessary steps to adopt such legislative measures as may be necessary to give effect to the rights recognised in the Covenant. As regards the prohibition of torture, the Convention Against Torture specifically requires states parties to take, *inter alia*, effective legislative measures to prevent acts of torture within territory under their jurisdiction and to ensure that all acts of torture are offences under their criminal law.⁹⁴⁷

However, human rights norms in customary international law do not form part of the wider frameworks of which their treaty-based equivalents form part. For example, the prohibition of torture in customary international law does not form part of such wider framework as do the corresponding provisions in the ECHR, ICCPR and Convention Against Torture. Accordingly, it is not clear that the customary international law rule prohibiting torture would require a state to amend or repeal laws. *A fortiori*, it is not

⁹⁴⁵ See e.g. David Harris and Michael O’Boyle et al, *Harris, O’Boyle and Warbrick, Law of the European Convention on Human Rights* (3rd Ed., 2014, Oxford University Press, Oxford), pp. 21-23. And see also, at *ibid*, pp. 30-31, the authors’ discussion of compliance with the European Court’s judgment in *Tyler v. United Kingdom* (A 26 (1978); 2 E.H.R.R. 1), in which it was held that judicial corporal punishment violated Article 3 of the ECHR. The authors note that the Manx authorities brought the judgment to the attention of the local courts but did not legislate to abolish judicial corporal punishment for a further 15 years; that no such sentences were executed in the period prior to abolition; and that the Committee of Ministers of the Council of Europe considered that the action of the authorities in merely bringing the case to the attention of the local courts was sufficient to comply with the *Tyler* judgment. The authors comment, however, that “it would appear that the United Kingdom’s obligation to ‘secure’ the rights and freedoms in the Convention required that it go further and for the relevant law to be amended” (*ibid*, p. 31).

⁹⁴⁶ See Thomas Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’, in Louis Henkin (Ed.), *The International Bill of Rights, The Covenant on Civil and Political Rights* (1981, Columbia University Press, New York), p. 77; Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (2nd Revised Ed., 2005, N.P. Engel, Publisher, Kehl, Germany), pp. 37-38;

⁹⁴⁷ Articles 2 and 4, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984, Vol. 1465 United Nations Treaty Series, p. 85 (No. 24841)

clear that human rights norms in customary international law would require an occupying state to amend the laws of a foreign state which it is occupying.

The position might be otherwise as regards genocide and slavery. The American Law Institute, in its *Third Restatement of the Foreign Relations Law of the United States*, expressed the view that a state violates customary international law if it “fails to make genocide a crime”.⁹⁴⁸ That proposition presumably rests on the premise that the provision of the Genocide Convention which requires states parties to enact the necessary legislation to give effect to the Convention has passed into customary international law, at least as regards the criminalisation of genocide.⁹⁴⁹ The American Law Institute also asserts in the *Third Restatement* that states which are not parties to the conventions outlawing slavery and the slave trade “are bound by essentially the same obligations as a matter of customary law”.⁹⁵⁰ In the Slavery Convention of 1926 the states parties undertook, in respect of the territories under their sovereignty, jurisdiction, protection, suzerainty or tutelage, *inter alia* to bring about “progressively and as soon as possible” the complete abolition of slavery in all its forms.⁹⁵¹ The passage quoted from the *Third Restatement* therefore suggests that the Institute is of the view that states may be obliged by customary international law to enact legislation abolishing slavery. In any event, the Institute does not make similar claims as regards the other human rights in customary international law.

⁹⁴⁸ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (adopted 14 May 1986) (1987, American Law Institute Publishers, St. Paul, Minn.), Vol. 2, p. 163, § 702

⁹⁴⁹ Convention on the Prevention and Punishment of the Crime of Genocide, 1948, adopted by the U.N. General Assembly on 9 December 1948, Vol. 78 United Nations Treaty Series, p. 277 (No. 1021), Article V requires states parties to enact the necessary legislation to give effect to the Convention, and in particular to provide effective penalties for persons found guilty of genocide and the associated acts set out in the Convention. In Article I of the Convention the states parties confirm that genocide is a crime under international law which they undertake to prevent and punish. Article III sets out the acts which shall be punishable (genocide and conspiracy, incitement, attempt and complicity in relation to genocide). Note that the earlier U.N. General Assembly Resolution 96(I), entitled ‘The Crime of Genocide’, adopted 11 December 1946 (which is referred to in the preamble to the Convention) whilst affirming that genocide is a crime under international law, stated that the General Assembly merely “invites” Member States to enact the necessary legislation for the prevention and punishment of genocide.

⁹⁵⁰ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (adopted 14 May 1986) (1987, American Law Institute Publishers, St. Paul, Minn.), Vol. 2, p. 163, § 702

⁹⁵¹ Slavery Convention, signed at Geneva 25 September 1926, (1927) Vol. LX League of Nations Treaty Series, p. 253 (No. 1414), Article 2. Fischer notes that the states parties “merely bound themselves to abolish slavery at a future date. They themselves are to judge how soon it will be possible to abolish slavery in all its forms”: see Hugo Fischer, ‘The Suppression of Slavery in International Law – II’ (1950) Vol. 3 *The International Law Quarterly*, p. 503, at p. 511

Does it make a difference that human rights norms in customary international law which do not require a state to amend or repeal laws may also be rules of *jus cogens*? *Jus cogens* has been described as “substantive rules recognised to be of a higher status as such” and it has been observed that the concept “is based upon an acceptance of fundamental and superior values within the system”.⁹⁵²

The Vienna Convention on the Law of Treaties defines a peremptory norm (i.e. a rule of *jus cogens*) as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.⁹⁵³ The Convention provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.⁹⁵⁴ Furthermore, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.⁹⁵⁵

In addition to these rules relating to conflicts between treaties and rules of *jus cogens*, more generally, according to the International Law Commission’s Study Group on the Fragmentation of International Law, in the case of a conflict between a rule of *jus cogens* and another norm of international law, if it is not possible to interpret the latter in a manner consistent with the former, the rule of *jus cogens* will prevail.⁹⁵⁶

There is some uncertainty as to exactly which rules of international law are *jus cogens*. The International Law Commission’s Study Group on the Fragmentation of International Law concluded that “[t]he most frequently cited examples of *jus cogens* norms” are:

⁹⁵² Malcolm N. Shaw, *International Law* (8th Ed., 2017, Cambridge University Press, Cambridge) at p. 92 and p. 93

⁹⁵³ Article 53, Vienna Convention on the Law of Treaties, 1969

⁹⁵⁴ *ibid*

⁹⁵⁵ Article 64, Vienna Convention on the Law of Treaties, 1969

⁹⁵⁶ International Law Commission Study Group on ‘The Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report, adopted 17 July 2006, Conclusion (42), reproduced in Yearbook of the International Law Commission, 2006, Vol. II, Part Two, p. 176, at p. 184

“... the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination, apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination.”⁹⁵⁷

Brownlie stated that the “least controversial” examples of *jus cogens* are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy, and further, that there is “general agreement” regarding the *jus cogens* status of the rules relating to the use of force by states, self-determination and genocide.⁹⁵⁸ At the current time at least, it is unlikely that the rule requiring an occupying state to respect the existing law in occupied territory is a rule of *jus cogens*.⁹⁵⁹

⁹⁵⁷ International Law Commission Study Group on ‘The Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report, adopted 17 July 2006, Conclusion (33), reproduced in Yearbook of the International Law Commission, 2006, Vol. II, Part Two, p. 176, at p. 182. C.f. the detailed analytical study prepared by the Study Group, which stated that “the most frequently cited candidates for the status of *jus cogens*” included a list of rules which was the same as the rules later itemised in Conclusion (33) of the 17 July 2006 Report but with the variations that the right to self-determination was omitted, and crimes against humanity, the prohibition of piracy and the right to self-defence were included, whilst “the prohibition of hostilities directed at civilian population (“basic rules of international humanitarian law”)” was the formula used rather than the “basic rules of international humanitarian law applicable in armed conflict”: see ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission (Finalised by Martti Koskeniemi), 13 April 2006 (U.N. Doc. A/CN.4/L.682), p. 189, para. 374

⁹⁵⁸ Ian Brownlie, *Principles of Public International Law* (7th ed., 2008, Oxford University Press, Oxford), p. 511, p. 512. See now James Crawford, *Brownlie’s Principles of Public International Law* (9th Ed., 2019, Oxford University Press, Oxford), pp. 581-82 who has retained substantially unaltered Brownlie’s list of the least controversial examples of *jus cogens*, except that he refers only to “systematic forms” of racial discrimination, rather than the principle of racial non-discrimination, and omits the rules prohibiting piracy. Crawford also omits what was said by Brownlie about there being general agreement about the *jus cogens* status of the rules relating to the use of force, self-determination and genocide.

⁹⁵⁹ It is not among the examples of *jus cogens* norms given in the treatments of the subject in Malcolm N. Shaw, *International Law* (8th Ed., 2017, Cambridge University Press, Cambridge) at pp. 91-95 or James Crawford, *Brownlie’s Principles of Public International Law* (9th Ed., 2019, Oxford University Press, Oxford), pp. 581-83. As noted above, the International Law Commission’s Study Group on the Fragmentation of International Law concluded in its Report adopted on 17 July 2006 that “[t]he most frequently cited examples of *jus cogens* norms” included “basic rules of international humanitarian law applicable in armed conflict” but there was no suggestion that the rule in question was regarded as one of such basic rules. Furthermore, as noted above, in the equivalent passage of the detailed analytical study (Report of 13 April 2006) prepared by the Study Group, “the prohibition of hostilities directed at civilian population (“basic rules of international humanitarian law”)” was the formula used rather than the “basic rules of international humanitarian law applicable in armed conflict”, which does not suggest that the norm in question was there being contemplated. See also Kaiyan Homi Kaikobad, ‘Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004’ I.C.L.Q., p. 253 at p. 263 (“it appears that the [Hague Regulations] does not

The International Court of Justice has expressed the view, *obiter*, that the prohibition of genocide is a rule of *jus cogens*.⁹⁶⁰ The International Court of Justice has also stated that, in its opinion, the prohibition of torture has become a peremptory norm (*jus cogens*).⁹⁶¹

Despite the recognition that the prohibition of torture and the prohibition of slavery possess *jus cogens* status, at the current time it is probably correct to say that most of the rights contained in the ICCPR do not constitute norms of *jus cogens*.⁹⁶² Thus, the

constitute *jus cogens*"); Carcano (n 900) 180 (difficult to construe Article 43 as falling in the category of *jus cogens*).

⁹⁶⁰ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Judgment, [2006] I.C.J. Reports, p. 6, p. 32, para. 64

⁹⁶¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, [2012] I.C.J. Reports, p. 422, at p. 457 (para. 99) (cited in Shaw, *International Law* at p. 94). Judge Abraham in his separate opinion described this as a “mere *obiter dictum*”: Separate Opinion of Judge Abraham (*ibid*, at p. 477 (para. 27)). Similarly Judge *ad hoc* Sur, dissenting, stated that the reference in the Judgment to *jus cogens* was “entirely superfluous”, “does not contribute to the settlement of the dispute” and was an “*obiter dictum*”: Dissenting Opinion of Judge *ad hoc* Sur (*ibid*, at p. 606, para. 4). Shaw states that the examples which he gives of norms of *jus cogens*, including therefore the prohibition of torture, “are by no means uncontroverted” (Shaw, *International Law*, p. 94).

⁹⁶² See Rosalyn Higgins, ‘Derogations Under Human Rights Treaties’, (1976-1977) Vol. XLVIII B.Y.B.I.L. p. 281, at p. 282 (“neither the wording of the various human rights instruments nor the practice thereunder leads to the view that all human rights are *jus cogens*”); Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd Ed., 1984, Manchester University Press, Manchester), p. 217 (stating that, given that the ICCPR is geared only towards “achieving progressively” full realisation of the rights contained therein, “it would be unwise to take at its face value the suggestion that *jus cogens* embraces all human rights provisions”); Anthony Aust, *Modern Treaty Law and Practice* (3rd Ed., 2013, Cambridge University Press, Cambridge), p. 279 (“... it would be rash to assume – as some seem to have done – that all prohibitions (not just absolute ones) in human rights treaties are *jus cogens*”, and noting that a state can derogate from a number of rights, such as due process, in time of public emergency). See also Oscar Schachter, ‘International Law in Theory and Practice’ (General Course in Public International Law) (1982-V) Vol. 178 *Recueil des Cours* (Collected Courses of the Hague Academy of International Law), who states that the prohibitions of slavery, genocide, torture, mass murders, prolonged arbitrary imprisonment and systematic racial discrimination constitute norms of *jus cogens* because they are of concern to all states and protect interests which are not limited to a particular state or group of states (at p. 340 and p. 336). See also the American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (adopted 14 May 1986) (1987, American Law Institute Publishers, St. Paul, Minn.), Vol. 2, p. 167, which states that “Not all human rights norms are peremptory norms (*jus cogens*)” but that the prohibitions on (i) genocide; (ii) slavery and the slave trade; (iii) the murder or causing the disappearance of individuals; (iv) torture, or other cruel, inhuman, or degrading treatment or punishment; (v) prolonged arbitrary detention; and (vi) systematic racial discrimination are peremptory norms. See also Jochen Abr. Frowein, ‘*Jus Cogens*’ in Rudolf Bernhardt, *Encyclopedia of Public International Law*, Vol. III (1997, Elsevier Science B.V., Amsterdam), p. 65, at p. 67, who states that “[i]t ... seems clear that *fundamental* human rights form part of *jus cogens*...” (italics added), although he does not identify which human rights are fundamental. For further discussion of the question as to which human rights form part of *jus cogens*, see Alexander Orakhelashvili, *Peremptory Norms in International Law* (2006, Oxford University Press, Oxford), pp. 53-60; and Erika de

concept of *jus cogens* does not provide a general solution to the question of how conflicts between human rights norms and Article 43 of the Hague Regulations are to be resolved.

Because the Vienna Convention applies only to treaties concluded by states after the entry into force of the Convention with regard to such states⁹⁶³, Articles 53 and 64 of the Vienna Convention do not apply to the Hague Convention of 1907. However, Article 4 of the Vienna Convention makes clear that this non-retroactivity of the Vienna Convention is without prejudice to any rules contained in the Convention to which treaties would be subject under international law independently of the Convention. Thus, where rules contained in the Vienna Convention reflect or are reflected in customary international law, those rules of customary international law may apply to a treaty which was concluded prior to the entry into force of the Vienna Convention. The provisions of the Vienna Convention relating to *jus cogens* did not amount to a codification of existing customary international law.⁹⁶⁴ Thus, were the question of a conflict between Article 43 of the Hague Regulations and a rule of *jus cogens* to come before a court or tribunal, the question would arise whether the rules relating to *jus cogens* contained within the Vienna Convention have subsequently been reflected in customary international law. It is not clear that that is the case.⁹⁶⁵

Furthermore, it is to be expected that an international court or tribunal would be reluctant to find that the Hague Convention of 1907, containing as it does many important rules of the law of armed conflict, is void, yet that is the sanction stipulated in Articles 53 and 64 of the Vienna Convention, which in that respect are something of

Wet, 'Jus Cogens and Obligations Erga Omnes', in Dinah Shelton (Ed.), *The Oxford Handbook of International Human Rights Law* (2013, Oxford University Press, Oxford), at pp. 543-47

⁹⁶³ See Article 4, Vienna Convention on the Law of Treaties, 1969

⁹⁶⁴ See Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd Ed., 1984, Manchester University Press, Manchester), pp. 17-18, p. 222

⁹⁶⁵ As at 7 January 2020 there were 116 states parties to the Vienna Convention on the Law of Treaties: see the relevant page of the section of the web site maintained by the UN in relation to the status of treaties deposited with the UN Secretary-General, at

[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXIII-](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXIII-1&chapter=23&Temp=mtmsg3&clang=en)

[1&chapter=23&Temp=mtmsg3&clang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXIII-1&chapter=23&Temp=mtmsg3&clang=en). Last accessed: 07.01.20. This is as against a UN membership of 193 states. Aust states that "... there are no reported instances of Articles 53 or 64, as such, being seriously invoked": see Anthony Aust, *Modern Treaty Law and Practice* (3rd Ed., 2013, Cambridge University Press, Cambridge), p. 279.

a legal blunderbuss.⁹⁶⁶ Presumably, if Articles 53 and 64 were to be reflected in customary international law, the sanction would be the same. Nevertheless, as noted above, quite apart from the provisions of the Vienna Convention, according to the International Law Commission's Study Group on the Fragmentation of International Law, in the case of a conflict between a rule of *jus cogens* and another norm of international law, if it is not possible to interpret the latter in a manner consistent with the former, the rule of *jus cogens* will prevail.

Whether one applies the rules contained in Articles 53 or 64 of the Vienna Convention (or any equivalent in customary international law) or the more general proposition advanced by the ILC Study Group, it is necessary for there to be a conflict between a rule of *jus cogens* and another rule of international law which does not possess a *jus cogens* character.⁹⁶⁷ Both Articles 53 and 64 expressly refer to such a conflict and the applicability of the rules contained therein is premised on the existence of such a conflict. As regards the more general proposition put forward by the ILC Study Group, it should be noted that the International Court of Justice has held that the argument that, because *jus cogens* rules always prevail over any inconsistent rule of international law which is not of a *jus cogens* character, a particular *jus cogens* rule prevails over an inconsistent rule which is not of *jus cogens*, depends upon the existence of a conflict between the two rules in question.⁹⁶⁸ Thus the argument that a human rights norm of *jus cogens* should prevail over the norm requiring respect for the existing law contained in Article 43 on the basis of the former's *jus cogens* character, presupposes that there is a conflict between the two norms in question.

⁹⁶⁶ Article 53 provides that the *treaty* in question is void. Article 44(5) makes clear that where Article 53 applies, "no separation of the provisions of the treaty is permitted". Article 64 provides that the *treaty* in question becomes void and terminates. Article 71(2) provides that where a treaty becomes void and terminates under Article 64, the parties are released from any obligation further to perform the treaty.

⁹⁶⁷ The ILC Study Group on the Fragmentation of International Law defined a relationship of conflict between two norms as follows: "This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them.": see International Law Commission Study Group on 'The Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', Report, adopted 17 July 2006, Conclusion (2), reproduced in Yearbook of the International Law Commission, 2006, Vol. II, Part Two, p. 176, at p. 178

⁹⁶⁸ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, International Court of Justice, (2012) I.C.J. Reports, p. 99, at p. 140 (paras. 92-93). The Court found there to be no conflict between the putative rules of *jus cogens* being advanced before it (certain rules of the law of armed conflict) and the rules on state immunity.

However, as noted above, it is not clear that the human rights norms which form part of customary international law (with the possible exception of norms in relation to genocide and slavery) would require an occupying state to amend or repeal law in occupied territory. If the human rights norms which form part of customary international law do not require an occupying state to amend or repeal law in occupied territory, there is no conflict with the rule requiring respect for the existing law contained in Article 43 of the Hague Regulations and no role for the rules contained in Articles 53 or 64 of the Vienna Convention (or customary law equivalents), or the more general proposition put forward by the ILC Study Group.

In conclusion, at the current time most of the rights contained in the ICCPR do not constitute norms of *jus cogens* and the concept of *jus cogens* therefore does not provide a general solution to the question of how conflicts between human rights norms and the rule requiring respect for the existing law in occupied territory are to be resolved. Furthermore, it is not clear that those human rights norms which have passed into customary international law and acquired the status of *jus cogens* (with the possible exception of norms in relation to genocide and slavery⁹⁶⁹) require a state to amend or repeal laws, because human rights norms in customary international law do not form part of the wider frameworks of which their treaty-based equivalents form part and which require legislative changes where necessary. On that basis, if there is no conflict between a *jus cogens* human right norm in customary international law and the rule requiring an occupying power to respect the existing law in occupied territory, there is no role for the concept of *jus cogens* to play in causing the human rights norm in question to prevail over the rule requiring respect for existing law.

⁹⁶⁹ The practical effect of recognising a rule of customary international law obliging states, including occupying states in occupied territory, to abolish slavery may be somewhat limited by the fact that according to the Reporters for the *Third Restatement* (Professors Louis Henkin, Andreas F. Lowenfeld, Louis B. Sohn and Detlev F. Vagts), slavery has been outlawed by the constitutions or laws of “virtually all states”: see American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (adopted 14 May 1986) (1987, American Law Institute Publishers, St. Paul, Minn.), Vol. 2, p. 169 (under ‘Reporters’ Notes’). See also Paul Sieghart, *The Lawful Rights of Mankind, An Introduction to the International Legal Code of Human Rights* (1985, Oxford University Press, Oxford), p. 60, who states that “every state in the world “ has formally prohibited slavery and the slave trade in its domestic legislation. On that basis, where territory is occupied, it is likely that laws abolishing slavery already exist in the occupied territory.

Can the obligations of an *occupied* state under a human rights treaty provide a legal basis for an occupying state to change the existing law in occupied territory?

We will now turn to the question whether the obligations of an occupied state (as opposed to those of the occupying power) under a human rights treaty provide a legal basis for an occupying state to change the existing law in occupied territory. In this connection, we will first examine relevant legislation enacted by the CPA Administrator in Iraq.

A number of the Orders promulgated by the CPA Administrator made reference to international human rights norms. In a number of cases the CPA Administrator invoked international human rights norms or obligations by way of justification in the preamble to the Order and/or in the section of the Order which set out the purpose of the Order, as will be seen below.

In the early Orders, human rights were referred to in a very general way. Thus, in Order No. 1, De-Ba'athification of Iraqi Society and Order No. 5, Establishment of the Iraqi De-Baathification Council the preamble referred by way of justification to the CPA Administrator recognising that the Iraqi people had suffered "large scale human rights abuses" at the hands of the Ba'ath Party.⁹⁷⁰ Order No. 7, Penal Code, which *inter alia* suspended provisions of the Iraqi penal code, referred in the preamble to the CPA Administrator recognising that the previous regime had used certain provisions of the penal code as a "tool of repression", in violation of "internationally recognized human rights standards". The point being made here was apparently not that the human rights norms which the CPA was seeking to advance were contained in treaties to which the occupying powers, or Iraq, were parties, but that the international community generally had accepted those norms.

After a certain point, CPA legislation in the human rights field explicitly refers by way of justification to Iraq's human rights obligations, as opposed to those of the occupying powers:

⁹⁷⁰ This was one of a number of justifications referred to in the preambles. Another was the continuing threat to the security of the Coalition Forces which the Ba'ath Party was said to pose.

1. As noted above, Order No. 19, Freedom of Assembly suspended a number of provisions of the Iraqi Penal Code which were stated to “unreasonably restrict the right to freedom of expression and the right of peaceful assembly”. Section 1 of the Order, which sets out the purpose of the Order, states *inter alia* that the prohibition on freedom of assembly contained in the Iraqi penal code “is inconsistent with *Iraq’s* human rights obligations” (italics added) and that it was the intention of the CPA to remove such prohibition. Thus, here we have the occupation authorities expressly invoking Iraq’s human rights obligations, as opposed to the human rights obligations of the US and UK as occupying powers, as a justification for suspending provisions of the pre-occupation law of Iraq.
2. As shown above, Order No. 60, Ministry of Human Rights established a new Ministry of Human Rights. The preamble to the Order referred to the CPA Administrator,

“Recognizing the obligations assumed *by Iraq* under international human rights treaties to which it is a party, including the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child, ...” (italics added)

Again, the occupation authorities are here citing Iraq’s obligations under human rights treaties, rather than those of the occupying powers.

3. As noted above, Order No. 66, Iraq Public Service Broadcasting established the Iraqi Media Network as the public service broadcaster for Iraq, one of the functions of which was to promote freedom of expression. The preamble to the Order referred to the CPA Administrator,

“Recognizing the right of freedom of expression, including freedom of the press and the right to hold opinions without interference as

articulated in the International Covenant of Civil and Political Rights *to which Iraq is a party....*” (italics added)

The occupation authorities were therefore again here citing the fact that Iraq was a party to the ICCPR rather than the fact that the occupying powers were a party to it.

It can therefore be seen from the above that a number of pieces of human rights legislation enacted by the CPA expressly refer by way of justification to Iraq’s human rights obligations or to the fact that Iraq is a party to one or more human rights treaties. In contrast, none of the CPA’s legislation in the human rights field refers to the human rights obligations of the occupying powers or to the fact that those powers were party to a particular human rights treaty.

It is therefore apparent from a survey of the occupation legislation enacted in the human rights sphere that the occupation authorities did not seek to rely on the human rights obligations of the occupying powers as a justification for the legislation, but rather cited Iraq’s human rights obligations on a number of occasions.⁹⁷¹

We will now turn to the question whether the fact that Iraq, the occupied state, was a party to the ICCPR could provide a legal justification for the US, as occupying power, to depart from the pre-occupation law. As noted above, Order No. 19, Freedom of Assembly, suspended a number of provisions of the Iraqi Penal Code which were stated to “unreasonably restrict the right to freedom of expression and the right of peaceful assembly”. As also noted above, section 1 of the Order, which set out the purpose of the Order, stated *inter alia* that the prohibition on freedom of assembly contained in the Iraqi penal code “is inconsistent with *Iraq’s* human rights obligations” (italics added). The question arises whether, if the relevant provisions of the Iraqi Penal Code were

⁹⁷¹ C.f. Michael J. Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’, (2005) 99 A.J.I.L. 119, at p. 132, note 90, who notes that the CPA cited human treaties other than the Convention against Torture as a basis for its actions in various Orders, and gives Orders 19 and 60 as examples. However, Dennis does not make the point that these Orders, and also Order 66, *expressly* refer, respectively, to *Iraq’s* human rights obligations, to *Iraq’s* obligations under certain specified human rights treaties and to the fact that *Iraq* is a party to the ICCPR. This point needed to be made, as has been done here in the foregoing text.

inconsistent with Iraq's obligations under the ICCPR, that entitled the US and UK as occupying powers to suspend the offending provisions. As shown above, Article 43 of the Hague Regulations requires the occupying power to respect the laws in force in the occupied territory "unless absolutely prevented" from doing so. Looking solely at the question whether *Iraq's* obligations under the ICCPR provide a justification under Article 43 for suspending the relevant penal provisions, the issue, then, is whether the US and UK were absolutely prevented, by Iraq's obligations under the ICCPR, from respecting the existing laws.⁹⁷² This in turn depends upon whether Iraq's treaty obligations were binding upon the US and UK as a result of their occupation of Iraq. By definition, the US and UK were not bound by *Iraq's* obligations under the ICCPR. Therefore, the US and UK were not "absolutely prevented", by Iraq's obligations under the ICCPR, from respecting the existing law. For these reasons, the US approach of seeking to rely on the ICCPR, on the basis that the occupied state is a party to it, as a justification for amending the pre-occupation law, whilst simultaneously denying that its own obligations under the ICCPR are applicable in the occupied state (see below), is unconvincing.

That an occupying state is not legally bound by the occupied state's treaty obligations becomes clearer if we consider the example of a treaty to which the occupied state is a party but the occupying state is not. Guidance on the legal position of a state which is not party to a treaty vis-à-vis such treaty can be found in the Vienna Convention on the Law of Treaties of 1969. In this example, the occupying state is a "third State", which is defined in the Vienna Convention as "a State not a party to the treaty".⁹⁷³ The position of "third states" is dealt with in Part III, Section 4 of the Vienna Convention. Within that Section, Article 34 sets out what is described in its heading as a "General rule regarding third States". Article 34 provides that "[a] treaty does not create either obligations or rights for a third State without its consent". Section 4 contains a number of exceptions to this general rule but the occupation of the territory of a party is not one

⁹⁷² Note that as the provisions suspended were penal provisions, Article 64 of the Fourth Geneva Convention is also relevant. Article 64 provides that the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to its security or an obstacle to the application of the Fourth Geneva Convention. The suspension of the relevant provisions of the Iraqi penal code would probably contravene Article 64.

⁹⁷³ Article 2(1)(h)

of them. In this example, therefore, the fact that a third state has gone into occupation of the territory a party to a treaty, and thus become occupying power, does not of itself entail that the occupied state's treaty obligations become binding on it. If it is right that the occupied state's treaty obligations do not, as a result of the occupation, become binding on the occupying state, the occupying state is not "absolutely prevented" by the occupied state's treaty obligations from respecting the existing law in the occupied territory and cannot rely on those treaty obligations as a legal justification for amending the existing law.⁹⁷⁴

At this point we shall consider an argument put forward by Benvenisti. Benvenisti has argued that in certain circumstances the occupying state should regard itself as bound by treaty commitments entered into by the occupied state prior to the occupation. He states that:

“...it would seem that to the extent that public order and civil life depend on complying with formal international obligations ... that the ousted government had assumed prior to the occupation, the occupant should regard itself as bound by those obligations.”⁹⁷⁵

He then gives the example of the legislation enacted by the CPA to amend the Iraqi Labour Code which the CPA justified by referring to the fact that Iraq was a party to certain conventions adopted by the International Labour Organisation. CPA Order No. 89, Amendments to the Labor Code - Law No. 71 of 1987, which amended the Iraqi Labour Code, referred in its preamble to the fact that “Iraq has ratified International Labour Convention[s] 182 and 138, which requires signatory nations to take affirmative steps towards eliminating child labor”. It should be noted that Benvenisti states in the above quotation that the occupying power “should regard itself as bound” by the occupying state's treaty obligations, rather than that the occupying state *is* bound by the treaty obligations. Thus, from the words which he has chosen to use, it is apparent that he is not stating that the occupying power is actually bound by the

⁹⁷⁴ C.f. Carcano (n 900) 330, who argues that “[a]s an element of its sovereignty” the occupied state “should” have the exclusive right to decide when and how to implement its international obligations after the end of the occupation.

⁹⁷⁵ Eyal Benvenisti, *The International Law of Occupation* (2nd ed., 2012, Oxford University Press), p. 83

occupied state's treaty obligations. This is also clear from the qualification which he gives: he states that it is only "to the extent that public order and civil life depend on" complying with the treaties entered into by the occupied state that the occupying state should regard itself as bound. If an occupying state is legally bound by the occupied state's treaty obligations, it would be bound by a particular treaty obligation whether public order and civil life depended on complying with the obligation or not.

It may well make sense for an occupying state to continue to operate a treaty between the occupied state and its neighbours, for example, one on transboundary natural resources such as water (to give an example referred to by Benvenisti in the relevant section of his book), so that the occupying state can comply with its obligations to ensure public order and civil life (which is not the same thing as saying that the occupying state is legally bound by the treaty as such). However, the problem with the example, referred to by Benvenisti, of the CPA's legislation to amend the Iraqi Labour Code is that the occupying state is required by Article 43 of the Hague Regulations to respect the existing law unless absolutely prevented from doing so. If it is right that the occupying power is not legally bound by the treaties entered into by the occupied state, it is not "absolutely prevented", by reason of the occupied state's treaty obligations, from leaving the law in the occupied territory un-amended. Thus, the US and UK were not absolutely prevented, by reason of the fact that Iraq had ratified ILO Conventions 138 and 182, from leaving alone the Iraqi Labour Code.

Conclusion regarding whether the obligations of an occupied state under a human rights treaty provide a legal basis for an occupying state to change the existing law in occupied territory

As shown above, a number of pieces of human rights legislation enacted by the CPA expressly referred by way of justification to Iraq's human rights obligations or to the fact that Iraq is a party to one or more human rights treaties. Some of this legislation suspended provisions of existing Iraqi law.

However, as noted above, Article 43 of the Hague Regulations requires the occupying power to respect the laws in force in the occupied territory "unless absolutely prevented" from doing so. An occupying state does not become bound by the occupied

state's obligations under a human rights treaty. Therefore, the occupying state is not "absolutely prevented" by the obligations of the occupied state under a human rights treaty from respecting the existing law. For these reasons and the reasons set out in greater detail above, the argument that the fact that an occupied state is a party to a particular human rights treaty is a legal basis for the occupying state to amend the pre-occupation law is unconvincing.

Do the obligations of an Occupying Power under the ICCPR require it to amend pre-occupation law in occupied territory?

We will now consider whether the obligations of an occupying power under the ICCPR may require it amend pre-occupation law in occupied territory. Bound up with this question is the question whether an occupying power's obligations under the ICCPR apply in territory which it occupies.

The considered position of the US Government as regards the question whether the ICCPR applies in occupied territory can be seen from the periodic report under the ICCPR which it submitted to the Human Rights Committee in November 2005.⁹⁷⁶ This was the first periodic report under the ICCPR to be submitted by the US Government after the end of the occupation of Iraq. In the 2005 periodic report the United States referred to "the continuing difference of view" between the Human Rights Committee and the United States regarding the scope of the Covenant.⁹⁷⁷ The US Government reiterated its "firmly held legal view on the territorial scope of application of the Covenant", namely that "the obligations assumed by the United States under the Covenant apply only within the territory of the United States".⁹⁷⁸ Elsewhere in the report the US Government referred to the Committee's view that the Covenant may apply in respect of a person who is outside the territory of the relevant state party but who is within its jurisdiction, and commented by way of reply:

⁹⁷⁶ United States of America, Combined Second and Third Periodic Report, 28 November 2005 (U.N. Doc. CCPR/C/USA/3)

⁹⁷⁷ Ibid, p. 4, para. 3

⁹⁷⁸ Ibid, p. 4, para. 3 and p. 31, para. 130

“The United States continues to consider that its view is correct that the obligations it has assumed under the Covenant do not have extraterritorial reach.”⁹⁷⁹

The US Government set out in detail its position on the territorial scope of the Covenant in Annex I to the 2005 periodic report.⁹⁸⁰ In the Annex the US Government offered a detailed legal analysis of the scope of application of the Covenant. It will be recalled that Article 2(1) of the ICCPR provides that each state party to the Covenant undertakes to respect and to ensure to “all individuals within its territory and subject to its jurisdiction” the rights recognised in the Covenant. The essential point made by the US Government in the Annex is that the plain and ordinary meaning of the words “individuals within its territory and subject to its jurisdiction” is individuals who are simultaneously within the territory of the State Party and subject to its jurisdiction. The US Government states in the Annex:

“... based on the plain and ordinary meaning of its text, this Article [i.e. Article 2(1)] establishes that States Parties are required to ensure the rights in the Covenant only to individuals who are both *within* the territory of a State Party *and* subject to that State Party’s sovereign authority.”⁹⁸¹

In addition, the US Government argued in the Annex that the *travaux préparatoires* to the Covenant establishes that the words “within its territory” were included in Article 2(1) to make clear that states parties were not obliged to ensure the rights contained in the Covenant to persons outside their territories.⁹⁸² It is explained in the Annex that in

⁹⁷⁹ Ibid, p. 105, paras. 468-469

⁹⁸⁰ Ibid, p. 109, Annex I, Territorial Application of the International Covenant on Civil and Political Rights

⁹⁸¹ Ibid, p. 109. (This interpretation put forward by the US Government is essentially the same as that argued for in the same year by Michael J. Dennis, an Attorney-Adviser in the Office of the Legal Adviser within the U.S. Department of State, writing in a personal capacity: see Dennis (n 971) 122. That article appeared in the January 2005 edition of A.J.I.L. and therefore does not refer to the periodic report submitted by the US to the Human Rights Committee in November 2005.)

⁹⁸² Ibid, p. 110. (Again, the analysis of the *travaux préparatoires* put forward by the US Government in the 2005 report is similar to that argued for by Dennis (see Dennis (n 971) 123-24), except that whereas Dennis states that the preparatory work establishes that the words “within its territory” were added to make clear that States Parties were not obliged to ensure the Covenant rights in “territories under military occupation” (123), the US Government’s report takes a broader approach, stating that the words were added to Article 2(1) to make clear that States Parties were not obliged to ensure the Covenant rights “outside their territories”. It may be surmised that this difference of approach may be motivated, at least in part, by a desire on the part of the US Government to argue not only for the non-

1950 the draft text of Article 2 being considered by the Commission on Human Rights would have required each states party to ensure the rights contained in the Covenant to everyone “within its jurisdiction”. The United States, the Annex further explains, proposed the addition of the requirement that the individual also be “within its territory”. The Annex states that the US representative, Eleanor Roosevelt, had emphasised that the US was “particularly anxious” not to assume an obligation to ensure the rights contained in the Covenant to “citizens of countries under United States occupation”.⁹⁸³ The US Government then quotes in the Annex the explanation for the amendment given by Mrs Roosevelt at the time (at the meeting of the Commission held on 29 March 1950):

“The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying states in certain respects, but were outside the scope of legislation of those states. Another illustration would be leased territories; some countries leased certain territories from others for limited purposes, and there might be question of conflicting authority between the lessor nation and the lessee nation.”⁹⁸⁴

applicability of the Covenant to situations of occupation, as in Iraq, but also for its non-applicability in territory leased from another state, as in its Guantanamo military base, which is on territory leased from Cuba. It is here relevant to note that whereas the US Government includes in the long quotation from Eleanor Roosevelt (reproduced in the main text below) what she had to say about the position of leased territories, Dennis omits this from his rendering of the quotation, halting after what she had to say about occupied territory. It is also relevant to note that the Human Rights Committee had, by letter dated 27 July 2004, requested that the US Government provide information about the treatment of persons detained in Guantanamo, Iraq and other places of detention outside of the USA: United States of America, Combined Second and Third Periodic Report, 28 November 2005, CCPR/C/USA/3, p. 31, para. 129.)

⁹⁸³ Ibid, p. 110 citing Summary Record of the Hundred and Ninety-Third Meeting, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 193rd mtg. at 13, 18, U.N. Doc. E/CN.4/SR.193 at 13, 18 (1950) (Mrs Roosevelt); Summary Record of the Hundred and Ninety-Fourth Meeting, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 194rd mtg. at 5, 9, U.N. Doc. E/CN.4/SR.194 (1950)

⁹⁸⁴ Ibid, p. 110, citing Summary Record of the Hundred and Thirty-Eighth Meeting, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 138th mtg. at 10, U.N. Doc. E/CN.4/SR.138 (1950)

Mrs Roosevelt was not entirely accurate when she stated that persons within occupied territories were outside the scope of legislation of the occupying states. Whilst the population of an occupied territory are outside the scope of the domestic legislation of the occupying state, such as Acts of the U.S. Congress, they are within the scope of occupation legislation enacted by the occupation authorities installed by the occupying state, albeit that the scope of such occupation legislation is limited by the constraints imposed by public international law. Nevertheless, the passage quoted indicates that the intention behind the proposal to add the words “within its territory” was that a state party would not be obliged to ensure the rights contained in the Covenant to persons who were within its jurisdiction but were outside of its territory.

The Annex further states that several representatives spoke against the US amendment, arguing that states parties should ensure the rights contained in the Covenant to their citizens abroad as well as at home, but that the US amendment was adopted by 8-2 votes, with 5 abstentions.⁹⁸⁵ The Annex also refers to the fact that subsequently the US and other states defeated an attempt by France to delete the phrase “within its territory” at the 1952 session of the Commission, during which France and Yugoslavia argued that those words should be deleted because states parties should be required to guarantee the rights contained in the Covenant to their own citizens abroad.⁹⁸⁶ Finally, the Annex relates that the US and other states defeated a proposal by France and China to delete the phrase “within its territory” at the 1963 session of the General Assembly, during which a number of states again argued that the Covenant should protect the rights of citizens abroad.⁹⁸⁷

⁹⁸⁵ Ibid, pp. 110-11, citing Summary Record of the Hundred and Ninety-Fourth Meeting, at p. 11

⁹⁸⁶ Ibid, p. 111 and p.112, note 12, citing Draft International Convention on Human Rights and Measures of Implementation, U.N. ESCOR Hum. Rts. Comm., 8th Sess., Agenda Item 4, U.N. Doc. E/CN.4/L.161 (1952) (French amendment); Summary Record of the Three Hundred and Twenty-Ninth Meeting, U.N. ESCOR Hum. Rts. Comm., 8th Sess., 329th mtg., U.N. Doc. E/CN.4/SR.329 (1952), at 14 (vote rejecting amendment); Ibid, at 13 (P. Juvigny, representative of France); Ibid, at 13 (Branko Jevremovic, representative of Yugoslavia)

⁹⁸⁷ Ibid, p. 111 and p. 112, note 13, citing U.N. GAOR 3rd Comm., 18th Sess, 1259th mtg. (U.N. Doc. A/C.3/SR.1259 (1963)), at 30 (rejection of French and Chinese proposal); 1257th meeting (U.N. Doc. A/C.3/SR.1257 (1963)), at 1 (Mrs Mantaoulinos, representative of Greece); Ibid, at 10 (Mr Capotorti, representative of Italy); Ibid at 21 (Mr Combal, representative of France); 1258th mtg. (U.N. Doc. A/C.3/SR.1258 (1963)), at 29 (Mr Cha, representative of China); Ibid, at 39 (Mr Belaunde, representative of Peru)

The position of the US Government on the non-applicability of the ICCPR in respect of individuals outside of its territory, as enunciated in its 2005 periodic report to the Human Rights Committee, is inconsistent with the approach to the issue taken by the International Court of Justice the previous year in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Indeed, the US Government's position on the issue as set out in the periodic report is, in effect, a rejection of the approach taken by the Court to the issue in that Advisory Opinion. As noted above, the Court concluded in that Advisory Opinion that the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

The Human Rights Committee did not accept the US analysis to the effect that the Covenant does not apply to individuals who are outside of its territory. In its concluding observations on the US periodic report of November 2005, the Committee stated that it “notes with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of”, *inter alia*, its position that the Covenant does not apply to individuals who are within its jurisdiction but outside its territory.⁹⁸⁸ The Committee concluded that the US Government “should ... acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory...”. These comments by the Committee are in line with its previously articulated position that the Covenant applies in relation to the actions of Israel in the Occupied Palestinian Territories.⁹⁸⁹

As noted above, contrary to the position of the US Government as stated in its 2005 periodic report, the International Court of Justice held in its Advisory Opinion in the Wall case that where an occupying power is a state party to the ICCPR, the ICCPR is applicable in respect of acts done by the occupying power in occupied territory. We will now consider in greater detail the Court's reasoning for that conclusion in order to assess whether or not the US position is correct.

⁹⁸⁸ Human Rights Committee, Concluding observations of the Human Rights Committee, United States of America, 15 September 2006, CCPR/C/USA/CO/3, p. 2 (para. 10)

⁹⁸⁹ Human Rights Committee, Concluding observations of the Human Rights Committee, Israel, 21 August 2003, CCPR/CO/78/ISR, pp. 2-3 (para. 11)

The ICJ's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and the travaux préparatoires to Article 2, ICCPR

As noted above, the US Government argued in its 2005 periodic report that the “plain and ordinary meaning” of the phrase “... to ensure to all individuals within its territory and subject to its jurisdiction...” in Article 2(1) is that a state party is required to ensure the rights contained in the ICCPR only to individuals who are both within the territory of that state party and subject to that state party’s jurisdiction. However, the International Court of Justice held in its Advisory Opinion in the *Wall* case that, whilst that provision can be interpreted as covering only individuals who are both present within the relevant state’s territory and subject to its jurisdiction, “[i]t can also be construed as covering both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction”.⁹⁹⁰ The fact that a majority of the judges on the International Court of Justice held that, when looking at the text of Article 2(1) alone, there is a possible alternative interpretation of that text to the one adopted by the US Government indicates that the US interpretation is not the “plain and ordinary meaning”.

The Court referred to three reasons for its conclusion that the obligations of a state party to the ICCPR are applicable where it exercises jurisdiction outside its national territory. First, the Court considered the object and purpose of the ICCPR and found that “it would seem natural” that where states parties exercise jurisdiction outside of their national territory, they should be bound to comply with the provisions of the ICCPR.⁹⁹¹ Second, the Court found that the practice of the Human Rights Committee

⁹⁹⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, International Court of Justice, [2004] I.C.J. Reports, p. 136, at p. 179 (para. 108)

⁹⁹¹ *Ibid*, at p. 179 (para. 109). See also Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd Ed., N.P. Engel, Publisher, Kehl, 2005), pp. 43-44, who argues for a teleological interpretation under which the ICCPR would apply to the actions of occupation forces on foreign territory.

was consistent with that interpretation.⁹⁹² Third, the Court found that the *travaux préparatoires* confirmed that interpretation.⁹⁹³

The Court reached the opposite conclusion in relation to the interpretation of the *travaux préparatoires* in respect of Article 2(1) of the Covenant to that reached by the US in its 2005 periodic report. The Court held that the *travaux préparatoires* confirms the interpretation that the Covenant is applicable where a state party exercises jurisdiction outside of its national territory.⁹⁹⁴ Which of these diametrically opposed interpretations is correct? The Court justified its conclusion on this point as follows:

“These [i.e. the *travaux préparatoires*] show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.”⁹⁹⁵

The US Government did not in its periodic report of 2005 specifically engage with this conclusion of the Court. It is a weakness in the analysis set out in Annex I of the US periodic report of 2005 that, although the Court had made certain claims about what “the drafters of the Covenant” intended, the US report does not analyse what was said during the drafting process by representatives of those states other than the US which also supported the adoption and retention of the reference to “territory”.⁹⁹⁶ Similarly, Dennis, in his discussion of the *travaux préparatoires*, does not refer to the specific conclusion of the Court in the *Wall* case on the *travaux* and nor does he describe the

⁹⁹² Ibid, citing *López Burgos v. Uruguay*, Case No. 52/79; *Lilian Celiberti de Casariego v. Uruguay*, Case No. 56/79; *Montero v. Uruguay*, Case No. 106/81. The Court also went on to cite the concluding observations of the Committee in 1998 and 2003 in relation to Israel’s periodic reports, which included the conclusion that the ICCPR applies in the Occupied Palestinian Territories: see *ibid*, pp.179-80 (para.110).

⁹⁹³ *Ibid*

⁹⁹⁴ *Ibid*, at p. 179 (para. 109)

⁹⁹⁵ *Ibid*

⁹⁹⁶ The US report merely notes in an endnote that “Several states maintained that the United States position was the most sound and logical one” and cites the speeches made by the representatives of Chile and Uruguay without quoting what they said on this point or analysing it: see United States of America, Combined Second and Third Periodic Report, 28 November 2005 (U.N. Doc. CCPR/C/USA/3), p.112, note 10. No reference is made to what the representative of the UK had to say on the point.

views of states other than the US which also supported the adoption and retention of the reference to “territory” in Article 2(1).⁹⁹⁷ Whilst it is true that it was a US proposal to add the reference to “territory” in Article 2(1), it is necessary to consider also the views expressed by the representatives of states other than the US which also supported the adoption and retention of the reference to “territory” in order to consider whether or not the Court’s conclusion in relation to the intention of the drafters of the Covenant was correct. In considering below whether the Court’s conclusion on this point was correct, the views expressed by those other states will be examined.

The Court cited two documents from the *travaux préparatoires* in support of this conclusion. By way of background, the US had proposed an amendment to the clause of the draft International Covenant on Human Rights (as it then was) which defined the scope of its application. Article 2(1) of the draft had provided *inter alia* that each state party undertook to ensure “to all individuals within its jurisdiction” the rights defined in the Covenant.⁹⁹⁸ The US proposed that the words “territory and subject to its” be added immediately prior to “jurisdiction” so that Article 2(1) would provide *inter alia* that each state party undertook to ensure “to all individuals within its territory and subject to its jurisdiction” the rights defined in the Covenant.⁹⁹⁹ Among the documents which form part of the *travaux préparatoires* but which are not referred to by the Court is the Summary Record of the meeting on 29 March 1950 at which the US representative, Mrs Roosevelt, introduced the US amendment and explained the purpose behind it.¹⁰⁰⁰ The relevant quotation from that speech is that which was reproduced in the US Government’s periodic report to the Human Rights Committee of November 2005 and is set out above. That statement by the US representative is not consistent with the conclusion drawn by the Court in relation to the *travaux*

⁹⁹⁷ See Dennis (n 971) 123-24. As to the former, Dennis merely refers to “The preparatory work cited by the Court” and the relevant paragraph number of the Court’s Advisory Opinion (*ibid*, p. 123 and note 33).

⁹⁹⁸ Report of the Fifth Session of the Commission on Human Rights, 23 June 1949 (U.N. Doc. E/1371, E/CN.4/350), p. 28

⁹⁹⁹ Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation, 4 January 1950 (U.N. Doc. E/CN.4/353/Add.1), pp. 2-3, citing communication from the US Secretary of State to the Secretary-General received 3 January 1950. See also Memorandum by the Secretary-General, Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles, 22 March 1950 (U.N. Doc. E/CN.4/365), p.14

¹⁰⁰⁰ Commission on Human Rights, Summary Record of the Hundred and Thirty-Eighth Meeting, held on 29 March 1950 (U.N. Doc. E/CN.4/SR.138), pp. 10-11

préparatoires in that it indicates that the purpose of the US amendment, as communicated to the other members of the Commission, was to make it clear that a state party's obligations would not apply in respect of persons outside of its territory, including territory which it occupies.

The first document cited by the Court is the Summary Record of the meeting of the Commission on Human Rights held on 16 May 1950.¹⁰⁰¹ That document records that at that meeting, the representative of the USA, Mrs Roosevelt, reiterated her call for the adoption of a US amendment in accordance with which the words "territory and subject to its" would be inserted immediately prior to "jurisdiction".¹⁰⁰² The US amendment was adopted by 8 votes to 2 with 5 abstentions.¹⁰⁰³ The record of the meeting on 16 May 1950 shows that when commencing the resumed discussion on the proposed US amendment, Mrs Roosevelt explained that the amendment would limit the application of the Covenant only to persons within its territory and subject to its jurisdiction and stated that,

"By this amendment the United States Government would not, by ratifying the covenant, be assuming an obligation to ensure the rights recognized in it to the citizens of countries under United States occupation."¹⁰⁰⁴

Although the Court cites this document, it does not mention this statement by the US representative or address it. Clearly, it does not fit with the Court's interpretation of the document.

Mrs Roosevelt went on to justify the US amendment in broader terms than the objection to applying the Covenant in occupied territory. She argued that it was not possible for any nation to guarantee the fundamental rights specified in the draft Covenant to its nationals resident abroad.¹⁰⁰⁵ She gave the specific example that a state

¹⁰⁰¹ Commission on Human Rights, Summary Record of the Hundred and Ninety-Fourth Meeting, held on 16 May 1950 (U.N. Doc. E/CN.4/SR.194)

¹⁰⁰² *Ibid.*, p. 5

¹⁰⁰³ *Ibid.*, p. 11, para. 46

¹⁰⁰⁴ *Ibid.*, p. 5

¹⁰⁰⁵ *Ibid.*, p. 7. This was said in response to a statement by the representative of Lebanon that, as recorded in the summary record, "... a nation should guarantee fundamental rights to its citizens abroad as well as at home" (*ibid.*). Mrs Roosevelt, for the US, replied that, again according to the

party could not guarantee a fair trial, within the terms of the draft Covenant, to its nationals in another country.¹⁰⁰⁶ Such a state party, she stated, would only be able to make diplomatic representations.

The US was one of a number of states which during the drafting process expressed the view that it was not possible for states to guarantee to persons outside their territory the rights contained in the draft Covenant. At the meeting of the Commission on 16 May 1950, the representative of Uruguay supported the US amendment on grounds that,

“Since no State could provide for judges, police, court machinery, etc in territories outside its jurisdiction, it was evident that States could effectively guarantee human rights only to those persons residing within their territorial jurisdiction.”¹⁰⁰⁷

For that reason, the Uruguayan representative stated, his delegation would support the US amendment to insert the reference to “territory” into Article 2(1). Thus, Uruguay did not believe that it was possible for states parties to guarantee the rights contained in the Covenant to persons who were resident outside their territory. Furthermore, it is evident that the understanding of the Uruguayan delegation was that adding the word “territory” to Article 2(1) meant that the obligations of a state party would not apply in respect of persons residing outside its territory.

The UK expressed a similar view. At a meeting of the Commission on 10 June 1952 – the Summary Record of which was, again, not referred to by the Court - the UK representative stated that he took the same view as the US representative regarding an amendment by France which proposed to delete the words “within their territory”.¹⁰⁰⁸ The US representative had stated at that meeting that she was unable to accept the French amendment and that the Commission had considered the expression “within their territory” necessary “so as to make it clear that a State was not bound to enact

summary record, “...it was not possible for any nation to guarantee such rights under the terms of the draft covenant to its nationals resident abroad” (ibid).

¹⁰⁰⁶ Ibid, p. 8

¹⁰⁰⁷ Ibid, p. 8

¹⁰⁰⁸ Commission on Human Rights, Summary Record of the Three Hundred and Twenty-Ninth Meeting, held on 10 June 1952 (U.N. Doc. E/CN.4/SR.329), p. 12 and p. 10

legislation in respect of its nationals outside its territory”.¹⁰⁰⁹ The UK representative went on to state:

“A State could hardly undertake to ensure to nationals outside its territory the rights set out in the covenant since, for example, there were cases in which such nationals were for certain purposes under its jurisdiction, but the authorities of the foreign country concerned would intervene in the event of one of them committing an offence.”¹⁰¹⁰

Accordingly the UK representative stated that he would vote against the French proposal to delete the words “within its territory” (see below).¹⁰¹¹ Thus the approach of the UK was that it was not possible for a state party to undertake to ensure to nationals outside its territory the rights set out in the covenant. Furthermore, it is evident that the UK understanding of the formula “within its territory and subject to its jurisdiction” was not that presence in the territory and being subject to the jurisdiction were two alternative bases for the application of the draft Covenant, but that an individual had to be both present within the territory of a state party and subject to its jurisdiction for the obligations of that state party to apply.

It is also noteworthy that, at the meeting on 16 May 1950, the representative of Yugoslavia, who made clear that he could not accept the US amendment, stated that “... the inclusion of both the word “territory” and the word “jurisdiction” would in fact reduce the obligations of the States as regards the protection of human rights.”¹⁰¹² Again, this indicates that in the understanding of the Yugoslavian representative being “within the territory” and being “subject to the jurisdiction” were not alternative bases for the application of the covenant but, rather, both of those requirements had to be met in order for the obligations of a state party to apply in respect of an individual.

¹⁰⁰⁹ Commission on Human Rights, Summary Record of the Three Hundred and Twenty-Ninth Meeting, held on 10 June 1952 (U.N. Doc. E/CN.4/SR.329), p. 10

¹⁰¹⁰ Commission on Human Rights, Summary Record of the Three Hundred and Twenty-Ninth Meeting, held on 10 June 1952 (U.N. Doc. E/CN.4/SR.329), p. 12

¹⁰¹¹ *Ibid*, p. 12

¹⁰¹² Commission on Human Rights, Summary Record of the Hundred and Ninety-Fourth Meeting, held on 16 May 1950 (U.N. Doc. E/CN.4/SR.194), p. 7

The second document cited by the Court is an annotated version of the draft ICCPR produced by the UN Secretary-General.¹⁰¹³ It should be noted that that document states that an attempt had been made therein “to present analytical summaries *of the debates* on all the articles, setting out the main points of substance and important questions of drafting” which had been raised (italics added).¹⁰¹⁴ The relevant part of that document, cited by the Court, is as follows:

“There was some discussion on the desirability of retaining the words “within its territory”. It was thought that a State should not be relieved of its obligations under the covenant to persons who remained within its jurisdiction merely because they were not within its territory. For example, States parties would have to recognise the right of their nationals to join associations within their territories even while they were abroad. There might also be a contradiction between the obligation laid down in paragraph 1 and that laid down in some of the other articles, particularly article 12, paragraph 2(b), which provided that anyone should be free to enter his own country. On the other hand, it was contended that it was not possible for a State to protect the rights of persons subject to its jurisdiction when they were outside its territory; in such cases, action would be possible only through diplomatic channels.”¹⁰¹⁵

It is important to note that most of this passage is taken up in summarising the views of those states and their representatives who were in favour of *deleting* the phrase “within its territory” or who expressed doubts about it. It is the last sentence of the passage quoted (commencing with the words “On the other hand...”) which summarises the views of those states and representatives who expressed support for retention of the words “within its territory”. This interpretation of the passage quoted is reasonably clear from a careful reading of it - note for example, the reference to a possible “contradiction” between the then current text of the relevant article and another article of the draft Covenant, a point against retention of the words “within its territory”.

¹⁰¹³ Draft International Covenants on Human Rights, Annotation, prepared by the Secretary-General, 1 July 1955 (U.N. Doc. A/2929)

¹⁰¹⁴ *Ibid*, p. 2 (Explanatory Note)

¹⁰¹⁵ *Ibid*, p. 48 (Ch. V, para. 4)

Furthermore, this interpretation is confirmed by the records of the meetings of the Commission on Human Rights. The Summary Record of the meeting of the Commission on Human Rights held on 10 June 1952 - which is again not referred to by the Court - records that, in relation to a proposal by France that the words “within its territory” be deleted, the representative of France had explained that the purpose of that proposed amendment was “to ensure that all individuals under a country's jurisdiction enjoyed equal rights, whether or not they were within the national territory of that country”.¹⁰¹⁶ The representative of France further stated that the current text, which included the words “within its jurisdiction”, “did not commit States in regard to their nationals abroad”. The representative of France had then given the specific example, also referred to in the passage from the Secretary-General’s memorandum quoted above, that *if the words “within its territory and” were deleted* states “would have to recognize the right of their nationals to join associations within their territory, even while abroad”.¹⁰¹⁷ It may be noted that the Secretary-General’s memorandum adopts this example almost word-for-word as it was stated by the representative of France, but without the condition precedent that the words “within its territory and” would first need to be deleted.

Furthermore, the reference in the Secretary-General’s memorandum to a possible contradiction between the wording “within its territory and subject to its jurisdiction” and the freedom of the individual to enter his own country contained in Article 12(2)(b) was a point which had previously been made by the representative of Lebanon at the Commission’s meeting on 16 May 1950. Lebanon had pointed to that conflict as a reason why the US-proposed formula, “within its territory and subject to its jurisdiction”, was “open to doubt”.¹⁰¹⁸

Thus what is stated in the passage quoted from the Secretary-General’s memorandum about it being thought that “a State should not be relieved of its obligations under the

¹⁰¹⁶ Commission on Human Rights, Eighth Session, Summary Record of the Three Hundred and Twenty-Ninth Meeting, held on 10 June 1952 (U.N. Doc. E/CN.4/SR.329), p. 13. The French amendment was rejected by 10 votes to 4, with 4 abstentions (see p. 14). The French amendment was to delete the words “within its territory and” from what was then Article 1(1): see ‘France: amendment to article 1’, 19 May 1952 (U.N. Doc. E/CN.4/L.161)

¹⁰¹⁷ Ibid

¹⁰¹⁸ p. 7. Lebanon suggested a further amendment, which was not taken up.

covenant to persons who remained within its jurisdiction merely because they were not within its territory” is actually a description of the thinking of those states which either tried unsuccessfully to delete the words “within its territory” or expressed doubts about the use of that phrase without further amendment.

Furthermore, the final sentence of the passage quoted from the Secretary-General’s memorandum indicates that states and representatives which were in favour of retaining the words “within its territory” simply did not believe that it was possible for a state to protect the rights of persons who were subject to its jurisdiction when they were outside of its territory. There is no suggestion here of a more nuanced position in accordance with which those states and representatives were only concerned about the assertion of rights that do not fall within the competence of the state of origin. For these reasons this document, and in particular the passage quoted, are not authority for the proposition in respect of which they were cited by the Court. It appears therefore that the Court misunderstood the passage quoted.

In summary, the *travaux préparatoires* reveals that:

- (i) The US made clear at meetings of the Commission on Human Rights that the purpose of its proposal to add the words “territory and subject to its” was to make clear that a state party was not obliged to ensure the rights contained in the Covenant to persons outside of its territory.¹⁰¹⁹ The US representative specifically referred to the fact that under the formula “within its territory and subject to its jurisdiction” a state party would not be obliged to ensure the rights contained in the Covenant to persons in territory occupied by the state party.¹⁰²⁰

¹⁰¹⁹ See the quotation from the speech by the US representative, Mrs Roosevelt, at the meeting on 29 March 1950 which is quoted by the US Government in its 2005 periodic report under the ICCPR and which is set out in the main text above. The next sentence in Mrs Roosevelt’s speech, which is omitted from the quotation reproduced in the 2005 periodic report, is “In the circumstances, it seemed advisable to resolve those ambiguities by including the words “territory and subject to its ...” in article 2, paragraph 1.”: see Commission on Human Rights, Summary Record of the Hundred and Thirty-Eighth Meeting, held on 29 March 1950, at pp. 10-11 (U.N. Doc. E/CN.4/SR.138). See also Commission on Human Rights, Summary Record of the Hundred and Ninety-Third Meeting, held on 15 May 1950 (U.N. Doc. E/CN.4/SR.193), p. 13 (para. 53); and Commission on Human Rights, Summary Record of the Hundred and Ninety-Fourth Meeting, held on 16 May 1950 (U.N. Doc. E/CN.4/SR.194), pp. 5-6

¹⁰²⁰ *ibid*

- (ii) It does not appear that any other state which spoke in favour of adoption of the US amendment, or its retention, referred to the need to exclude occupied territory from the scope of application of the ICCPR as an argument for doing so.
- (iii) However, the representatives of the UK and Uruguay stated that they agreed with the US that it was not possible for a state party to undertake to ensure the rights contained in the Covenant to persons outside its territory.¹⁰²¹ It is evident that these states understood that the effect of the inclusion of the phrase “within its territory” was that a state party was not obliged to guarantee the rights contained in the Covenant to persons outside its territory. Therefore, although the UK and Uruguay did not refer to the position in occupied territory, on their understanding of the effect of the addition of the word “territory”, a state party which was occupying territory would not be obliged to guarantee the rights contained in the Covenant to persons in the occupied territory.
- (iv) No state which expressed support for the adoption of the US amendment, or its retention, stated that under the formula “within its territory and subject to its jurisdiction” a state party would be obliged to ensure the rights contained in the ICCPR to persons who were outside of its territory but subject to its jurisdiction.¹⁰²²
- (v) States which argued for deletion of the reference to “territory” gave cogent examples of rights which could be exercised by persons who were outside of the territory of a state party. France pointed out that if the reference to “territory” was deleted a state party would have to recognise the right of its nationals while abroad to join associations within the territory of that state

¹⁰²¹ See the quotation from the speech of the representative of Uruguay at the meeting on 16 May 1950, and that from the speech of the UK representative at the meeting on 10 June 1952, both set out in the main text above.

¹⁰²² See the meetings of the Commission on Human Rights held on 29 March 1950 (U.N. Doc. E/CN.4/SR.138), 15 May 1950 (U.N. Doc. E/CN.4/SR.193), 16 May 1950 (U.N. Doc. E/CN.4/SR.194), 9 June 1952 (U.N. Doc. E/CN.4/SR.328), 10 June 1952 (U.N. Doc. E/CN.4/SR.329)

party.¹⁰²³ France also gave the example that a state party would have to observe in relation to its citizens abroad the principle of non-retroactivity of penal law in cases of trial *in absentia*.¹⁰²⁴ Subsequently, in the General Assembly (Third Committee), the delegate of Italy, in arguing for the deletion of “within its territory and”, pointed out that there were certain rights which were recognised in the draft Covenant and which could be exercised by persons who were not physically present in the territory of the state, for example, the right of free access to the courts and the right to be free from arbitrary interference with one’s family.¹⁰²⁵ However, these attempts to delete the reference to “territory” were defeated.

In conclusion, the interpretation of Article 2(1) adopted by the US in its 2005 periodic report finds strong support in the *travaux préparatoires*. The US, UK and Uruguay believed that it was not possible for a state party to undertake to ensure the rights contained in the ICCPR to individuals who were outside of its territory and intended that for a state party to be obliged to ensure those rights to an individual it would be a requirement that the individual would have to be both within the territory of that state party and subject to its jurisdiction.

Buergenthal had argued that “within its territory and subject to its jurisdiction” should be read as a “disjunctive conjunction” so that a state party is obliged to ensure the rights set out in the Covenant to all individuals within its territory and to all individuals subject to its jurisdiction.¹⁰²⁶ In support of this interpretation Buergenthal claimed that the *travaux préparatoires* indicate that attempts to delete “within its territory” from Article 2(1) “failed for other reasons”.¹⁰²⁷ He stated that the reason for retaining the reference to territory was that it was feared that otherwise it might be construed that a

¹⁰²³ Commission on Human Rights, Summary Record of the Three Hundred and Twenty-Ninth Meeting, held on 10 June 1952 (U.N. Doc. E/CN.4/SR.329), p. 13

¹⁰²⁴ *Ibid*, p. 13. The phrase used in the English language Summary Record is “judgment by default” but presumably trial *in absentia* is being referred to.

¹⁰²⁵ United Nations General Assembly, Official Records, Eighteenth Session, Third Committee, 1257th Meeting, 8 November 1963 (U.N. Doc. A/C.3/SR.1257), p.238 (Mr Capotorti). The delegate of Italy suggested that instead the words “territorial and personal” be inserted before “jurisdiction”.

¹⁰²⁶ Thomas Buergenthal, ‘To Respect and to Ensure: State Obligations and Permissible Derogations’, in Louis Henkin (Ed.), *The International Bill of Rights, The Covenant on Civil and Political Rights* (1981, Columbia University Press, New York), p. 72 at p. 74

¹⁰²⁷ *Ibid*

state party would be required to protect individuals who are subject to its jurisdiction but resident abroad against violations perpetrated by the state of residence. This, argument misses the point that states such as the US, UK and Uruguay argued for retention of the reference to territory because they evidently believed that it addressed the problem that it was not possible for a state party to ensure the rights contained in the Covenant to persons resident in other states. That only makes sense if they believed that, as a result of the inclusion of the reference to territory, a state party was only obliged to ensure the rights to an individual who was both within its territory and subject to its jurisdiction. If states such as the US, UK and Uruguay intended that the references to territory and jurisdiction should be read as a “disjunctive conjunction”, as argued by Buerghenthal, the inclusion of the reference to territory would have done nothing to address the problem of a state party being obliged to ensure the rights contained in the Covenant to persons resident outside of its territory. Thus the *travaux préparatoires* do not support the “disjunctive conjunction” approach.

An important qualification to the ICJ's approach to the extraterritorial application of the ICCPR

It is important to note that, even if one accepts the Court's interpretation of Article 2(1) of the ICCPR, contained within that interpretation there appears to be a potentially important qualification to the extraterritorial application of the ICCPR. As noted above, the Court stated that the *travaux préparatoires* show that the drafters of the ICCPR “intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence”. On the basis of the Court's interpretation of the *travaux préparatoires*, it would appear that where an individual is outside of the territory of a state party, that state party is not obliged to ensure to that individual rights which do not fall within the competence of that state party.

Given the Court's decision to hold that a state party is obliged to ensure the rights contained in the ICCPR to individuals who are outside of its territory but subject to its jurisdiction, such an exception in respect of rights which do not fall within the competence of the state party is clearly necessary. As we have seen, the US representative on the Commission on Human Rights, Mrs Roosevelt, referred to the

example that a state party could not guarantee a fair trial to one of its citizens resident abroad (where the trial is taking place in the state of residence) and could only make representations to the state in which the trial was taking place. Thus the US is not in a position (i.e. is not competent) to guarantee to one of its citizens living in France a fair trial in the French legal system.

In making these observations about the drafters' intentions in relation to rights which are outside the competence of a state party, the Court was referring to the specific case of persons residing abroad asserting rights vis-à-vis their state of origin. However, that case can be seen as an example of a more general problem: where an individual is outside of the territory of a state party, not all of the rights possessed by that individual fall within the competence of that particular state party. Another manifestation of this problem is the case of territory occupied by a state party, because international law places limits on the competence of an occupying state.

Clearly, on the basis of the Court's approach to the extraterritorial application of the ICCPR, where an individual in occupied territory is detained by the armed forces of the occupying power, the right not to be subjected to torture (Article 7) and the right to life (Article 6) will be within the competence of the occupying state. Again, where soldiers of the occupying state shoot an individual (who has not been detained) in occupied territory, the right not to be arbitrarily deprived of his/her life will be within the competence of the occupying state.

However, if it is right that the obligation of a state party to ensure the rights contained in the ICCPR does not apply in relation to rights which are outside of its competence, individuals in the occupied territory will not be entitled to assert against the occupying state rights that do not fall within the competence of that state. In particular, on that basis it can be argued that an individual in occupied territory would not be able to assert against the occupying state that his or her rights were being breached by legislation enacted prior to the occupation, because, as a result of Article 43 of the Hague Regulations, the occupying state is not competent to repeal or amend the pre-occupation legislation (unless it is absolutely prevented from leaving it intact). Nor, on the basis of the argument being advanced here, could it be claimed that the occupying state is absolutely prevented from leaving the offending legislation in place as a result

of its obligations under the ICCPR. For once it is accepted that a state party's obligations under the ICCPR only apply outside of its territory in relation to rights which are within its competence, it cannot be claimed that it is absolutely prevented by its obligations under the ICCPR from leaving the law in question in place. It remains to be seen whether the International Court of Justice would accept such an argument.

The UK's position on the extra-territorial application of the ICCPR following the occupation of Iraq

The UK also rejected the extra-territorial application of the ICCPR, subject to limited exceptions, in its next periodic report to the Human Rights Committee following the occupation of Iraq, its previous periodic review having taken place prior to the occupation. In the periodic report which it submitted to the Committee in November 2006 the UK Government stated of the obligation contained in Article 2 of the Covenant:

“The Government considers that this obligation, as the language of article 2 of ICCPR makes very clear, is essentially an obligation that States Parties owe territorially, i.e. to those individuals who are within their own territory and subject to the jurisdiction of the United Kingdom.”¹⁰²⁸

Referring to the suggestion by the Committee in its General Comment No. 31 that the ICCPR is applicable outside of the territory of a State Party¹⁰²⁹, the UK Government stated that it considered that the ICCPR “can only have such effect in very exceptional cases”.¹⁰³⁰ Noting the statement by the Committee in that General Comment that a State Party must respect and ensure the rights laid down in the Covenant “to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”, the UK Government stated that “the language adopted by

¹⁰²⁸ United Kingdom of Great Britain and Northern Ireland, Sixth Periodic Report, 1 November 2006, CCPR/C/GBR/6, 18 May 2007, pp. 46-47 (para. 59(a))

¹⁰²⁹ Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted 29 March 2004, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10

¹⁰³⁰ United Kingdom of Great Britain and Northern Ireland, Sixth Periodic Report, 1 November 2006, CCPR/C/GBR/6, 18 May 2007, p. 47 (para. 59(b))

the Committee may be too sweeping and general”. Nevertheless, the UK Government conceded that it was prepared to accept that in those circumstances its obligations under the Covenant could in principle apply to persons who are taken into custody by British forces and held in British-run military detention facilities outside of the UK.¹⁰³¹

Although the UK Government did not specifically address in its report the question of the applicability of the ICCPR in territory occupied by a State Party, the implication of what is stated in the report is that the UK Government does not accept that a State Party’s obligations under the ICCPR are applicable throughout territory which it occupies, and that it only accepts that those obligations may apply in military detention centres run by the State Party in such occupied territory.

The Committee, in the concluding observations which it adopted in 2008, responded that the UK Government “should state clearly that the Covenant applies to all individuals who are subject to its jurisdiction or control”.¹⁰³² The UK Government wrote to the Committee subsequently stating:

“The UK’s human rights obligations are primarily territorial, owed by the government to the people of the UK. The UK, therefore, considers that the ICCPR applies within a state’s territory. The UK considers that the Covenant could only have effect outside the territory of the UK in very exceptional circumstances. We are prepared to accept that the UK’s obligations under the ICCPR could in principle apply to persons taken into custody by UK forces and held in military detention facilities outside the UK. However, any such decision would need to be made in the light of the specific circumstances and facts prevailing at the time.”¹⁰³³

¹⁰³¹ Ibid

¹⁰³² Human Rights Committee, Concluding observations, United Kingdom of Great Britain and Northern Ireland, Adopted 18 July 2008, CCPR/C/GBR/CO/6, 30 July 2008, p. 4 (para. 14)

¹⁰³³ Information received from the United Kingdom of Great Britain and Northern Ireland on the implementation of the concluding observations of the Human Rights Committee, 11 August 2009, CCPR/C/GBR/CO/6/Add. 1, published 3 November 2009, p. 6 (para. 24). The UK Government reiterated its basic approach in its next periodic report, which it submitted to the Council in 2012, stating “...we still hold that the UK’s human rights obligations are primarily territorial, owed by the government to the people of the UK and that the UK considers that the Covenant could only have effect outside the territory of the UK in very exceptional circumstances”: United Kingdom of Great Britain and Northern

It can be seen that the UK, by accepting the possibility that the ICCPR may apply in military detention facilities outside the UK, has taken a slightly more pragmatic approach than the US did in the position which it outlined to the Human Rights Committee (see above). However, the UK position does not appear to be coherent: if, as the UK Government suggested in its periodic report of 2006 (see above), Article 2 of the ICCPR makes clear that the obligations of a State Party are owed to individuals who are simultaneously in the territory of the State Party and subject to its jurisdiction, it is difficult to see how those obligations are owed in a military detention facility situated outside the territory of the State Party concerned, for example in territory occupied by the State Party. In any event, as shown above the implication of the position outlined by the UK Government is that it does not accept that its obligation under the ICCPR apply in territory which it occupies, except possibly in military detention facilities run by UK forces.

It may be observed that the position taken by the UK in relation to the applicability of the ICCPR in its communications to the Human Rights Committee in 2007 and 2009 is in contrast to the approach taken by the UK, in the military manual on the law of armed conflict which it issued in 2004, as regards the applicability of the European Convention on Human Rights. That manual (as slightly amended in 2011) states, under the heading “Administration”:

“The occupying power assumes responsibility for administering the occupied area.... Further, an occupying power is also responsible for ensuring respect for applicable human rights standards in the occupied territory. Where the occupying power is a party to the European Convention on Human Rights, that Convention may, depending on the circumstances, be applicable in the occupied territories.”¹⁰³⁴

Ireland, Seventh Periodic Report, 29 December 2012, CCPR/C/GBR/7, published 29 April 2013, p. 97, para. 562

¹⁰³⁴ The Joint Service Manual of the Law of Armed Conflict (2004 Edition, promulgated as directed by the Chiefs of Staff) (Joint Service Publication 383), p. 282 (para. 11.19), citing the decision of the European Court of Human Rights in *Banković and others v. Belgium and others* (see main text below). The original version of this paragraph of the manual contained the additional words “the standards of” before “that Convention”. Those words were deleted by Amendment 5 dated 16 August 2011 (p. 4).

Thus the UK manual recognises that its obligations under the European Convention may be applicable in territory which it occupies (depending on the circumstances). However, no such statement is made in the UK manual regarding the applicability of the ICCPR. The questions which arises from the passage quoted is ‘what are the “applicable human rights standards in the occupied territory”?’

It is also worth considering the position of Australia, which, as noted above, was not recognised by the UN Security Council to be one of the occupying powers in Iraq but which contributed military forces to the invasion and occupation of that country. The military manual on the law of armed conflict which Australia issued in 2006 (after the occupation of Iraq) expressly stated that pre-occupation laws which are inconsistent with human rights may be amended:

“If aspects of existing laws are inconsistent with fundamental human rights ... those laws may be altered.”¹⁰³⁵

However, the Australian manual does not explain the basis on which human rights are applicable in such a situation. Is it on the basis of the treaty obligations of the occupied state or those of the occupying state? In the absence of any reference to the occupied state’s treaty obligations, it seems most likely that it was Australia’s human rights treaty obligations which the authors of the manual had in mind, although that is not entirely clear. Furthermore, the question arises as to what is meant by “fundamental human rights”? Does this mean that only some of the rights contained in, for example the ICCPR, may result in the alteration of existing laws in case of inconsistency? Does it mean “non-derogable rights” or something broader? In any event, the manual at least points to the potential implications of the applicability of human rights treaties in occupied territory for the legislative power of the occupying state, even if it is vague as to the basis or scope.

¹⁰³⁵ Australian Defence Doctrine Publication 06.4 - Law of Armed Conflict, 11 May 2006, para. 12.15

State practice other than that of the occupying powers in Iraq

It is useful to consider practice from another occupying power, albeit not in the case of Iraq, which is also a state party to the ICCPR, namely Israel. Israel, like the US, does not accept that a state party's obligations under the ICCPR are applicable outside of the state's territory. In the periodic report which it submitted to the Human Rights Committee in 2013, Israel stated that "in line with basic principles of treaty interpretation, Israel believes that the Convention, which is territorially bound, does not apply, nor was it intended to apply, to areas beyond a state's national territory".¹⁰³⁶ Israel therefore did not accept that the ICCPR applied in the Occupied Palestinian Territory. This is, again, inconsistent with the conclusion on this point reached by the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and indeed amounts to a rejection of the Court's ruling on that point. The Human Rights Committee expressed its regret that Israel continues to maintain its position on the non-applicability of the Covenant in the Occupied Territories.¹⁰³⁷

Having considered the response of Israel to the conclusion reached by the Court in the *Wall* case in relation to the application of the ICCPR in occupied territory, it is also relevant to consider the response to this finding by other states parties to the ICCPR. Within days of the Advisory Opinion being issued, the UN General Assembly adopted a resolution in which it stated that it "*Demands* that Israel, the occupying Power, comply with its legal obligations as mentioned in the advisory opinion".¹⁰³⁸ The legal obligations of Israel mentioned in the Advisory Opinion included its obligations under

¹⁰³⁶ Israel, Fourth Periodic Report, 14 October 2013, CCPR/C/ISR/4, published 12 December 2013, p. 12, para. 48, under the heading "Non-application of the Covenant in the Occupied Palestinian Territory". In that connection, the Israeli Government also stated in the report that the Law of Armed Conflict and Human Rights Law remain distinct systems of law and apply in different circumstances (ibid, pp. 11-12, para. 47).

¹⁰³⁷ Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Israel, Adopted 28 October 2014, CCPR/C/ISR/CO/4, published 21 November 2014, p. 2, para. 5

¹⁰³⁸ UN General Assembly Resolution ES-10/15, entitled 'Advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, including in and around East Jerusalem', adopted 20 July 2004 (U.N. Doc. A/RES/ES-10/15), operative paragraph 2. Italics in original.

human rights treaties, including the ICCPR.¹⁰³⁹ In the preamble to the resolution the General Assembly specifically “recalled” the ICCPR, as well as other treaties referred to by the Court in the Advisory Opinion.¹⁰⁴⁰ The resolution was adopted by 150 votes to 6, with 10 abstentions.¹⁰⁴¹ Of the states voting for the adoption of the resolution, 125 were states parties to the ICCPR, which represented the great majority of the total number of states parties at that time (152). Only three of the states which voted against the resolution were states parties to the ICCPR at the time: Israel, the USA and Australia. Five of the states which abstained on the resolution were states parties to the ICCPR at the time.¹⁰⁴²

Subsequently, the General Assembly has adopted resolutions on Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including one such resolution in December 2018, which “[d]emands that Israel, the occupying Power”, cease *inter alia* policies and actions in the Occupied Palestinian Territory “that violate the human rights of the Palestinian people”, including the killing of civilians and arbitrary detention and imprisonment of civilians, “and that it fully respect human rights law”.¹⁰⁴³ In the preamble to the resolution the General Assembly specifically recalled the ICCPR, the ICESCR and CRC and stated that it was “affirming that these human rights instruments must be respected in the Occupied Palestinian Territory, including East Jerusalem”. The resolution again demanded that Israel comply with its legal obligations under international law as mentioned in the Advisory Opinion in the *Wall* case.¹⁰⁴⁴ This resolution was adopted

¹⁰³⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, International Court of Justice, [2004] I.C.J. Reports, p. 136, at p. 180 (para. 111), pp. 191-92 (para. 134), pp. 193-94 (para. 137), p. 197 (para. 149)

¹⁰⁴⁰ The other treaties referred to in the preamble are the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Hague Regulations of 1907 and Geneva Convention (IV)

¹⁰⁴¹ U.N. General Assembly, *Official Records*, Tenth Emergency Special Session, 27th Meeting, 20 July 2004 (U.N. Doc. A/ES-10/PV.27), p. 6

¹⁰⁴² Cameroon, Canada, El Salvador, Uganda and Uruguay

¹⁰⁴³ U.N. General Assembly, Resolution 73/99, entitled “Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem”, 7 December 2018 (U.N. Doc. A/RES/73/99), operative paragraph 2. (For similar resolutions, see U.N. General Assembly Resolution 60/107, entitled ‘Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem’, adopted 8 December 2005 (U.N. Doc. A/RES/60/107) and U.N. General Assembly Resolution 72/87, entitled ‘Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem’, adopted 7 December 2017 (U.N. Doc. A/RES/72/87))

¹⁰⁴⁴ Operative paragraph 12

by 152 votes to 8, with 13 abstentions.¹⁰⁴⁵ Five of the states which voted against the resolution were states parties to the ICCPR: Israel, the USA, Australia, Canada and the Marshall Islands.

These General Assembly resolutions suggest that there is an emerging consensus among the great majority of state parties to the ICCPR that where a state party to the Covenant occupies territory, its obligations under the Covenant will be applicable in the territory occupied. However, the question needs to be considered: what is the legal significance of these resolutions for the interpretation of Article 2 of the ICCPR? Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969 provides that in the interpretation of a treaty there shall be taken into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. Even if these resolutions of the General Assembly can be regarded as “subsequent practice in the application of the treaty” by states parties to the ICCPR for the purpose of Article 31(3)(b) of the Vienna Convention, the fact that other states parties such as the US and Israel have made clear their disagreement, prevents these resolutions from amounting to such practice “which establishes the agreement of the parties” regarding the interpretation of the treaty. Under Article 31(3)(b), it is necessary that all parties to the relevant treaty have either engaged in the practice in question or agreed with it, expressly or tacitly.¹⁰⁴⁶ Thus, this undoubtedly extensive practice by states parties does not establish the applicability of the ICCPR in occupied territory because of the disagreement of other states parties such as the US and Israel.

In that regard it is relevant to note that the US has stated in the military manual which it issued in 2015 that its obligations under the ICCPR do not apply outside of its territory and, specifically, do not apply in territory which it occupies, citing details of the *travaux préparatoires*.¹⁰⁴⁷ The US position would therefore appear to have become entrenched.

¹⁰⁴⁵ U.N. General Assembly, *Official Records*, 48th Plenary Meeting, 7 December 2018 (U.N. Doc. A/73/PV.48), pp. 10-11. States parties to the ICCPR which voted for adoption of the resolution included the UK, France, Germany, Russia and Turkey.

¹⁰⁴⁶ See Richard K. Gardiner, *Treaty Interpretation* (2nd Ed., 2015, Oxford University Press, Oxford), p. 267, p. 268; Anthony Aust, *Modern Treaty Law and Practice* (3rd Ed., 2013, Cambridge University Press, Cambridge), pp. 215-16

¹⁰⁴⁷ Department of Defense [USA], *Law of War Manual* (June 2015, Updated December 2016), pp. 24-25 (§ 1.6.3.3) and pp. 758-59 (§ 11.1.2.6)

Conclusion in relation to whether the obligations of an Occupying Power under the ICCPR require it to amend pre-occupation law in occupied territory

Following the occupation of Iraq, in its periodic report to the Human Rights Council of 2005 the US Government offered a detailed legal analysis of the scope of application of the ICCPR, in part based on the *travaux préparatoires*. Its essential conclusion for present purposes was that a state party is not obliged under Article 2(1) of the ICCPR to respect and ensure the rights set out in the Covenant to individuals in territory which it occupies. The position taken by the US is inconsistent with the approach to the issue taken by the International Court of Justice the previous year in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

Given that the US stance on the non-applicability of the ICCPR in occupied territory finds strong support in the *travaux préparatoires*, the US is perhaps unlikely to be influenced by the Court's Advisory Opinion in the Wall case on this point, at least in the foreseeable future. That the US position appears to have become entrenched is indicated in the 'Law of War Manual' which it issued in 2015.

General Assembly resolutions on the subject of human rights in Occupied Palestinian Territory suggest that there is an emerging consensus among the great majority of states parties to the ICCPR that where a state party to the Covenant occupies territory, its obligations under the Covenant will be applicable in the territory occupied. However, the fact that other states parties such as the US and Israel have made clear their disagreement, prevents these resolutions from amounting to subsequent practice "which establishes the agreement of the parties" regarding the interpretation of the treaty, within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. For this reason this extensive practice by states parties does not establish the applicability of the ICCPR in occupied territory.

As regards the Court's interpretation of Article 2(1) of the ICCPR in the Wall case, contained within that interpretation there appears to be a potentially important qualification to the extraterritorial application of the ICCPR. On the basis of the

Court's interpretation of the *travaux préparatoires*, it can be argued that where an individual is outside of the territory of a state party, that state party is not obliged to ensure to that individual ICCPR rights which do not fall within the competence of that state party. Such an approach suggests that an individual in occupied territory would not be able to assert against the occupying state that his or her rights were being breached by legislation enacted prior to the occupation, because, as a result of Article 43 of the Hague Regulations, the occupying state is not competent to repeal or amend the pre-occupation legislation (unless it is absolutely prevented from leaving it intact). Nor, on the basis of the argument being advanced above, could it be claimed that the occupying state is "absolutely prevented" from leaving the offending legislation in place as a result of its obligations under the ICCPR. For once it is accepted that a state party's obligations under the ICCPR only apply outside of its territory in relation to rights which are within its competence, it cannot be claimed that it is absolutely prevented by its obligations under the ICCPR from leaving the law in question in place. It remains to be seen whether the International Court of Justice would accept such an argument. More generally, it remains to be seen how the International Court would deal with the question whether an occupying power is obliged to change the existing law in occupied territory in order to make it comply with the occupying power's obligations under the ICCPR.

For the above reasons, it is far from clear that the ICCPR poses a viable challenge to the requirement that an occupying state, subject to limited exceptions, must respect the existing law and institutions of the occupied territory.

It may be noted that, given the positions taken by the US and Israel, there is a tendency by states which are, or have recently been, occupying powers to deny the applicability of the ICCPR outside of their sovereign territory, with the corollary that it does not apply in occupied territory. Consequently, whilst a number of writers have argued that an occupying power is entitled to repeal or amend pre-occupation laws which violate human rights law, in practice the unwillingness of occupying powers to accept the applicability in occupied territory of their obligations under the ICCPR entails that they are not able to avail of this alleged legal basis for repealing or amending the laws in occupied territory.

The European Convention on Human Rights as a possible legal basis for changing the existing law in occupied territory

We will now turn to the question whether the European Convention on Human Rights requires an occupying power which is a state party to it to repeal or amend (pre-occupation) laws in occupied territory which are incompatible with the rights set out in the Convention.

Such conflicts between the Convention rights and pre-occupation law are particularly likely to arise where the territory occupied is that of a non-Western state which is not a party to the European Convention. One could take the example of laws which criminalise homosexual acts between consenting adults in private. Such laws continue to exist in many non-Western states.¹⁰⁴⁸ However, the European Court of Human Rights has held, in the context of the territory of a state party to the Convention, that “the very existence” of legislation which criminalised homosexual acts breached Article 8 of the Convention.¹⁰⁴⁹ The application of such a standard to occupied territory outside of the Council of Europe area is further complicated by the fact that in *Dudgeon* the European Court, in considering whether the legislation in question could be justified under Article 8(2) of the Convention, stated that it could not overlook the fact that the great majority of member states of the Council of Europe had repealed such legislation.¹⁰⁵⁰ In that regard, it is submitted that it would be inappropriate, when applying Article 8 (or other rights) in relation to indigenous legislation in occupied territory outside the area of the Council of Europe, to base a decision on the “European

¹⁰⁴⁸ According to Aengus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia 2017: a world survey of sexual orientation laws: criminalisation, protection and recognition* (International Lesbian, Gay, Bisexual, Trans and Intersex Association, 12th Ed., May 2017, Geneva), 71 states and territories continue to criminalise same-sex sexual activity. The report includes within that number Iraq (citing Article 404, Penal Code, 1969) (Ibid, p. 39).

¹⁰⁴⁹ *Dudgeon v. The United Kingdom*, Application No. 7525/76, Judgment, 22 October 1981, para. 41; *Norris v. Ireland*, Application No. 10581/83, Judgment, 26 October 1988, para. 38. In the *Dudgeon* case the evidence before the Court was that between 1972 and 1980 there had been no prosecutions in Northern Ireland in respect of homosexual acts in private between consenting adult males aged 21 years and over who were capable of giving valid consent (paras. 30, 41 and 60). In other words, in those years there had been no prosecutions in Northern Ireland for such an act which would not have been an offence in England and Wales, such acts between consenting adult males aged 21 years having been decriminalised there in 1967 (para. 30). In the *Norris* case the Court referred to Government statistics which showed that there had been no prosecutions in Ireland in “the relevant period” in respect of homosexual acts between consenting adults in private (paras. 19-20).

¹⁰⁵⁰ para. 60. See also the judgment in the *Norris* case, para. 46.

consensus” on the issue in question. For example, in relation to legislation in Iraq (whilst occupied), or another Arab or predominantly Muslim state (outside of the Council of Europe) under occupation, it could be argued that it would be more logical and appropriate to examine whether there is a consensus among the members of the League of Arab States or the Organisation of Islamic Cooperation.

Furthermore, it would need to be considered how any such obligation upon the occupying power to amend pre-occupation law which was inconsistent with the European Convention is compatible with the occupying state’s duty under Article 43 of the Hague Regulations to respect the laws in force in occupied territory unless absolutely prevented from doing so.

In considering whether the ECHR provides a legal basis for changing the pre-occupation law in occupied territory, it is important to bear in mind that the Convention is a *regional* human rights treaty. As noted above, the European Court of Human Rights held, in *Loizidou v. Turkey*, that the ECHR was applicable to the actions of a state party in the territory of another state which it occupied and over which it had effective control. However, as Greenwood observed shortly after the judgment on the merits was given, that case concerned the situation where a state party to the Convention (Turkey) was occupying the territory of another state party to the Convention (the Republic of Cyprus) and the Court had yet to be called upon to deal with a case in which a state party to the Convention was occupying the territory of a “non-European state”.¹⁰⁵¹

Subsequently, in *Banković v. Belgium and Others*, the Court was required to deal with a case relating to military action against the territory of a state which was not a state party to the Convention.¹⁰⁵² More specifically the case related to a NATO airstrike against a building in Belgrade in the Former Republic of Yugoslavia, which was not a state party to the Convention. The applicants were the relatives of persons killed, and in one instance was a person injured, as a result of the building in question being hit by

¹⁰⁵¹ Greenwood, ‘Rights at the Frontier’ (n 902) 281

¹⁰⁵² *Banković and Others v. Belgium and Others*, Application No. 52207/99, European Court of Human Rights (Grand Chamber), Decision of 12 December 2001, Reports of Judgments and Decisions, 2001-XII, p. 333

a missile launched from a NATO aircraft. In its decision on the admissibility of the case, the Court referred to “the special character of the Convention as a constitutional instrument of *European* public order for the protection of individual human beings” (italics in original) and to “the essentially regional vocation of the Convention system”.¹⁰⁵³ The Court went on to state:

“In short, the Convention is a multilateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY [Federal Republic of Yugoslavia] clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States....”¹⁰⁵⁴

These statements seemed to raise the prospect that the obligations of a state party under the Convention would not be applicable in territory occupied by such state party if that territory was not that of another state party.

However, as noted above, in *Al-Skeini v. The United Kingdom*, the European Court of Human Rights held that Article 2 (the right to life) of the European Convention on Human Rights was applicable to the acts and omissions of UK military forces in Iraq during the occupation of that country by the US and UK. The precise basis on which obligations under the Convention were held to be applicable during that occupation, and the implications, will be considered below. First we will look at how judges in the domestic legal proceedings instituted by the applicants dealt with the issues with which we are concerned.

The issue of the greater potentiality for conflict between ECHR rights and the law in non-Western states under occupation by a state party to the ECHR, and that of the potential conflict between obligations under the ECHR and that under Article 43 of the Hague Regulations, were discussed in the judgments given by the House of Lords in the domestic UK proceedings in *Al-Skeini and others v. Secretary of State for*

¹⁰⁵³ *Ibid*, at p. 358 (§ 80)

¹⁰⁵⁴ *Ibid*, pp. 358-59 (§ 80)

Defence.¹⁰⁵⁵ Lord Rodger noted that the case-law of the European Court on the interpretation of the Convention rights constituted “a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world”.¹⁰⁵⁶ Lord Rodger held that the idea that the UK was obliged to secure all of the rights contained in the European Convention, as interpreted by the European Court, “in the utterly different society of southern Iraq” was “manifestly absurd”.¹⁰⁵⁷ Furthermore, he warned, if the European Court recognised an occupying state as having jurisdiction based on its effective control of territory of a state which was not a contracting party to the European Convention, it would run the risk of being accused of “human rights imperialism”.¹⁰⁵⁸

In a similar vein, Lord Brown stated that a state having effective control of territory outside the area of the Council of Europe is “unlikely ... to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population”.¹⁰⁵⁹ Furthermore, Lord Brown explicitly referred to the obligations of an occupying power under Article 43 of the Hague Regulations, and in particular to that to respect the laws in force in the occupied territory unless absolutely prevented from doing so.¹⁰⁶⁰ As regards the claimants’ argument that an occupying power necessarily has effective control of the occupied area and is therefore responsible for securing there all the Convention rights and freedoms, Lord Brown held that.

“... the occupants’ obligation is to respect ‘the laws in force’, not to introduce laws ... such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied.”¹⁰⁶¹

Wilde criticised the approach of the House of Lords in *Al-Skeini*, in relation to the “human rights imperialism” and Article 43 points, on the ground that they are based on

¹⁰⁵⁵ *Al-Skeini and others v. Secretary of State for Defence*, House of Lords, Judgment, 13 June 2007, [2007] UKHL 26

¹⁰⁵⁶ *Ibid*, para. 78

¹⁰⁵⁷ *Ibid*

¹⁰⁵⁸ *ibid*

¹⁰⁵⁹ *Ibid*, para. 129

¹⁰⁶⁰ *Ibid*

¹⁰⁶¹ *Ibid*

the erroneous assumption that the rights contained in the ECHR always apply in an identical way such that there cannot be “differential application”, as between occupied territory and the national territory of the occupying state, “which might accommodate cultural differences”.¹⁰⁶² He argues that the rights contained in the ECHR are intended to be interpreted in different ways in different contextual situations.¹⁰⁶³ The rights should be interpreted with “[f]lexibility and contextualization”, he argues, through the operation of the limitation clauses, derogation provisions and the “margin of appreciation” doctrine applied by the European Court.¹⁰⁶⁴

Furthermore, Wilde argued that the interpretation of rights under the ECHR would also be affected by other rules of international law, including humanitarian law and the right of self –determination, which he considers to be of particular relevance.¹⁰⁶⁵ As to the latter, he notes that an occupying state is obliged to respect the right of the population of the occupied territory to freely determine their political, economic and social situation.¹⁰⁶⁶ Consequently, he argues that an occupying state’s obligations under the ECHR must be interpreted in the light of that obligation and that this requires a different interpretation of the obligations under the ECHR as they apply in occupied territory as compared to how they should be interpreted to apply in its national territory.¹⁰⁶⁷

Wilde concludes that the ECHR rights, and the impact on them of other areas of international law, in particular the right of self-determination, “may require the State to

¹⁰⁶² Ralph Wilde, ‘Complementing Occupation Law? Selective Judicial Treatment of the Suitability of Human Rights Norms’, (2009) Vol. 42 Israel Law Review p. 80, at p. 89, p. 93 and p. 99

¹⁰⁶³ Ibid, p. 93

¹⁰⁶⁴ Ibid, p. 93. See also Tobias Thienel, ‘The ECHR in Iraq, The Judgment of the House of Lords in *R (Al-Skeini) v. Secretary of State for Defence*’, (2008) 6 Journal of International Criminal Justice, p. 115 who argues that even where the European Court has held that a particular interference with a right cannot be justified as protecting public morals in one Contracting State, it may nevertheless find on the facts that the same interference is justified in another state, including one under occupation such as Iraq (at pp. 122-23). He further states that “Cultural differences ... can still be accommodated within the law of the Convention” and that such differences need not entail that the ECHR rights should not apply at all in occupied territory (p. 123). However, he accepts that it is a possibility that in some cases it may not be possible to reconcile the local culture in the occupied territory with the requirements of the ECHR. In particular, he accepts that elements of Sharia law may be incompatible with the ECHR (ibid, note 60).

¹⁰⁶⁵ Ralph Wilde, ‘Complementing Occupation Law? Selective Judicial Treatment of the Suitability of Human Rights Norms’, (2009) Vol. 42 Israel Law Review p. 80, at p. 94 and p. 96

¹⁰⁶⁶ Ibid, p. 96

¹⁰⁶⁷ Ibid, p. 96

be deferential to and accommodating of local cultural norms...”.¹⁰⁶⁸ Accordingly, he also concludes that it is “far from clear” that application of the ECHR “necessarily” places occupying states in a position where they violate the duty under Article 43 of the Hague Regulations to respect the existing law.¹⁰⁶⁹ He therefore questions the adoption by the House of Lords in *Al-Skeini* of a “blanket denial” of the application of the ECHR to occupied territory belonging to a state which is not a state party to the ECHR.¹⁰⁷⁰

However, the suggestion that the ECHR be applicable in occupied territory belonging to a state which is not a state party to the ECHR on the basis that it could be interpreted differently there so as to be “deferential to and accommodating of local cultural norms” runs into practical problems. First, on that approach there would presumably be occasions where, upon dealing with applications from the occupied population, the European Court of Human Rights would be required to depart from the Court’s established case law, perhaps on issues such as the rights of homosexuals or transsexuals¹⁰⁷¹, if they are to be deferential to and accommodating of “local cultural norms”, as suggested by Wilde. Judges of the Court may find that an unattractive prospect and be reluctant to engage in such manner of operating. Thus, Wilde’s approach, if adopted, would place judges in a difficult position.

Second, because the judges of the Court are appointed from the states parties to the ECHR, where territory which belongs to a state which is not party to the ECHR is occupied, as in Iraq, it is unlikely that any of the judges on the Court will have lived in the occupied territory and it may therefore be difficult for them to appreciate the “local cultural norms” in the occupied territory so as to be able to accommodate them. Judges sitting in courts in the national territory of an occupying state which is a state party to the ECHR, before whom legal proceedings might first be brought, are likely to be in

¹⁰⁶⁸ Ibid, p. 99

¹⁰⁶⁹ Ibid, pp. 99-100

¹⁰⁷⁰ Ibid, p. 100

¹⁰⁷¹ See e.g. *Y.Y. v. Turkey*, Application No. 14793/08, European Court of Human Rights (Second Section), Judgment, 10 March 2015 (refusal of access to gender reassignment surgery violated right to respect for private life contained in Article 8, ECHR). On the right of a transsexual to marry a member of his/her “new opposite sex” under Article 12, ECHR, see David Harris, Michael O’Boyle *et al*, *Harris O’Boyle and Warbrick, Law of the European Convention on Human Rights* (3rd Ed., 2014, Oxford University Press, Oxford), pp. 758-59, citing *Christine Goodwin v. The United Kingdom*, Application No. 28957/95, European Court of Human Rights (Grand Chamber), Judgment, 11 July 2002.

similar difficulties. For these reasons, the approach suggested by Wilde appears to be impractical and unrealistic.

In any event, for the reasons set out above and other reasons, the House of Lords held in *Al-Skeini* that the European Convention did not apply to the acts and omissions of UK forces in occupied Iraq in relation to the claimants' deceased relatives, other than in the case of that of the sixth appellant, who was detained in a UK military detention facility at the time of his death.¹⁰⁷² Five of the six claimants in those domestic proceedings then made an application to the European Court of Human Rights.

In order to understand the significance and implications of the judgment of the European Court of Human Rights in *Al-Skeini and others v. The United Kingdom*, it is necessary to understand the basis on which the Court held that the European Convention was applicable to the acts and omissions of UK forces in Iraq. The Court was called upon to interpret and apply Article 1 of the European Convention which provides as follows:

“The High Contracting shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

The Court observed that the exercise of “jurisdiction” is a necessary condition for a Contracting State to be held responsible for acts or omissions which are imputable to it and which are alleged to violate the rights and freedoms contained in the Convention.¹⁰⁷³ The Court affirmed that a state’s jurisdictional competence under Article 1 is “primarily territorial” and that acts of the Contracting States performed outside their territories may constitute an exercise of jurisdiction within the meaning of Article 1 “only in exceptional cases”.¹⁰⁷⁴ The Court identified in its case-law two

¹⁰⁷² Per Lord Brown, at paras. 105-132; per Lord Rodger, at paras. 62-84 (agreeing with Lord Brown on “all essentials” on the issue but adding some observations of his own); per Baroness Hale, at paras. 90-91 (agreeing with the reasons of both Lord Brown and Lord Rodger); per Lord Carswell, at para. 97 (agreeing with both Lord Brown and Lord Rodger).

¹⁰⁷³ *Al-Skeini and others v. The United Kingdom*, Application No. 55721/07, Judgment, 7 July 2011, para. 130

¹⁰⁷⁴ *Ibid*, para. 131. See also *Chagos Islanders v. The United Kingdom*, Application No. 35622/04, European Court of Human Rights (Fourth Section), Decision, 11 December 2012 for a succinct summary of what the Court there described as the “authoritative statement of principles” as regards jurisdiction

exceptions to the primarily territorial nature of jurisdiction, recognising that under these exceptions a Contracting State may exercise jurisdiction outside its territorial boundaries. Taking these exceptions in reverse order, one exception involves a Contracting State’s “effective control over an area” outside its national territory. The other exception relates to “State agent authority and control”.

As noted above, one of the two exceptions identified by the Court to the principle that “jurisdiction” under Article 1 is limited to a state’s own territory is where a state has “effective control over an area” outside of its own territory.¹⁰⁷⁵ This basis of jurisdiction was established in the case of *Loizidou v. Turkey*, discussed above. The Court in *Al-Skeini* reiterated the principle that “jurisdiction” under Article 1 of the Convention may arise where, as a consequence of lawful or unlawful military action, a Contracting State exercises “effective control of an area” outside of its national territory.¹⁰⁷⁶

The Court’s reiteration that, for the purpose of Article 1 of the ECHR, “jurisdiction” embraces the situation where the effective control of an area results from military action which is unlawful confirms that, as suggested by Wilde some years prior to the Court’s judgment¹⁰⁷⁷, “jurisdiction” as it is employed in that article is not limited to the term as it is used in general public international law. As Wilde noted, the idea that a state’s obligations under the ECHR would not apply to action which is unlawful would be “perverse”.¹⁰⁷⁸

The other exception which the Court identified to the principle that “jurisdiction” under Article 1 is limited to a state’s own territory relates to “state agent authority and

under Article 1 pronounced by the Grand Chamber in *Al-Skeini* (at para. 70). The Court noted that “extraterritorial jurisdiction still remains exceptional after *Al-Skeini*” (para, 71).

¹⁰⁷⁵ *Al-Skeini and others v. The United Kingdom*, Application No. 55721/07, Judgment, 7 July 2011, para. 138

¹⁰⁷⁶ *Ibid*, para. 138

¹⁰⁷⁷ Ralph Wilde, ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’, (2007) Vol. 40 Israel Law Review, p. 503, at pp. 513-14, citing *Loizidou v. Turkey (Preliminary Objections)*, European Court of Human Rights (Grand Chamber), Judgment (Preliminary Objection), 23 March 1995, Application No. 15318/89, para. 62; *Loizidou v. Turkey*, European Court of Human Rights (Grand Chamber), Judgment (Merits), 18 December 1996, Application No. 15318/89, paras. 52-56.

¹⁰⁷⁸ *Ibid*, p. 514

control”. Under this head, the Court identified three strands in the case law where the Court had recognised the exercise of extra-territorial jurisdiction.¹⁰⁷⁹ The first strand of cases relates to the acts of diplomatic and consular agents who are present on foreign territory and exert authority and control over others.¹⁰⁸⁰

The second strand of cases involves a Contracting State, through the consent, invitation or acquiescence of a foreign government, exercising all or some of the public powers normally to be exercised by that government.¹⁰⁸¹ For example, one of the cases in this strand cited by the Court was *X and Y v. Switzerland* which related to an agreement between Switzerland and Liechtenstein, a sovereign state which had not ratified the Convention, under which Swiss laws and decrees on the entry, exit and residence of third-country nationals were applicable in Liechtenstein; administration of these matters was entrusted to the Swiss authorities; and expulsions and restrictions or prohibitions of entry pronounced for Switzerland as a whole automatically had effect in Liechtenstein.¹⁰⁸² It was held that where an order made by the Swiss immigration authorities prohibited a German citizen resident in Germany from entering Liechtenstein, with the effect that it prevented him from visiting his children and their mother who were resident there, the individual to whom the Swiss order applied was within the jurisdiction of Switzerland within the meaning of Article 1 of the Convention.¹⁰⁸³

The third strand of cases was described by the Court in *Al-Skeini* as follows:

“... the Court’s case-law demonstrates that, in certain circumstances, the use of force by a State’s agents operating outside its territory may bring the individual thereby brought under the control of the State’s authorities into the State’s Article 1 jurisdiction.”¹⁰⁸⁴

¹⁰⁷⁹ *Al-Skeini and others v. The United Kingdom*, Application No. 55721/07, Judgment, 7 July 2011, paras. 133-37

¹⁰⁸⁰ *Ibid*, para. 134

¹⁰⁸¹ *Ibid*, para. 135

¹⁰⁸² *X and Y v. Switzerland*, Application Nos. 7289/75 and 7349/76, European Commission on Human Rights, Decision on admissibility, 14 July 1977, DR 9, p. 57

¹⁰⁸³ *Ibid*, pp. 71-73

¹⁰⁸⁴ *Al-Skeini and others v. The United Kingdom*, Application No. 55721/07, Judgment, 7 July 2011, para. 136

The Court's survey of the exceptions to the primarily territorial nature of "jurisdiction" under Article 1 of the European Convention may be contrasted with that previously set out by the Court in 2001 in the case of *Banković and Others v. Belgium and Others*.¹⁰⁸⁵ In *Banković* the Court referred to exceptions (i) in respect of a Contracting Party's "effective control of an area" outside its national territory as a result of military occupation; (ii) where, through the consent, invitation or acquiescence of another government, a Contracting Party exercises all or some of the public powers normally to be exercised by that government; (iii) "cases involving the activities of [a Contracting Party's] diplomatic or consular agents abroad"; and (iv) cases "on board craft and vessels registered in, or flying the flag of [a Contracting Party]".¹⁰⁸⁶ The Court in *Banković* had not identified a broader exception of "state agent authority and control" of which the exception relating to diplomatic and consular agents, and that relating to the exercise of another state's public powers with its consent etc, were sub-sets. More specifically, the Court in *Banković* had not identified an exception in respect of the use of force by state agents outside national territory as a result of which individuals are brought under the state's authority.

The Court in *Al-Skeini* cited a number of cases in support of the principle that the use of force by a state's agents operating outside its territory may bring individuals thereby brought under the control of the state's authorities within the "jurisdiction" of the State for the purpose of Article 1. The Court referred to these cases as examples where "[t]his principle has been applied where an individual is taken into the custody of State agents abroad". The judgments in these cases were given subsequent to the decision in *Banković*. These cases will be considered briefly below:

¹⁰⁸⁵ *Banković and Others v. Belgium and Others*, Application No. 52207/99, European Court of Human Rights, Grand Chamber, Decision on Admissibility, 12 December 2001, [2001] XII Reports of Judgments and Decisions, p. 333

¹⁰⁸⁶ *Ibid.*, §. 71 and 73. As regards the exception in respect of cases on board craft and vessels registered in a Contracting State, the Court in *Banković* did not cite any authority, but an example is the decision of the former European Commission on Human Rights in *Ilich Sánchez Ramirez v. France*, Application No. 28780/95, Decision on Admissibility, 24 June 1996, Decisions and Reports, No. 86-B, p. 155, in which it was held that, if it was indeed the case that the Applicant, a suspected terrorist ("Carlos The Jackal"), was taken into the custody of French police officers and deprived of his liberty in a French military aeroplane at Khartoum in Sudan, from the time of being handed over to those officers he was effectively under the authority, and therefore the jurisdiction, of France, even though the authority was being exercised abroad (at pp. 161-62).

- (i) In *Öcalan v. Turkey* the Court found that once the applicant had been handed over by Kenyan officials to Turkish officials who were on board a Turkish-registered aircraft in the international zone at Nairobi airport, he was effectively under Turkish authority and therefore within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention, even though Turkey exercised its authority outside its territory.¹⁰⁸⁷ However, this case could be regarded as falling under the exception relating to cases on board aircraft registered in a Contracting Party, referred to in *Banković*, given that it was on such an aircraft that the Applicant was handed over to the custody of Turkish officials.¹⁰⁸⁸
- (ii) In *Issa and Others v. Turkey* the applicants’ deceased relatives, Iraqi shepherds, were alleged to have been taken into custody and killed by Turkish troops in Northern Iraq during military operations conducted there by Turkey in 1995.¹⁰⁸⁹ The Court stated the broad principle that (quite apart from the “effective control of an area” exception) an individual would be within the “jurisdiction” of a Contracting State if he/she was in the territory of another state but was found to be under the former state’s “authority and control through its agents operating – whether lawfully or unlawfully - in the latter State”.¹⁰⁹⁰ It was this principle, enunciated by the Second Section of the Court in *Issa*, which the Grand Chamber adopted in *Al-Skeini*.¹⁰⁹¹

¹⁰⁸⁷ *Öcalan v. Turkey*, Application No. 46221/99, Grand Chamber, Judgment, 12 May 2005, European Court of Human Rights [2005] Vol. IV Reports of Judgments and Decisions, p. 131, at §. 91 (p. 164-65)

¹⁰⁸⁸ The Court’s Judgment in *Öcalan* contains little discussion of the question of “jurisdiction”, noting that it was common ground between the parties that, directly after being handed over by Kenyan officials to Turkish officials inside an aircraft registered in Turkey in the international zone of Nairobi Airport, the Applicant was under Turkish authority and within Turkey’s jurisdiction for the purposes of Article 1 (Ibid, at §. 91 (p. 164-65)).

¹⁰⁸⁹ *Issa and Others v. Turkey*, Application No. 31821/96, European Court of Human Rights (Second Section), Judgment, 16 November 2004.

¹⁰⁹⁰ Ibid, §. 71

¹⁰⁹¹ Long before this, the former European Commission on Human Rights had stated a broad principle that where a Contracting State’s agents operated outside that State’s territory, persons under their authority are brought within the “jurisdiction” of that State: see *Cyprus v. Turkey*, European Commission on Human Rights, Application nos. 6780/74 and 6950/75, Decision on Admissibility, 26 May 1975, D.R. 2, p. 125, in which the Commission stated, “...authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property ‘within the jurisdiction’ of that State, to the extent that they exercise authority over such persons or property” (p. 136, §.8). The Commission held that the Turkish

The Court in *Issa* justified the principle on the basis that “Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory....”. The Court held that the essential question to be examined in the particular case was whether at the relevant time Turkish troops conducted operations in the specific area where the killings occurred (“the hills above the village of Azadi”).¹⁰⁹² In the event, the Court in *Issa* found on the evidence before it that it had not been established to the required standard of proof that the armed forces of Turkey conducted operations in the area in question, more specifically, the hills above the village of Azadi, where the victims were alleged to be at the material time.¹⁰⁹³ Accordingly, the Court was not satisfied that the Applicants’ relatives were within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention.¹⁰⁹⁴ Nevertheless, the Court in *Issa* articulated a principle of “State agent authority and control” which was applicable on the territory of a state other than that exercising the authority and control and even where the agents were not diplomatic or consular officials; the acts of authority and control were not performed on aircraft or vessels registered in the state exercising authority; and the acts were not performed with the consent or acquiescence of the state on whose territory they were

armed forces in Cyprus were authorised agents of Turkey and that to the extent that they exercised control over persons or property in Cyprus, they brought such persons or property “within the jurisdiction” of Turkey under Article 1 (p. 137, §. 10). Similarly, in *X v. The United Kingdom*, European Commission on Human Rights, Application No. 7547/76, Decision on Admissibility, 15 December 1977, D.R. 12, p. 73, a case involving the acts and alleged omissions of UK consular officials in Jordan, the Commission stated the broad principle that “...authorised agents of a State, including diplomatic or consular agents bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property” (p. 74). This broad principle was stated in identical terms by the Commission in *M v. Denmark*, European Commission on Human Rights, Application No. 17392/90, Decision on Admissibility, 14 October 1992 (a case concerning the actions of the Danish ambassador in the German Democratic Republic). This latter case was cited by the Court in *Issa* (at §. 71) in support of its formulation of the principle regarding the exercise of authority and control by a state’s agents in the territory of another state.

¹⁰⁹² §. 76 and 81. The Court had rejected the idea that Turkey had been in “effective overall control” of the entire area of Northern Iraq (see §. 75) and was therefore considering whether the deceased came under Turkey’s “authority and control” through its agents, i.e. Turkish troops, in the specific area concerned (see §. 71-72).

¹⁰⁹³ *Ibid*, §. 81

¹⁰⁹⁴ *Ibid*, §. 82

performed, albeit that the Court in *Issa* did not find this principle applied on the particular facts of the case.

- (iii) In *Al-Saadoon and Mufdhi v. The United Kingdom (decision on admissibility)* the Court held that two Iraqis detained in British-run detention facilities in Iraq between December 2003 and December 2008 were within the UK's jurisdiction for the purpose of Article 1 of the Convention, because of "the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question".¹⁰⁹⁵ Despite the subsequent "re-interpretation" of this decision by the Court in *Al-Skeini* (see below), it is clear that the reason for the decision on the "jurisdiction" point given by the Court in *Al-Saadoon* was the control exercised by the UK over the buildings in which the Applicants were held.
- (iv) In *Medvedyev and Others v. France* the Court held that the crew of a merchant vessel registered in Cambodia which was intercepted by the French navy on the high seas several thousand kilometres from France were within France's jurisdiction for the purposes of Article 1 of the Convention because France had exercised full and exclusive control over the vessel and its crew, at least *de facto*, from the time of interception.¹⁰⁹⁶ It should be noted that the case of *Medvedyev* cannot be regarded as falling within the exception relating to cases on board vessels and aircraft registered in, or flying the flag of, a Contracting Party, referred to in *Banković*, since the vessel which was intercepted and on which the crew were subsequently held was registered in Cambodia rather than France.¹⁰⁹⁷ The rationale for the

¹⁰⁹⁵ *Al-Saadoon and Mufdhi v. The United Kingdom (Decision on Admissibility)*, Application No. 61498/08, European Court of Human Rights (Fourth Section), 30 June 2009, paras. 84-89

¹⁰⁹⁶ *Medvedyev and Others v. France*, Application No. 3394/03, European Court of Human Rights (Grand Chamber), Judgment, 29 March 2010, [2010] Vol III Reports of Judgments and Decisions, p. 61, paras. 13 (p. 72) and paras. 66-67 (p. 92)

¹⁰⁹⁷ Details of the country of registration are given at para. 9 of the judgment (*Ibid*, at p. 71). The Court distinguished *Banković* on grounds that whilst that case concerned an "instantaneous extraterritorial act", in *Medvedyev* France had control over the vessel and crew from the time of its interception "in a continuous and uninterrupted manner" until the crew were tried in France (*Ibid*, p. 92, paras. 64 and 67).

finding that the crew were within the “jurisdiction” of France for the purpose of Article 1 was that France exercised “full and exclusive control” over the vessel and its crew.¹⁰⁹⁸

The interpretation put on these cases by the Court in *Al-Skeini* was that jurisdiction over the individuals concerned did not arise solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held and that “[w]hat is decisive in such cases is the exercise of physical power and control over the person in question”.¹⁰⁹⁹

In this regard, it is submitted that *Issa* is the most significant of the cases cited by the Court because in that case the Court did not relate the question of “jurisdiction” to whether the individuals in question were held in a building, aircraft or vessel which was under the control of the respondent state. In fact, although the Court in *Al-Skeini* summarised *Issa* in terms that jurisdiction would have been held to exist if it had been established that Turkish soldiers had taken the applicants’ deceased relatives to a certain cave and executed them, the actual approach of the Court in *Issa* was that the essential question to be determined was whether at the relevant time Turkish soldiers had conducted operations in the area where the killings took place, and more specifically “in the hills above the village of Azadi”.¹¹⁰⁰ Thus, the Court in *Issa* did not regard it as necessary, in order to establish “jurisdiction”, that the individuals in question had been killed at a location such as a cave which might be said to be analogous to a building.¹¹⁰¹

¹⁰⁹⁸ Ibid, p. 92, para. 67

¹⁰⁹⁹ *Al-Skeini and others v. The United Kingdom*, Judgment, 7 July 2011, para. 136. Some years prior to this judgment, Wilde had argued, citing the judgment (para. 93) of the First Section of the European Court of Human Rights in *Öcalan v. Turkey* (12 March 2003) (the conclusion reached in the relevant paragraph of which was not disturbed by the Grand Chamber), that the obligations of a state party to the ECHR (including those of the UK during the occupation of Iraq) could apply outside of its territory if it was exercising control over an individual, regardless of whether it was exercising effective control over the territory where the individual was present: see Ralph Wilde, ‘The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq’, (2005) 11 ILSA Journal of International and Comparative Law, p. 485, at pp. 494-95

¹¹⁰⁰ *Issa*, Judgment, paras. 76 and 81

¹¹⁰¹ The focus of the Court in *Al-Skeini* upon the cave in *Issa* is unwarranted for the further reason that, although a “villager” had suggested that it “seemed” to him that Turkish troops were firing inside the cave (*Issa*, Judgment, paras. 28 and 32), according to the Second Applicant the bodies of five of the applicants’ deceased relatives were found “near the cave” (Ibid, para. 28) and according to the Second and Sixth Applicants the bodies of the two others were found after two days of further searching by the villagers (Ibid, paras. 28 and 32), indicating that they were found in another place.

Part of the significance of the judgment in *Al-Skeini* is that the Grand Chamber has endorsed the approach of the Second Section of the Court in *Issa* whereby “jurisdiction” on the basis of “State agent authority and control” does not require that the individual concerned must, at the time of the alleged violation of his or her rights, have been located in a building, aircraft or vessel which was under the control of the relevant Contracting State.

It is important to note that the Court in *Al-Skeini* concluded that the applicants’ deceased relatives were within the UK’s jurisdiction for the purposes of Article 1 of the Convention, not on the basis of the “effective control over an area” exception, as one might have expected given that the UK was an occupying power in Iraq at the time, but under the “State agent authority and control” exception. The Court stated:

“It can be seen, therefore, that following the removal from power of the Ba’ath regime and until the accession of the Interim Iraqi Government, the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.”¹¹⁰²

A further reason why the judgment in *Al-Skeini* is significant is that it establishes that “State agent authority and control” may arise from the use of force by a state’s agents outside its territory even where the individual concerned is not in the custody of the state’s agents. The four cases cited by the Court in support of the “use of force” species of “State agent authority and control” (i.e. *Öcalan*, *Issa*, *Al-Saadoon* and

¹¹⁰² *Al-Skeini and others v. The United Kingdom*, Judgment, 7 July 2011, para. 149

Medvedyev) were, as the Court noted, cases where individuals had been taken into custody by State agents abroad. However, in *Al-Skeini* some of the Applicants' deceased relatives had clearly not been taken into custody by the UK's armed forces at the time of their deaths but were nevertheless held to have been subject to the authority and control of the UK, through its soldiers, and therefore within the UK's "jurisdiction" for the purpose of Article 1. For example, the First Applicant's brother was shot dead in the street by a British soldier who was some distance away (in the context of a funeral ceremony at which guns were discharged, as is customary in Iraq).¹¹⁰³ The example of the Third Applicant's wife is particularly stark in this regard. The Third Applicant and his family were sitting around the dinner table at home when his wife and child were hit by bullets fired by British soldiers who were outside the building and engaged in a fire-fight with unknown gunmen in open ground.¹¹⁰⁴ The Third Applicant's wife was fatally wounded in the head and ankles. Again, there is no question of the Third Applicant's wife having been in the custody of the soldiers concerned at the time of her death.

It emerges from the Court's judgment in *Al-Skeini* that there is an important distinction between the "State agent authority and control" exception and the "effective control over an area" exception as regards the extent to which the rights and freedoms set out in the Convention will apply. The Court made clear that where a State exercises effective control over an area, the controlling State has the responsibility under Article 1 of the Convention to secure, within the area under its control, "the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified".¹¹⁰⁵ Such a state, the Court continued, "will be liable for any violations of those rights". This is to be contrasted with the position where the basis for "jurisdiction" is the "State agent authority and control" exception, in which case, the Court held, the Convention rights can be "divided and tailored".¹¹⁰⁶ What the Court means by the "dividing and tailoring" of rights is that where the basis of "jurisdiction"

¹¹⁰³ *Al-Skeini*, Judgment, paras. 34-36. The First Applicant's brother was one of two men shot in the same incident. According to the First Applicant, his brother was about 10 metres away from the soldier in question when he was shot. According to the British account, one of the men who was shot was about 5 metres away, and the position of the other man was impossible to tell. It is not clear from this summary of the British account, which of the two men was the First Applicant's brother.

¹¹⁰⁴ *Ibid*, paras. 43-45

¹¹⁰⁵ *Ibid*, para. 138

¹¹⁰⁶ *Ibid*, para. 137

is that the state concerned, through its agents, exercises authority and control over an individual, the state is under an obligation under Article 1 to secure “to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual”.¹¹⁰⁷

Therefore, if, as the Court indicates, the basis for the UK’s “jurisdiction” in Iraq for the purposes of Article 1 of the Convention was the “State agent authority and control” exception rather than the “effective control over an area exception”, the UK was not obliged to secure in Iraq (or even in South East Iraq) the entire range of substantive rights set out in the Convention and the Protocols which it had ratified. Rather, on that basis, the UK was only under an obligation to secure to particular individuals who fell under the authority and control of its agents, such as soldiers, the rights that were relevant to the situation of each such individual. Most obviously, these would be the rights contained in Article 2 (the right to life), Article 3 (the right not to be subjected to torture or inhuman or degrading treatment or punishment), Article 5 (the right to liberty and security of the person) and Article 6 (the right to a fair hearing). The UK would not, on the basis identified by the Court, have been obliged to secure to Iraqis who were not under the authority and control of its agents, such as its soldiers, any of the rights contained in the Convention. In all probability, therefore, at any given moment the UK would not have been obliged to secure any Convention rights to the great majority of the population of Iraq, or even that of South East Iraq.

Whether the basis for an occupying state’s “jurisdiction” under Article 1 of the Convention is “State agent authority and control” rather than “effective control over an area” has important implications for whether the occupying state is obliged by the Convention to amend the pre-occupation law in the occupied territory. If the basis of jurisdiction is “State agent authority and control”, the occupying state will not be obliged by the Convention to change pre-occupation laws, at least where its soldiers or other agents do not enforce them.

This can be illustrated if we consider again the example of laws which criminalise homosexual acts between consenting adults in private. It is understood that such a law

¹¹⁰⁷ Ibid, para. 137

existed in Iraq during the occupation.¹¹⁰⁸ However, as stated above, the European Court of Human Rights has held, in the context of the territory of a Contracting State, that “the very existence” of legislation which criminalised homosexual acts breached Article 8 of the Convention.¹¹⁰⁹ If the basis of the UK’s “jurisdiction” for the purpose of Article 1 of the Convention was the “effective control over an area” exception, the UK would have been obliged to secure within the area under its control the entire range of Convention rights. This suggests that it would have been obliged by the Convention to repeal Iraq’s law criminalising homosexual acts between consenting adults. However, under the “State agent authority and control” basis of jurisdiction, provided that UK soldiers or other UK agents were not involved in enforcing the law, for example by carrying out arrests, Iraq’s homosexuals could not legitimately claim that the UK had violated Article 8 (the right to respect for private life), or any other of their Convention rights, by allowing the pre-occupation law criminalising homosexual acts to continue in existence. Nor, on that basis, could the UK have used the European Convention as a justification for repealing that law. As seen above, Article 43 of the Hague Regulations requires an occupying power to respect the existing law in the occupied territory “unless absolutely prevented” from doing so. Where the European Convention does not oblige an occupying power to change a pre-occupation law, the occupying power is not “absolutely prevented” by the Convention from leaving the law in place.

Given the implications of an occupying power’s “jurisdiction” under Article 1 of the Convention being based on “effective control over an area” rather than “State agent authority and control”, it is important to be able to determine when an occupying power will be subject to the “effective control over an area” basis of jurisdiction. In *Al-Skeini*, the UK Government, relying on the Court’s earlier judgement in *Banković and Others v. Belgium and Others*, argued that the “effective control over an area” basis of jurisdiction could apply only within the “the legal space of the Convention”, i.e. where the occupying state was occupying the territory of another Contracting State, as in the

¹¹⁰⁸ Aengus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia 2017: a world survey of sexual orientation laws: criminalisation, protection and recognition* (International Lesbian, Gay, Bisexual, Trans and Intersex Association, 12th Ed., May 2017, Geneva), states that Iraq continues to criminalise same-sex sexual activity, citing Article 404, Penal Code, 1969 (*Ibid*, p. 39).

¹¹⁰⁹ *Dudgeon v. The United Kingdom*, Application No. 7525/76, Judgment, 22 October 1981, para. 41; *Norris v. Ireland*, Application No. 10581/83, Judgment, 26 October 1988, para. 38.

case of Turkey's occupation of northern Cyprus.¹¹¹⁰ The UK Government further argued that (as paraphrased in the Court's judgment) any other approach would risk requiring the occupying power to "impose culturally alien standards, in breach of the principle of sovereign self-determination".¹¹¹¹ The UK Government submitted before the Court that because Iraq fell outside the "the legal space of the Convention", the "effective control over an area" basis of jurisdiction could not apply there.¹¹¹²

This is how the Court dealt with that point, at paragraphs 141 and 142 of its judgment:

"141. The Convention is a constitutional instrument of European public order (see *Loizidou v. Turkey* (preliminary objections) ... §75). It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Soering* ... §86).

"142. The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "legal space of the Convention" (see *Cyprus v. Turkey* ...§78, and *Banković* ...§80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction (see amongst other examples *Öcalan*, *Issa*, *Al-Saadoon and Mufdhi*, *Medvedyev* ...)."1113

¹¹¹⁰ *Al-Skeini and others v. The United Kingdom*, Judgment, 7 July 2011, para. 110

¹¹¹¹ *Ibid*, para. 110

¹¹¹² *Ibid*, para. 112

¹¹¹³ *Ibid*, paras. 141-42

Whilst the Court does not expressly state that it will not apply the “effective control over an area” basis of jurisdiction where a Contracting State occupies territory of a non-Contracting State, reading the judgment as a whole it appears to be reasonably clear that that is what the Court is indicating. First, the Court states that the Convention does not purport to require Contracting States to impose Convention standards on non-Contracting States. If that is to be taken at face value, it entails that the “effective control over an area” basis of jurisdiction will not be applied where the territory of a non-Contracting State is occupied, because, as we have seen, that basis of jurisdiction carries with it the obligation upon the occupying power to secure within the occupied territory the entire range of Convention rights.

Second, whilst the Court indicates in the passage quoted that jurisdiction under Article 1 of the Convention can exist outside the territory covered by the Council of Europe Member States, all the cases there cited by the Court are cases which the Court has categorised earlier in its judgment as examples of the “State agent authority and control” basis of jurisdiction (see above), indicating that it is that basis of jurisdiction which the Court had in mind. As we have seen, the “State agent authority and control” basis of jurisdiction entails that the occupying state is only obliged to secure to particular individuals who are subject to the authority and control of the state’s agents the Convention rights which are relevant to their “situation”.

Whilst the matter is not entirely free from doubt, what the Court appears to be indicating is that where the individual affected by the putative violation of the Convention was at the material time outside the territory of the Council of Europe Member States, the basis of jurisdiction which the Court will use, if “jurisdiction” is to be found at all, is the “State agent authority and control” basis.

This would appear to explain why, despite the fact that the UK was an occupying power in Iraq at the material times, the Court concluded that the applicants’ deceased relatives were within the UK’s jurisdiction for the purposes of Article 1 of the Convention, not on the basis of the “effective control over an area” exception, but under the “State agent authority and control” exception. Iraq is of course outside the *espace juridique*.

In effect, by employing the “State agent authority and control” basis of jurisdiction, rather than the “effective control over an area” basis, in relation to occupations which occur outside the legal space of the Council of Europe, the Court has found a way of protecting and vindicating the rights of individuals who come into direct contact with soldiers or other agents of the occupying power, whilst at the same time avoiding the imposition of European Convention standards on non-European societies and any requirement to change pre-occupation laws. It is submitted that this nuanced and sophisticated approach, which seeks to deal with the complexity of the issues involved, is to be commended.

Having said all of that, by not expressly stating that it will apply the “State agent authority and control” basis rather than the “effective control over an area” basis of jurisdiction where a Contracting State occupies territory of a non-Contracting State, the Court has given itself room for manoeuvre should it wish to back out of this position. Unfortunately, the failure to be explicit also means that, where there is an occupation outside the *espace juridique*, unless and until there is a Court ruling in relation to the particular occupation, an occupying state cannot be entirely sure whether it is expected to secure within the occupied territory the entire range of Convention rights, or only the rights which are relevant to the situation of particular individuals who come under the control of its soldiers or other agents.

The analysis of the *Al-Skeini* judgment offered herein differs from the view expressed by some writers who argue that the judgment makes clear that the “effective control of an area” basis of jurisdiction applies outside the Council of Europe area. Mallory, states that the judgment clarifies that the “effective control of an area” basis of jurisdiction is “applicable globally”.¹¹¹⁴ Similarly, Milanovic asserts that the judgment contains “the affirmation in pretty clear terms that both the personal [i.e. i.e. the “state agent authority and control” basis] and the spatial [i.e. the “effective control of an area”] conceptions of jurisdiction can apply outside the unfortunate *espace juridique*”.¹¹¹⁵ These interpretations fail to take into account what the Court stated at

¹¹¹⁴ Conall Mallory, ‘European Court of Human Rights *Al-Skeini and Others v. United Kingdom* (Application No 55721/07) Judgment of 7 July 2011’, (2012) Vol. 61 I.C.L.Q., p. 301, at p. 307 and see pp, 304-05 (citing para. 142 of the Judgment)

¹¹¹⁵ Marko Milanovic, ‘*Al-Skeini and Al-Jedda in Strasbourg*’, (2012) Vol. 23 E.J.I.L., p. 121, at p. 131

paragraph 141 of the judgment (set out above) about the Convention not purporting to be a means of requiring Contracting States to impose Convention standards on other states coupled with what it stated about the controlling state with effective control over an area having responsibility to secure within the area it controls “the entire range of substantive rights set out in the Convention”.

Furthermore, in response to the views of those writers, it should be noted that the Court did *not* state in paragraph 142 of its judgment (set out above) that the importance of establishing the occupying State’s jurisdiction in cases where there is an occupation by one state party of the territory of another state party “does not imply, *a contrario*, that *the effective control of an area basis of jurisdiction* under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States....”. Rather, the Court stated that the importance of establishing jurisdiction in such cases “does not imply, *a contrario*, that *jurisdiction* under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States....” (italics added). Furthermore, as noted above, the cases then cited by the Court were cases which the Court had categorised as examples of the “state agent authority and control” basis, indicating that that is what the court had in mind. This is hardly an affirmation “in pretty clear terms” that the “effective control of an area” basis of jurisdiction applies outside the *espace juridique*.

Issue must also be taken with the view, expressed by Milanovic, that in paragraph 142 of its judgment in *Al-Skeini* the European Court “killed off the concept of the *espace juridique*” with the result that it “is now rightly nothing more than a fishy French phrase, which is all that it was in *Bankovic* anyway”.¹¹¹⁶ First, in that paragraph the Court actually endorsed the concept of the “legal space of the Convention” (i.e. the *espace juridique*) in relation to the need to avoid a vacuum in the protection of rights within it, when one state party to the Convention occupies the territory of another. Furthermore, on the analysis offered herein, the concept of *espace juridique* has a continuing relevance in that the “effective control of an area” basis of jurisdiction,

¹¹¹⁶ Ibid, at p.129. See also Miša Zgonec-Rožej, ‘Al-Skeini v. United Kingdom’, (2012) Vol. 106 A.J.I.L., p. 131, at pp. 136-37, who states that the Grand Chamber in *Al-Skeini* “rejected” the notion of *espace juridique* and “[i]nstead” emphasised that jurisdiction under Article 1 of the ECHR can exist outside of the Council of Europe area, citing para 142 of the Judgment (set out in the main text above).

which carries with it responsibility to secure the entire range of Convention rights, can only apply within it. Whilst in certain circumstances jurisdiction under Article 1 can be established in relation to individuals outside the *espace juridique*, using the “State agent authority and control” basis, that will bring with it only responsibility to secure to that individual the rights which are relevant to the situation of that individual. Thus the concept of the *espace juridique* continues to be relevant. As with Mark Twain, rumours of its death have been greatly exaggerated.

On the above basis, the European Court did not adopt the approach urged by a number of writers, prior to its judgment in *Al-Skeini*, whereby the “effective control over an area” basis of jurisdiction applies even where a state party to the ECHR occupies the territory of a state which is not a party to the ECHR, with the result that all the rights contained in the ECHR would become applicable there. Wilde, for example, had argued prior to the European Court’s judgment in *Al-Skeini* that, as things then stood, “the ‘legal space’ notion is of doubtful significance in operating as a limitation on the extraterritorial application of the ECHR”.¹¹¹⁷ The Convention was applicable outside the Council of Europe area, he argued, not only on the basis of control exercised over an individual, but also, alternatively, on the basis of control exercised over territory.¹¹¹⁸ Again, Milanovic proposed, prior to the European Court’s judgment in *Al-Skeini*, that the ECHR be applicable where a state party had effective overall control of territory, including where the territory was not that of a state party to the Convention.¹¹¹⁹ He

¹¹¹⁷ Ralph Wilde, ‘The “Legal Space” or “*Espace Juridique*” of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?’, [2005] European Human Rights Law Review p. 115, at p. 124

¹¹¹⁸ *Ibid.* p. 124

¹¹¹⁹ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties, Law, Principles, and Policy* (Oxford University Press, 2011), p.210 and p. 257. Milanovic proposes that the word “jurisdiction” in Article 1 of the ECHR and other human rights treaties be interpreted as effective overall control of areas and places (*ibid.*, at p. 210). However, he states that this threshold would apply only to the state’s obligation to secure the ECHR rights (which, broadly, he defines as its positive obligations, including in particular those to prevent violations by private parties) and not to its obligation to respect the rights (i.e. its negative obligation not to violate the rights by state action), which, he states, would be “territorially unbound” (*ibid.*, at p. 210, pp. 211-12, p. 209). Unconvincingly, whilst he states that the obligation contained in Article 1 to “secure” the rights contained in the Convention “implies” the negative obligation to respect them, he argues that the obligation to respect the rights need not be subject to the threshold that the individual in question be within the “jurisdiction” of the state party concerned (which he argues should mean effective overall control of territory by that state party) (*ibid.*, p. 214). Against this, it is submitted that if “secure” in Article 1 embraces the obligation to respect the ECHR rights, as it surely must, then the obligation to respect the rights must also be subject to the requirement that the relevant individual be within the “jurisdiction” (as defined by the Court) of the relevant state party, given that Article 1 states that state parties “shall secure to everyone within their

refers to the example that, under the approach which he advocates, if the UK were to become an occupying state in Iran, it would have effective overall control of Iranian territory and the ECHR would be applicable there.¹¹²⁰ Accordingly, he explains, under his approach the UK would, despite Article 43 of the Hague Regulations, be required to change Iranian (non-penal) laws, including Sharia laws, which were inconsistent with rights contained in the ECHR.¹¹²¹

In contrast to the views of those writers, on the basis of the reasons set out above, the Court's judgment in *Al-Skeini* indicates that the "legal space" concept remains significant in that it is the "State agent authority and control" basis, rather than the "effective control of an area" basis which is to be applied outside of the *espace juridique*, with the result that it is only the rights which are relevant to the situation of the particular individual who is subject to the authority and control of the state agent which will be applicable and not the entire range of Convention rights.

The approach to jurisdiction taken by the Court in *Al-Skeini* has important implications for the argument that human rights law may be used to carry out "transformative occupations". The Court's approach there indicates that the European Convention on Human Rights is not a vehicle for transforming the law of occupied territories where the territory occupied is not that of a Contracting State to the Convention. As stated above, if the European Convention does not oblige an occupying power to amend a local law, the occupying power is not "absolutely prevented" by the Convention from allowing it to continue in existence un-amended for the purposes of Article 43 of the Hague Regulations.

jurisdiction" the ECHR rights. Milanovic states that he does not suffer from the "naïve belief" that his proposed model of extraterritorial application "will be adopted any time soon" (ibid, p. 264).

¹¹²⁰ Ibid, p. 257

¹¹²¹ Ibid, pp. 257-58. He states that the UK would be "absolutely prevented" from leaving such laws in place. As regards Iranian *penal* laws which are incompatible with the ECHR, such as the provision which prescribes stoning as the punishment for adultery, Milanovic argues that the UK would have a "political choice" as to whether to breach its obligations under the ECHR or Article 64 of the Fourth Geneva Convention, which requires that the penal laws of the occupied be left in force, subject to exceptions (ibid, pp. 258-59).

Conclusion in relation to the ECHR

The possibility that the ECHR would be held applicable in occupied Iraq raised the possibility that a state party which occupied the territory of a state which was not a party to the ECHR would be obliged to change pre-occupation laws which conflicted with ECHR rights, and that European interpretations of human rights may therefore be imposed upon the societies of non-European states.

In *Al-Skeini*, the Grand Chamber of the European Court of Human Rights identified in the Court's case-law two bases for the establishment of extraterritorial jurisdiction under Article 1 of the ECHR. One basis involves a Contracting State's "effective control over an area" outside its national territory (as in *Loizidou*). The other basis involves "State agent authority and control".

The Court made an important distinction between the "State agent authority and control" basis and the "effective control over an area" basis as regards the extent to which the rights set out in the Convention will apply. Where a State exercises effective control over an area, the controlling State has the responsibility under Article 1 of the Convention to secure, within the area under its control, "the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified". In contrast, where the basis for "jurisdiction" is "State agent authority and control" the Convention rights are "divided and tailored" so that under Article 1 the state is only under an obligation to secure to the individual who falls under such control the rights and freedoms which are relevant to the situation of that individual.

The Court in *Al-Skeini* concluded that the applicants' deceased relatives were within the UK's jurisdiction for the purposes of Article 1 of the Convention, not on the basis of the "effective control over an area" exception, as one might have expected given that the UK was an occupying power in Iraq at the time, but under the "State agent authority and control" exception. On that basis, the UK was not obliged to secure in Iraq (or even in South East Iraq) the entire range of substantive rights set out in the Convention and the Protocols which it had ratified. Rather, the UK was only under an obligation to secure to particular individuals who fell under the authority and control of its agents, such as soldiers, the rights that were relevant to the situation of each such individual.

Most obviously, these would be the rights contained in Article 2 (the right to life), Article 3 (the right not to be subjected to torture or inhuman or degrading treatment or punishment), Article 5 (the right to liberty and security of the person) and Article 6 (the right to a fair hearing).

Where the basis of jurisdiction is “State agent authority and control” rather than “effective control over an area”, the occupying state will not be obliged by the Convention to change pre-occupation laws, at least where its soldiers or other agents do not enforce them. As seen above, Article 43 of the Hague Regulations requires an occupying power to respect the existing law in the occupied territory “unless absolutely prevented” from doing so. Where the European Convention does not oblige an occupying power to change a pre-occupation law, the occupying power is not “absolutely prevented” by the Convention from leaving the law in place.

Whilst the matter is not entirely free from doubt, the Court appears to indicate in the *Al-Skeini* judgment that where the individual affected by the putative violation of the Convention was at the material time outside the territory of the Council of Europe Member States, the basis of jurisdiction which the Court will use, if “jurisdiction” is to be found at all, is the “State agent authority and control” basis rather than the “effective control of an area” basis.

In effect, by employing the “State agent authority and control” basis of jurisdiction, rather than the “effective control over an area” basis, in relation to occupations which occur outside the legal space (*espace juridique*) of the Council of Europe, the Court has found a way of protecting and vindicating the rights of individuals who come into direct contact with soldiers or other agents of the occupying power, whilst at the same time avoiding the imposition of European Convention standards on non-European societies and any requirement to change pre-occupation laws. Should the analysis offered here not reflect the Court’s thinking in the *Al-Skeini* case, then the approach described herein is proposed for consideration.

Under the principles outlined in *Al-Skeini*, the possibility remains however that where one state party to the Convention occupies the territory of another state party, the “effective control of an area” basis of extraterritorial jurisdiction may apply and the

occupying state might therefore come under an obligation, under the Convention, to change pre-occupation laws.

Conclusion

For the reasons given above, the argument (as relied upon by the occupation authorities in Iraq) that the fact that an *occupied* state is a party to a particular human rights treaty is a legal basis for the occupying state to amend the pre-occupation law is unconvincing.

Following the occupation of Iraq, the US Government offered a detailed legal analysis of the scope of application of the ICCPR, in part based on the *travaux préparatoires*. Its essential conclusion for present purposes was that a state party is not obliged under Article 2(1) of the ICCPR to respect and ensure the rights set out in the Covenant to individuals in territory which it occupies. The position taken by the US is inconsistent with the approach to the issue taken by the International Court of Justice the previous year in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Given that the US stance on the non-applicability of the ICCPR in occupied territory finds strong support in the *travaux préparatoires*, the US is perhaps unlikely to be influenced by the Court's Advisory Opinion in the *Wall* case on this point, at least in the foreseeable future. That the US position appears to have become entrenched is indicated in the 'Law of War Manual' which it issued in 2015.

General Assembly resolutions on the subject of human rights in Occupied Palestinian Territory suggest that there is an emerging consensus among the great majority of states parties to the ICCPR that where a state party to the Covenant occupies territory, its obligations under the Covenant will be applicable in the territory occupied. However, the fact that other states parties such as the US and Israel have made clear their disagreement, prevents these resolutions from amounting to subsequent practice "which establishes the agreement of the parties" regarding the interpretation of the treaty, within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of

Treaties. For this reason this extensive practice by states parties does not establish the applicability of the ICCPR in occupied territory.

As regards the Court's interpretation of Article 2(1) of the ICCPR in the *Wall* case, contained within that interpretation there appears to be a potentially important qualification to the extraterritorial application of the ICCPR. On the basis of the Court's interpretation of the *travaux préparatoires*, it can be argued that where an individual is outside of the territory of a state party, that state party is not obliged to ensure to that individual ICCPR rights which do not fall within the competence of that state party. Such an approach suggests that an individual in occupied territory would not be able to assert against the occupying state that his or her rights were being breached by legislation enacted prior to the occupation, because, as a result of Article 43 of the Hague Regulations, the occupying state is not competent to repeal or amend the pre-occupation legislation (unless it is absolutely prevented from leaving it intact). Nor, on the basis of the argument being advanced above, could it be claimed that the occupying state is "absolutely prevented" from leaving the offending legislation in place as a result of its obligations under the ICCPR. For once it is accepted that a state party's obligations under the ICCPR only apply outside of its territory in relation to rights which are within its competence, it cannot be claimed that it is absolutely prevented by its obligations under the ICCPR from leaving the law in question in place. It remains to be seen whether the International Court of Justice would accept such an argument. More generally, it remains to be seen how the International Court would deal with the question whether an occupying power is obliged to change the existing law in occupied territory in order to make it comply with the occupying power's obligations under the ICCPR.

For the above reasons, it is far from clear that the ICCPR poses a viable challenge to the requirement of the law of occupation that an occupying state respect the existing law in the occupied territory.

The question whether the ECHR requires an occupying power which is a state party to it to change pre-occupation laws in occupied territory which are incompatible with the ECHR rights is a complicated one following the judgment of the Grand Chamber in *Al-Skeini*. An important question will be whether the basis of jurisdiction for the purpose

of Article 1 of the Convention is the “effective control of an area” basis or the “State agent authority and control” basis. If it is the “effective control of an area” basis, the occupying state becomes responsible for securing in the occupied territory the entire range of Convention rights, with the consequence that it will, at least arguably, be obliged to change pre-occupation laws which are inconsistent with those rights.

However, if the basis of jurisdiction is “State agent authority and control”, the occupying state is only under an obligation to secure to an individual who falls under the control of the state’s agent the ECHR rights which are relevant to the situation of that individual. In other words, the ECHR rights are “divided and tailored”, in the language adopted by the Court. Consequently, if the basis of the occupying state’s jurisdiction under Article 1 of the ECHR is “State agent authority and control” rather than “effective control over an area”, it may well not be obliged by the Convention to alter any pre-occupation laws which are inconsistent with the Convention, with the result that, for the purpose of Article 43 of the Hague Regulations, it will not be “absolutely prevented” by the Convention from leaving the existing law in place.

The Court appears to indicate in its judgment that where a state party occupies the territory of a non-party (i.e. the occupation is outside the “legal space of the Convention” or *espace juridique*), the Court will use the “State agent authority and control” basis of jurisdiction rather than the “effective control of an area” basis, if it finds jurisdiction at all. On that basis, the Court has found a way of protecting and vindicating the rights of individuals who come into direct contact with soldiers or other agents of the occupying power, whilst at the same time avoiding the imposition of European Convention standards on non-European societies and any requirement to change pre-occupation laws. In the *Al-Skeini* case itself, the Court concluded that the individuals concerned were within the UK’s jurisdiction on the “State agent authority and control” basis, despite the fact that the UK was an occupying power in Iraq at the material time. However, where one state party to the Convention occupies the territory of another state party (as in *Loizidou*), the “effective control of an area” basis of extraterritorial jurisdiction may apply, in which case the occupying state might come under an obligation, under the Convention, to change pre-occupation laws.

For the above reasons, on the basis of the European Court’s judgment in *Al-Skeini*, it appears that at the current time the ECHR does not pose a challenge to the requirement of the law of occupation that an occupying state respect the existing law in the occupied territory, at least where the occupation takes place outside the “legal space of the Convention”.

Chapter 6

The Challenge from Security Council Authorisation: Security Council Resolutions as a legal basis for occupation legislation to change the existing law in Iraq

In previous chapters we have examined the challenge to the rules of occupation law which require respect for existing law and institutions posed by the idea that occupying states should be freed of their obligations under those rules so as to be permitted to engage in “transformational” or “transformative” occupations, as well as the challenge posed by Court decisions on the applicability of human rights treaties in occupied territory. In this chapter we will examine the challenge posed by the idea that the Security Council may authorise a departure from, or override, the rules which require respect for existing laws and institutions. There is a link here with the challenge posed by “transformative occupation” in that Security Council authorisation is argued to be a means by which “transformative occupation” can lawfully be carried out. There is also a possible link with human rights in that Security Council resolutions might be used to promote human rights in occupied territory.

It will be argued below that there is uncertainty as to whether a Security Council resolution provides a sound legal basis for an occupying power to enact legislation which would otherwise be outside the constraints of the law of occupation. Furthermore, in part because of revelations contained in the Chilcot Report, there are particular reasons to doubt that Security Council authorisation provided a legal basis for a number of pieces of legislation which were enacted by the CPA and were outside the constraints of occupation law.

As noted above, a further challenge to the rules of occupation law which require respect for existing law and institutions comes from the idea that the Security Council may authorise a departure from, or override, these rules. A number of writers have expressed the view that the Security Council may authorise an occupying state to change the existing law in occupied territory when this would not otherwise be

permitted under the law of occupation.¹¹²² However, there are a number of issues which require to be considered in order to reach that conclusion, including one fundamental problem which these writers have not considered.

In this chapter we will examine the idea that the Security Council may authorise an occupying state to change the existing law in the occupied territory when such change would not otherwise be permitted under the law of occupation, in particular Article 43 of the Hague Regulations. First, we will consider whether this is legally possible in principle. Then we will look at the particular case of the occupation of Iraq in 2003-04 and consider the legal argument relied upon by the occupying powers in relation to Security Council authorisation as a legal basis for changing the law in Iraq, and whether that argument is correct, having regard to the relevant Security Council Resolution (Resolution 1483). In considering that Resolution we will also look at the previous cases of Kosovo and East Timor. Finally, we will consider whether, even if one assumes that the interpretation by the occupying powers of the relevant Security Council Resolution was correct, the occupying powers complied with the terms of the Resolution so that it could be concluded that legislation which would not otherwise have been lawful under the law of occupation was nevertheless rendered lawful under the terms of the Resolution.

¹¹²² David J. Scheffer, 'Beyond Occupation Law', (2003) Vol. 97 A.J.I.L. p. 842, at pp. 849-50; Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', (2005) Vol. 16 E.J.I.L. p. 661, at pp. 680-81; Michael N. Schmitt and Charles H.B. Garraway, 'Occupation Policy in Iraq and International Law', (2004) Vol. 9 International Peacekeeping: The Yearbook of International Peace Operations, p. 27, at p. 31; Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', (2006) 100 A.J.I.L. p. 580, at p. 622. See also Marten Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation' (2004) Vol. 86 IRRC p. 745, at p. 763, who states that the Security Council can derogate from the law of occupation, at least as regards non-peremptory norms. See also Rüdiger Wolfrum, 'Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference' (2005) Vol. 9 Max Planck Yearbook of United Nations Law 1, at p. 16, who states, more generally, that the "possibility exists" for Security Council resolutions to mandate an occupying power to take steps which go beyond the limitations set by international humanitarian law (citing Scheffer). See also Eyal Benvenisti, *The International Law of Occupation* (2nd ed., 2012, Oxford University Press), at p. 66, who argues that the Security Council has authority to authorise "the transformation of a regime under occupation beyond what the law of occupation would otherwise allow". See also Andrea Carcano, *The Transformation of Occupied Territory in International Law* (2015, Brill Nijhoff, Leiden), who states that binding resolutions of the Security Council may "amend" the law of occupation (at p. 107) and suggests that "transformative occupations authorised by the Security Council" may be lawful (at p. 451).

In relation to the specific case of Iraq, in the period following the adoption of Resolution 1483, a number of writers expressed views on whether that Resolution provided the occupying powers with a legal basis to make changes to the law in Iraq which would not otherwise be lawful under the law of occupation. Scheffer, writing in the aftermath of the adoption of Resolution 1483 was of the view that that Resolution did not modify the obligations of occupation law such as to entitle the occupying powers to pursue broad transformational objectives, because the Resolution expressly reiterated the occupying powers' obligations under occupation law.¹¹²³ Scheffer even refers to "Washington's willing acceptance of occupation law in Iraq".¹¹²⁴ Scheffer himself accepted that an "epic transformation" needed to take place in Iraq but "in a manner largely unsuited to occupation law".¹¹²⁵ He considered that the circumstances in Iraq would have been far better addressed "by a tailored nation-building mandate of the Security Council".¹¹²⁶ Clearly, Scheffer did not believe that Resolution 1483 contained such a mandate. Consequently, Scheffer called for a fresh Security Council resolution establishing a UN civilian administration which would assume powers held by the CPA, or, as an alternative, a clearer delegation of responsibilities by the Security Council to the CPA so that the latter was acting on behalf of the Council and not as an occupying power.¹¹²⁷

Similarly, Fox concluded that "Resolution 1483 should not be read as a clear endorsement of CPA-led reforms" and that "[a] legislative override of occupation law cannot be read into the Council's tepid language".¹¹²⁸ Orakhelashvili, in an article which does not mention Article 43 of the Hague Regulations or any of the legislation enacted by the CPA, concluded that Resolution 1483 "is not intended to override the operation of general international law otherwise applicable to the situation" and that consequently no actor was able to invoke the Resolution as a justification for action in

¹¹²³ Scheffer (n 1122) 850. Scheffer does however acknowledge that some specific decisions of the Council in Resolution 1483 permitted the occupying powers to act outside of occupation law: he cites the Council's decisions in relation to the Development Fund for Iraq, management of Iraq's petroleum and natural gas resources and the formation of an Iraqi interim administration as a transitional administration run by Iraqis (p. 846, note 18).

¹¹²⁴ *Ibid*, p. 858

¹¹²⁵ *Ibid*, p. 853

¹¹²⁶ *Ibid*, p. 843

¹¹²⁷ *Ibid*, p. 859

¹¹²⁸ Gregory H. Fox, 'The Occupation of Iraq' (2005) Vol. 36, *Georgetown Journal of International Law*, p.195, at p. 259, p. 262

breach of fundamental principles of general international law.¹¹²⁹ Other writers have expressed views about whether particular CPA measures were authorised by Security Council resolution.¹¹³⁰

However, these writers were writing before the release by the Chilcot Inquiry of the UK Attorney General's advice on Resolution 1483, and consequently they were not able to engage with that advice and the argument on which that advice was based. (The article by Orakhelashvili referred to above does not even mention the paragraph of the Resolution on which, as we shall see, the Attorney General set great store – operative paragraph 8 - or its content.) These writers were also writing before the publication of the Chilcot Report and were therefore not able to take into account certain information contained in the Report which is highly relevant to the question whether certain CPA legislation can be regarded as authorised by the Security Council. These are all issues which will be discussed below.

In terms of methodology, we shall examine contemporaneous documents disclosed by the Chilcot Inquiry (in particular the UK Attorney General's advice on the effect of Resolution 1483); transcripts of the evidence given by witnesses at the hearings of the Inquiry; and material contained within the Chilcot Report itself. In an effort to understand some of the language employed in Resolution 1483, we will also consider the Resolution which established the UN interim civil administration in Kosovo, as well as some of the legislation enacted by that administration. We will also examine judgments of international courts which are relevant to the issues with which we are concerned.

¹¹²⁹ Alexander Orakhelashvili, 'The Post-War Settlement in Iraq: The UN Security Council Resolution 1483(2003) and General International Law', (2003) Vol. 8 *Journal of Conflict and Security Law* p. 307, at p. 314

¹¹³⁰ See e.g. Roberts, 'Transformative Military Occupation' (n 1122) 615

Can the Security Council authorise an occupying state to change the existing law in the occupied territory when such change would not otherwise be permitted under the law of occupation ?

In the *Aerial Incident at Lockerbie* case the International Court of Justice held that, under Article 103 of the UN Charter (see below), the obligation of states, as Members of the United Nations, to carry out decisions of the Security Council prevails over their obligations under any other international agreement.¹¹³¹ On that basis, the Court held that, *prima facie*, the obligations of Libya, the UK and the US to accept and carry out Security Council Resolution 748 (1992), which *inter alia* required Libya to surrender for trial in the UK or US the persons who had been charged with placing a bomb on the relevant airliner, prevailed over their obligations under the Montreal Convention (the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971), which in the particular case apparently required submission of the case to the competent authorities of Libya for prosecution.¹¹³²

It should be noted that this decision of the Court was in respect of a request for the indication of provisional measures and that, accordingly, the Court made clear that it was not making definitive findings of fact or law on the issues relating to the merits of the case.¹¹³³

¹¹³¹ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, [1992] I.C.J. Reports, p. 3, at p. 15 (para. 39); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, [1992] I.C.J. Reports, p. 114, at p. 126 (para. 42). Sassòli cites the *Lockerbie* case (or at least that in which the US was respondent) in support of his conclusion that a Security Council resolution may prevail over Article 43: see Sassòli (n 1122) 680-81.

¹¹³² *Aerial Incident at Lockerbie*, [1992] I.C.J. Reports, p. 3, at p. 15 (para. 39); and p. 114, at p. 126 (para. 42). Article 8 of the Montreal Convention recognises that Contracting States may make extradition conditional on the existence of a treaty and provides that such a State which receives an extradition request from another Contracting State with which it does not have an extradition treaty, may “at its option” treat the Montreal Convention as the legal basis for extradition. However, Article 8 goes on to state that extradition shall be subject to the other conditions provided by the law of the requested state. In that regard, Libya pointed out that Libyan law prohibited the extradition of Libyan nationals. Furthermore, Libya had no extradition treaty with the UK or US. See [1992] I.C.J. Reports, at pp. 5-6 and pp. 116-17. Article 7 requires that a Contracting State in the territory of which an alleged offender is found must, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

¹¹³³ *Aerial Incident at Lockerbie*, [1992] I.C.J. Reports p. 3, at p. 14 (para. 38) and p. 126 (para. 41). Proceedings before the Court were later discontinued by agreement of the parties after Libya surrendered the two persons suspected of placing the bomb on the airliner so that they could be tried

Nevertheless, the logic of the Court is correct on the point regarding obligations under decisions of the Security Council prevailing over obligations under any other international agreement. The Court cited Articles 25 and 103 of the UN Charter in support of its decision on this point. Article 25 of the Charter provides:

“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

Article 103 of the 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.”

The obligation to carry out the decisions of the Security Council under Article 25 is clearly one of “the obligations of the Members of the United Nations under the ... Charter”, as referred to in Article 103. Therefore the obligation of Members to accept and carry out the decisions of the Security Council prevails over their obligations under any other international agreement, in case of conflict. To put it another way, as Bernhardt has stated, “Article 103 does not say that only the Charter shall prevail, but

by a Scottish Court sitting in the Netherlands, composed of three Scottish judges sitting without a jury and applying Scots law, and the trial had taken place. See UN Security Council Resolution 1192 (1998), adopted 27 August 1998 (U.N. Doc. S/RES/1192 (1998)); letter dated 24 August 1998 from the Acting Permanent Representatives of the UK and USA to the Secretary-General of the UN (U.N. Doc. S/1998/795) (proposal for the trial of the accused by a Scottish Court sitting in the Netherlands); The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998, made 16 September 1998 (S.I. 1998 No. 2251) [Scotland]; High Court of Justiciary [Scotland] at Camp Zeist, *H.M. Advocate v. Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah* (Case No. 1475/99), Opinion of the Court, 31 January 2001 (first accused found guilty, second accused acquitted); Appeal Court, High Court of Justiciary [Scotland] [sitting at Camp Zeist, Netherlands], *Appeal against Conviction of Abdelbaset Ali Mohamed Al Megrahi v. H.M. Advocate* (Appeal No. C104/01), Opinion of the Court, 14 March 2002 (first accused's appeal against conviction refused); International Court of Justice, *Libyan Arab Jamahiriya v. United Kingdom*, Order dated 10 September 2003 (General List No. 88); International Court of Justice, *Libyan Arab Jamahiriya v. United States of America*, Order dated 10 September 2003 (General List No. 89).

refers rather to obligations under the Charter...”, which includes Security Council decisions.¹¹³⁴

Following the decision in the *Lockerbie* case, there was some academic discussion regarding whether the Security Council is bound to act in accordance with international law or may override it.¹¹³⁵ However, once it is recognised that the obligation to carry out the decisions of the Council under Article 25 is one of the “obligations of the Members of the United Nations under the ... Charter” as referred to in Article 103, it follows from Article 103 that, in principle, the Security Council can override the obligations of Members under other international agreements and is not constrained to act consistently with such other agreements. It has been suggested that the obligation to carry out a Security Council decision cannot, by operation of Article 103, prevail over a rule of *jus cogens* which is in conflict with it.¹¹³⁶ That may well be correct but,

¹¹³⁴ Rudolf Bernhardt, ‘Article 103’ in Bruno Simma (Ed.), *The Charter of the United Nations, A Commentary* (2nd Ed., 2002, Oxford University Press, Oxford), Vol. II, pp. 1295-96.

¹¹³⁵ See e.g. Dapo Akande, ‘The International Court of Justice and the Security Council: Is there room for judicial control of decisions of the political organs of the United Nations?’ (1997) Vol. 46 I.C.L.Q. p. 309, in particular pp. 314-25; Bernd Martenczuk, ‘The Security Council, the International Court and Judicial Review: What lessons from Lockerbie?’, (1999) Vol. 10 E.J.I.L. 517, in particular pp. 544-46 (“... it is doubtful whether general international law is a binding constraint on the Council acting under Chapter VII of the Charter”, *ibid*, at p. 544-45; “... the Council’s discretion to overrule the rights of parties to a dispute” which constitutes a threat to the peace, breach of the peace or act of aggression under Article 39 of the Charter “is essentially unlimited”, *ibid*, p. 546)

¹¹³⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, [1993] I.C.J. Reports, p. 325, Separate Opinion of Judge Lauterpacht, p. 407 at p. 440 (para. 100). Judge Lauterpacht justifies this conclusion, in part, as being “a matter of simple hierarchy of norms” (*ibid*). See also Dapo Akande, ‘The International Court of Justice and the Security Council: Is there room for judicial control of decisions of the political organs of the United Nations?’ (1997) Vol. 46 I.C.L.Q. p. 309, at p. 322, who argues that a decision of the Security Council which conflicts with a rule of *jus cogens* “must necessarily be without effect”. See also *Yassin Abdullah Kadi v. Council of the European Union*, Case T-315/01, Court of First Instance of the European Communities (Second Chamber, Extended Composition), Judgment of 21 September 2005, European Court Reports 2005 II-03649, in which the Court of First Instance held, *inter alia*, that if Security Council resolutions fail to observe the fundamental peremptory provisions of *jus cogens* “however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community” (at para, 230) (judgment set aside on other grounds on appeal to the European Court of Justice: see *Yassin Abdullah Kadi v. Council of the European Union*, C-402/05 P, Judgment of the Court of Justice of the European Communities (Grand Chamber) of 3 September 2008, European Court Reports 2008 I-06351). However, it would be a leap from the proposition that a Security Council decision does not prevail over a rule of *jus cogens* with which it is inconsistent to any suggestion that the Security Council is bound to order an occupying power to amend existing law in occupied territory which is inconsistent with human rights norms having the character of *jus cogens*. Apart from anything else, as shown above (in Chapter 5), it is not clear that the human rights norms in customary international law (with the possible exception of norms in relation to genocide and slavery), including those which possess the character of *jus cogens*, require the amendment or repeal of laws. Nor is it

as noted above, it is unlikely that the rule contained in Article 43 is a rule of *jus cogens*.¹¹³⁷

If it is right that the obligation of a UN Member to accept and carry out the decisions of the Security Council prevails over any conflicting obligation under another international agreement to which it is party, where an occupying state is faced with a conflict between its obligation to carry out a Security Council decision and its obligation under Article 43 of the Hague Regulations to respect the laws in force in the occupied territory (unless absolutely prevented), the obligation to carry out the Security Council decision will prevail.

However, it is here that we first come up against a major complication. As shown above, the rules contained in the Hague Regulations also form part of customary international law. Therefore, the obligation to respect the existing law in occupied territory (unless absolutely prevented) forms part of customary international law. A serious problem with the idea that a decision of the Security Council can override an occupying state's obligation to respect the existing law in occupied territory (unless it is absolutely prevented from doing so) is that Article 103 of the UN Charter says nothing about Security Council decisions prevailing over a UN Member's obligations under customary international law. On the face of it, therefore, Article 103 does not provide that the obligation to carry out a Security Council decision prevails over an obligation under customary international law with which it is in conflict. If there is no legal basis for the obligation to carry out a Security Council decision to prevail over an obligation under customary international law, a Security Council decision cannot free an occupying state from its obligation under customary international law to respect the existing law in the occupied territory (unless absolutely prevented).

Bernhardt, in his commentary on Article 103 of the Charter, whilst acknowledging that Article 103 does not deal with obligations deriving from customary international law, argues that Article 103 must be seen in connection with Article 25 and with "the

clear on what basis the Security Council would be obliged to take such positive action to enforce *jus cogens* human rights norms.

¹¹³⁷ See Chapter 5, above, under 'Human rights norms in customary international law and *jus cogens*'

character of the Charter as the basic document and ‘constitution’ of the international community”.¹¹³⁸ He concludes from this approach that “the ideas underlying Art. 103” are therefore valid in case of conflict between obligations under the Charter and obligations which are not contained in treaty, such as those under customary international law.¹¹³⁹ This argument holds some attraction but is not entirely convincing. It does not explain on what legal basis “the ideas underlying Art. 103” – Bernhardt seems to make a distinction between Article 103 and the ideas underlying it – apply in case of conflict between obligations under the Charter and, for example, obligations in customary international law. Furthermore, this argument does not utilise the established legal framework for the interpretation of treaties, as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Rather, it is based on treating the UN Charter as a special case.

It could perhaps be argued, applying Article 31 of the Vienna Convention, that interpreting Article 103 in the light of the Charter’s “object and purpose”, it should be interpreted as providing that an obligation to carry out a Security Council decision prevails over an obligation under customary international law (as well as one under an international agreement), or at least that it does so where the customary international law rule in question was generated by a rule contained in an international agreement, as in the case of the customary international law equivalent of Article 43 of the Hague Regulations (see above). However, it has to be said that it is far from clear that a Court would accept that argument.

Moreover, if recourse is had to the *travaux préparatoires*, under Article 32 of the Vienna Convention, it tends to favour the interpretation that, under Article 103, Charter obligations prevail only over treaty obligations, and not obligations under customary international law. During the San Francisco conference it had at one point been proposed that what is now Article 103 be amended to state that obligations under the Charter were to prevail over any other international obligations, and not merely obligations under other international agreements. On 13 June 1945 the Advisory Committee of Jurists amended the draft article which was to become Article 103 so that

¹¹³⁸ Bernhardt, ‘Article 103’ (n 1134) 1298-99

¹¹³⁹ *Ibid*

the obligations of Members under the Charter would prevail over “any other international obligations to which they are subject”, and not merely over obligations under any other international treaty or agreement.¹¹⁴⁰ The formula, “any other international obligations to which they are subject”, would have included obligations under customary international law. However, subsequently, on 23 June 1945, the Coordination Committee substituted “their obligations under any other international agreement” for “any other international obligations to which they are subject”.¹¹⁴¹

Thus, it was proposed at the San Francisco Conference that, under what is now Article 103, Charter obligations would prevail over any other international obligation to which Members were subject, a formula which would have included obligations under rules of customary international law, but that proposal was rejected.¹¹⁴² This does not support the interpretation of Article 103 in accordance with which obligations under the Charter are to prevail over obligations under customary international law.

It is therefore far from clear that a Security Council decision prevails over a conflicting rule of customary international law.¹¹⁴³ (The point here is not to offer a definitive view on the issue but to draw attention to the uncertainty and consequent risk, on which see

¹¹⁴⁰ Summary Report of Seventh Meeting of Advisory Committee of Jurists on 13 June 1945 (Doc. No. WD 290, Symbol CO/118) (reproduced in Documents of the United Nations Conference on International Organization, San Francisco, 1945, Vol. XVII (1954, United Nations, New York), p. 415) (for the previous wording which the Advisory Committee of Jurists amended, see *ibid*, Vol. XVIII (1954, United Nations, New York), p. 341); Text revised by the Advisory Committee of Jurists at its Seventh Meeting, June 13, 1945 and approved by the Coordination Committee at its Eighteenth Meeting, June 13, 1945, Article 76 (Doc. No. WD 296, Symbol CO/102(2)) (reproduced in *ibid*, Vol. XVIII, p. 342); Draft Charter of the United Nations as finally approved in English by both the Coordination Committee and the Advisory Committee of Jurists on June 22, 1945 (Doc. No. 1159, Symbol CO/181) (Reproduced in *ibid*, Vol. XV (1945, United Nations Information Organizations, London and New York), p. 170, at p. 209 (Article 103));

¹¹⁴¹ Summary Report of Forty-First Meeting of Coordination Committee, 23 June 1945 (Doc. No. WD 441, Symbol CO/205) (Reproduced in *ibid*, Vol. XVII, p. 379, at p. 382)

¹¹⁴² See also Bernhardt, ‘Article 103’ (n 1134) 1293 (citing J. Combacau, *Le Pouvoir de sanction de l’O.N.U.* (1974), p. 282), who states “A formula according to which all other commitments, including those arising under customary law, were to be superseded by the Charter, was ultimately not included”. Bernhardt does not refer to any specific details or supporting documents. Nevertheless, the documents cited above establish that a proposal that obligations under the Charter would prevail over any other international obligations was made but rejected. Bernhardt does not mention that in this respect the *travaux préparatoires* run counter to his argument that the Charter prevails over customary international law obligations.

¹¹⁴³ It will often be possible to interpret the terms of a Security Council resolution, and a relevant rule of customary international law, so that they are compatible with one another. The problem under discussion here is where it is not possible to interpret them so as to be compatible with one another.

the paragraph following.) There is therefore considerable uncertainty as to whether a Security Council decision can free an occupying state from its obligation under customary international law to respect the existing law in occupied territory (unless absolutely prevented).

Here we should recall that, as shown above, where an occupying state enacts legislation in violation of the restrictions placed upon its legislative power by Article 43, or the equivalent rule in customary international law, there is a risk that courts in the occupied territory (either during the occupation, or after it and possibly with retrospective effect) will hold the legislation to be invalid and devoid of legal effect. As argued above, there needs to be a sound legal basis for the legislation which an occupying state enacts. Because of the uncertainty regarding whether the obligation of UN Members to carry out Security Council decisions prevails over the customary international law equivalent of Article 43, there is uncertainty about whether Security Council authorisation provides a sound legal basis for an occupying state to enact legislation outside the constraints of that rule of customary international law. It should be noted that this statement relates to legislation enacted by an occupying *state* and not that enacted by a UN interim civil administration – it is recognised that different considerations apply in the latter case (see below).

A further issue is that in order to determine whether a Security Council resolution creates obligations for Members which might prevail over their other international obligations under Article 103 of the Charter, it is necessary to determine whether the Security Council has made a “decision” within the meaning of Article 25 of the Charter. Writers discuss this issue in terms of whether the relevant provision in the Security Council resolution concerned is “binding” or “mandatory”, or whether on the other hand it is “non-binding”.¹¹⁴⁴

¹¹⁴⁴ See Loraine Sievers and Sam Daws, *The Procedure of the UN Security Council* (4th Ed., 2014, Oxford University Press, Oxford), pp. 380-81 which states “...Member States must be able to evaluate whether a provision adopted by the Security Council imposes legal obligations, in order to apply Article 103 ...The question, then, is to know under what circumstances a decision adopted by the Security Council is to be considered mandatory”, and see generally pp. 380-93 on that question. See also Bernhardt (n 1005) 1296, who states “When UN organs, including the SC, adopt non-binding resolutions, Art. 103 is not applicable.” On the meaning of “decision” in Article 25 see also Jost Delbrück, ‘Article 25’ in Bruno Simma (Ed.), *The Charter of the United Nations, A Commentary* (2nd Ed., 2002, Oxford University Press, Oxford), Vol. I, pp. 452-64

Some guidance on this question has been given by the International Court of Justice in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.¹¹⁴⁵ In that case it had been argued that the relevant Security Council resolutions had been couched in exhortatory rather than mandatory language and that they therefore did not purport to impose any legal duty on any state. The Court stated that the “[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect”.¹¹⁴⁶ The Court went on to state that the question whether the Security Council has in fact exercised its powers under Article 25 requires to be determined in each case, having regard to (i) the terms of the resolution to be interpreted; (ii) the discussions leading to it; (iii) the Charter provisions invoked; and (iv) in general, all circumstances which might assist in determining the legal consequences of the resolution concerned.¹¹⁴⁷ As to the Charter provision invoked, the Court rejected the argument that Article 25 only applies to enforcement measures adopted under Chapter VII of the Charter, stating that it was not possible to find any support for that argument in the Charter.¹¹⁴⁸

Thus, leaving to one side for a moment the question whether Security Council decisions prevail over rules of customary international law, where an occupying state argues that the Security Council has released it from its obligation to respect the existing law of the occupied territory (unless absolutely prevented), it will be necessary to determine whether the Security Council has made a decision with binding effect under Article 25 of the Charter and in that regard the factors outlined by the Court in its Advisory Opinion on *Namibia* will be useful.

A further complication is that Security Council resolutions often authorise, rather than oblige, Members to take certain action. Indeed, it is perhaps unlikely that a Security Council resolution would oblige an occupying state to legislate in occupied territory,

¹¹⁴⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] I.C.J. Reports p. 16

¹¹⁴⁶ *Ibid*, p. 53, para. 114

¹¹⁴⁷ *Ibid*

¹¹⁴⁸ *Ibid*, pp. 52-53, para. 113

particularly if the occupying state is a permanent member of the Council and thus possessed of a veto. On the face of it, where a provision in a Security Council resolution authorises but does not oblige a state to take certain action, it is difficult to see logically how that state can be said to be obliged under Article 25 to “carry out” such a provision, since authorisation amounts to a power rather than a duty. Furthermore, according to the wording of Article 103, if no obligation under the Charter exists to conflict with an obligation under another treaty, there is no Charter obligation to prevail over any such treaty obligation. On that basis, if a provision in a Security Council resolution authorises, but does not oblige, an occupying state to legislate in occupied territory, in relation to that provision there would be no obligation which could prevail over Article 43 of the Hague Regulations (or its customary law equivalent) under Article 103 of the Charter.

Some writers have however suggested that even where a Security Council resolution authorises, rather than obliges, a Member to take certain action, Article 103 should apply so that the implementation of the authorisation prevails over other treaty obligations.¹¹⁴⁹ That argument was however implicitly rejected by Grand Chamber of the European Court of Human Rights in *Al-Jedda v. The United Kingdom*.¹¹⁵⁰ That case concerned an individual who was interned without charge for over three years in Iraq (after the occupation) by UK armed forces. The applicant complained that his internment by the UK violated Article 5(1) of the ECHR, which provides that everyone has the right to liberty and security of the person and that no one shall be deprived of his liberty, subject to specified exceptions.

The UK Government argued in *Al-Jedda* that a Security Council resolution - Resolution 1546 - prevailed over its obligations under Article 5 of the ECHR, as a result of the operation of Articles 25 and 103 of the Charter.¹¹⁵¹ Resolution 1546 stated that the Security Council had decided that the multinational force in Iraq shall have

¹¹⁴⁹ Jochen Abr. Frowein and Nico Krisch, ‘Article 39’ in Bruno Simma (Ed.), *The Charter of the United Nations, A Commentary* (2nd Ed., Oxford University Press, Oxford, 2002), Vol. I, p. 729; Danesh Sarooshi, *The United Nations and the Development of Collective Security, The Delegation by the UN Security Council of its Chapter VII Powers* (Clarendon Press, Oxford, 1999), pp. 150-51

¹¹⁵⁰ *Al-Jedda v. The United Kingdom* [GC] (Application No. 27021/08), European Court of Human Rights, Judgment of 7 July 2011, [2011] IV Reports of Judgments and Decisions, p. 305

¹¹⁵¹ *Ibid*, p. 369 (para. 91)

“the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters [from the Prime Minister of the Interim Government of Iraq, Dr. Ayad Allawi, and U.S. Secretary of State, Mr Colin Powell, both addressed to the President of the Security Council] annexed to this resolution ... setting out its tasks....”. The annexed letter from the Iraqi Prime Minister stated that the Interim Government of Iraq was seeking a new resolution on the multinational force mandate to contribute to maintaining security in Iraq, “including through the tasks ... set out in” the letter from U.S. Secretary of State. The letter from the U.S. Secretary of State annexed to the resolution stated that the multinational force stood ready to continue to undertake a broad range of tasks to contribute to the maintenance of security, including “internment where this is necessary for imperative reasons of security”. The UK Government argued, therefore, that Resolution 1546 authorised the multinational force to use internment where necessary for imperative reasons of security.¹¹⁵²

Furthermore, the UK Government argued that Article 103 of the Charter did not apply only to Security Council resolutions which obliged states to act in a certain way, but also to resolutions which authorised action.¹¹⁵³ The UK Government pointed out that since the early 1990s the practice of the Security Council had been to authorise military action by states. The UK Government further stated that no agreements had ever been entered into by states under Article 43 of the Charter to make troops available to the UN, and that in the absence of such an agreement no state could be required to take military action.¹¹⁵⁴

As regards the application of Article 103 of the Charter the Court in *Al-Jedda* held:

“Before it can consider whether Article 103 had any application in the present case, the Court must determine whether there was a conflict between the United Kingdom’s obligations under United Nations Security Council Resolution 1546 and its obligations under Article 5 § 1 of the Convention. In other words, the

¹¹⁵² Ibid, pp. 367-68 (para. 88)

¹¹⁵³ Ibid, p. 368 (para. 90)

¹¹⁵⁴ Ibid, pp. 368-69 (para.90)

key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment.”¹¹⁵⁵

Thus the Court implicitly rejected the UK’s argument that Article 103 could apply in relation to a Security Council resolution which merely authorised certain action: in the Court’s view, for Article 103 to apply, there needed to be an obligation under the resolution concerned which was in conflict with an obligation under another treaty.¹¹⁵⁶ The Court found that Resolution 1546 did not require the UK to place an individual whom its authorities considered to constitute a risk to the security of Iraq in indefinite detention without charge.¹¹⁵⁷ The Court therefore concluded that “in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom’s obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention”.¹¹⁵⁸ Accordingly, the Court found that the internment of the Applicant by the UK violated Article 5(1) of the ECHR.

Thus, applying the approach to the application of Article 103 adopted by the European Court of Human Rights in *Al-Jedda*, if a provision in a Security Council resolution authorised but did not oblige an occupying state to legislate for occupied territory, in relation to such provision there would, for the purpose of Article 103, be no obligation under the Charter to conflict with and prevail over Article 43 of the Hague Regulations (or its customary international law equivalent). Accordingly, in such circumstances the occupying power would not be freed from the constraints of Article 43 (or the equivalent rule in customary international law).

It should be noted that prior to this decision of the European Court of Human Rights, the House of Lords in the UK had, in earlier proceedings brought by Mr Al-Jedda, reached the opposite conclusion on the Article 103 point. In *R (on the application of Al-Jedda) v Secretary of State for Defence* the House of Lords held that the power to

¹¹⁵⁵ Ibid, p. 373 (para. 101)

¹¹⁵⁶ C.f. Marko Milanovic, ‘*Al-Skeini and Al-Jedda in Strasbourg*’, (2012) Vol. 23 E.J.I.L., p. 121, at p. 138, who states that the Court “did not address the issue of whether authorizations are capable of being covered by Article 103”.

¹¹⁵⁷ *Al-Jedda v. The United Kingdom*, p. 377 (para. 109)

¹¹⁵⁸ Ibid

detain authorised in Resolution 1546 prevailed over Article 5 of the ECHR.¹¹⁵⁹ Part of the reasoning for that decision, as explained by Lord Bingham (with whom the other Law Lords agreed) was that:

“There is ... a strong and to my mind persuasive body of academic opinion which would treat Article 103 as applicable where conduct is authorised by the Security Council as where it is required...”¹¹⁶⁰

Lord Bingham favoured what he described as a “purposive interpretation” of Article 103 which reflected the practice of the UN and member states as it had developed, i.e. the practice of the Security Council authorising states to take action.¹¹⁶¹

Thus different courts of high authority have dealt with this issue in different ways, although outside the UK it may be that greater weight would be attached to the judgment of an international court such as the European Court of Human Rights. It is apparent therefore that there is a substantial risk that other courts, whether courts in occupied territory, or in an occupying state or a third state, or indeed an international court, should the matter come before it, may well hold that a provision in a Security Council resolution which authorises, but does not oblige, a state to take certain action does not, under Article 103 of the Charter, prevail over an obligation under another international agreement.

The purpose here is, again, not to offer a definitive view, as if that were possible, on whether, under Article 103 of the UN Charter, provisions in Security Council resolutions which authorise but do not oblige states to take action prevail over obligations under other treaties. Rather, the point being made here is that there is, to say the least, considerable uncertainty regarding whether Article 103 has that effect in relation to such provisions in Security Council resolutions. Consequently, there is substantial reason to doubt the wisdom of using a provision in a Security Council

¹¹⁵⁹ *R (on the application of Al-Jedda) (Appellant) v Secretary of State for Defence (Respondent)*, House of Lords, 12 December 2007, [2007] UKHL 58, pp. 17-25 (paras. 26-39) (Lord Bingham of Cornhill); pp. 51-53 (paras. 114-118) (Lord Rodger of Earlsferry); p. 55 (para. 125) (Baroness Hale of Richmond); pp. 57-59 (para. 131-36) (Lord Carswell); pp. 64-65 (paras. 150-52) (Lord Brown of Eaton-Under-Heywood)

¹¹⁶⁰ *Ibid.*, p. 21 (para. 33)

¹¹⁶¹ *Ibid.*, p. 22 (para. 33)

resolution which authorises but does not oblige an occupying state to legislate as a legal basis for changing the existing law in occupied territory where it would not otherwise be permitted under Article 43 of the Hague Regulations and the equivalent rule of customary international law. Again, it should be recalled that if an occupying state enacts legislation in violation of the restrictions placed upon its legislative power by Article 43, there is a risk that courts in the occupied territory (either during the occupation, or after it and possibly with retrospective effect) will hold the legislation to be invalid and devoid of legal effect. Consequently, as noted above, there needs to be a sound legal basis for the legislation which an occupying state enacts.

Having considered above these general problems with the idea that a Security Council resolution may provide a legal basis for an occupying state to legislate outside the constraints of Article 43 of the Hague Regulations and its equivalent in customary international law, we will now consider the argument that a Security Council resolution provided a legal basis for the occupying states to legislate outside those constraints in Iraq, and the problems in relation to that argument.

Security Council authorisation as a legal basis for legislative change in Iraq

On 26 March 2003 the UK Attorney General, Lord Goldsmith, provided written advice to the Prime Minister in relation to the reform and restructuring of Iraq and its Government during the anticipated occupation of that country by the US and UK.¹¹⁶² Lord Goldsmith stated in that advice:

“... In short, my view is that a further Security Council resolution is needed to authorise imposing reform and restructuring of Iraq and its Government. In the absence of a further resolution, the UK (and US) would be bound by the provisions of international law governing belligerent occupation, notably the Fourth Geneva Convention and the 1907 Hague Regulations. The provisions of these treaties would need to be considered against specific proposals in order to

¹¹⁶² Note from Lord Goldsmith QC, Attorney General to the Prime Minister, 26 March 2003, ‘Iraq: Authorisation for an Interim Administration’. Available on the web site of the Iraq (Chilcot) Inquiry, now archived by the UK National Archive at <https://webarchive.nationalarchives.gov.uk/20100919030826/http://www.iraqinquiry.org.uk/transcripts/declassified-documents.aspx>

give detailed advice on the precise limits of what is possible, but the general principle is that an Occupying Power does not become the government of the occupied territory. Rather, it exercises temporary de facto control in accordance with the defined rights and obligations under Geneva Convention IV and the Hague Regulations. These instruments are complex, but the following points give an indication of the limitations placed on the authority of an Occupying Power:

“(a) 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 structure 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.

...

“(c) Geneva Convention IV also requires that the penal laws of the occupied territory must remain in force except where they constitute a threat to security or an obstacle to application of the Convention. In addition, the courts of the occupied territory must be allowed to continue to function. There are limited exceptions allowing the Occupying Power to promulgate its own laws in order to fulfil its obligations under the Convention and to maintain security and public order, but in principle, the existing structures for the administration of justice must remain in place.

“(d) Apart from rules on the collection of taxes (which must as far as possible be in accordance with existing local law), there are no specific provisions in Geneva Convention IV or the Hague Regulations dealing with the economy of the occupied territory. However, the general principle outlined in (a) above applies equally to economic reform, so that the imposition of major structural economic reforms would not be authorised by international law.....”¹¹⁶³

¹¹⁶³ Ibid, para. 2

It can be seen from the above that the most senior legal adviser in the UK Government accepted, and advised the Government accordingly, that, subject to the exceptions which he refers to, the international law of belligerent occupation prohibits an occupying power from making changes to the laws or institutions, encompassing both governmental institutions and the economic system, of the occupied state. It can also be seen from this quotation from his advice, that the Attorney General was of the opinion that the Security Council has the power to authorise an occupying state to make changes to the law and institutions of an occupied state which would otherwise be prohibited by the international law of occupation.

The context of this written advice is indicated in its opening paragraph, which refers to a meeting having taken place earlier that day at which the Attorney gave oral advice to the Prime Minister, which he is writing to confirm, concerning the need for UN Security Council authorisation for the establishment of an interim Iraqi administration “to reform and restructure Iraq and its administration”.¹¹⁶⁴ Thus the reform and restructuring of Iraq and its Government was being discussed at the highest levels within the UK Government prior to the commencement of the occupation. In his evidence to the Chilcot Inquiry, Lord Goldsmith indicated that the impetus for this reform and restructuring was coming from the US Government:

“... I was concerned that some of the things that it became apparent that the United States administration wanted to do probably did go beyond the powers of an occupying force. Therefore, what was necessary was United Nations Security Council cover for that.

“That’s really then what Resolution 1483 and then subsequent resolutions were designed to attain.”¹¹⁶⁵

On 22 May 2003 the Security Council adopted Resolution 1483 (2003) which addressed arrangements for the occupation of Iraq.¹¹⁶⁶ However, this resolution did not

¹¹⁶⁴ Ibid, para. 1

¹¹⁶⁵ Transcript of evidence, Rt Hon Lord Goldsmith Q.C., 27 January 2010, pp. 226-27

¹¹⁶⁶ United Nations Security Council, Resolution 1483 (2003), adopted 22 May 2003, U.N. Doc. S/RES/1483 (2003)

expressly authorise the US and UK to make changes to the law of Iraq going beyond what the international law of occupation permitted. Indeed, the preamble to the resolution referred to the Council "... recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states [i.e. the US and UK] as occupying powers under unified command (the "Authority")..." Furthermore, in operative paragraph 5 of the resolution the Council called 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 latter of course including Article 43.

Nevertheless, the resolution went on to request, in operative paragraph 8, that the Secretary General appoint a Special Representative for Iraq whose independent responsibilities were stated to include,

"...in coordination with the Authority, assisting the people of Iraq through:

"(a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;

...

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

...

"(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;

“(f) encouraging international efforts to contribute to basic civilian administration functions;

“(g) promoting the protection of human rights;

...

“(i) encouraging international efforts to promote legal and judicial reform; ...”

The Security Council also expressed its support in the resolution for 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”.¹¹⁶⁷

The Security Council adopted subsequent resolutions relating to the occupation (Resolutions 1500, 1511 and 1546) but these are not directly relevant to the power of the CPA to enact occupation legislation (other than the fact that in Resolution 1546 the Council endorsed the formation of a sovereign Interim Government of Iraq which was to assume full authority for governing Iraq by 30 June 2004 and welcomed that by 30 June 2004 the occupation was to end, the CPA would cease to exist and Iraq would reassert its full sovereignty).¹¹⁶⁸

The question, then, is whether Security Council Resolution 1483 provided the basis for the occupying powers to enact legislation outside the constraints of the law of occupation, including Article 43 of the Hague Regulations. In considering the interpretation of a Security Council resolution such as this, it is useful to recall that the International Court of Justice stated, in its Advisory Opinion on the *Accordance with*

¹¹⁶⁷ Operative paragraph 9

¹¹⁶⁸ Security Council Resolution 1500 (2003), adopted 14 August 2003 (U.N. Doc. S/RES/1500 (2003)); Security Council Resolution 1511 (2003), adopted 16 October 2003 (U.N. Doc. S/RES/1511 (2003)); Security Council Resolution 1546 (2004), adopted 8 June 2004 (U.N. Doc. S/RES/1546 (2004)), operative paragraphs 1-2. For a general overview of Resolutions 1483, 1500 and 1511, see Thomas D. Grant, ‘The Security Council and Iraq: An Incremental Practice’, (2003) Vol. 97 A.J.I.L. p. 823, which largely focuses on the incremental progress towards the creation of an internationally recognised government in Iraq. He does not address Resolution 1546, which had not been adopted at the time of his writing. Grant does not deal with the question of the power to legislate in this article.

International Law of the Unilateral Declaration of Independence in Respect of Kosovo, that in the interpretation of Security Council resolutions the rules on treaty interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance but that, because of differences between such resolutions and treaties, it may also be necessary when interpreting such resolutions to analyse statements made by representatives of Council members at the time of their adoption, other resolutions of the Council on the same issue, as well as the subsequent practice of relevant UN organs and of states affected by those given resolutions.¹¹⁶⁹

The *procès verbal* of the meeting of the Security Council at which Resolution 1483 was adopted is of little assistance in the interpretation of the Resolution as regards the question of whether it was intended to confer legislative power.¹¹⁷⁰ Many members of the Council referred to the fact that the Resolution embodied a compromise.¹¹⁷¹ However, the members did not state that that compromise related to the issue of legislative power. More generally, the statements by the Council members contain no reference to the power to legislate. The representative of Mexico came closest to the issue when he stated that once the Special Representative's office is set up, the United Nations will have to "involve itself" in many tasks, such as *inter alia* the promotion of human rights, including "the crafting of legislation" to bring to justice the perpetrators of human rights violations.¹¹⁷² However, stating that the UN would be "involved" in "crafting" legislation is not the same thing as saying that it would be the Special Representative who promulgated that legislation once drafted. Nor does this statement make clear that it was envisaged that it would be the occupying powers who would enact the legislation in question. The statements made by the representatives of the members of the Security Council at the time of the adoption of Resolution 1483 are therefore of little assistance on the question with which we are here concerned.

¹¹⁶⁹ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, [2010] I.C.J. Reports, p. 403, at p. 442, para. 94.

¹¹⁷⁰ U.N. Security Council, 4761st meeting, 22 May 2003 (U.N. Doc. S/PV.4761)

¹¹⁷¹ Germany ("This resolution is a compromise reached after intensive and sometimes difficult negotiations. By definition, it does not fulfil the every wish of all the parties....", *ibid*, p. 5); Mexico ("The text of this resolution is undoubtedly a compromise text", *ibid*, p. 6); Russian Federation (During the negotiations in respect of the Resolution, "Definitely ... there was compromise", *ibid*, p. 7); Angola (referred to "the constructive spirit of compromise in the process leading to the adoption of the resolution", *ibid*, p. 10).

¹¹⁷² *Ibid*, p. 7

We will now turn to the UK Government's interpretation of Resolution 1483. The document containing the UK Attorney General's legal advice on the effect of Resolution 1483 upon the authority of the occupying powers was declassified and published by the Chilcot Inquiry. The Attorney General's advice is recorded in a letter dated 9 June 2003 from the Legal Secretariat to the Law Officers to the Foreign and Commonwealth Office.¹¹⁷³ The first part of the letter deals with the political process, i.e. the process for establishment of an interim Iraqi administration and subsequently of an internationally recognised, representative government. As regards the reform of Iraq by the occupying powers, the key passage in the letter of advice states:

“... the Attorney considers that OP8 [i.e. operative paragraph 8] does appear to mandate the Coalition to engage in activity going beyond the scope of authority of an Occupying Power. OP8 is principally directed at the SRSG, but the activities set out in sub-paragraphs (a)-(i) which he is directed to conduct are to be carried out “in coordination with the [Coalition]”, which must be read as implied recognition of the Coalition's authority to engage in such activities. The Attorney considers that paragraphs (e) (promote economic reconstruction and the conditions for sustainable development), (g) (promote the protection of human rights) and (i) (encourage international efforts to promote legal and judicial reform) in particular could encompass activity going beyond the limits of occupation law. However, to the extent that the Coalition's involvement in activities falling under these headings is not otherwise authorised elsewhere in the resolution or under occupation law, then there is a clear requirement that the Coalition's action should be undertaken only in coordination with the SRSG.”¹¹⁷⁴

The relevant part of operative paragraph 8 has been set out above. Scholars who wrote in the past about the effect of Resolution 1483 without having sight of this advice by the UK Attorney General appear not to have been aware of the reliance which was being placed on operative paragraph 8 of the Resolution and therefore do not

¹¹⁷³ Letter dated 9 June 2003 from Ms Cathy Adams, the Legal Secretariat to the Law Officers to Mr Huw Llewellyn, Legal Counsellor, Foreign and Commonwealth Office, 'Iraq: Effect of Security Council Resolution 1483 on the Authority of the Occupying Powers'. The letter states in its opening paragraph “... I am writing to record the Attorney's views’.

¹¹⁷⁴ *Ibid*, para. 12

adequately address that paragraph of it, and nor were they able to engage with the Attorney General's specific argument.¹¹⁷⁵ As can be seen from the passage quoted from the letter of advice, the Attorney General's advice was that because the activities listed in sub-paragraphs (a) to (i) of operative paragraph 8 were stipulated to be carried out "in coordination with" the US and UK, that was an "implied recognition" of the authority of the US and UK to engage in such activities, in coordination with the Special Representative, including where this would go beyond the limits of occupation law.

However, it is submitted that a more natural reading of operative paragraph 8 than that offered by the Attorney General is that it is *for the Secretary General's Special Representative* to engage in the activities listed in sub-paragraphs (a) to (i), albeit that he must coordinate with the US and UK.¹¹⁷⁶

A further argument as to why the Attorney General's advice is unconvincing relates to the Special Representative's role, under sub-paragraph (a) of operative paragraph 8, in coordinating humanitarian and reconstruction assistance by UN agencies, and between UN agencies and non-governmental organizations. The Special Representative's role in those matters is subject to the "in coordination with [the US and UK]" condition in the same way as sub-paragraph's (e), (g) and (i). If the words "in coordination with [the US and UK]" must be read as "implied recognition" of the authority of the US and UK to engage in the activities which are stated in the resolution to be subject to coordination with the US and UK, the US and UK were being given authority to coordinate humanitarian and reconstruction assistance by United Nations agencies, and between United Nations agencies and non-governmental organizations. However, it seems unlikely that the Security Council would have intended to bestow upon the US and UK the power to coordinate the work of UN agencies in the field of humanitarian and reconstruction assistance. It seems unlikely that such a role would be given by the

¹¹⁷⁵ For an example see Wolfrum (n 1122)

¹¹⁷⁶ See also Fox (n 1128) 261 ("...the resolution's list of reformist tasks was directed not to the CPA but to the Special Representative of the Secretary-General."); Carsten Stahn, *The Law and Practice of International Territorial Administration, Versailles to Iraq and Beyond* (Cambridge University Press, 2008), p.146 (the Security Council mandate was "primarily addressed" to the Special Representative, therefore it is logical to assume that the Special Representative had primary responsibility, rather than the occupying powers)

Council to anyone other than a UN official. This represents a flaw in the “implied recognition” theory and is a further reason to doubt whether Resolution 1483 authorised the occupying powers to enact legislation which would not be permitted under Article 43 of the Hague Regulations and the equivalent rule of customary international law.

A further difficulty with the idea that Security Council Resolution 1483 provided a legal basis for the occupying powers to legislate outside the constraints of occupation law is that, as noted above, in operative paragraph 5 of the resolution the Council called 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 latter of which includes Article 43. The UK Attorney General’s “implied recognition” theory assumes that the occupying powers’ alleged entitlement to engage in the activities allocated to the Special Representative under operative paragraph 8 takes priority over the call by the Security Council for full compliance with the Hague Regulations in operative paragraph 5. However, the Resolution does not state that that is the case. As Stahn has stated, Resolution 1483 “contained a significant constructive weakness” in that it failed to address “in a satisfactory way” the tension between occupation law, referred to in the Resolution, and the “state-building” elements of the Resolution, thus enabling conflicting interpretations of the Resolution to be made.¹¹⁷⁷

¹¹⁷⁷ Stahn (n 1176) 144-45. See also Kaiyan Homi Kaikobad, ‘Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004’ I.C.L.Q., p. 253, who argues that authorities conferred on the CPA by Resolution 1483 are subject to the limitations imposed by the Hague Regulations and Geneva Convention (IV) since otherwise there would be no point in referring to the obligations under those treaties in the Resolution (at p. 263). However, somewhat confusingly and ambiguously Kaikobad goes on to conclude that the legal regime following Resolutions 1483 and 1511 was the Hague Regulations and Geneva Convention “*as modified* by Resolutions 1483 and 1511” (ibid, at p. 264, italics in original). See also Marten Zwanenburg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’ (2004) Vol. 86 IRRC p. 745, at pp. 765-66, who states that it is not clear from Resolution 1483 whether the Security Council intended to authorise the CPA to derogate from occupation law in the reconstruction of the economy in Iraq, noting that the Resolution explicitly called for the occupying powers to comply with international law, including the Hague Regulations, without making any express exception for those provisions which are difficult to reconcile with reform in Iraq. See also Wolfrum (n 1122) 18, who states (somewhat vaguely) that operative paragraph 5 means that Resolution 1483 “does not mean to override international humanitarian law completely but it has to be read and interpreted in the context of the former”, but concludes nevertheless (at p. 19) that the Resolution “modified” international humanitarian law on belligerent occupation as it applied in Iraq to an extent that legalised the actions of the occupying powers to restructure Iraq politically.

Furthermore, the phrase “comply *fully*” (italics added) suggests that the Security Council was not intending to impliedly carve out for the occupying powers an exception to their obligations under the Hague Regulations. Moreover, the fact that the Council did not make clear that operative paragraph 5 was subject to operative paragraph 8 rather suggests that the Council never intended to impliedly permit the occupying powers to engage in the areas of responsibility allocated in the latter paragraph to the Special Representative free from the constraints of the law of occupation. If the Security Council had intended that, it would be expected that it would have made clear that operative paragraph 5 was subject to operative paragraph 8. The Council did not need to make this clear in the case of the Special Representative because he is not in any case bound by the Hague Regulations.

As noted above, the International Court of Justice stated in its Advisory Opinion on Kosovo that when interpreting a Security Council resolution it may be necessary to consider subsequent practice of relevant UN organs in relation to the resolution. It is therefore pertinent to consider the views of the United Nations Secretariat on whether the occupying powers were endowed by Resolution 1483 with power to introduce major economic and other reforms. The analysis of the United Nations Secretariat is contained in a ‘Joint Iraq Needs Assessment’ which the United Nations and World Bank Group published in October 2003 and which addressed the current status and priority reconstruction and rehabilitation needs of each sector of the Iraqi economy.¹¹⁷⁸ The Needs Assessment outlined a number of options for policy reform, including transition to a market-based economy and eventual privatisation of State-Owned Enterprises.¹¹⁷⁹

Annex 3 of the Needs Assessment contains a document entitled “Present Legal Regime and Organizational Structure”.¹¹⁸⁰ A note at the beginning of the Annex states:

¹¹⁷⁸ United Nations/World Bank, Joint Iraq Needs Assessment, October 2003. The Needs Assessment states that it was carried out under the overall coordination of the Secretary-General’s Special Representative for Iraq, Mr Sergio Vieira de Mello (ibid, p. iii).

¹¹⁷⁹ See in particular ibid, pp. 8-9 (paras. 2.30-2.35), 11 (para. 2.49), p. 41 (paras. 3.120-3.121)

¹¹⁸⁰ Ibid, p. 76

“This section, *prepared by the United Nations*, describes the context in which *the United Nations considers* the Needs Assessment should be read.” (italics added)

Much of the Annex summarises Resolution 1483, including by referring to the fact that in it the Security Council recognised the authorities, responsibilities and obligations under applicable international law of the US and UK “as occupying powers”, and called on all concerned to comply fully with their obligations under international law, including the Geneva Conventions of 1949 and the Hague Regulations of 1907, “which” the Annex adds “set out the rights and obligations of occupying powers”. The Annex includes in its summary of Resolution 1483 reference to the facilitation of a process leading to an internationally recognised, representative government of Iraq. The Annex concludes:

“This Needs Assessment proposes a certain number of recommendations and options related to policy and legal changes. It is recognized that some decisions have to be made in the short term, in particular those related to the welfare of the people of Iraq and the initiation of the reconstruction process. However, in compliance with the applicable international law, some of these changes – in particular those related to the governance, rule of law and economic sectors – are directed at a future internationally recognized, representative government established by the people of Iraq.”¹¹⁸¹

Thus, the view of the United Nations Secretariat was that international law prevented the occupying powers from implementing the policy and legal changes recommended in the Needs Assessment related to governance, the rule of law and the economy.¹¹⁸²

This legal assessment by the United Nations Secretariat makes no mention at all of the

¹¹⁸¹ Ibid, p. 77

¹¹⁸² C.f. Conor McCarthy, ‘The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq’, (2005) 10 Journal of Conflict and Security Law, p. 43, at pp. 70-72 who concludes from this passage that the term “reconstruction” used in Resolution 1483 is seen as a “phased process”, “not solely or even necessarily primarily relevant to the occupying powers”, with much of the process of reconstruction taking place under a sovereign Iraqi government. As indicated in the main text to this note, the significance of the analysis by the UN contained in the Needs Assessment is wider than merely the definition of “reconstruction”. Furthermore, McCarthy does not refer to the further quotation from the Needs Assessment set out in the main text below regarding responsibility for reviewing laws with the aim of institutionalising human rights etc.

notion that the occupying powers were permitted to engage in economic reform, legal and judicial reform or human rights reforms under operative paragraph 8 of Resolution 1483 provided they did so in coordination with the Special Representative.

Consistent with that approach, the Needs Assessment states, in its body, that:

“One of the first priorities *of an elected government* will be to review existing laws with the aim of institutionalizing human rights, introducing a system of transparency and accountability, and generally meeting the requirements of a free and democratic society.” (italics added)¹¹⁸³

Thus, the United Nations Secretariat did not believe that it was appropriate for the occupying powers (or CPA) to reform the laws of Iraq in order to institutionalise human rights. It is clear from the analysis contained in the Needs Assessment that the United Nations Secretariat did not subscribe to the “implied recognition” theory.

A cause of further uncertainty as to whether Resolution 1483 provided a legal basis for the occupying powers to legislate outside the constraints of Article 43 of the Hague Regulations is that it is not clear that operative paragraph 8 imposed on the occupying powers a binding obligation under Article 25 of the Charter to engage in the activities in question.¹¹⁸⁴ If there is no such obligation on the occupying powers, there is for the purpose of Article 103 of the Charter no obligation to conflict with and prevail over Article 43 of the Hague Regulations.

As shown above, the International Court of Justice stated in the *Namibia* case that the language of the resolution in question should be carefully analysed in order to assess whether it has a binding effect under Article 25 of the Charter. The difficulty here is that the Attorney General is relying on “implied recognition”, which he believes to inhere in the phrase “in coordination with the Authority”, regarding the role of the

¹¹⁸³ Ibid, p. 47 (para. 3.142)

¹¹⁸⁴ C.f. Stahn (n 1176) 145, who makes a similar point in relation to the phrase “calls upon” which appears in some paragraphs of the Resolution, including operative paragraph 4 (“calls upon” the Authority to promote the welfare of the Iraqi people through the effective administration of the territory), but does not appear in operative paragraph 8. Here we will focus on operative paragraph 8 as it is the paragraph relied upon by the UK Attorney General in his advice on Resolution 1483.

occupying powers – operative paragraph 8 contains no express wording stating that an obligation was being placed on the occupying powers. The paragraph expressly states that the Special Representative’s “independent *responsibilities shall* involve” (italics added) the activities listed, which suggests a duty is being placed upon him, but the fact that the phrase “in coordination with the Authority” is placed before the list of activities contained in sub-paragraphs (a) to (i) does not entail that the words “responsibilities” and “shall”, which appear earlier on in the paragraph (i.e. before “in coordination with...”) are impliedly being applied to the occupying powers, even if one were to accept the Attorney General’s “implied recognition” theory.

Furthermore, the fact that operative paragraph 24 merely “encourages” the US and US to inform the Council at regular intervals of their efforts under the resolution could be taken to suggest that no duty was being placed on the occupying powers under operative paragraph 8. If a duty was being placed on the occupying powers under operative paragraph 8, it would seem more logical that the Council would have placed an obligation on those powers to report to the Council on their fulfilment of it. Furthermore, it is instructive that Sir Jeremy Greenstock, who was the UK’s Permanent Representative to the UN at the time of the adoption of Resolution 1483, gave evidence to the Chilcot Inquiry as follows regarding the fact that operative paragraph 24 “encourages” the US and UK keep the Council informed:

“That word “encourages” would have been a negotiation with the Americans to some extent, because they would not have accepted a Security Council instruction, and so that verb came out like that.”¹¹⁸⁵

What Sir Jeremy says about the US refusing to accept a Security Council instruction contained in a Security Council resolution appears, from the language he uses, to represent a general statement of US policy, in that period at least. In any event, if the US would not accept in Resolution 1483 an instruction to report to the Council at regular intervals, it is unlikely that they would have accepted an obligation to do something more substantive, such as one to carry out the activities listed in operative paragraph 8.

¹¹⁸⁵ Transcript of evidence, Sir Jeremy Greenstock, 15 December 2009, p. 44

The Court stated in the *Namibia* case that in order to determine whether a binding obligation was being created under Article 25 of the Charter, regard should also be had to the Charter provision invoked in the resolution. Resolution 1483 states in its preamble that the Security Council was acting under Chapter VII. That gives some support to the idea that the resolution contains one or more binding decisions by the Council since there is no doubt that under Chapter VII the Council has the power to make binding decisions. However, as Sievers and Daws point out, not all provisions of a decision adopted under Chapter VII are necessarily binding.¹¹⁸⁶ Furthermore, in *Al-Jedda v. The United Kingdom* (see above), the Security Council resolution in question (Resolution 1546) was expressly adopted under Chapter VII, but the Court held that it did not create an obligation in relation to the activity there in question (internment without charge). Thus, when considering whether a binding obligation has been created by a resolution, it is not enough to look at the Charter provision invoked. One must also look at the language of the resolution in order to see whether it has binding effect under Article 25 of the Charter as regards the particular activity in question. As indicated above, there is nothing in operative paragraph 8 which expressly placed an obligation on the occupying powers to engage in the activities in question (promoting economic reconstruction etc).

For these reasons, it is far from clear that operative paragraph 8 of Resolution 1483 imposed any obligation on the occupying powers in relation to the activities in question which could, under Article 103 of the Charter, conflict with and prevail over Article 43 of the Hague Regulations. As shown above, there is considerable uncertainty regarding whether under Article 103 of the UN Charter, provisions in Security Council resolutions which authorise but do not oblige states to take action prevail over obligations under other treaties. This is a reason for further uncertainty as to whether Resolution 1483 provided a legal basis for the occupying powers to legislate outside the constraints of Article 43 of the Hague Regulations.

¹¹⁸⁶ Loraine Sievers and Sam Daws, *The Procedure of the UN Security Council* (4th Ed., 2014, Oxford University Press, Oxford), p. 389

It should also be recalled that, as shown above, it is far from clear that under Article 103 of the Charter a Security Council decision prevails over a rule of customary international law and that there is therefore considerable uncertainty as to whether a Security Council resolution can free an occupying state from its obligation under customary international law to respect the existing law in occupied territory (unless absolutely prevented). This is a reason to doubt whether Resolution 1483 provided a legal basis for the occupying powers to legislate outside the constraints of the customary international law equivalent of Article 43 of the Hague Regulations.

Another question which arises is whether the language employed in describing the activities listed in operative paragraph 8 of the resolution embraced the enacting of legislation. For example, as can be seen above, the responsibilities of the Special Representative are stated to include, in coordination with the US and UK, assisting the people of Iraq through “promoting economic reconstruction and the conditions for sustainable development” (subparagraph 8(e)). Does that entitle the Special Representative (or, on the “implied recognition” theory, the occupying powers) to enact legislation in the economic sphere, including major economic reforms? Although certain activities are mentioned in that subparagraph, legislation is not one of them. However, some guidance on this question can be obtained by looking at the resolution which had previously been adopted in order to set up an interim administration in Kosovo and at the practice following adoption of that resolution. To this Kosovo precedent we will now turn.

The Kosovo precedent

In June 1999 the Security Council adopted Resolution 1244 in which the Council decided to deploy in Kosovo, under UN auspices, “international civil and security presences”.¹¹⁸⁷ The resolution authorised the Secretary-General to establish an

¹¹⁸⁷ United Nations Security Council Resolution 1244 (1999), adopted 10 June 1999 (U.N. Doc. S/RES.1244 (1999)). The international security presence was known as KFOR: see Military-technical agreement between the international security force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia dated 9 June 1999, sent to the U.N. Secretary-General under cover of a letter dated 10 June 1999 from the Secretary-General of NATO (together contained in U.N. Doc. S/1999/682). The letter from the NATO Secretary-General describes the agreement as having been made by “NATO military authorities” with the Federal Republic of Yugoslavia (Serbia and Montenegro).

international civil presence in Kosovo (which it was subsequently decided would be known as the United Nations Interim Administration Mission in Kosovo, or UNMIK¹¹⁸⁸) in order to provide an interim administration which would provide transitional administration whilst establishing and overseeing the development of provisional democratic self-governing institutions.¹¹⁸⁹ The resolution also requested that the Secretary-General appoint a Special Representative “to control the implementation of the international civil presence”.¹¹⁹⁰

On the question of legislating for Kosovo, the first thing to note about Resolution 1244 is that it makes no express reference to the Special Representative or the international civil presence, or anyone else, having a power to legislate for Kosovo. Nevertheless, the Secretary-General’s Special Representative in Kosovo promulgated legislation, in the form of Regulations, on a variety of topics. These Regulations are available in the UNMIK Official Gazette, online.¹¹⁹¹

How did it come to pass that, without any express authorisation in a Security Council resolution, the Secretary-General’s Special Representative for Kosovo became legislator for that province? Regulation No. 1999/1 provided, in Section 1, that “[a]ll legislative and executive authority with respect to Kosovo ... is vested in UNMIK and is exercised by the Special Representative of the Secretary-General”.¹¹⁹² Section 4 provided that in performance of the duties entrusted to the interim administration under Resolution 1244, “UNMIK will, as necessary, issue legislative acts in the form of regulations”. Looking at the instruments alone (Resolution 1244 and Regulation No. 1999/1) it might be thought that it was solely the Special Representative who had vested legislative power in UNMIK and himself. However, that is not the whole story.

¹¹⁸⁸ Report of the Secretary-General pursuant to paragraph 10 of Security Council Resolution 1244 (1999), 12 June 1999 (U.N. Doc. S/1999/672), para 1

¹¹⁸⁹ Resolution 1244, operative paragraph 10

¹¹⁹⁰ Ibid, operative paragraph 6

¹¹⁹¹ The Regulations can be accessed at :

<http://www.unmikonline.org/regulations/unmikgazette/02english/Econtents.htm>. Last accessed: 15.10.18.

¹¹⁹² Regulation No. 1999/1, On the Authority of the Interim Administration in Kosovo, 25 July 1999 (UNMIK/REG/1999/1), section 1

Prior to the Special Representative enacting Regulation No. 1999/1, the Secretary-General informed the Security Council that it was intended that the Special Representative would exercise legislative power in Kosovo. In a report to the Security Council dated 12 July 1999 the Secretary-General stated that the Security Council had, in Resolution 1244, “vested in the interim civil administration authority over the territory and people of Kosovo”.¹¹⁹³ He then declared:

“All legislative and executive powers, including the administration of the judiciary, will, therefore, be vested in UNMIK.”¹¹⁹⁴

The authority vested in UNMIK, the Secretary-General explained, will be exercised by the Special Representative.¹¹⁹⁵ He would be empowered to “regulate” within his areas of responsibility as set out in Resolution 1244.¹¹⁹⁶ Furthermore, the Secretary-General stated that by such regulations the Special Representative “may change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration.”¹¹⁹⁷ The Secretary-General also announced that UNMIK would “initiate a process to amend current legislation in Kosovo, as necessary” including criminal laws, the law on internal affairs and the law on public peace and order, “in a way consistent with the objectives of” Resolution 1244 and internationally recognised human rights standards.¹¹⁹⁸

Thus, prior to the Special Representative promulgating his first Regulation on 25th July 1999 (Regulation No. 1999/1), the Secretary-General made known to the Security Council that his interpretation of Resolution 1244 was that it gave the Special Representative legislative power in Kosovo, including the power to amend, repeal or suspend the existing law. There does not appear to have been any formal response from the Security Council on this point – the Council did not adopt a further resolution

¹¹⁹³ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999 (U.N. Doc. S/1999/779), p. 8 (para. 35)

¹¹⁹⁴ *Ibid*

¹¹⁹⁵ *Ibid*, p. 9 (para. 39)

¹¹⁹⁶ *Ibid*

¹¹⁹⁷ *Ibid*

¹¹⁹⁸ *Ibid*, p. 15 (para. 75)

at that time and there does not appear to have been any formal discussion in the Council or Presidential statement or letter from the President of the Council in response to this report by the Secretary-General. Thus the Special Representative commenced promulgation of Regulations with the knowledge and acquiescence of the Security Council.

The Secretary-General sent a further report to the Security Council on 16 September 1999 to which he annexed all Regulations which had been issued by the Special Representative in Kosovo as at that date, i.e. the first seven such Regulations which he promulgated.¹¹⁹⁹ Again, there does not appear to have been any response from the Security Council regarding the Regulations, either in the form of a further resolution, formal discussions in the Council, Presidential statement or letter from the President of the Council. Nevertheless, it is clear that the Security Council was aware that the Special Representative was legislating for Kosovo.

It should also be noted that the International Court of Justice, in its Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, held that UNMIK Regulations were adopted by the Special Representative “on the basis of the authority derived from Security Council resolution 1244 (1999), notably its paragraphs 6, 10 and 11, and thus ultimately from the United Nations Charter”.¹²⁰⁰ The Court also stated that a particular UNMIK Regulation which was relevant to the issues in its Advisory Opinion “derives its binding force from the binding character of resolution 1244 (1999) and thus from international law”.¹²⁰¹ Thus the International Court of Justice regarded Resolution 1244 as the legal basis for the Special Representative to legislate.

Turning now to the basis in Resolution 1244 for legislation promulgated in Kosovo on particular subject areas, operative paragraph 11 set out the main responsibilities for the

¹¹⁹⁹ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 16 September 1999 (U.N. Doc. S/1999/987), Annex which contains Regulation No. 1999/1 to Regulation No. 1999/7, inclusive

¹²⁰⁰ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] I.C.J. Reports, p. 403, at p. 440, para. 88

¹²⁰¹ *Ibid.* The regulation in question was UNMIK Regulation 2001/9 on a Constitutional Framework for Provisional Self-Government, 15 May 2001

international civil presence in Kosovo, implementation of which was to be controlled by the Secretary-General's Special Representative, including, at subparagraph (g), "[s]upporting the reconstruction of key infrastructure *and other economic reconstruction*" (italics added). Thus, Resolution 1244 vested the interim administration in Kosovo with the responsibility for "supporting ... economic reconstruction". This is highly significant for the purpose of studying the Security Council's intentions in respect of Iraq during the occupation because that phrase is very similar to the "promoting economic reconstruction" of operative paragraph 8(e) of Resolution 1483 in the case of Iraq.

Furthermore, the Special Representative in Kosovo did enact legislation in the economic sphere, including in relation to business organisations; the licensing, supervision and regulation of banking; foreign investment; contracts for the sale of goods; and labour law.¹²⁰² Some of this legislation explicitly referred to "reconstructing ... the economy" in its preamble.¹²⁰³ Furthermore, the Secretary-General informed the Security Council, when reporting to the Council under Resolution 1244, that some of these pieces of legislation had been enacted.¹²⁰⁴ Moreover, he did this under the heading "Economic reconstruction".¹²⁰⁵ A case can therefore be made that, in the case of Iraq, when the Security Council subsequently used the phrase "promoting economic reconstruction" in operative paragraph 8(e) of Resolution 1483,

¹²⁰² Regulation No. 2001/6, On Business Organizations, 8 February 2001 (UNMIK/REG/2001/6); Regulation No. 1999/21, On Bank Licensing, Supervision and Regulation, 15 November 1999 (UNMIK/REG/1999/21); Regulation No. 2001/3, On Foreign Investment in Kosovo, 12 January 2001 (UNMIK/REG/2001/3); Regulation No. 2000/68, On Contracts for the Sale of Goods, 29 December 2000 (UNMIK/REG/2000/68); Regulation No. 2001/27, On Essential Labour Law in Kosovo, 8 October 2001 (UNMIK/REG/2001/27)

¹²⁰³ The Regulation on Foreign Investment in Kosovo referred in its preamble to "For the purpose of reconstructing and enhancing the economy of Kosovo and creating a viable market-based economy by attracting foreign investment". The Regulation on Contracts for the Sale of Goods referred in its preamble to "For the purpose of reconstructing and enhancing the economy of Kosovo and creating a viable market-based economy by providing for the regulation of contracts for the sale of goods".

¹²⁰⁴ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 13 March 2001 (U.N. Doc. S/2001/218), p. 11, informing the Council that the Regulation On Business Organizations, the Regulation On Contracts for the Sale of Goods and the Regulation On Foreign Investment in Kosovo had been enacted. In an earlier report the Secretary-General informed the Council that the Special Representative would shortly enact a Regulation establishing a basic legal framework for a private banking sector, i.e. what became the Regulation On Bank Licensing, Supervision and Regulation: see Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 16 September 1999 (U.N. Doc. S/1999/987), p. 10

¹²⁰⁵ *Ibid*

it intended that that would embrace the enactment of legislation in the economic sphere.

The Kosovo precedent is also relevant when considering the CPA legislation in the field of human rights. In Resolution 1244 the Security Council decided that another of the main responsibilities of the international civil presence in Kosovo, implementation of which was to be controlled by the Secretary-General's Special Representative, was "[p]rotecting and promoting human rights".¹²⁰⁶ This is again very similar to responsibility for "promoting the protection of human rights", which the Security Council conferred on the Secretary-General's Special Representative for Iraq in Resolution 1483, operative paragraph 8(g) (see above).

In the case of Kosovo the Special Representative enacted a number of pieces of legislation in the field of human rights. Regulation No. 1999/1 provided, in section 2, that all persons undertaking public duties or holding public office in Kosovo, in exercising their functions, shall observe "internationally recognized human rights standards" and shall not discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status. That Regulation was one of the Regulations contained in the annex to the report sent by the UN Secretary-General to the Security Council in September 1999 and which is referred to above.¹²⁰⁷ The Security Council was therefore aware that the Secretary-General's Special Representative in Kosovo was legislating in the field of human rights.

The legislation enacted in Kosovo in the field of human rights included legislation which made changes to the law as it had existed prior to the creation of the UN civil presence in Kosovo. Thus Regulation No. 1999/10 repealed certain legislation of the Republic of Serbia in relation to housing and property rights which was discriminatory.¹²⁰⁸ The preamble to that Regulation, after stating that the Special

¹²⁰⁶ Operative paragraph 11(j)

¹²⁰⁷ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 16 September 1999 (U.N. Doc. S/1999/987), Annex entitled "Regulations issued by the Special Representative of the Secretary-General as at 16 September 1999"

¹²⁰⁸ Regulation No. 1999/10, On the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property, 13 October 1999 (UNMIK/REG/1999/10), repealing the Law on Changes and Supplements on

Representative was acting pursuant to the authority given to him in Resolution 1244, stated that the Regulation was being made “[f]or the purpose of repealing certain legislation that is discriminatory in nature and that is contrary to international human rights standards”.

Another piece of legislation issued by the Special Representative in Kosovo in the field of human rights was a Regulation setting out the rights of persons arrested by the police.¹²⁰⁹ The Regulation contained relatively detailed provisions in relation to the rights of arrested persons, including the right to be informed of the reason for arrest, the right to remain silent, the right to the assistance of defence counsel and the right to notify a family member or other appropriate person. The preamble to the Regulation states that in promulgating the Regulation the Special Representative has taken into account, *inter alia*, the ICCPR, the ECHR and the Convention on the Rights of the Child.

The Special Representative in Kosovo also promulgated a Regulation establishing an Ombudsperson to investigate complaints of human rights violations or abuses of authority by the interim civil administration or by any emerging central or local institution.¹²¹⁰ The preamble stated that the Regulation was being promulgated “[f]or the purpose of enhancing the protection of human rights in Kosovo”. It was provided that the duties of the Ombudsperson included that he/she was to “ensure that all persons in Kosovo are able to exercise effectively the human rights and fundamental freedoms safeguarded by international human rights standards” including in particular the ECHR and its protocols and the ICCPR.¹²¹¹ The UN Secretary-General specifically informed the Security Council that this Regulation had been enacted and that the institution

the Limitation of Real Estate Transactions (Official Gazette of Republic of Serbia, 22/91 of 18 April 1991) and the Law on the Conditions, Ways and Procedures of Granting Farming Land to Citizens Who Wish to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohija (Official Gazette of Republic of Serbia, 43/91 of 20 July 1991)

¹²⁰⁹ Regulation No. 2001/28, On the Rights of Persons Arrested by Law Enforcement Authorities, 11 October 2001 (UNMIK/REG/2001/28)

¹²¹⁰ Regulation No. 2000/38, On the Establishment of the Ombudsperson Institution in Kosovo, 30 June 2000 (UNMIK/REG/2000/38)

¹²¹¹ *Ibid*, Section 1.1

would investigate complaints of human rights violations and other abuses of power by the authorities.¹²¹²

Thus it can be seen that the Special Representative in Kosovo promulgated a number of pieces of legislation for the purpose of protecting and promoting human rights and that the Security Council was informed that at least some of this legislation had been enacted. Again, therefore, a case can be made that when in Resolution 1483 the Security Council later gave the Special Representative in Iraq responsibility for “promoting the protection of human rights”, which is very similar to the wording “[p]rotecting and promoting human rights” contained in the corresponding resolution in the case of Kosovo, it intended that he would have the power to enact legislation in that field.

There is however no equivalent in the list of responsibilities of the international civil presence in Kosovo (implementation of which was to be controlled by the Special Representative) contained in Resolution 1244 (at operative paragraph 11) to the “encouraging international efforts to promote legal and judicial reform” which is listed in operative paragraph 8 (at sub-paragraph (i)) of Resolution 1483 on Iraq as one of the Special Representative’s areas of responsibilities. The Kosovo precedent does not therefore assist on the question whether the Security Council intended that Resolution 1483 authorise the enactment of legislation in the field of legal and judicial reform. Moreover, even if one accepts the UK Attorney General’s implied recognition theory, we would arrive at the position that the US and UK were entitled to “encourage international efforts” to promote legal and judicial reform, which suggests that the US and UK were merely entitled to encourage efforts by *other states* to promote legal and judicial reform.

In summary, given the legislation enacted by the Special Representative in Kosovo, the knowledge of the Security Council of such legislation and the similarity of wording used in the relevant resolutions in the case of Kosovo (Resolution 1244) and Iraq (Resolution 1483) in respect of economic reconstruction and the protection of human

¹²¹² Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 18 September 2000 (U.N. Doc. S/2000/878), p. 9 (para. 51)

rights, a case can be made that the Security Council intended that the language used in operative paragraph 8 of Resolution 1483 embraced legislative power in relation to economic reconstruction and human rights. However, as will be seen when we examine the case of East Timor, the matter is not free from doubt.

In any event, even if one concludes on the basis of the Kosovo precedent that the Security Council intended that the language used in operative paragraph 8 of Resolution 1483 embraced legislative power in relation to economic reconstruction and human rights, in the case of Kosovo it was of course the Special Representative who promulgated legislation. The Kosovo precedent therefore does not provide any assistance in relation to the argument that Resolution 1483 authorised the occupying powers, as opposed to the Special Representative, to legislate outside the constraints of the law of occupation. Nor does it help the occupying powers in relation to other issues referred to above such as the fact that Resolution 1483 called upon the occupying powers to comply with their obligations under the law of occupation.

East Timor

A matter of months after the adoption of Resolution 1244 in respect of Kosovo, the Security Council adopted a resolution in respect of East Timor which, with admirable clarity, set out the legislative power of the transitional administration and Special Representative. In Resolution 1272 the Council decided to establish a United Nations Transitional Administration in East Timor (UNTAET) which was endowed with overall responsibility for the administration of East Timor “and will be empowered to exercise all legislative and executive authority, including the administration of justice”.¹²¹³ Resolution 1272 went on to state that the Special Representative appointed by the Secretary-General, as Transitional Administrator, “will have the power to enact new laws and regulations and to amend, suspend or repeal existing ones”.¹²¹⁴ The Security Council had apparently learnt from the experience in Kosovo where, after being appointed under a Security Council resolution which made no reference to a

¹²¹³ UN Security Council Resolution 1272 (1999), adopted 25 October 1999 (U.N. Doc. S/RES/1272 (1999)), Operative Paragraph 1

¹²¹⁴ *Ibid*, Operative Paragraph 6

power to legislate, the Special Representative had nevertheless found it necessary to exercise legislative power.

The fact that the Security Council was explicit about legislative power in this resolution on East Timor raises the question why it was not explicit in Resolution 1483 on Iraq.¹²¹⁵ One interpretation which might be made is that the Council has two models for endowing Special Representatives with legislative power: (i) the East Timor model, where the relevant resolution expressly endows the Special Representative with legislative power, including the power to change the law; and (ii) the Kosovo model, where no explicit reference is made in the relevant resolution to the power to legislate but there are vague references to the Special Representative having responsibility for promoting economic reconstruction and human rights and it is understood that this means that the Special Representative can legislate and change the existing laws. Under this interpretation, the Council may adopt either model and we should not assume that just because there is no express reference to the power to legislate, no legislative power is being vested. In accordance with this interpretation, in Iraq, for reasons that are not entirely clear, the Security Council decided to employ the vague Kosovo model of impliedly endowing a Special Representative (now “in coordination with” occupying powers) with legislative power, rather than adopting the precision of the East Timor model.

Another interpretation, however, is that the Council did not expressly provide for legislative power in Resolution 1483 because it simply did not intend to endow the Special Representative with legislative power and nor did it intend that the occupying powers would have legislative power more extensive than under the law of occupation (albeit to be exercised “in coordination with” the Special Representative).

¹²¹⁵ See also Fox (n 1128) 262 who notes that, in transitioning territories into democracies, the Security Council had “a decade’s worth of precedent on which to draw”; that “[n]one of that experience seems to have informed the wording” of the resolutions on Iraq [Fox does not refer to or consider the relevant language contained in Resolution 1244 on Kosovo relating to economic reconstruction and human rights, considered in the main text above, which is similar to the wording in Resolution 1483], which, he states, “lack the clarity and forthrightness of the prior documents”. Although in reaching these conclusions Fox refers *inter alia* to selective elements of Resolution 1244 on Kosovo, he does not mention its absence of any reference to the power to legislate or to the way in which vague references to supporting economic reconstruction and promoting human rights were used as the basis for the enactment of legislation in Kosovo. In that respect, no one could claim, as Fox suggests, that there was “clarity and forthrightness” in Resolution 1244 on Kosovo.

This latter interpretation is all the more plausible when one considers the historical trajectory of Security Council involvement in Kosovo, East Timor and Iraq. In Kosovo, as we have seen, the Security Council had omitted from the relevant resolution any reference to the Special Representative having legislative power but it had subsequently been found necessary for him to exercise such power. In East Timor the Security Council apparently learnt from this experience and explicitly stated in the relevant resolution that the Special Representative was vested with legislative power. Having learnt that lesson, it is difficult to see why in the case of Iraq the Security Council would regress back into employing vague wording, as in the Kosovo resolution, which made no reference to the power to legislate, if in fact the Council really intended to endow the Special Representative for Iraq (“in coordination with” the occupying powers) with legislative power. Viewed from this perspective, the case of East Timor casts doubt on whether Resolution 1483 vested the Special Representative for Iraq (“in coordination with” the occupying powers) with legislative power.

Whether or not the Security Council intended to bestow legislative power on the Special Representative for Iraq (“in coordination with” the occupying powers), Resolution 1483 was unsatisfactory. If the Council intended to create legislative power in Resolution 1483, it would have been far more preferable to have stated that expressly. This would have been more transparent and would have engendered greater legal certainty in respect of legislation subsequently enacted on the basis of the Resolution, with less risk of such legislation being held to be invalid by courts in Iraq, or of courts of third states refusing to recognise it as valid. The deficiency in the language of the Resolution, if it was the intention to create legislative power, is all the more difficult to understand given that the Council had already developed explicit language in the Resolution on East Timor. On the other hand, if the Council did not intend to create legislative power in Resolution 1483, it was extremely ill-advised to use language on the promotion of economic reconstruction and human rights which was very similar to that used in the Resolution on Kosovo and which had been used there as the basis for legislative power. By adopting such language in Resolution 1483 the Council enabled the case to be made that the occupying powers had an implied power to legislate extensively (in co-ordination with the Special Representative). Thus,

whether its intention was to create a legislative power or not, the Security Council did not exactly cover itself in glory.

If the Council did not intend to create legislative power in Resolution 1483, one possible explanation for the fact that the Resolution adopts language on the Special Representative's role in promoting economic reconstruction and human rights which is similar to that contained in Resolution 1244 on Kosovo may be that the non-permanent members, or many of them, may not have appreciated that in Kosovo this language was used as the basis for legislative power. It should be noted that the non-permanent membership of the Security Council had entirely changed between the adoption of Resolutions 1244 on Kosovo and Resolution 1483 on Iraq.¹²¹⁶ Thus it is possible that the US and UK may have voted for Resolution 1483 with a view to using this language as a basis for claiming broad legislative power whilst other, non-permanent, members may have voted for the same resolution in the belief that it did not confer any legislative power. This, it must be admitted, however, is speculation.

The surrounding circumstances for the adoption of Resolution 1483

Part of the circumstances surrounding the adoption of Resolution 1483 was that Iraq was under occupation and the Security Council would have been well aware that the occupying powers already had power to enact legislation in Iraq, albeit within the constraints of the law of occupation, including Article 43 of the Hague Regulations. A further part of the context for the Resolution (which was adopted on 22 May 2003) was that the CPA Administrator had already commenced enacting legislation, including CPA Regulation No. 1 (promulgated on 16 May), which provided *inter alia* that the CPA was “vested with all executive, legislative and judicial authority necessary to achieve its objectives”, and CPA Order No. 1, De-Ba'athification of Iraqi Society (also

¹²¹⁶ At the time of the adoption of Resolution 1244 the non-permanent members were Argentina, Bahrain, Brazil, Canada, Gabon, Gambia, Malaysia, Namibia, Netherlands, Slovenia: see U.N. Security Council, 4011th Meeting, 10 June 1999 (U.N. Doc. S/PV.4011). At the time of the adoption of Resolution 1483 the non-permanent members were Angola, Bulgaria, Cameroon, Chile, Germany, Guinea, Mexico, Pakistan, Spain, the Syrian Arab Republic (did not vote): see U.N. Security Council, 4761st Meeting, 22 May 2003 (U.N. Doc. S/PV.4761)

promulgated on 16 May 2003). This context points to there being no need to provide for legislative power in Resolution 1483.

If Resolution 1483 did not vest legislative power in the Special Representative, the occupying powers cannot have received such legislative power (free of the constraints of the law of occupation) as a result of the qualification “in coordination with the Authority”, in accordance with the “implied recognition” theory.

Summary

For the above reasons, it is doubtful that Security Council Resolution 1483 provided a legal basis for the occupying powers to legislate outside the constraints of the law of occupation, as advised by the UK Attorney General in accordance with his “implied recognition” theory. However, we will now consider whether, even if the “implied recognition” theory is correct, in practice Resolution 1483 provided a legal basis for changes to the law in Iraq having regard to the manner in which the occupying powers did or did not implement that Resolution.

Problems in practice with Security Council authorisation as a basis for legislation in Iraq: non-coordination with the UN Special Representative

As shown above, the UK Attorney General advised that the fact that the Special Representative was to carry out his responsibilities “in coordination with” the occupation authorities meant that there was an “implied recognition” that the occupation authorities could also carry out these responsibilities, albeit in coordination with the Special Representative, including by implication legislation in these areas. For the reasons given above, this “implied recognition” theory is questionable.

Nevertheless, it might be argued that given that under Resolution 1483 the Special Representative had legislative power unconstrained by the law of occupation, he had the power to approve the enactment of legislation by the occupation authorities which would otherwise fall outside the constraints of the law of occupation.

However, whether one adopts the “implied recognition” theory or the approach that the Special Representative had power to approve legislation by the CPA which would

otherwise go beyond the constraints of the law of occupation, there are, in the case of much of the CPA's legislation, serious problems with the idea that Resolution 1483 provided a legal basis for it. In order to explore these problems, we will consider two time periods in which legislation was being promulgated by the CPA.

(i) The period 20 August to 9 December 2003: following the assassination of Mr Sergio Vieira de Mello

The first serious problem relates to the fact that, as a result of the murder of the Secretary-General's Special Representative, for a substantial period of time there was no Special Representative with whom the CPA could coordinate, or who could approve CPA legislation. On 27 May 2003 the UN Secretary-General had appointed Mr Sergio Vieira de Mello to be his Special Representative for Iraq.¹²¹⁷ On 19 August 2003 there was a terrorist attack on the UN headquarters in Baghdad and the Special Representative was killed.¹²¹⁸ An acting Special Representative was not appointed until 10 December 2003, when Mr Ross Mountain was appointed Special Representative for Iraq *ad interim*.¹²¹⁹ In the intervening period when there was no Special Representative in place (i.e. 20 August to 9 December 2003) the CPA Administrator, Mr Bremer, promulgated a large number of pieces of legislation: Orders No. 23 to No. 45, inclusive, Regulation No. 7 and Memoranda No. 4 to No. 7, inclusive.

In so far as that legislation was within the constraints of the law of occupation, the absence of any Special Representative is not a problem for its legality. However, where the legislation is inconsistent with the existing law and there is no (absolute) necessity for it, the absence of a Special Representative entails that neither the "implied

¹²¹⁷ U.N. Press Release SG/A/837-BIO/3494-IK/361, 'Secretary-General appoints Sergio Vieira de Mello as his Special Representative for Iraq', 28 May 2003, at <https://www.un.org/press/en/2003/sga837.doc.htm>

¹²¹⁸ U.N. News, 'Top UN envoy Sergio Vieira de Mello killed in terrorist blast in Baghdad', 19 August 2003, at <https://news.un.org/en/story/2003/08/77212-top-un-envoy-sergio-vieira-de-mello-killed-terrorist-blast-baghdad>

¹²¹⁹ See U.N. Press Release SG/A/860-BIO/3545, 'Ross Mountain Named Acting Special Representative for Iraq', 10 December 2003; U.N. Secretary-General, 'Press encounter with Secretary-General and Ross Mountain, Special Representative for Iraq, ad interim (rev. 1)', 10 December 2003. The latter document also states that, in that capacity, Mr Mountain would be in charge of the U.N. office in respect of Iraq, which would now be based in Nicosia, Cyprus with a presence also in Amman, Jordan.

recognition” argument, nor the argument based on approval by the Special Representative, will provide a legal basis for the provision in question. As regards the “implied recognition” theory, if the legislation in question was not “coordinated with” the Special Representative, the CPA could not rely on operative paragraph 8 of Resolution 1483 as a legal basis for the legislation since that paragraph requires “coordination” between Special Representative and the occupation authorities, and indeed the requirement of coordination is the whole basis for the “implied recognition” argument as enunciated by the UK Attorney General (see above). Furthermore, if as a matter of fact the legislation in question was not approved by the Special Representative, no argument derived from Resolution 1483 and based on the approval of the Special Representative can arise.

Let us examine, for example, Order No. 39, Foreign Investment, which was promulgated by the CPA Administrator on 19 September 2003, a month after the death of Mr Vieira de Mello.¹²²⁰ This Order regulated foreign investment in Iraq. Among other things, it provided that a foreign investor was to be entitled to make foreign investment in Iraq on terms no less favourable than those applicable to an Iraqi investor, unless otherwise provided in the Order.¹²²¹ The Order made clear that a foreign investor was permitted, *inter alia*, to establish a wholly foreign-owned company, establish a company jointly with an Iraqi investor, or directly acquire and possess shares in an Iraqi company.¹²²² The Order expressly replaced all existing foreign investment law.¹²²³

Order No. 39 was, it is understood, inconsistent with the existing Iraqi company law which prohibited foreign investors (other than Arabs) from establishing Iraqi companies or owning shares in Iraqi companies. Shortly after the beginning of the occupation, the U.S. Department of Commerce produced a guide to Commercial Law in Iraq which noted that Article 12 of the Companies Law, No. 21 of 1997 provided that all founders of, and shareholders in, Iraqi companies must be Iraqi nationals or

¹²²⁰ CPA Order No. 39, Foreign Investment, promulgated 19 September 2003 (CPA/ORD/19 September 2003/39)

¹²²¹ *Ibid*, section 4(1)

¹²²² *Ibid*, section 7, and see the definitions contained in section 1

¹²²³ *Ibid*, section 3(1)

resident citizens of other Arab countries.¹²²⁴ However, Order No. 39 provided that “[n]o legal text that impedes the operation of this Order shall hold” and that all investors, foreign and Iraqi, shall be treated equally under the law, except to the extent that the Order provides otherwise.¹²²⁵ The Iraqi Companies Law of 1997 might be regarded as such a “legal text” which would therefore “not hold” in the face of the provisions of Order No. 39. In any event, under CPA Regulation No. 1, Orders issued by the CPA Administrator took precedence over all other laws to the extent that such laws were inconsistent.¹²²⁶ Accordingly, provisions of Order 39 took precedence over Iraq’s Companies Law of 1997. Thus, the occupying powers, by enacting Order 39, did not “respect” the existing law, as required by Article 43 of the Hague Regulations (subject to the necessity exception).

The CPA Administrator endeavoured to make the case that Order No. 39 promoted the interest and welfare of the Iraqi people by promoting foreign investment into Iraq. This was stated in section 2 of the Order, under the heading “Purposes”. It was further stated there that the Order was “intended to attract new foreign investment to Iraq”. Even if Order 39 advanced the interest of the Iraqi population (in addition to advancing the interest of potential US investors), it is doubtful that there was a *necessity*, as required by Article 43 of the Hague Regulations, for the enactment of such legislation during the occupation.¹²²⁷ If that is right, the question of Security Council authorisation becomes important as a possible alternative legal basis for the Order.¹²²⁸

¹²²⁴ Department of Commerce [U.S.], Overview of Commercial Law in Iraq, 12 September 2003, p. 5. Available at : http://www.aschq.army.mil/gc/files/Iraqi_Comm_Law.pdf. Accessed 06.05.14. See also Essam Al Tamimi and Adil Sinjakli, ‘Legal Aspects of Setting up Business in Iraq and Iraqi Company Regulations’, (1999) Vol. 14 Arab Law Quarterly p. 320, which states that foreign individuals (other than Arab citizens resident in Arab states), and foreign companies, cannot acquire shares in an Iraqi company (at p. 323). (The special dispensation for Arab citizens was stated to be “frozen” at the time of writing of the article.) The same article, which was published around four years prior to the occupation, also states that “[f]oreign investment, according to prevailing laws is not permitted in Iraq unless authorised by specific legislation...” (ibid).

¹²²⁵ CPA Order No. 39, section 13

¹²²⁶ CPA Regulation No. 1, promulgated 16 May 2003, section 3(1)

¹²²⁷ See also Wolfrum (n 1122) 22-23 and 27 who states that certain economic reforms including Order No. 39 “go considerably beyond what is necessary to re-establish public order and civil life” under Article 43, and that there was “no foundation in international humanitarian law” for such reforms, including Order No. 39

¹²²⁸ Roberts states that Order No. 39 “lacked a convincing mandate ... in Security Council resolutions” (Roberts, ‘Transformative Military Occupation’, (n 1122) 615). However, he does not elaborate. He is presumably basing this judgment on a simple reading of the text of the resolutions on Iraq. He was writing before the release by the Chilcot Inquiry of the UK Attorney General’s advice on Resolution 1483 and therefore was not in a position to engage with the “implied recognition” argument there

The CPA Administrator invoked Resolution 1483 in the preamble to Order No. 39 (as he did in other Orders), stating that he was acting “consistent with” relevant U.N. Security Council resolutions, including Resolution 1483. Furthermore, it is apparent from the preamble to the Order that the CPA Administrator was seeking to rely on operative paragraph 8(e) of Resolution 1483, which, as noted above, gave the Special Representative responsibility (in coordination with the CPA) for “promoting economic reconstruction and the conditions for sustainable development”. The CPA Administrator’s reliance on operative paragraph 8(e) is apparent from the fact that the preamble to the Order refers to the CPA Administrator having “coordinated with the international financial institutions, *as referenced in paragraph 8(e) of the U.N. Security Council Resolution 1483*” (italics added). However, if Resolution 1483 was to provide a legal basis for the enactment of Order No. 39, as a measure “promoting economic reconstruction and the conditions for sustainable development” within the meaning of operative paragraph 8(e) of that Resolution, it would have been necessary for the CPA to have obtained the approval of the Special Representative to the enactment of the Order, or, at least (on the approach of the UK Attorney General), to promulgate it “in coordination with” the Special Representative.

Whilst the CPA Administrator was at pains to state in the preamble to Order No. 39 that he had “coordinated with” the international financial institutions and that he was promulgating the Order “[i]n close consultation with and acting in coordination with the Governing Council”, he made no mention of having coordinated the Order with the Special Representative, or obtained his approval. This may be accounted for by the fact that, as noted above, Order No. 39 was enacted a month after the death of the Special Representative.

If the CPA Administrator did not obtain the approval of the Special Representative to Order No. 39, or, in accordance with the approach of the UK Attorney General, enact it “in coordination with” the Special Representative, then Resolution 1483 does not provide a legal basis for those provisions of the Order which were inconsistent with the

raised (see above). Roberts also does not discuss the issues raised in the main text immediately following.

existing Iraqi law and which were not justified by necessity under Article 43 of the Hague Regulations.

(ii) The period 10 December 2003 to the end of the occupation: after the appointment of a new Special Representative for Iraq ad interim

The second serious problem relates to the failure of Mr Bremer to obtain the approval of, or properly coordinate with, the Special Representative in relation to legislation even after Mr Ross Mountain was appointed Special Representative for Iraq *ad interim* on 10 December 2003. The detailed factual narrative set out in the Chilcot Report contains important new information regarding this issue.

The background to this period is that, as related in the Chilcot Report, after the UN left Iraq in August 2003 (following the terrorist attack on the UN headquarters in Baghdad) the CPA's Office of General Counsel had started to send draft legislation to the UN Legal Office through the US Mission to the UN but the US Mission was subsequently advised by a "reliable source" that if the Mission continued to send draft legislation to the UN Legal Office, it was likely to veto legislation.¹²²⁹ In the words of the Chilcot Report "[c]onsultation had then ceased".¹²³⁰

As regards this reference to a "reliable source" it appears relevant to recall that LeBor has described the problem of espionage at the UN:

"Some employees [of the UN] have two bosses: it is an open secret that some Secretariat officials are spies, reporting back to their home intelligence services."¹²³¹

LeBor was writing before the publication of the Chilcot Report and does not refer to this particular example. In the Chilcot report we are told that the "reliable source" informed the US Mission rather than an "intelligence service", although, if the situation

¹²²⁹ The Report of the Iraq Inquiry, Report of a Committee of Privy Counsellors, Ordered by the House of Commons to be printed on 6 July 2016 (HC 264), Volume 7, p. 340, para. 818

¹²³⁰ Ibid, p. 340, para. 818

¹²³¹ Adam LeBor, *"Complicity with Evil", The United Nations in the Age of Modern Genocide* (2006, Yale University Press, New Haven and London), p. 19

in embassies is anything to go by, it is perhaps naïve to assume that the staff of national missions to the UN never include agents of the sending state's intelligence service. Nor is it clear from the Chilcot Report that the "reliable source" in this instance was a US national or a foreign national, for example one in the pay of a US intelligence service. The more general point which can be made is that espionage conducted by states against the United Nations undermines the organisation's work, as is shown by this example in respect of the occupation of Iraq.

As regards the practice of sending draft legislation to the UN Legal Office after the UN left Iraq in August 2003, it is worth making the point that what Resolution 1483 actually required was coordination *with the Special Representative* in relation to what were described as his "independent responsibilities". Coordination with the UN Legal Office would probably not have fulfilled that condition in any case. The problem, as noted above, was that between 20 August and 9 December 2003 there was no Special Representative to coordinate with.

As regards the period commencing with the appointment of Mr Ross Mountain as the Secretary-General's Special Representative for Iraq *ad interim*, on 10 December 2003, the Chilcot Report relates that:

- (i) when Mr Mountain was appointed Special Representative *ad interim*, the CPA Office of General Counsel suggested that draft CPA Orders should be sent to Mr Mountain¹²³²;
- (ii) the US State Department objected to that proposed course of action on the ground that Mr Mountain would forward such draft legislation to the UN Legal Office who would veto it¹²³³;

¹²³² The Report of the Iraq Inquiry, Report of a Committee of Privy Counsellors, Ordered by the House of Commons to be printed on 6 July 2016 (HC 264), Volume 7, p. 340, para. 818, citing a letter dated 15 March 2004 from Mr David Richmond, the UK's Special Representative for Iraq, in Baghdad to Mr Neil Crompton, head of the Iraq Policy Unit, which related a conversation he had had with a US lawyer working in the CPA Office of General Counsel. All of the information contained in the sub-paragraphs of this paragraph of the main text, as well as the factual information contained in the previous paragraph, is derived from that letter, as summarised in the Chilcot Report.

¹²³³ *Ibid*, p. 340, para. 818

- (iii) US State Department officials suggested that the CPA Office of General Counsel, in the words of the Chilcot Report, “should simply mention to Mr Mountain when he was in Baghdad that they had legislation in various areas in process”¹²³⁴;
- (iv) the CPA Office of General Counsel had attempted to agree a new procedure for consultation with the UN but Mr Bremer had objected to the proposals because he wished to avoid a UN veto of proposed CPA Orders and delay to the CPA’s legislative programme¹²³⁵;
- (v) in or around March 2004, the UK Special Representative for Iraq, Mr David Richmond, requested the CPA Office of General Counsel to resume the practice of consulting the UN on draft CPA Orders, by faxing copies to Mr Mountain, but was informed that, whilst the Office of General Counsel was content to do so, Mr Bremer was not.¹²³⁶

The approach of merely mentioning to the Special Representative during the course of his visits to Iraq that the CPA had draft legislation in process in various areas is plainly inadequate to constitute “coordination” within the meaning of operative paragraph 8 of Resolution 1483. Meaningful coordination of legislation with the Special Representative would involve supplying the Special Representative with a draft of the proposed legislation for his comments or approval. The Chilcot Report relates that even the CPA’s Office of General Counsel was of the view that the State Department’s approach of “mentioning” to the Special Representative legislation that was in process of preparation was not sufficient to meet the requirements of Resolution 1483.¹²³⁷

Similarly, UK officials were of the view that co-ordination with the Special Representative had not taken place. On 23 June 2004 the Iraq Policy Unit (IPU), an

¹²³⁴ Ibid, p. 340, para. 819

¹²³⁵ Ibid, p. 340, para. 820

¹²³⁶ Ibid, p. 340, para. 817. This conversation would have occurred sometime between 25 February and 15 March 2004, when Mr Richmond related the conversation to London.

¹²³⁷ Ibid, p. 340, para. 819. This information is again apparently derived from the letter dated 15 March 2004 from Mr Richmond relating his conversation with a US lawyer in the CPA’s Office of General Counsel.

inter-departmental unit based in the Foreign and Commonwealth Office (FCO) and consisting of officials from that Department and of the Ministry of Defence and Department for International Development, reported to the Secretary of State for Foreign and Commonwealth Affairs, via his Private Secretary, on advice received from FCO Legal Advisers regarding the CPA's legislation and that, as summarised in the Chilcot Report,

“[i]n relation to resolution 1483, consultation with the Special Representative to the UN Secretary General had not taken place”.¹²³⁸

It is indicated by the Chilcot Report in general terms that the advice from the FCO Legal Advisers was that this lack of consultation with the Special Representative was, in the words of the Chilcot Report at least, a “potential risk area” for the United Kingdom.¹²³⁹

In their report to the Foreign Secretary's private secretary, after referring to the failure to consult the Special Representative (see above), the IPU commented that, as summarised in the Chilcot Report, “... no one in the UN had ever protested to the CPA or UK”.¹²⁴⁰ That however is not a credible argument for the legality of legislation which was made outside the legislative power of the occupying powers under the law of armed conflict. To recap, the US and UK as occupying powers were seeking to rely on co-ordination with the UN Special Representative, as required by a Security Council resolution, as a basis for the assertion that certain legislation which would otherwise be outside of the legislative power of the occupying powers under the law of armed conflict was nevertheless lawful as having been authorised by the Security Council

¹²³⁸ Ibid, p. 392, paras. 1119-1122. The Chilcot Report explains that the “Iraq Planning Unit”, as it was originally known, was an inter-departmental unit (FCO, MOD, DfID), based in the FCO which was established on 10 February 2003 to improve Whitehall co-ordination on post-conflict issues: see Chilcot Report, Vol. 1, p. 302, para. 223. The Iraq Planning Unit later became the “Iraq Policy Unit”: see Transcript of evidence of Dominick Chilcott, 8 December 2009, p. 3. Mr Chilcott was head of the IPU from its establishment on 10 February 2003 until mid-June 2003.

¹²³⁹ The Report contains (at p. 392, para. 1121) the sentence just quoted in the main text above about consultation with the Special Representative not having taken place and then the next sentence commences “The advice identified three *other* potential risk areas...” (at p. 392, para. 1122, italics added). This would appear to indicate that the lack of consultation with the Special Representative was identified as a “potential risk area”.

¹²⁴⁰ Ibid, p. 392, para. 1121

resolution in question. UK officials acknowledged that that co-ordination did not take place. As a matter of logic, the absence of protest by the UN does not entail that co-ordination which did not take place, did take place. However, co-ordination with the Special Representative is the very basis of the argument that operative paragraph 8 of Resolution 1483 authorised the occupying powers to legislate beyond the constraints of the law of occupation. To put it another way, if occupying powers seek to rely on a Security Council resolution as a basis for legislating beyond the constraints of the law of occupation, it is incumbent on those occupying powers to ensure that they comply with any conditions which are set out in the resolution in question. This the US and UK failed to do in Iraq (albeit that UK officials did at least try to persuade the US to do so).

As shown above, the International Court of Justice has stated, in its Advisory Opinion on *Kosovo*, that the rules on treaty interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance on the interpretation of Security Council resolutions. Even before the Court gave that Advisory Opinion, the (chief) Legal Adviser at the Foreign and Commonwealth Office, Sir Michael Wood, and the Attorney General, Lord Goldsmith, in their evidence to the Chilcot Inquiry on the question of whether the use of force against Iraq was authorised by Security Council resolution, had also suggested that the Vienna Convention on the Law of Treaties can provide some guidance or assistance in the interpretation of Security Council resolutions.¹²⁴¹

The general rule of interpretation provided for in Article 31 of the Vienna Convention on the Law of Treaties includes the requirement that a treaty shall be interpreted “in good faith”. Applying this approach to Security Council resolutions entails that such resolutions must similarly be interpreted in good faith.¹²⁴² It is difficult to see how it

¹²⁴¹ Statement by Sir Michael Wood, 15 January 2010, p. 5, paras. 18-19; Transcript of evidence of Rt. Hon. Lord Goldsmith Q.C., 27 January 2010, p. 122. See also Sir Michael’s earlier article discussing the application of the rules on treaty interpretation contained in the Vienna Convention on the Law of Treaties when interpreting Security Council Resolutions: Michael C. Wood, ‘The Interpretation of Security Council Resolutions’, (1998) 2 Max Planck Yearbook of United Nations Law, p. 73, in particular p. 95

¹²⁴² See also Michael C. Wood, ‘The Interpretation of Security Council Resolutions’, (1998) 2 Max Planck Yearbook of United Nations Law, p. 73, at p. 89: “The requirement of good faith in interpretation applies to the interpretation of resolutions as it does to treaties. This is reinforced by Article 2 para. 2

can be credibly claimed otherwise. In contrast, the approach of the US State Department to co-ordination with the Secretary-General's Special Representative, whereby the CPA merely mention to him that legislation in various areas was in the process of preparation without sending him a copy of the legislation proposed, violated the requirement to interpret a Security Council resolution in good faith. In particular, the purpose of the policy of merely mentioning that legislation is in process of preparation and not providing a copy of the proposed legislation to the Special Representative was to prevent the Special Representative, and the UN Legal Office from whom he might seek legal advice, from knowing what the provisions of the proposed legislation were. Clearly, that is not a "good faith" interpretation of "coordination".

We will now examine some of the legislation promulgated by the CPA in this period and consider what effect the failure of the CPA to co-ordinate with the Special Representative may have had upon it. CPA Orders Nos. 80, 81 and 83 made a massive number of amendments and additions to Iraq's existing intellectual property legislation, as follows:

- (i) CPA Order No. 80, Amendment to the Trademarks and Descriptions Law No. 21 of 1957 made a large number of amendments to the Trademark and Descriptions Law No. 21 of 1957 [Iraq], including re-naming it the "Trademark and Geographical Indications Law"¹²⁴³;
- (ii) CPA Order No. 81, Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law made a very large number of amendments and additions to the Patent and Industrial Designs Laws and Regulations (No. 65 of 1970) [Iraq], including re-naming the latter legislation "Patents, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law"¹²⁴⁴;

of the Charter, in accordance with which all Members shall fulfil in good faith the obligations assumed by them in accordance with the Charter."

¹²⁴³ CPA Order No. 80, Amendment to the Trademarks and Descriptions Law No. 21 of 1957, promulgated 26 April 2004 (CPA/ORD/26 April 04/80)

¹²⁴⁴ CPA Order No. 81, Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law, promulgated 26 April 2004 (CPA/ORD/26 April 2004/81)

- (iii) CPA Order No. 83, Amendment to the Copyright Law made a large number of amendments to the Copyright Law No. 3 of 1971 [Iraq]¹²⁴⁵. Order No. 83 specifically invokes in its preamble operative paragraph 8 of Resolution 1483, stating that the CPA Administrator had “coordinated” with the international financial institutions as referred to in operative paragraph 8(e) of Resolution 1483.

It cannot credibly be argued that there was a necessity for Iraq’s intellectual property laws to be amended in this way during the occupation. For the occupying powers to be able to argue that these Orders were nevertheless valid on the basis of Resolution 1483, in accordance with the “implied recognition” theory, the CPA would have had to co-ordinate the legislation with the Special Representative. The information disclosed in the Chilcot Report reveals that no such co-ordination took place during the relevant period. Furthermore, the highly technical nature of these CPA Orders underlines the need for a copy of the draft legislation to have been provided to the Special Representative. In the absence of the requisite co-ordination, the legislation cannot be regarded as having been authorised by the Security Council and must therefore be regarded as unlawful under Article 43 of the Hague Regulations.

A further example of a CPA Order promulgated in this period is CPA Order No. 64, Amendment to the Company Law No. 21 of 1997.¹²⁴⁶ This Order made an enormous number of amendments to the existing company legislation in Iraq, Company Law No. 21 of 1997 [Iraq]. As noted above, shortly after the beginning of the occupation, the U.S. Department of Commerce produced a guide to Commercial Law in Iraq which noted that Article 12 of the Companies Law, No. 21 of 1997 provided that all founders of, and shareholders in, Iraqi companies must be Iraqi nationals or resident citizens of other Arab countries. One of the amendments made in Order No. 64 was to amend Article 12 (First paragraph) to read:

¹²⁴⁵ CPA Order No. 83, Amendment to the Copyright Law, promulgated 1 May 2004 (CPA/ORD/29 April 2004/83)

¹²⁴⁶ CPA Order No. 64, Amendment to the Company Law No. 21 of 1997, promulgated 3 March 2004 (CPA/ORD/29 February 2004/64)

“A juridical or natural person *foreign* or domestic has the right to acquire membership in the companies stipulated in this law as founder, shareholder, or partner, unless such person is banned from such membership under the law, or due to a decision issued by a competent court or authorized governmental body.”¹²⁴⁷ (italics added)

Thus the occupying powers formally amended the Iraqi company legislation so that foreigners were permitted to establish, own or become shareholder in Iraqi companies. Another of the amendments to the Iraqi Company Law which was effectuated by Order No. 64 was to amend all references to the “socialist sector” contained in that Law to read “state sector”.¹²⁴⁸ That amendment would appear to be purely ideological in nature, an example of the occupying powers attempting to stamp out the ideology of the occupied state.

Again, it is doubtful that there was a necessity for the occupying powers to amend the existing Iraqi law as was done in Order No. 64. Again, for the occupying powers to be able to argue that that Order was nevertheless valid on the basis of Resolution 1483, in accordance with the “implied recognition” theory, the CPA would have had to co-ordinate the Order with the Special Representative. The information disclosed in the Chilcot Report reveals that no such co-ordination took place during the relevant period. Furthermore, the highly technical nature of CPA Order No. 64 again underlines the need for a copy of the draft legislation to have been provided to the Special Representative. In the absence of the requisite co-ordination, Order No. 64 cannot be regarded as having been authorised by the Security Council and must therefore be regarded as unlawful under Article 43 of the Hague Regulations.

In summary, then, even if one accepts the “implied recognition” theory, CPA legislation issued after the assassination of the Special Representative in August 2003 which the occupying powers were not entitled to enact under the law of occupation cannot be regarded as having been authorised by the Security Council under Resolution 1483 if it was not coordinated with the Special Representative. From 20 August until 9

¹²⁴⁷ Ibid, Section 1(14)

¹²⁴⁸ Ibid, Section 2(3)

December 2003 there was no Special Representative in place to co-ordinate with. The CPA nevertheless issued legislation in that period for which there was no necessity as required under Article 43 of the Hague Regulations. As regards the period from 10 December 2003 until the end of the occupation, material referred to in the Chilcot Report discloses that the US Department of State and the CPA Administrator, Mr Bremer, decided to refrain from supplying the Special Representative with a copy of proposed CPA legislation, because it was apprehended that the UN would veto it, and that it would be merely mentioned to the Special Representative that the CPA had legislation in process. That approach cannot be regarded as co-ordination of the legislation with the Special Representative and consequently legislation which did not fall within the constraints of the law of occupation must be regarded as unlawful.

Legislation by UN Interim Administrations¹²⁴⁹

It should be noted that whilst doubts are expressed here in relation to the power of the Security Council to authorise an occupying state to legislate outside the constraints of occupation law, including the customary international law equivalent of Article 43, it is recognised that the Security Council has the power to authorise a UN interim administration or UN official, such as a Special Representative of the Secretary-General, to legislate for a particular territory and that such administration or official would not be constrained by Article 43 of the Hague Regulations or the equivalent rule in customary international law.¹²⁵⁰ This follows from the fact that neither the UN nor such UN officials are states parties to the Hague Convention of 1907¹²⁵¹ and that, as regards the equivalent rule in customary international law, neither are they an “occupant” within that rule. As noted above, under Article 42 of the Hague Regulations, which is also reflected in customary international law, territory is considered “occupied” when it is placed under the authority of a “hostile army”, a phrase which would not appear to embrace a UN interim administration or a UN official such as a Special Representative of the Secretary-General.

¹²⁴⁹ On UN international territorial administration, see generally Carsten Stahn (n 1176)

¹²⁵⁰ See also Scheffer (n 1122) 852-53. C.f. Eyal Benvenisti, *The International Law of Occupation* (2nd ed., 2012, Oxford University Press), at pp. 62-66, who argues that the law of occupation applies to UN administrations (“UN-led occupations”), at least unless the Security Council expressly derogates from it.

¹²⁵¹ See Sassòli (n 1122) 687

It may seem counterintuitive that, on the analysis presented here, the Security Council has the power to authorise a UN interim administration or UN official, such as a Special Representative of the Secretary-General, to legislate for a particular territory outside the constraints of Article 43 or the equivalent rule in customary international law, but there is serious reason to doubt that the Council has the power to authorise an occupying state to legislate outside the constraints of occupation law, including the customary international law equivalent of Article 43. It might be argued that if the Council has the power to take the more radical step of imposing upon a territory a UN interim administration with the power to legislate outside the constraints of occupation law, it must have the power to take the less radical step of authorising or ordering an occupying state to legislate outside the constraints of Article 43 and its customary law equivalent. However, this dichotomy is the consequence of the fact that, in the case of the latter scenario, there is serious reason to doubt the power of the Council to override a rule of customary law, whereas in the case of the former scenario there is, for the reasons set out above, no relevant rule of customary international law which constrains legislation and requires to be overridden. Thus the two situations (UN interim administration and occupation) are not the same.

Furthermore, although the International Court of Justice did not expressly consider Article 43 of the Hague Regulations (or its customary international law equivalent) in its Advisory Opinion on *Kosovo*, it did state that Resolution 1244 and UNMIK Regulation 1999/1, which as we have seen above provided that “[a]ll legislative and executive authority with respect to Kosovo” was vested in UNMIK and exercised by the Special Representative, taken together, “had the effect of superseding the legal order in force at that time in the territory of Kosovo”, as well as setting up an international territorial administration.¹²⁵² It is noteworthy that the Court did not express any reservations about these sweeping legal powers. Rather, the Court confined itself to commenting that the establishment of civil and security presences in Kosovo under Resolution 1244 “must be understood as an exceptional measure relating to civil, political and security aspects and aimed at addressing the crisis existing in that territory in 1999”.¹²⁵³

¹²⁵² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] I.C.J. Reports, p. 403, at p. 443, para. 97

¹²⁵³ *Ibid*

Furthermore, this apparent acceptance by the Court of the executive and legislative arrangements put in place in Kosovo by the Security Council and UN was despite the fact that, as the Court had earlier described in the Advisory Opinion, on a single day two UNMIK Regulations had, in effect, dis-applied in Kosovo around 10 years of Serbian legislation.¹²⁵⁴

Of course, in this Advisory Opinion the Court was dealing with a particular question in relation to the unilateral declaration of independence in relation to Kosovo and not with the scope of the legislative power of a UN interim administration or the constraints thereon. Nevertheless, tentatively, it can be said that the Court has indicated its acceptance that the Security Council may establish a UN interim administration in a territory with very wide legislative power, including broad power to change the existing law, as an exceptional measure aimed at dealing with a crisis of the sort which existed in Kosovo.

From a policy perspective it is desirable that the Security Council should have that power, in exceptional circumstances, in order to deal with situations such as those in Kosovo or East Timor, or where there has been a collapse of government, as in a “failed state”.¹²⁵⁵ The ‘*jus post bellum*’ school of thought has made suggestions as to how UN interim administrations should exercise legislative power.¹²⁵⁶

¹²⁵⁴ Ibid, p. 428, para. 61. More specifically, the Court referred to the fact that Regulation 1999/1 had (in section 3) provided that, subject to exceptions, the law applicable in Kosovo prior to 24 March 1999 would continue to apply, and to the fact that subsequently UNMIK Regulations repealed that provision and provided that the law applicable in Kosovo shall be the law in force in Kosovo on 22 March 1989, together with legislation enacted by the Special Representative (Regulations 1999/24 and Regulation 1999/25, both enacted on 12 December 1999).

¹²⁵⁵ See also Scheffer (n 1122) 849. Note, however, that Scheffer also argues for occupation law to be revised to permit “transformational occupations”, even without Security Council approval, in certain circumstances and if the Council is “gridlocked” (ibid, pp. 859-60). This is not being endorsed here.

¹²⁵⁶ See e.g. Kristen Boon, ‘Legislative Reform in Post-conflict Zones: *Jus Post-Bellum* and the Contemporary Occupant’s Law-Making Powers’, (2005) 50 McGill Law Journal 285. Boon proposes three principles as principles of justice in accordance with which international authorities should exercise their temporary legislative powers: trusteeship, accountability and proportionality (ibid, pp. 294-95). And see Kristen E. Boon, ‘Obligations of the New Occupier: The Contours of a *Jus Post Bellum*’, (2009) 31 Loyola of Los Angeles International & Comparative Law Review p. 57, where Boon argues that there are four emerging norms of *jus post bellum*: accountability; good economic governance; stewardship; and proportionality in intervention, to safeguard self-determination (ibid, pp. 77-82).

Conclusions

Individuals and companies in occupied territories require legal certainty in the same way as individuals and companies in states which have not been occupied. Similarly, foreign businesses who are being encouraged to invest or do business in occupied territory would require legal certainty that the laws under which they are being asked to invest or do business are legally valid. As noted above, where an occupying state enacts legislation in violation of the restrictions placed upon its legislative power by Article 43, there is a risk that courts in the occupied territory (either during or after the occupation) will hold the legislation to be legally invalid and devoid of legal effect, or that Courts of third states may rule that the legislation cannot be recognised as valid.

However, there is uncertainty whether a Security Council Resolution provides a sound legal basis for an occupying power to enact legislation which would otherwise be outside the constraints of the law of occupation. In particular, there is uncertainty regarding whether, under Article 103 of the UN Charter, a Security Council decision prevails over a rule of customary international law. Therefore there is uncertainty whether the obligation of UN Members to carry out Security Council decisions prevails over the rule of customary international law which is equivalent of Article 43 of the Hague Regulations. Accordingly, there is uncertainty about whether Security Council authorisation provides a sound legal basis for an occupying state to enact legislation outside the constraints of that rule of customary international law. The position of a UN interim civil administration endowed by a Security Council resolution with the power to legislate is however in a different position.

Furthermore, there is uncertainty regarding whether, under Article 103 of the UN Charter, provisions in Security Council resolutions which authorise but do not oblige states to take action prevail over obligations under other treaties (or customary law, if applicable). Consequently, there is substantial reason to doubt the wisdom of using a provision in a Security Council resolution which authorises but does not oblige an occupying state to legislate as a legal basis for changing the existing law in occupied territory where it would not otherwise be permitted under Article 43 of the Hague Regulations and the equivalent rule of customary international law.

In the case of reliance on Security Council authorisation as a basis for legislation during the occupation of Iraq in 2003-04, legal uncertainty was piled upon legal uncertainty. Resolution 1483 did not expressly authorise the US and UK to make changes to the law of Iraq going beyond what the international law of occupation permitted. The Resolution (in operative paragraph 8) did give certain responsibilities to the UN Secretary-General's Special Representative for Iraq, to be carried out "in coordination with" the occupying powers, including promoting economic reconstruction and the conditions for sustainable development, promoting the protection of human rights and encouraging international efforts to promote legal and judicial reform. In the absence of any express authorisation for the occupying powers to legislate outside the constraints of the law of occupation, the UK Attorney General advised that because the activities in which the Special Representative was to engage were stipulated to be carried out "in coordination with" the US and UK, that was an "implied recognition" of the authority of the US and UK to engage in such activities, in coordination with the Special Representative, including where this would go beyond the limits of occupation law.

It may be observed that there is a danger in relying on interpretations of Security Council resolutions by which implied powers are divined in them, as in the Attorney General's advice. The danger is that the Council never intended that any such power be given to the state or states alleged to be endowed with them.

There are a number of reasons to doubt the UK Attorney General's "implied recognition" theory. A more natural reading of the relevant provision in the Resolution (operative paragraph 8) than that offered by the Attorney General is that it was *for the Secretary General's Special Representative* to engage in the activities listed, albeit that he must coordinate with the US and UK. A further argument as to why the Attorney General's advice is unconvincing is that another of the listed responsibilities of the Special Representative to be carried out in coordination with the occupying powers is coordinating humanitarian and reconstruction assistance by UN agencies, and between UN agencies and non-governmental organizations. If the words "in coordination with [the US and UK]" must be read as "implied recognition" of the authority of the US and UK to engage in the activities listed, the US and UK were being given authority to coordinate humanitarian and reconstruction assistance by United Nations agencies, and

between United Nations agencies and non-governmental organizations. However, it seems unlikely that the Security Council would have intended to bestow upon the US and UK the power to coordinate the work of UN agencies in the field of humanitarian and reconstruction assistance. It seems unlikely that such a role would be given by the Council to anyone other than a UN official.

Furthermore, another provision of the Resolution (operative paragraph 5) called 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 latter of which includes Article 43. The UK Attorney General’s “implied recognition” theory assumes that the occupying powers’ alleged entitlement to engage in the activities allocated to the Special Representative under operative paragraph 8 takes priority over the call by the Security Council for full compliance with the Hague Regulations in operative paragraph 5. However, the Resolution does not state that that is the case. Moreover, the phrase “comply *fully*” (*italics added*) suggests that the Security Council was not intending to impliedly carve out for the occupying powers an exception to their obligations under the Hague Regulations. Furthermore, the view of the United Nations Secretariat was that international law prevented the occupying powers from implementing major legal changes in relation to the rule of law and the economy.

Additionally, there was nothing in operative paragraph 8 of the Resolution which indicated that it expressly placed an *obligation* on the occupying powers to engage in the activities in question (promoting economic reconstruction etc) and there are reasons to doubt that it did. It is therefore far from clear that operative paragraph 8 of Resolution 1483 imposed any obligation on the occupying powers in relation to the activities in question which could, under Article 103 of the Charter, conflict with and prevail over Article 43 of the Hague Regulations. There is considerable uncertainty regarding whether under Article 103 of the UN Charter, provisions in Security Council resolutions which authorise but do not oblige states to take action prevail over obligations under other treaties.

A case can be made that, on the basis of past practice in relation to Kosovo, when the Security Council used the phrase “promoting economic reconstruction” and “promoting

the protection of human rights” in operative paragraph 8(e) of Resolution 1483, it intended that that would embrace the enactment of legislation in the areas of the economy and human rights. Similar language had been used in Resolution 1244 in respect of Kosovo and had been used by the Special Representative there as the basis for legislating, without any express reference in the Resolution to a power to legislate. However, this only takes things so far given that in the case of Kosovo it was the Special Representative who promulgated legislation. Furthermore, practice in relation to East Timor casts doubt on the usefulness of the Kosovo precedent. In respect of East Timor the Security Council apparently learnt from the experience in Kosovo, where the relevant resolution had not expressly provided for legislative power but the Special Representative had nevertheless found it necessary to exercise it. The Security Council explicitly stated in Resolution 1272 on East Timor that the Special Representative was vested with legislative power, including the power to change the existing law. Having learnt that lesson, it is difficult to see why in the case of Iraq the Security Council would regress back into employing vague wording, as in the Kosovo resolution, which made no reference to the power to legislate, if in fact the Council really intended to endow the Special Representative for Iraq (“in coordination with” the occupying powers) with legislative power. Nor does the Kosovo precedent help the occupying powers in relation to other issues referred to above in relation to Resolution 1483, including the fact that it called upon the occupying powers to comply with their obligations under the law of occupation.

To add to all these uncertainties in relation to the wording of Resolution 1483, in the period after the assassination of the Special Representative for Iraq, Mr Sergio Vieira de Mello, and before a new Special Representative (*ad interim*) was appointed (i.e. the period 20 August to 9 December 2003) Mr Bremer continued to promulgate legislation including laws which changed the existing law in Iraq which was not co-ordinated with a Special Representative. Even if the UK Attorney General’s “implied recognition” theory is correct, legislation for which there was no necessity under Article 43 could not be saved from unlawfulness on the basis of Resolution 1483 if it had not been co-ordinated with the Special Representative. Order No. 39, Foreign Investment is an example.

To cap it all, the Chilcot Report discloses that after Mr Ross Mountain was appointed Special Representative for Iraq *ad interim* on 10 December 2003 Mr Bremer and the U.S. State Department decided not to send copies of proposed legislation to him for the purposes of co-ordination because a “reliable source” had informed the State Department that the UN would veto the legislation. Instead, Mr Bremer and the State Department introduced a policy of merely mentioning to the Special Representative that legislation in various areas was in process. This clearly would not constitute “coordination” within the meaning of Resolution 1483. Accordingly Resolution 1483 did not provide a basis for legislation enacted during that period which was outside the constraints of Article 43. Orders Nos. 80, 81 and 83, which extensively amended Iraq’s intellectual property laws, and Order No. 64, which made a large number of amendments to Iraq’s company law, including so as to permit foreign investors to own shares in Iraqi companies, are examples.

The approach taken by the CPA Administrator, and the US State Department, to coordination with the Special Representative of the UN Secretary-General in relation to proposed legislation was ill-advised given the possibility that Iraqi Courts might hold CPA legislation to be invalid, as courts of occupied states have done previously, either during or after occupation. That episode underlines the need for the Security Council to be explicit about *how* extensive legislative power is to be exercised, if it is bestowed at all, during an occupation.

It is relevant to note that CPA Orders Nos. 80, 81 and 83 continue to be included as part of Iraq’s intellectual property legislation on the web site of the World Intellectual Property Organization, which suggests that they have not been formally repealed.¹²⁵⁷ However, should an intellectual property dispute reach the Courts in Iraq in which the plaintiff relies upon one of these Orders, the defendant could argue that the Order is invalid as being in breach of occupation law and not having any basis in Resolution 1483, particularly given the CPA’s failure to coordinate with the Special Representative of the UN Secretary-General. This exemplifies how the CPA

¹²⁵⁷ See <https://wipolex.wipo.int/en/legislation/profile/IQ>. Last accessed: 05.05.19. To find reference to the relevant CPA Order, including the full text, it is necessary to click on the piece of Iraqi legislation which the CPA Order in question amended.

Administrator took a wrong turn in his approach to coordination with the Special Representative.

The experience in relation to Security Council Resolution 1483 contains lessons for the future. That Resolution was silent on the subject of legislative power. Vagueness may have assisted diplomats in reaching agreement on the Resolution but it was not conducive to legal certainty in Iraq. It is highly undesirable that the three principal actors could take divergent approaches to the same Security Council Resolution:

- (i) the UK believed that the occupation authority could enact legislation outside the constraints of the law of occupation, provided that a copy of the draft legislation was first sent to the Special Representative (apparently for his approval);
- (ii) the US acted on the basis that the occupation authority could enact legislation free from the constraints of the law of occupation, and even though it had not sent a copy of the draft legislation to the Special Representative, provided that the occupation authority merely mentioned to the Special Representative that it had legislation in process;
- (iii) the position of the UN Secretariat was that international law required that reforms in relation to governance, the rule of law and the economy must await a future internationally recognised, representative government established by the people of Iraq (see the Joint Iraq Needs Assessment, referred to above).

It might be that what was at work in the negotiation of Resolution 1483 was “constructive ambiguity”. From the point of view of legal certainty in relation to legislation subsequently enacted during the occupation, it was “destructive ambiguity”.

Given that in the last two decades the Security Council has entered the realm of allocating legislative power in particular territories, when it adopts a resolution which provides for the appointment of a Special Representative for a particular state or territory with responsibilities such as those in Kosovo or Iraq, including for example

the promotion of economic reconstruction and human rights, the Council needs to be explicit about legislative power. In such circumstances, the following guidelines are proposed in order to reduce the scope for abuse:

1. If it is the Council's intention that the Special Representative is to have power to enact legislation and change the existing law, that should be expressly stated in the resolution (as in relation to East Timor).
2. If it is not the Council's intention that such a Special Representative should have legislative power, that should be explicitly stated.
3. If it is a hybrid situation and such a Special Representative is to exercise his functions in occupied territory (as in Iraq), the resolution providing for his appointment should clearly state whether it is the Special Representative or the occupying powers (occupation authority) which is to exercise legislative power.
4. If it is not the intention of the Council to bestow on the occupying states the power to change the existing law in the occupied territory in circumstances not permitted by the law of occupation, that should be clearly stated. The example of Iraq shows that occupying powers may claim that a resolution contains an implied power to legislate outside the confines of the law of occupation, in that case merely on the basis that the resolution called for "coordination" between Special Representative and occupying powers. As we have also seen in the case of Iraq, it was not in practice sufficient to refer in the resolution in general terms to the obligations under applicable international law or even to the Hague Regulations. Such general references in Resolution 1483 did not prevent the occupying powers finding in the resolution an implied power (whether it was intended or not) to legislate outside the constraints of the law of occupation. The resolution should expressly require that legislative power be exercised by the occupying states consistently with Article 43 of the Hague Regulations, if that is the Council's intention.
5. If (despite the views expressed above) the Council intends that the occupying powers should have the power to change the existing law, even where it would

not be permitted under the law of occupation, but provided that the Special Representative agrees with the change, the resolution should expressly state that the occupying power (occupation authority) should first provide a copy of the full text of the proposed legislation in draft form to the Special Representative for his approval, amendment or rejection. The resolution should further expressly require that the occupation authority may not enact such legislation until the Special Representative has certified his approval in writing upon the legislation to be enacted. These requirements are to deal with the situation which arose in Iraq whereby the CPA Administrator and US State Department adopted the approach that legislation inconsistent with the law of occupation could be enacted although the Special Representative had not been provided with a copy of the proposed legislation and on the basis that it had been merely mentioned to him that legislation was in process.

More generally, Security Council authorisation does not pose a viable challenge to the rules of occupation law which require respect for the existing law and institutions because of the uncertainty as to whether a Security Council Resolution provides a sound legal basis for an occupying power to enact legislation which would otherwise be outside the constraints of those rules. In particular, there is uncertainty regarding whether, under Article 103 of the UN Charter, a Security Council decision prevails over the rule of customary international law which is equivalent to Article 43 of the Hague Regulations. There is also the uncertainty regarding whether, under Article 103 of the UN Charter, provisions in Security Council resolutions which authorise but do not oblige states to take action prevail over obligations under other treaties (or customary law, if applicable). Nevertheless, despite these doubts about the effect of Security Council authorisation in relation to occupations, it is recognised that where a territory is placed under a UN interim civil administration rather than occupation, different considerations apply.

Chapter 7

Conclusion

The international law of belligerent occupation requires an occupying state, subject to limited exceptions, to respect the existing law and institutions of the occupied territory.

In this thesis we have looked at three challenges to the rules of the law of occupation which require an occupying power to respect the laws and institutions of the occupied territory. These are:

- (i) the challenge posed by the idea that occupying states should be freed of their obligations to respect the existing law and institutions so as to be permitted to engage in “transformational” or “transformative” occupations;
- (ii) the challenge posed by decisions by international courts on the applicability of human rights treaties in occupied territory, with the possible implication that an occupying state must change laws in the territory which it occupies if they are inconsistent with the occupying state’s obligations under a human rights treaty to which it is party; and
- (iii) the challenge from the idea that the Security Council may authorise a departure from, or override, the rules which require respect for existing laws and institutions.

Judging from the case study of the occupation of Iraq, the rules of the law of occupation which require respect for the existing law and institutions in occupied territory survive largely unscathed the challenges which have been identified. In respect of each challenge the conclusions are as follows.

The challenge from “transformative occupation”

The Iraq case study suggests that occupying states should not be freed of their obligations to respect the existing law and institutions so as to be permitted to engage in “transformational” or “transformative” occupations. The examples of the legislation on de-Ba’athification and dissolution of the Iraqi armed forces show the damage which can be inflicted upon an occupied state where it engages in “transformative” occupation (see Chapter 3).

In relation to the dissolution of the Iraqi Army, what emerges is a picture of an occupying power which was out of its depth. The US Defense Secretary, Mr Rumsfeld, indicates in his memoir that at the time the decision was made he did not fully appreciate the significance or importance of the decision which was being made:

“CPA Order Number 2 – the decision to disband the Iraqi army – has since become one of the most criticized decisions of the war. Of the dozens of important decisions made during that week in May 2003, it was not one that stuck out with unique prominence at the time. But in hindsight, its importance is unmistakable.”¹²⁵⁸

Mr Rumsfeld further states that “it is now clear that the National Security Council should have deliberated the decision more fully” and that the decision to dissolve the Army “did not receive the full interagency discussion it merited”.¹²⁵⁹ Condoleezza Rice, who was President George W. Bush’s National Security Advisor at the time of the occupation of Iraq, makes clear in her memoir that, in her view, the decision to dissolve the Army was made without the U.S. Government’s “full and considered deliberation”:

“... something was wrong when a decision of that magnitude could be made without Washington’s full and considered deliberation.”¹²⁶⁰

¹²⁵⁸ Donald Rumsfeld, *Known and Unknown, A Memoir* (Sentinel, 2011), p. 515

¹²⁵⁹ *Ibid*, pp. 518-19 and p. 517

¹²⁶⁰ Condoleezza Rice, *No Higher Honour, A Memoir of My Years in Washington* (2011, Simon & Schuster UK Ltd), p. 238. She also states of the Iraqi Army that “We all knew that it was one of the pillars of Iraqi society and a source of pride”.

Ms Rice further states that she was surprised when she read in the newspaper that the Iraqi armed forces had been dissolved by an Order issued by Mr Bremer.¹²⁶¹

Part of the problem here may be that states, even military powers such as the US, are (with the obvious exception of Israel) only infrequently involved in occupations which last for a significant period of time and result in the enactment of legislation and the pursuit of policies. For example, the Chilcot Report informs us that the invasion and occupation of Iraq in 2003 was “the first time since the Second World War [that] the United Kingdom took part in an opposed invasion and full-scale occupation of a sovereign State...”.¹²⁶² Consequently, such states are likely to lack expertise and experience in governing occupied territory.

It has been suggested that UN involvement would have avoided the mistakes made by the CPA in disbanding the Iraqi Army and de-Ba’athification because these policies “ran counter to lessons from previous operations”.¹²⁶³ That suggests that UN interim civil administration is preferable to “transformative occupation”. Working through the UN rather than occupation offers the opportunity to build up further expertise and experience in that institution and to ensure that lessons are learned. This does not mean that the UN will never make mistakes in the administration of territory, but the concentration of experience in the UN should make mistakes less likely.¹²⁶⁴ In short, the administration of states which have no government as a result of armed conflict is another area in which we need international organisation. Furthermore, working

¹²⁶¹ Ibid, p. 238, where Mr Rice states that “I was surprised when I read in the newspaper on May 24 that the Iraqi military had been dissolved by order of the U.S. envoy”. She also states that “I resolved at that moment to get a better handle on what was going on in Baghdad”.

¹²⁶² The Report of the Iraq Inquiry, Executive Summary, p. 4 (para. 1)

¹²⁶³ See Simon Chesterman, Michael Ignatieff and Ramesh Thakur (Eds.), *Making States Work: State failure and the crisis of governance* (United Nations University Press, Tokyo, 2005), p. 381

¹²⁶⁴ C.f. Andrea Carcano, *The Transformation of Occupied Territory in International Law* (2015, Brill Nijhoff) at pp. 457-58, who states, under the heading “Whether the Security Council should support pro-democratic transformative occupations”, “In principle, the job of building a new political and economic order within a forcibly controlled territory through a process of democratisation ... may be better carried out (if by anybody) by entities that are less divisive, less prone to bias, more inclined to comply with international standards, and more experienced than an occupation administration would normally be. Of course, the key hurdle remains of identifying not only which entities could perform these tasks, but how such entities could perform such difficult tasks in a fair and effective manner.”

through UN administration avoids the danger of an occupying state making legal and institutional changes in order to pursue its own economic and commercial interests, because the UN, as an international organisation, has no such interests. Again, UN administration may avoid the possibility of hubris or over-confidence which may afflict an occupying power following military victory and may have been a factor in the decisions on de-Ba'athification and dissolution of the Iraqi Army.

Furthermore, the evidence that during the occupation the CPA enacted a large number of laws which were not implemented during the occupation (including most of the commercial laws) casts serious doubt on the very idea of “transformational” or “transformative” occupation. Many laws were being promulgated on paper but, because they were not being implemented, could not produce effects within society.

Again, the CPA enacted a substantial amount of legislation in the field of human rights but the available evidence and information suggests that this legislation did not transform the human rights position in Iraq (see Chapter 4). The available evidence and information suggests that in the years since the occupation serious and widespread human rights abuses have continued to take place. In particular, it appears that torture and ill-treatment of detainees was widespread even a decade after the end of the occupation; substantial numbers of persons have been subjected to secret detention in secret prisons and substantial numbers have been subjected to enforced disappearance; and accused persons have frequently been denied legal representation. The experience in Iraq in relation to occupation legislation in the field of human rights again calls into question the idea of “transformational” or “transformative” occupation and suggests that the challenge which it poses to occupation law is not viable.

At the higher, political level, there has been change in Iraq – periodic parliamentary elections are now held.¹²⁶⁵ However, the idea of “transformational” or “transformative” occupation is undermined by the case study of Iraq, including the damaging effects of de-Ba'athification and the dissolution of the Iraqi Army; the fact

¹²⁶⁵ The most recent parliamentary election in Iraq in May 2018 was won by an alliance headed by the Shia cleric, Moqtada Sadr, who was formerly leader of the Mehdi Army militia, which was involved in uprisings against US forces: see BBC, ‘Shia cleric Moqtada Sadr’s bloc wins Iraq elections’, 19 May 2018, at <https://www.bbc.com/news/world-middle-east-44178771>. Last accessed 24.05.19.

that large numbers of laws were being enacted and then not implemented; and the evidence and information suggesting that despite all the occupation legislation on human rights, serious and widespread human rights abuses including torture have continued to take place for years after the occupation.

The challenge from international human rights law

Assessing the challenge from international human rights law involves complex questions regarding the applicability of human rights treaties in occupied territory. The position in relation to the ICCPR and the ECHR were each looked at in turn (see Chapter 5).

(i) The International Covenant on Civil and Political Rights

The occupying powers in Iraq did not seek to use their obligations under human rights treaties to which they were party as a legal basis to change the existing law in Iraq. Following the occupation of Iraq, the US Government offered a detailed legal analysis of the scope of application of the ICCPR, in part based on the *travaux préparatoires*. Its essential conclusion for present purposes was that a state party is not obliged under Article 2(1) of the ICCPR to respect and ensure the rights set out in the Covenant to individuals in territory which it occupies. The position taken by the US is inconsistent with the approach to the issue taken by the International Court of Justice the previous year in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Given that the US stance on the non-applicability of the ICCPR in occupied territory finds strong support in the *travaux préparatoires*, the US is perhaps unlikely to be influenced by the Court's Advisory Opinion in the *Wall* case on this point, at least in the foreseeable future. That the US position appears to have become entrenched is indicated in the 'Law of War Manual' which it issued in 2015.

General Assembly resolutions on the subject of human rights in Occupied Palestinian Territory suggest that there is an emerging consensus among the great majority of states parties to the ICCPR that where a state party to the Covenant occupies territory, its

obligations under the Covenant will be applicable in the territory occupied. However, the fact that other states parties such as the US and Israel have made clear their disagreement, prevents these resolutions from amounting to subsequent practice “which establishes the agreement of the parties” regarding the interpretation of the treaty, within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. For this reason this extensive practice by states parties does not establish the applicability of the ICCPR in occupied territory.

As regards, the International Court’s interpretation of Article 2(1) of the ICCPR in the Wall case, contained within that interpretation there appears to be a potentially important qualification to the extraterritorial application of the ICCPR. On the basis of the Court’s interpretation of the *travaux préparatoires*, it can be argued that where an individual is outside of the territory of a state party, that state party is not obliged to ensure to that individual ICCPR rights which do not fall within the competence of that state party. Such an approach suggests that an individual in occupied territory would not be able to assert against the occupying state that his or her rights were being breached by legislation enacted prior to the occupation, because, as a result of Article 43 of the Hague Regulations, the occupying state is not competent to repeal or amend the pre-occupation legislation (unless it is absolutely prevented from leaving it intact). Nor, on the basis of the argument being advanced above, could it be claimed that the occupying state is “absolutely prevented” from leaving the offending legislation in place as a result of its obligations under the ICCPR. For once it is accepted that a state party’s obligations under the ICCPR only apply outside of its territory in relation to rights which are within its competence, it cannot be claimed that it is absolutely prevented by its obligations under the ICCPR from leaving the law in question in place. It remains to be seen whether the International Court of Justice would accept such an argument. More generally, it remains to be seen how the International Court would deal with the question whether an occupying power is obliged to change the existing law in occupied territory in order to make it comply with the occupying power’s obligations under the ICCPR. As noted above, neither the Wall case nor the Armed Activities case was concerned with the question whether a state party to the ICCPR is obliged to amend the existing legislation in territory which it occupies in order to make it compliant with the ICCPR.

For the above reasons, it is far from clear that the ICCPR poses a viable challenge to the requirement of the law of occupation that an occupying state respect the existing law in the occupied territory.

(ii) The European Convention on Human Rights

Seven years after the end of the occupation of Iraq, judgment was given by the Grand Chamber of the European Court of Human Rights in the *Al-Skeini* case, which arose out of that occupation.

The question whether the ECHR requires an occupying power which is a state party to it to change pre-occupation laws in occupied territory which are incompatible with the ECHR rights is a complicated one following the judgment of the Grand Chamber in *Al-Skeini*. An important question will be whether the basis of jurisdiction for the purpose of Article 1 of the Convention is the “effective control of an area” basis or the “State agent authority and control” basis. If it is the “effective control of an area” basis, the occupying state becomes responsible for securing in the occupied territory the entire range of Convention rights, with the consequence that it will, at least arguably, be obliged to change pre-occupation laws which are inconsistent with those rights.

However, if the basis of jurisdiction is “State agent authority and control”, the occupying state is only under an obligation to secure to an individual who falls under the control of the state’s agent the ECHR rights which are relevant to the situation of that individual. In other words, the ECHR rights are “divided and tailored”, in the language adopted by the Court. Consequently, if the basis of the occupying state’s jurisdiction under Article 1 of the ECHR is “State agent authority and control” rather than “effective control over an area”, it may well not be obliged by the Convention to alter any pre-occupation laws which are inconsistent with the Convention, with the result that, for the purpose of Article 43 of the Hague Regulations, it will not be “absolutely prevented” by the Convention from leaving the existing law in place.

The Court appears to indicate in its judgment that where a state party occupies the territory of a non-party (i.e. the occupation is outside the “legal space of the Convention” or *espace juridique*), the Court will use the “State agent authority and

control” basis of jurisdiction rather than the “effective control of an area” basis, if it finds jurisdiction at all. On that basis, the Court has found a way of protecting and vindicating the rights of individuals who come into direct contact with soldiers or other agents of the occupying power, whilst at the same time avoiding the imposition of European Convention standards on non-European societies and any requirement to change pre-occupation laws. In the *Al-Skeini* case itself, the Court concluded that the individuals concerned were within the UK’s jurisdiction on the “State agent authority and control” basis, despite the fact that the UK was an occupying power in Iraq at the material time. However, where one state party to the Convention occupies the territory of another state party (as in *Loizidou*), the “effective control of an area” basis of extraterritorial jurisdiction may apply, in which case the occupying state might come under an obligation, under the Convention, to change pre-occupation laws.

For the above reasons, on the basis of the European Court’s judgment in *Al-Skeini*, it appears that at the current time the ECHR does not pose a challenge to the requirement of the law of occupation that an occupying state respect the existing law in the occupied territory, at least where the occupation takes place outside the “legal space of the Convention”.

The challenge from Security Council authorisation

Security Council authorisation does not pose a viable challenge to the rules of occupation law which require respect for the existing law and institutions because of the uncertainty as to whether a Security Council Resolution provides a sound legal basis for an occupying power to enact legislation which would otherwise be outside the constraints of those rules (see Chapter 6). In particular, there is uncertainty regarding whether, under Article 103 of the UN Charter, a Security Council decision prevails over the rule of customary international law which is equivalent to Article 43 of the Hague Regulations. There is also the uncertainty regarding whether, under Article 103 of the UN Charter, provisions in Security Council resolutions which authorise but do not oblige states to take action prevail over obligations under other treaties (or customary law, if applicable).

Nevertheless, despite these doubts about the effect of Security Council authorisation in relation to occupations, it is recognised that where a territory is placed under a UN interim civil administration rather than occupation, different considerations apply.

It is important to recognise that individuals and companies in occupied territories require legal certainty in the same way as individuals and companies in states which have not been occupied. Similarly, foreign businesses which are being encouraged to invest or do business in occupied territory would require legal certainty that the laws under which they are being asked to invest or do business are legally valid.

It is important to stress that where an occupying state enacts legislation in violation of the restrictions placed upon its legislative power by Article 43, there is a risk that courts in the occupied territory (either during or after the occupation) will hold the legislation to be legally invalid and devoid of legal effect, or that Courts of third states may rule that the legislation cannot be recognised as valid. It is important to note that there is a risk that even where a court in occupied territory is ruling after the end of occupation, it may hold occupation legislation to have been invalid during the occupation, thus upsetting transactions entered into during the occupation.

As we have seen above, the UK Attorney General advised that, on the basis of Resolution 1483, the occupying powers could engage in activity going beyond the limits of occupation law, including in the field of economic reconstruction, human rights and legal and judicial reform, but provided that the actions of the occupying powers in these areas were undertaken in coordination with the UN Secretary-General's Special Representative for Iraq. The advice of the Attorney General is open to doubt for the reasons given above. It may well be that the Security Council did not intend to bestow such powers on the occupying states. That a claim to such power can be made underlines the need for the Security Council to be explicit about whether or not occupying powers are to have legislative power going beyond what is permitted by the law of occupation.

Furthermore, in the period after the assassination of the Special Representative for Iraq, Mr Sergio Vieira de Mello, and before a new Special Representative (*ad interim*) was appointed (i.e. the period 20 August to 9 December 2003), the CPA Administrator, Mr

Bremer continued to promulgate legislation, including laws which changed the existing law in Iraq, which was not co-ordinated with a Special Representative. Thus even on the approach of the UK Attorney General, legislation for which there was no necessity under Article 43 could not be saved from unlawfulness on the basis of Resolution 1483 if it had not been co-ordinated with the Special Representative. CPA Order No. 39, Foreign Investment is an example.

Moreover, the Chilcot Report discloses that after Mr Ross Mountain was appointed Special Representative for Iraq *ad interim* on 10 December 2003 Mr Bremer and the U.S. State Department decided not to send copies of proposed legislation to him for the purposes of co-ordination because a “reliable source” had informed the State Department that the UN would veto the legislation. Instead, Mr Bremer and the State Department introduced a policy of merely mentioning to the Special Representative that legislation in various areas was in process. This clearly would not constitute “coordination” within the meaning of Resolution 1483. The UK tried to persuade the CPA to resume coordination by sending proposed legislation to Mr Mountain but was unsuccessful. Accordingly Resolution 1483 did not provide a basis for legislation enacted during that period which was outside the constraints of Article 43 of the Hague Regulations. CPA Orders Nos. 80, 81 and 83, which extensively amended Iraq’s intellectual property laws, and CPA Order No. 64, which made a large number of amendments to Iraq’s company law, including so as to permit foreign investors to own shares in Iraqi companies, are examples.

The approach taken by the CPA Administrator, and the US State Department, to coordination with the Special Representative of the UN Secretary-General in relation to proposed legislation was ill-advised given the possibility that Iraqi Courts might hold CPA legislation to be invalid, as courts of occupied states have done previously, either during or after occupation. That episode underlines the need for the Security Council, if it intends to bestow extensive legislative power on an occupying state, to be explicit about *how* the power is to be exercised.

If in the future the Security Council should be called upon to adopt a resolution in the context of an occupation, the lessons of what happened in Iraq need to be learned, as

indicated in Chapter 6, where guidelines have been proposed to reduce the scope for abuse.

More generally, as noted above, to judge from the case study of the occupation of Iraq, the rules of the law of occupation which require respect for the existing law and institutions in occupied territory survive largely unscathed the challenges which have been identified. It is relevant to recall what the International Court of Justice said in the *Nicaragua* case about the effect on legal rules of actions by states which are inconsistent with them:

“If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”.¹²⁶⁶

The Court was here referring to a rule of customary international law which reflected a rule of treaty law. The rule contained in Article 43 of the Hague Regulations is also such a rule. It is significant that the occupying powers in Iraq (particularly the UK), rather than denying the continued normative force of that rule, sought to rely on Security Council authorisation by way of exception, even if legislation enacted outside the scope of the rule contained in Article 43 is not in fact justifiable on that basis, for the reasons discussed above. The stance taken by the occupying powers in Iraq, in relying on Security Council authorisation by way of exception, therefore confirms rather than weakens that rule.¹²⁶⁷

¹²⁶⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, [1986] I.C.J. Reports, p. 14, at p. 98 (para. 186)

¹²⁶⁷ C.f. Kristen E. Boon, ‘Obligations of the New Occupier: The Contours of a *Jus Post Bellum*’, (2009) 31 *Loyola of Los Angeles International & Comparative Law Review* p. 57, at p. 61, who argues that “The 2003 invasion and occupation of Iraq provided confirmation, if any was needed, that the core principle of “conservationism” has been seriously compromised.”

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