New Wars, New Laws?

Applying the Laws of War in 21st Century Conflicts

Edited By
David Wippman &
Matthew Evangelista

Transnational Publishers

Published and distributed by Transnational Publishers, Inc.
Ardsley Park
Science and Technology Center
410 Saw Mill River Road
Ardsley, NY 10502

———————————

Phone: 914-693-5100
Fax: 914-693-4430
E-mail: info@transnationalpubs.com
Web: www.transnationalpubs.com

Library of Congress Cataloging-in-Publication Data

New wars, new laws? : applying the laws of war in twenty-first century conflicts / edited by David Wippman and Matthew Evangelista.
p. cm.
"This volume originated in a conference held in June 2003, co-sponsored by the Clarke Center for International and Comparative Legal Studies at Cornell Law School and the Cornell Peace Studies Program"—Acknowledgments.
Includes bibliographical reference and index.
ISBN 1-57105-315-8
1. War (International law)—Congress. I. Wippman, David, 1954– II. Evangelista, Matthew, 1958–

KZ6355.N49 23005
341.6—dc22

2004058868

Manufactured in the United States of America

TABLE OF CONTENTS

CHAPTER TEN
IRAQ AND OCCUPATION

*Phillip James Walker**

I. INTRODUCTION

On April 9, 2003, U. S. tanks rolled into Central Baghdad, punctuating the short but bloody conflict the United States labeled "Operation Iraqi Freedom." The United States, Great Britain, and other members of the "coalition of the willing" launched this war to end the regime of Saddam Hussein and his Ba'ath Party, and to bring Democracy to Iraq. They expected to be greeted as a liberating force throughout Iraq, and early indications bore this out. The Iraqi Army, with few exceptions, failed to oppose the Coalition forces, and some units disintegrated, as ordinary soldiers voted with their feet to abandon Saddam. Even more encouraging, in the hours after Coalition forces took up positions in the Capital, jubilant throngs toppled the gigantic statue of Saddam Hussein at Baghdad's Firdas Square. Coalition forces, and the rest of the world, watched the statue fall, much as the Berlin wall fell 14 years earlier. "Liberation" was on everyone's lips. In the heady days surrounding the fall of Baghdad, few people used the word "occupation." Perhaps they should have.

Despite the jubilation of April, Iraq in September 2003 appeared in every way like a country under foreign military occupation. Heavily armed foreign forces were dug in everywhere, weapons aimed at passing civilians. Tanks rumbled down Baghdad's wide boulevards; the low, seismic reverberation stopped conversations far and wide. Curfews governed people's lives. Shops were shuttered; few honest people ventured far from home. Sullen pedestrians milled about at checkpoints, waiting to be searched and waived past the silent guns, or perhaps to be pulled aside for interrogation.

* The author is an attorney and international development consultant, concentrating on the legal systems of the Middle East. He has worked extensively in the Palestinian Authority, Egypt, Saudi Arabia, and elsewhere in the Arab world. He was on assignment in Iraq during September and October 2003.

This was very different from my memory of Kuwait City in April 1991, where I arrived weeks after another Coalition had also defeated Iraqi forces. Checkpoints were haphazard and relaxed. The happy anarchy was infectious. People cheerfully ignored the lack of food, water, power, and sanitation, knowing everything would soon get better. That felt like liberation. Baghdad reminded me more of Ramallah or Gaza during the Intifada, where I had spent much of the past several years. The sights and smells, and especially the checkpoints, were disturbingly familiar. Leaving aside for the moment the legal definition of "occupation," Iraq felt occupied to those who had to live there. It is worth reflecting for a moment upon the hardships of life under foreign military domination, even benevolent domination, because that is the necessary starting point for any discussion of the international law of belligerent occupation. The purpose of the law is to mitigate the evils of war. The reality of foreign domination, not legal definitions, is the backdrop against which legal issues are played out.

British and American leaders never denied that the international law of belligerent occupation, embodied in the 1949 Fourth Geneva Convention,[1] the 1907 Hague Regulations,[2] and customary international law, applied to the Coalition's presence in Iraq from the end of active hostilities in April 2003 until the "transfer of sovereignty" to the Iraqi Interim Government on June 28, 2004. They had, however, avoided the word "occupation" wherever possible. This is not surprising. Coalition leaders had always portrayed their forces as the liberators of Iraq. In the popular mind, "liberation" and "occupation" are polar opposites, and one cannot coexist with the other. In Arabic, the word "occupation" ("ihtilal") has particularly unfortunate connotations, because of the Israeli occupation of the West Bank and Gaza Strip. Coalition leaders also avoided the word because of the inherent tension between "regime change" and the law of belligerent occupation. It is easy to understand why the Coalition chose to avoid the word. Still, after April 2003 Iraq was occupied and everyone knew it.

---

[1] Geneva Convention (IV) Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

[2] Hague Convention (IV) Respecting the Laws and Customs of War on Land, Regulations Respecting the Laws and Customs of War on Land, and Annex, Oct. 18, 1907 [hereinafter the Hague Regulations].

The occupation of Iraq gave rise to some interesting questions about military occupation in the new millennium: Is the traditional law of belligerent occupation up to the challenges of the 21st century? Was it relevant and useful in the Iraq context? Did the Coalition respect it? Did the Coalition administration of Iraq represent a new and different kind of occupation? Did the occupation end with the June 28, 2004, "transfer of sovereignty?" There is no simple, short answer to any of these questions.

On balance, the existing law of belligerent occupation acquitted itself well in Iraq. Without doubt, the drafters of the Hague Regulations and the Fourth Geneva Convention never imagined some of the situations confronting occupation forces in Iraq. Nonetheless, the general principles in those texts have shown themselves to be as vital today as they were decades ago. In particular, regarding the occupier's duties to respect the rights of protected persons and to maintain public order, those texts have shown their enduring value. Had the occupiers of Iraq paid more attention to their obligations under existing law, they—and the Iraqi people—would have been better off.

On the other hand, gaps in the existing law of occupation slowed the international effort to put the pieces of a shattered Iraq back together. However one may have felt about the invasion of Iraq, an overwhelming international consensus exists that there should be no return to Ba'athist rule. The law of occupation is, however, silent on how an occupier is to extricate itself from a country such as Iraq when there is no government capable of assuming power from the hands of the occupier. If anything, the law of occupation favors the maintenance of the *status quo ante bellum* to the extent possible, to minimize the impact of occupation on the lives of ordinary people. The retention of prewar legal or political institutions was really not acceptable in Iraq for both moral and prudential reasons, leaving the Coalition with a dilemma that it was never able to solve satisfactorily.

II. A NEW KIND OF OCCUPATION?

"Occupation" is both a legal status and a state of mind. The legal status is easy to sum up. Article 42 of the Hague Regulations defines occupation, stating that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army." The state of mind is harder to pin down, but no less important. Occupation is fear, and powerlessness.

For the ordinary civilian, occupation means living at the mercy of foreign troops that may not speak your language, understand your culture, or respect your laws. It means standing at checkpoints, being searched, being detained, perhaps being caught in a crossfire. Occupation means humiliation, arising both from the indignities of daily life under foreign domination and also from the bitter taste of defeat. Occupied people live with the knowledge that they were losers, and they live with daily reminders of their weakness.

The legal and psychological aspects of occupation share a common origin. The laws of war exist to "diminish the evils of war."[3] Chief among those evils are those that arise from the radical juxtaposition of complete power and complete powerlessness that is occupation. History and literature are replete with images of rape, pillage, and plunder accompanying military conquest. The oldest tales in the Western literary tradition explore the savagery unleashed by war and the degradation that accompanies occupation. Occupation provides fertile soil within which the darkest aspects of human nature can thrive. That is why the law of occupation falls within the canon of the laws of war.[4] It exists to keep civilized people civilized.

Several key principles embody the mission of the law of occupation to diminish the evils of war. The first and most basic is that individuals living under military occupation have rights. Those rights may be quite circumscribed in comparison to international human rights standards of general application. Nonetheless, people under occupation are not merely at the mercy of the occupier, and shall at a minimum be safe from torture or other kinds of abuse and safe from indefinite, secret, or arbitrary detention by the occupier. A second principle is that the occupier shall maintain public order, and shall act responsibly to conserve the property of the occupied state. A third principle is that the occupier will, to the extent possible, leave the laws and other domestic arrangements of the occupied state alone, confining itself to administration of matters necessary to the immediate health and well being of the people under occupation.

---

[3] *Id.*, Preamble.

[4] *See id.*, art. 42–54; Fourth Geneva Convention, *supra* note 1, art. 2.

There is no serious doubt that after Coalition forces wrested control of Iraq from the armies of the Ba'athist government in March and April 2003, the law of occupation applied. On March 20, 2003, citing Iraqi violations of U.N. Security Council resolutions concerning weapons of mass destruction, the United States, Britain, and a few other countries invaded Iraq by air, land, and sea. British forces seized positions in Southern Iraq while U.S. forces pushed towards Baghdad and the North. The invading forces met relatively little organized opposition. In some areas, the Iraqi forces disintegrated entirely. In others, lightly armed irregulars resisted Coalition forces. Coalition forces soon moved into Baghdad, which fell on April 9. On May 1, U.S. President George W. Bush declared that "[m]ajor combat operations in Iraq have ended. In the battle of Iraq, the United States and our allies have prevailed."[5] Within weeks of the start of the war, Iraq was "under the authority of" the Coalition, and occupied territory.

Shortly after assuming authority in Iraq, Coalition forces formed a civil administration, the Coalition Provisional Authority (CPA), to run Iraq until the reestablishment of a sovereign Iraqi government. From the collapse of the Ba'athist regime until June 28, 2004, the CPA was the occupation government of Iraq. From the start, the Coalition viewed its role in Iraq as unique. President Bush expressed this sense of exceptionalism, stating: "In the images of falling statues, we have witnessed the arrival of a new era. . . . Today, we have the greater power to free a nation by breaking a dangerous and aggressive regime. . . . No device of man can remove the tragedy from war; yet it is a great moral advance when the guilty have far more to fear from war than the innocent."[6] President Bush's ambitions for Iraq were equally visionary:

> The goals of our coalition are clear. . . . We will end a brutal regime, whose aggression and weapons of mass destruction make it a unique threat to the world. . . . We will . . . build a peaceful and representative government that protects the rights of all citizens. . . . In the new era that is coming . . . [Iraq] will no longer be held captive to the will of a cruel dictator. [Iraqis] will be free to build a better life, instead of

---

[5] Remarks by President George W. Bush aboard the U.S.S. Abraham Lincoln, May 1, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html.

[6] *Id.*

> building more palaces for Saddam and his sons, free to pursue economic prosperity. . . .[7]

The CPA described its mission in terms that downplayed the Coalition's role as occupier. The CPA Mission Statement declared that:

> The Coalition Provisional Authority (CPA) is the name of the temporary governing body which [sic] has been designated by the United Nations as the lawful government of Iraq until such time as Iraq is politically and socially stable enough to assume its sovereignty. The CPA has been the government of Iraq since the overthrow of the brutal dictatorship of Saddam Hussein and his deeply corrupt Baath Regime in April of 2003.[8]

Reading statements from the White House or CPA alone, one would think that Saddam's regime was terminated pursuant to a use of force sanctioned by the Security Council, and that the Security Council constituted the CPA much as it constituted UNMIK in Kosovo.[9] Oddly, the CPA never cited the Fourth Geneva Convention or the Hague Regulations, the primary source of whatever legal authority it had. Nowhere in its founding regulations did the CPA acknowledge that it was an occupation authority. Of course, these were

---

[7] Message from President George W. Bush to the Iraqi People, Apr. 10, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/04/iraq/20030410-2.html. The message bears a striking resemblance to the statement made by British General F. S. Maude when his forces captured Baghdad in 1917: "Our armies do not come into your cities and lands as conquerors or enemies, but as liberators. Your wealth has been stripped of you by unjust men. . . . The people of Baghdad shall flourish under institutions which are in consonance with their sacred laws. . . . The Arab race may rise once more to greatness!" *Quoted in* A.S. Winter, *Buying Up Iraq*, Countercurrents, Dec. 2, 2003, *available at* http://www.countercurrents.org/iraq-amal021203.htm.

[8] CPA Mission Statement, *available at* http://www.iraqcoalition.org. This Web site, published by the CPA, provides the only public record at present of the legislative acts of the CPA. The CPA Web site is scheduled to be taken off the Internet on June 30, 2005.

[9] In fact, the Security Council Resolutions referenced by the CPA bear no resemblance to Security Council Resolution 1244, which established the U.N. Mission in Kosovo (UNMIK) as the provisional authority in Kosovo. Resolutions 1483 (May 22, 2003), 1500 (Aug. 14, 2003), and 1511 (Oct. 16, 2003), all of which were adopted after the creation of the CPA, acknowledge the existence of the CPA, but do not endorse it as Resolution 1244 endorsed the creation of UNMIK.

in part political statements, calculated to making the strongest case possible for an accomplished fact. What was noteworthy, however, was the extent to which the Coalition confused propaganda with reality.

In keeping with the sense of exceptionalism that pervaded the Coalition, the CPA and Coalition forces never conformed to the limited model for occupation implicit in the Hague Regulations and the Fourth Geneva Convention. Instead, the CPA aspired to remake Iraq's government and society in a manner not seen since the Allied occupation of Germany in 1945. CPA Regulation Number 1, published May 16, 2003, illustrates the broad sweep of CPA authority.[10] In it, the CPA declared its own existence and supremacy, arrogated all power to itself, and justified this assumption of absolute control by claiming a non-existent Security Council mandate. In short, the CPA declared itself "vested with all executive, legislative and judicial authority necessary to achieve its objectives."[11] These objectives included the "establish[ment] of national and local institutions for representative governance," as well as more traditional concerns such as maintenance of order and reconstruction.[12]

Regulation Number 1 recognized no limitations on CPA authority, or the authority of Coalition forces, beyond self-imposed limitations. The CPA's expansive view of its own authority conflicted with the limited nature of occupation described by the Fourth Geneva Convention and Hague Regulations. In all three of the key areas outlined previously, the Coalition had, at best, taken the requirements of international law lightly. The incompatibility between regime change and the law of belligerent occupation led to difficulties for both ordinary Iraqis and the Coalition's own objectives in Iraq. Although the record remains incomplete, it is becoming apparent that the Coalition's attempt to remake Iraq succeeded primarily in disassembling the foundations of the state, without replacing it with a structure solid enough to withstand the tempests of Middle East politics.

Did the Coalition reinvent the law of occupation in any meaningful way? No. The Coalition's departures from existing law were haphazard, ill

---

[10] *Available at* http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority.pdf.

[11] *Id.* § 1(1).

[12] *Id.* §§ 1(1) and 1(2).

considered, and for the most part counterproductive. If the CPA model had been a success, then perhaps one might judge it otherwise. While it is too early to conclude that the Coalition failed completely to transform Iraq into a stable and prosperous democracy through force of arms, the signs are not promising. As of June 28, 2004, the day that the CPA formally dissolved itself and handed off sovereignty to the Interim Government, named by the United Nations in consultation with the Coalition, lawlessness was rampant, the Coalition had made no progress against a mounting insurgency, basic public services such as water, sewer, electricity and trash collection remained dysfunctional, economic activity was minimal, and ethno-religious tensions were on the rise. One cannot honestly assert that this dismal picture was caused entirely by the Coalition's disregard for the law of occupation. However, adherence to the law of occupation would have avoided some of the problems that the Interim Government must now resolve.

III. RIGHTS OF PROTECTED PERSONS

Foreign military occupation remains one of the most terrifying events that can befall a nation, precisely because individuals under occupation are at the mercy of armed foreigners. Between occupier and occupied, no social contract exists. Absent application of the laws of war, only personal morality prevents individual soldiers from looting, raping, torturing, or killing at will. The old maxim that power corrupts applies both to privates and presidents, and in an occupation setting, every private is a dictator to those within his grasp.

For this reason, the essence of the law of occupation is that there are legal limits to what a soldier can do to an individual under his or her control, or collectively, to what an occupier can do to a subject population. This is not a controversial principle. The occupying powers in Iraq embraced it long ago, and the details of the principle are well developed in international law. Even a cursory glance at the relevant texts will find clear guidance on how to treat people under occupation. Article 46 of the Hague Regulations, for example, requires that "[fa]mily honour and rights, [and] the lives of persons, and private property . . . must be respected." In the Fourth Geneva Convention, Article 4 introduces the concept of protected persons, defining them as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which

they are not nationals," and enumerates the rights of protected persons with specificity. To name just a few, Article 27 restates the requirements of the Hague Regulations, Article 31 specifically prohibits "physical or moral coercion," and Article 71 affords minimal due process rights to, among others, security detainees.

Coalition forces overlooked the obvious in their treatment of individual Iraqis. Despite the good works done by thousands of Coalition troops, often at risk to life and limb, the enduring image of the occupation will be that of hooded Iraqi detainees humiliated, degraded, tortured, and killed at the hands of U.S. personnel, in crystal clear violation of international law. The scandal arising from the abuse of Iraqi prisoners at Abu Ghraib prison and elsewhere cast a long shadow over the entire Iraq project, sowed hatred of the United States among many Iraqis, swelled the ranks of the insurgency, and undermined the credibility of those Iraqis that cast their lot with the Coalition. The scandal is a perfect example of how respect for international law and sound, effective policy go hand in hand.

Even before the public disclosure that Coalition personnel were torturing Iraqi detainees, virtually all Iraqis, and many Westerners, knew that there was something very wrong with the Coalition's detention practices. The ever-present fear of being picked up by Coalition forces helped poison Iraqi attitudes towards the Coalition. Time and again I encountered Iraqis who told anecdotes of rude or brutal treatment at the hands of U.S. soldiers, and of friends or relatives that were taken away for no reason.[13]

---

[13] Some of those stories are especially scary in light of what we now know was happening at Abu Ghraib. For example, a local lawyer seeking help for a client approached me at the Iraqi Bar Association. He told me that a family hired him to find their son, who had disappeared several months earlier. He had managed to discover that U.S. personnel had arrested him at a checkpoint. The lawyer despaired of finding or helping the young man. Some of the lawyer's colleagues shared similar stories. One observed bitterly that this kind of treatment violated the Geneva Convention. I inquired at the CPA on behalf of this lawyer, but got nowhere. A U.S. military policeman, a middle-aged reservist and policeman in civilian life, told me a similar story. While on patrol, the MP saw a young GI arrest an Iraqi man at a checkpoint. The MP asked the GI why he had arrested the Iraqi. The GI replied that the Iraqi had been using a cell phone. The MP made the point that this was no reason to arrest someone, and convinced the GI to let the man go. The MP told me that if he had not intervened the Iraqi would have gone to detention. He went on to explain that the younger GIs lacked life experience, and sometimes made strange decisions.

It was easy to see how widely circulated stories of ill-treatment eroded public support for the Coalition even among Iraqis that were well disposed towards the invasion of the country. These occurrences illustrate how indifference to the law of occupation can devastate public confidence and sow the seeds of insurrection.

The anecdotal evidence is consistent with many other, more systematic, accounts showing that arbitrary detention in violation of the Fourth Geneva Convention was common. Human Rights Watch reported that since the official end of major combat in Iraq more than 12,000 Iraqis had been taken into custody by U.S. forces and detained for weeks or months, and that prior to the disclosure of the Abu Ghraib scandal, Coalition personnel rarely reviewed the cases of detainees.[14] In its February 2004 report to Coalition forces, the International Committee of the Red Cross reported that military intelligence officers told the ICRC that 70 to 90 percent of those in custody in Iraq had been arrested by mistake.[15]

What is most troubling about both the Abu Ghraib scandal and the wider issue of arbitrary indefinite detention is that it suggests a disrespect for international humanitarian law on the part of the American leadership that represents a departure from 200 years of military tradition and the rejection of treaties to which the United States has bound itself. While Coalition leaders never declared that the Hague Regulations and Fourth Geneva Convention did not apply in Iraq, their actions suggested other-

---

U.S. personnel even arrested my driver, Hakim. Hakim is a meek, middle-aged man who speaks no English. Our security company employed him as a driver. One day, Hakim failed to come home for dinner. His frantic wife contacted the security company, which started searching for him, and for the car. Fortunately, someone had seen Hakim being arrested by American soldiers, and told his wife. With that information, the employer was able to find Hakim at a local police station, awaiting the truck to detention. An American employee of the security company, a retired Ranger himself, convinced the soldiers to release Hakim. It seems that they arrested him because his car was "too nice for an Iraqi." But for a lucky accident, Hakim might well have become one of the hooded ghosts of Abu Ghraib.

[14] *See* Human Rights Watch, *The Road To Abu Ghraib*, June 2004, *available at* http://www.hrw.org/reports/2004/usa0604/index.htm.

[15] International Committee of the Red Cross, Report on the Treatment by Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation, Feb. 2004, *available at* http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf.

wise. The resistance to using the word "occupation" may have been more than simple public relations; it may have reflected an unwillingness to be bound by the law of occupation. The Administration in Washington has maintained for several years that the "unlawful combatants" held at Guantanamo Bay and Bagram Air Base in Afghanistan are not entitled to the protections of the Fourth Geneva Convention, despite the fact that most of those detainees fit the definition of "protected persons" within the Convention. The U.S. Department of Justice had also concluded that when questioning suspects in the "war on terror," the restrictions of the Fourth Geneva Convention do not apply.[16] Given that the Bush Administration has deemed the Iraq war to be a front in the "war on terror," it is, in retrospect, not so surprising that the Fourth Geneva Convention's protections for detainees were widely ignored.

The purpose of this chapter is not, however, to criticize the Bush Administration. It is simply to examine whether the law of occupation is relevant to the 21st century, using Iraq as a case study. The evidence of Abu Ghraib has shown that Americans are as vulnerable to cruelty, indifference, and folly as the citizens of every other nation on Earth. Given that the law of occupation was designed to restrain the baser human impulses, it is as relevant as ever from both a humanitarian and a pragmatic point of view. Torture of the Abu Ghraib prisoners did not bring the Coalition any closer to breaking the back of the insurgency. If anything, the pictures from Abu Ghraib served as recruiting posters for the insurgents. Disrespect for the law of occupation did more harm to the Coalition's objectives than any Republican Guard Division ever could.

IV. PUBLIC ORDER

The second key principle through which we can evaluate the lessons of Iraq is the requirement that an occupier shall ensure public order in occupied territory. Even a cursory examination of the Iraq experience shows that the principle is as vital today as it was in 1907. Quite simply, an occupier must effectively police areas under its control. Article 43 of the Hague Regulations requires that an occupier must "restore, and ensure, as far as possible, public order and safety." Moreover, the occupying power

---

[16] *See* Memorandum to Alberto R. Gonzalez, Counsel to the President, Re: Standards of Conduct For Interrogation, Aug. 1, 2002, *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

must administer public property for the benefit of the occupied state. Article 43 provides that: "[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." Equally clearly, Coalition forces neglected to fulfill this duty, at least in the early days of the occupation, with devastating consequences for Iraq and the Coalition.

Within hours of the fall of Baghdad, anarchy descended upon cities and towns all across Iraq. It is difficult to overstate the devastation caused by the looting. Municipal services disintegrated. Police, fire, hospital, and emergency services ceased functioning. Public utilities, including electric generation and water purification, ceased. Not only did the organizational structures collapse; looters destroyed the physical infrastructure as well, making rapid reconstruction impossible. Coalition forces did not act to halt the anarchy, and unchecked mobs gutted government buildings, emptied hospitals, pulled down electrical wires, looted and destroyed power generation plants, and even looted the Iraqi National Museum.

The war and its aftermath dealt a serious, and possibly fatal, blow to the continuity of the Iraqi state. Every agency of the Iraqi government ceased functioning for at least some period. Some elements of the Iraqi government were wiped away entirely. Mobs burned and pillaged the Ministries of Planning, Education, Irrigation, Trade, Industry, Foreign Affairs, Culture, and Information.[17]

The destruction of the Ministry of Justice serves as an example of why the physical destruction of the Iraqi government made governing Iraq problematic. Largely ignored in the Saddam years, the Ministry is one of the key institutions in building a democratic Iraq. Held in low regard by Saddam, the Ministry was less penetrated by the Ba'ath Party than some other parts of the government. By the standards of the Arab world, Iraq had a well-developed legal tradition. The Ministry of Justice served as a repository of Iraqi case law as well as statutes codified over the decades.

---

[17] Robert Fisk, *Americans Knew What to Defend*, Countercurrents, Apr. 14, 2003, *available at* http://www.countercurrents.org/iraq-14403.htm. Fisk stated that Coalition forces had acted to protect the Ministries of Interior and Oil. However, when I tried to visit the Ministry of Interior in September 2003, I found it had also been gutted.

The Ministry of Justice is located in a several-acre compound in Central Baghdad, with a tall concrete perimeter wall and access through two steel gates. Eyewitnesses told me that Coalition tanks smashed down the gates of the Ministry, and then departed, leaving the premises unguarded. Given its physical layout, Coalition personnel could have secured the location at little risk. Looters swept in, and removed the furniture, file cabinets, computers, and other equipment. They dumped and scattered books and files throughout the buildings, and set fire to many of them. They ripped doors from their hinges, pulled down light fixtures, and pulled the wires out of the walls. In some places, they even removed sheet rock and ceiling tiles, leaving only naked concrete.

Through looting, Iraq lost its law. Literally, no intact copy of the Iraqi law remained in the Ministry of Justice or any other public location in Baghdad.[18] Iraq lost 80 years of reported cases. Iraq lost property records. It lost records of government proceedings. In the months after the looting, Ministry of Justice employees reassembled some of the lost documents, painstakingly collating the thousands of pages scattered haphazardly throughout the Ministry of Justice. However, even with a heroic effort by Ministry staff, a great deal had been lost. In a sense, Saddam, war, and looting undermined the very foundations of the Iraqi state. Not only did Saddam's government collapse; the building blocks of government—all government—also collapsed. Saddam took the state down with him.

Certainly, Coalition forces should have done more to stop the looting. But the hard question is how much more? To what extent is an occupier obliged to make the control of looting a priority? Both Article 43 and Article 55 of the Hague Regulations state that it shall be high priority. Article 55 in particular states without qualification that an occupier shall act as a trustee so long as it holds power, and shall preserve the public property of the vanquished state. The Coalition neglected that duty. The practical result of that neglect was that the CPA had to completely rebuild institutions and infrastructure that had functioned only months earlier. Article 43 is broader and less categorical. Article 43 requires the occupier to preserve

[18] I looked in vain for complete collections of Iraqi law in Iraq. I was helped in my research into Iraqi electoral and party law by the chief judge of the Court of Cassation, who has a private collection. Several law libraries outside Iraq also hold collections of Iraqi law, complete up to the imposition of sanctions in 1990.

order "as far as possible." At some point, an occupier would need to consider in more detail what Article 43 means by "as far as possible."

The most straightforward way to think about the issue is in terms of force protection. An occupier must preserve order unless doing so puts its forces at an unreasonable risk of harm. Of course, one can argue about what level of risk would be acceptable, but some level of risk must be expected, or else Article 43 would mean little. In Baghdad, however, this seemed not to have been an issue in many instances. In an easily secured location like the Ministry of Justice, any kind of Coalition presence would have deterred looters without incurring significant risk. In other cases, Coalition forces witnessed looting, but declined to intervene.[19] This would suggest that a lack of planning, rather than solely a concern for the safety of the troops, contributed to the Coalition failure to stop the looting.

Another way to think about the issue relates to the larger military objectives of the war. Police duty ties up troops that could pursue other military objectives. This seems to have been a concern in Iraq when most of the looting was taking place. Coalition personnel stated repeatedly that they did not have sufficient manpower to halt the looting in Baghdad or the South while offensive operations continued in the North or West of Iraq. This argument, however, lacks merit, because it will always permit a belligerent to discount Article 43. As in Iraq, a belligerent could engage the enemy with a relatively small force and then argue that insufficient forces exist to police the areas already under occupation.

Of course, military strategy is not an end in itself; it supports an underlying political objective. In Iraq, it seems that military strategy did not support the underlying political objective. Yet again, strict adherence to the law of belligerent occupation would have furthered the Coalition's own objectives. Maintenance of order should have been a top priority precisely because the Coalition's stated objective was "regime change." The goal was to remake Iraq as a stable, prosperous, democratic state. In light of this objective, the preservation of basic institutions and an orderly transition to a new administration should have been of paramount importance to war planners. It is

---

[19] *See* Amnesty International, *Iraq: Looting, lawlessness and humanitarian consequences*, Apr. 11, 2003, *available at* http://amnesty.org.nz/web/pages/home.nsf/dd5cab6801f172358525647400532 7c8/c58b57baf90b937acc256d080025e514!OpenDocument.

ironic that the looters, operating under the very guns of Coalition forces, dealt the Coalition a stunning blow even as Iraq's armed opposition was collapsing on all sides. To the extent that the looters denied the Coalition a core military objective, control of the apparatus of government in Baghdad, they defeated Coalition forces in a key battleground while those forces were involved in minor skirmishes elsewhere.

Beyond denying the Coalition a key asset—control of the government apparatus—the looters demonstrated the Coalition's inability to control Iraqi cities. They undermined international and Iraqi confidence in the Coalition's ability to remake Iraq. In material terms, the looting greatly lengthened the process of rebuilding vital infrastructure. When I asked Iraqis about the hardships of occupation, they all mentioned the CPA's inability to restore basic public services. Many expressed their incredulity that the United States, the most powerful and technologically advanced country on Earth, could not restore basic electricity to Baghdad and other Iraqi cities.

The Coalition's failure to maintain public order in the weeks and months following the fall of Baghdad gives rise to a more general question. To what extent does planning for post-war occupation need to be a legal consideration as well as a prudential one? In the Iraq case, it appears that the Coalition seriously underestimated the need to keep order in the wake of Saddam's fall, with devastating consequences for Iraqis and the Coalition. Again, the point is simple—respect for the law of belligerent occupation is not only a requirement. It is good policy.

So what is the practical result of concluding that the Coalition failed a basic duty as an occupier by neglecting to prepare adequately to keep order? Should there be any sanction beyond the setback to the Coalition's political objectives? Is folly a war crime? International jurists may not be quite ready to embrace criminal folly as a cause of action, but the Iraq experience certainly provides support for the proposition that an occupier is obliged to clean up the messes that it makes by failing to live up to clearly understood legal duties.

The problem with the looting encountered by the Coalition goes back to the larger question of self-image. Coalition forces did not come prepared to police the streets of Iraq's major cities, nor were they numerous enough to do so. They were not prepared to "occupy" Iraq. Everyone knew

even before the fall of Baghdad that the Coalition was seeking to depose Saddam Hussein with a smaller ground force than conventional military doctrine required, and smaller than many military planners felt prudent.[20] It seems that the Pentagon planners were correct that a small expeditionary force could, in fact, topple Saddam, but were mistaken in believing that the same force could police the country once Saddam was gone. The Coalition lacked the numbers to fill the vacuum created by its own actions, and in doing so, the Coalition created a disastrous state of affairs. The essence of the Hague Regulations and the Fourth Geneva Convention is that the occupier is responsible for the occupied territory. By rejecting reality, the Coalition courted disaster.

V. FUNDAMENTAL LEGAL CHANGE

A third principle by which one can evaluate the Iraq experience concerns fundamental legal change. The Coalition invaded Iraq with the explicit objective of transforming the legal and political landscape of the country. "Regime change," however, runs squarely into the conservatism of the Fourth Geneva Convention and the Hague Regulations. By and large, those texts concern themselves with limiting occupation government, not empowering it. In short, "nation building" falls outside the scope of the law of occupation, leaving many unanswered questions for the occupier. Given the ever-expanding phenomenon of the "failed state," and the proliferation of foreign military incursions into fragile or collapsing states, expanding our understanding of the law of occupation to include fundamental legal transformation in some circumstances may be desirable. On the other hand, the Iraq experience shows that even where circumstances may warrant it, fundamental legal change is a risky proposition, not to be taken for granted. Iraq shows that an occupier may not be the best change

---

[20] On February 25, 2003, Army Chief of Staff Gen. Erik Shinseki told the Senate Armed Services Committee that "several hundred thousand soldiers" would be needed both to win a war with Iraq and then maintain control over the country. He observed, "[w]e're talking about post-hostilities control over a piece of geography that's fairly significant, with the kinds of ethnic tensions that could lead to other problems. . . . It takes a significant ground-force presence to maintain a safe and secure environment, to ensure that people are fed, that water is distributed, all the normal responsibilities that go along with administering a situation like this." *See* Eric Schmitt, *Army Chief Raises Estimate of G.I.'s Needed in Postwar Iraq*, N.Y. TIMES, Feb. 25, 2003, *available at* http://www.nytimes.com/2003/02/25/international/middleeast/25CNDMILI. html?ex=1089950400&en=1f8775cab8185269&ei=5070.

agent, even when change is necessary. The conservatism of the law of occupation may turn out to be less of an obstacle to necessary change than a check on ill-considered exuberance.

The Hague Regulations and Fourth Geneva Convention remain largely silent on the authority of an occupation government to engage in nation building. To the extent that they are not silent, they envision a very limited form of occupation government incompatible with nation building. Article 43 of the Hague Regulations contains the most succinct statement of the duties of an occupier concerning the legal underpinnings of the occupied territory. It states that the "occup[ier] . . . shall . . . respect . . . , unless absolutely prevented, the laws in force in the country." Article 48 permits an occupier to levy taxes in the stead of the vanquished government, but requires it to do so only by the rules previously in force. Article 55 provides that the occupier shall act as a conservator of the assets of the vanquished state.

The Fourth Geneva Convention also limits the scope of authority of an occupation government. The Convention is far more concerned with what the occupier cannot do than what it can do.[21] To the extent that the Convention permits or requires the occupier to act as a government, it is only to ensure that essential services continue with minimal interruption, and otherwise limits what an occupier can do.[22] With respect to legal change, 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 present Convention. . . .

---

[21] For example, Article 47 prohibits derogation of rights under the Convention through legal change or agreement with local authorities, Article 49 prohibits deportation, Article 51 prohibits forced labor, and Article 54 prohibits sanction of public officials for non-cooperation due to reasons of conscience.

[22] For example, as previously discussed, an occupier has the obligation to provide security. It also must ensure that education of children shall continue (Article 50), that food and medical supplies are distributed (Article 55), and that medical facilities continue to operate (Article 56).

> 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.

The Convention simply does not envision fundamental legal change in an occupation setting. In short, an exercise in nation building takes extreme liberties with the terms of the Hague Regulations and the Fourth Geneva Convention, and violates the spirit, if not the letter, of the texts.

One could argue that the phrase "unless absolutely prevented" in Article 43 of the Hague Regulations provides the loophole by which an occupier can engage in nation building so long as it fulfills its other duties. Certainly, if any situation ever presented a case for scrapping the old legal system and starting anew, it was Iraq after the fall of Saddam. Saddam had made a mockery of the legal system of Iraq, subverting Iraq's already historically weak constitutional structure to support his totalitarian rule, and promulgating legislation that sanctioned gross violations of major international human rights standards. Beyond this, the Ba'ath party had for decades used the tools of law to viciously suppress dissent, infiltrating every organ of government in the process. Furthermore, the Ba'athists expropriated property across ethnic lines, and pursued ethnic cleansing among the Kurds of the North and the marsh Arabs of the South. The widespread dislocation of people and property that resulted so thoroughly confused ownership of land and access to vital resources as to set the stage for large-scale clashes as soon as the Coalition lifted the mantle of Ba'athist repression. Given all this, and given the fact that after Saddam fell the entire government collapsed, few would disagree that the Coalition was "absolutely prevented" from respecting the laws in force in Iraq.

Even so, one clause from the Hague Regulations seems a slender reed upon which to rest the widest-ranging experiment in fundamental legal change while under occupation since the transformation of Germany after the Second World War. This is without doubt one reason that the Coalition tried so hard to rest the CPA's scope of authority on Security Council resolutions, rather than the law of occupation. As already noted, the CPA, in Regulation Number 1, rested its authority not upon the laws of war, as one would expect, but upon a non-existent Security Council

mandate. Looking at the four principal post-war resolutions, it is clear that the United States and the United Kingdom pushed hard for the Security Council to endorse the CPA—to give it the patina of legitimacy necessary to transform Iraq.[23] The key resolutions on Iraq, 1483 (May 22, 2003), 1500 (August 14, 2003), 1511 (October 16, 2003), and 1546 (June 8, 2004), with one hand reinforced the CPA's authority to oversee a process of governmental transformation in Iraq, but with the other hand shoved the CPA off the stage as quickly as possible. It was as if the Council agreed to overlook the manner by which the CPA came into existence so long as the CPA did its work quickly and quietly, and then went away. Resolution 1483 "*[c]all[ed] upon* the Authority . . . [to] creat[e] conditions in which the Iraqi people can freely determine their own political future." The resolution went on to state that the Security Council "*[s]upports* the formation, by the people of Iraq with the help of the Authority . . . 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." Resolution 1500 endorsed the Governing Council (a CPA-created body) as representing the Iraqi people. Resolution 1511 gave the emerging political process added legitimacy by endorsing a timetable for action. With the end of occupation arguably in sight, Resolution 1546 went farther, putting the Council's stamp of approval on the Interim Government that eventually took charge on June 28, 2004, and declaring the occupation at an end with the formal dissolution of the CPA on that date.

Given the rhetoric out of Washington, the sweeping powers that the CPA claimed for itself, the (grudging) endorsement of the Security Council, and the dire conditions on the ground, one would have expected the CPA

---

[23] An interesting side issue is whether, in fact, the Security Council has the right to mandate fundamental legal change. This point seems to have eluded all parties to the Iraq controversy. On the one hand, the United States and the United Kingdom sought to get that much-coveted stamp of approval on the new legal arrangements without giving up control on the ground. The U.N. Secretariat and the Security Council members that opposed the war, on the other hand, jockeyed to use the U.N. stamp of approval to get the Coalition out of Iraq. Iraqis I spoke with by and large wanted elections as soon as possible, and if that was not possible, a U.N. appointed government. It seems that the United Nations has slipped quietly into the role of "legitimizer of last resort" for a number of hard cases, including Cambodia, Kosovo, East Timor, and now Iraq.

to act vigorously to remake Iraq, with little or no regard to the conservatism inherent in the law of occupation. The actual record was mixed, with the CPA in some areas breaking decisively with the past, and in other areas leaving the prior legal structures intact. In the areas where the CPA completely rewrote the law, it remains to be seen whether Iraqis will take those changes to heart, or simply ignore or reject them at the first available opportunity. Early indications suggest that when dealing with fundamental legal change there may be some wisdom to the conservatism of the Hague Regulations and Fourth Geneva Convention, even in a situation as dire as that which the CPA inherited.

The greatest single instance of fundamental legal change was, of course, the abandonment of the preexisting political and constitutional structure in favor of a completely new system. Being the essence of "regime change," this move surprised no one. What was surprising, however, was the absence of a plan to put a new system into place. For three months after the fall of Baghdad, the Coalition offered no guidance to Iraqis on how their country was to be governed. On July 13, 2003, the CPA named the Iraqi Governing Council (GC), but never defined the powers of the GC, and never answered the question of whether it could "govern," as the name suggested.[24] The CPA followed this first tentative step on August 23, 2003, by formally dissolving the former government of Iraq, its principal institutions, and the entire Iraqi security establishment.[25]

While no one missed the Revolutionary Command Council, the dissolution of the Iraqi armed forces and security services turned out to be a disaster for the Coalition. The move threw hundreds of thousands of Iraqi men out of work, jeopardized pensions that they had counted upon, and terminated one of the few Iraqi institutions that had remained partially

[24] *See* CPA Reg. No. 6. In practice, the GC was a purely advisory body, even thought the CPA often emphasized the importance of the Council. It had no legislative authority, although it made recommendations to the CPA. The CPA often ignored those recommendations. For example, in September 2003, the GC reached consensus on a new Nationality Law to resolve the issue of who was, in fact, an Iraqi (an issue much obscured by Saddam). A key component of the GC position was that dual nationals, primarily exiles, retained Iraqi citizenship. This was important to organizing elections. The CPA ignored the draft law, and never tackled the issue itself. The issue was finally resolved in the Transitional Administrative Law, discussed below.

[25] *See* CPA Order No. 2.

intact. The dissolution did not, however, disarm the legions of angry men left in its wake. Nor did the Coalition have the personnel to carry the burdens previously borne by the Iraqi military. Attacks on Coalition forces, most probably launched by angry former Iraqi soldiers, escalated dramatically in September 2003, and have continued unabated since then.

Against a backdrop of silence from the CPA regarding the government of Iraq, Iraqis started taking matters into their own hands. In August 2003, Grand Ayatollah Ali al-Sistani, the senior Shi'a cleric in Iraq, called for direct elections of a government to which the CPA could transfer sovereignty. At about the same time, the GC formed a Constitutional Preparatory Committee (CPC) to recommend a plan to rebuild a constitutional structure for Iraq. In October 2003, the CPC came out with its recommendations, calling for direct elections for a constitutional assembly to which sovereignty could be transferred.[26]

In November 2003, the CPA unveiled its long awaited sovereignty plan. The CPA plan, ignoring the CPC recommendations and the warnings of al-Sistani, called for a complex caucusing system to "select" a government and a constitutional assembly, with a "transfer of sovereignty" to take place on June 30, 2004. Leading Iraqis, including most notably Ayatollah al-Sistani, quickly rejected the plan. Even the CPA-appointed GC disowned the caucus plan. By January 2004, the CPA had quietly dropped the whole idea, retaining only the June 30 date.

Facing a self-imposed June 30 deadline and no plan for getting there, the CPA passed the ball to the GC and the United Nations. The most substantial single instance of fundamental legal change, the promulgation of an interim "constitution" and a plan for the return to sovereignty came formally out of the GC, not the CPA. On March 8, 2004, the GC passed the "Law of Administration for the State of Iraq for the Transition Period"

[26] It seems nobody at the CPA or in the international media ever read the CPC report. I was at the CPA the day the report was delivered from the GC. An official at the CPA that had the document refused to give me a copy, even though it was relevant to the report that we were preparing for Ambassador Bremer. Others in the CPA never got the report at all, and hoped I would share it with them if I could get and translate a copy. I was able to obtain a copy from the GC itself, and my colleagues and I translated the document the day after it was issued. We were surprised to find that the CPC had recommended direct elections of a constitutional assembly, contrary to expectation. The international media incorrectly reported the CPC recommendations as inconclusive.

(TAL).[27] Breaking from prior practice, the CPA never legislated the TAL or its annex, also put out by the GC. CPA fingerprints only appeared on the TAL in Regulation Number 9, promulgated June 9, 2004, in which the CPA ratified the GC's decision to dissolve itself, and noted that the GC had passed the TAL and its annex before it dissolved. They also appeared in Order Number 96, adopted on June 15, 2004, containing the electoral law by which upcoming elections would be governed.[28] The electoral law "notes" that the TAL will be the governing law of Iraq for the transition period.

The CPA also began to form a new government to run Iraq after June 30, but did so in an oblique manner, pushing the United Nations out in front. While the CPA reserved final say over some appointments to the new government, it left the process of identifying candidates to the Special Advisor to the Secretary-General of the United Nations, Lakhdar Brahimi. The deference to the United Nations was such that when asked about the composition of the new government, President Bush referred all questions to Mr. Brahimi.[29] This was quite a change from the bold rhetoric aboard the U.S.S. Abraham Lincoln, a year earlier. In the end, the

[27] *Available at* http://www.cpa-iraq.org/government/TAL.html. Key features of the TAL include: deadlines for transfer of sovereignty by June 30, 2004, National Assembly elections by January 31, 2005, and an elected government under a permanent constitution by December 31, 2005 (Article 2); freedom of religion within the context of Islam as the religion of the state (Article 7); bi-nationalism (Article 9); an array of civil and political rights reflecting contemporary international standards (Articles 10–23); establishment of new national institutions including a presidency council, a council of ministers (including a prime minister), a national assembly and an independent judiciary (Article 24); and recognition of a Kurdistan Regional Government within a federal state structure (Article 53).

[28] The electoral law itself represents a significant instance of fundamental legal change. Iraq had a well-established electoral law based upon single and multi-member districts, which the CPA scrapped in favor of a contemporary code using proportional representation. The old code was much corrupted by Saddam, but the 1952 law upon which it was based was very familiar to all Iraqis. Iraqis with whom I spoke were very resistant to the idea of scrapping the old "list" system common in the Arab world in favor of proportional representation. It remains to be seen whether the new Iraqi government will actually honor the new electoral law, or whether it will try and revive the old system.

[29] Speech by President George W. Bush at the United States Army War College, Carlisle, Pennsylvania, May 24, 2004, *available at* http://www.whitehouse.gov/news/releases/2004/05/20040524-10.html.

CPA did not even appoint the new government; in Regulation Number 10, it simply "acknowledges" the authority of the individuals listed in the regulation, who were "identified" by the Special Advisor to the Secretary-General of the United Nations. Reading only the CPA's own legislation, one would think that it had little to do with the actual formation of the new Iraqi government. This was quite a contrast from the ringing declaration of sweeping authority with which the CPA announced its existence in Regulation Number 1. In the end, the United Nations was instrumental in bringing about the transition to self-rule.

Apart from the dissolution and reestablishment of the Iraqi government, the CPA undertook significant legal change in Iraq in a number of other areas, with mixed results. One such area involved CPA efforts to undo the legacy of Ba'athist rule. In this, the CPA encountered little opposition.[30] Specifically, the CPA repealed Ba'athist era controls on freedom of speech, assembly, and conscience.[31] The CPA also abolished the Ba'ath Party, removed the upper echelons of the party from public office, seized the party's sizeable assets, most of which had been expropriated from opponents of the regime over the years, and initiated a claims process for returning assets to the rightful owners.[32]

The CPA also left a sizeable legislative record on the economic front. Against a backdrop of destitution and economic stagnation, the CPA, on paper at least, significantly rewrote the legal foundations of the Iraqi economy. Iraqis readily embraced some of the CPA's actions, such as the issuance of the new Iraqi Dinar to replace the Saddam Dinar. Other changes seem to have slipped by unnoticed. The CPA restructured the banking sector, permitting foreign banks to establish branches in Iraq and up to 50 percent foreign ownership of Iraqi banks,[33] enacted a new company

[30] One exception involved opposition to the wholesale removal of senior Ba'athists from positions of prominence. This is not surprising considering the sheer size of the Ba'ath Party. Many Iraqis argued that most senior Ba'athists were never involved in criminal activity, and only joined because it was a requirement for career advancement. Moreover, many of the people inside Iraq with the skills to rebuild the country had been members of the Ba'ath Party, and their wholesale exclusion from government hamstrung the reconstruction effort.

[31] *See* CPA Order No. 7.

[32] *See* CPA Order No. 1.

[33] CPA Order No. 40.

law,[34] erected protections for intellectual property,[35] established a system for assignment of broadcast wavelengths,[36] and established a regulatory structure to support the new laws.

One of the CPA's most notable pieces of economic legislation opened the door to foreign direct investment in Iraq, and rather obliquely permitted some privatization of Iraqi state assets.[37] Prior to the occupation, Iraqi law severely limited foreign investment or ownership in Iraq. After the Coalition toppled Saddam's regime, Washington was abuzz with ambitious plans to reform the Iraqi economy, including privatization of Iraq's vast oil wealth. In the end, the CPA backed away from large-scale privatization. CPA Order Number 39, promulgated September 19, 2003, permitted foreign direct investment and foreign ownership in every sector of the economy, except natural resource extraction and processing. Order Number 39 also preserved the old prohibition on foreign ownership of real property, but permitted its long-term lease to foreign entities. Order Number 39 did not specifically authorize the sale of state assets, but defined foreign direct investment in such a way as to permit investment in state-owned entities. To date, there have been few reports of any sales of Iraqi state assets actually taking place, and the process by which an Iraqi asset might be purchased remains ambiguous. It remains to be seen whether much privatization occurred during the CPA's tenure, whether it took place in a transparent and accountable manner, and whether it was in the best interest of Iraqis.

Since most of the CPA's wide-ranging economic reforms existed only on paper, with only modest implementation, it is unclear whether they will have any significant impact in the future. In theory at least, the Interim Government has no authority to alter or amend CPA legislation.[38] How-

[34] CPA Order No. 64.

[35] CPA Order No. 81.

[36] CPA Order No. 65.

[37] Privatization of state assets in particular runs afoul of Article 55 of the Hague Regulations, which requires an occupier to "safeguard [public properties], and administer them in accordance with the rules of usufruct." One might argue that a trustee can commonly sell assets held in trust for the good of the beneficiary; this is, however, a rather weak foundation upon which to build a major privatization program.

[38] *See* CPA Order No. 100.

ever, there is little to prevent the Interim Government from simply not enforcing certain of the CPA's orders. In the end, it is too early to tell whether the CPA acted with great foresight to the long-term benefit of Iraq, whether its legislative record in the economic arena opened the door to widespread abuse and corruption, or whether drafting legislation that had no immediate relevance to the reality in Iraq and no popular support was simply a waste of time.

Overall, it seems that Coalition leaders came to the conclusion, somewhat belatedly, that an occupier should avoid fundamental legal change, or at least not be out in front on it. In general, on matters that were most pressing, Iraqis accepted legal change with little difficulty. In others, where the need was less obvious, Iraqis reacted with hostility or passive indifference. Even where the need was great, the CPA lacked the credibility and public support to make major changes on its own.

VI. THE FUTURE?

While the formal dissolution of the CPA on June 28, 2004, ended one chapter in the history of modern Iraq, it did not resolve all questions concerning occupation of the country. Whether the occupation, in fact, ended on June 28 remains a debatable point. Occupation most clearly ends when the occupying force withdraws. That did not happen in Iraq; for ordinary Iraqis, not much changed on June 28. Occupation is not, however, merely the physical or psychological state discussed in the first section of the chapter. The legal definition of occupation, that the territory is "under the authority of the hostile army," easily encompasses a change in the terms of the foreign presence, with no change on the ground.[39] Of course, a sovereign government has the capacity to permit foreign forces on its soil for a specific agreed purpose. The question, then, is whether the new government of Iraq is sovereign, or at any rate sovereign enough to remove the taint of occupation from the continued presence of Coalition forces in Iraq.

Is the new Iraqi government sovereign? The phrase "limited sovereignty" has been used on many occasions to describe the Interim Government, and indeed the powers of that government are limited in a number of key respects. Notably, the TAL limits its ability to exercise the normal functions of government, and sets a clear timetable for elections to end the

[39] Hague Regulations, *supra* note 2, art. 42.

interim period. That is, however, quite normal for any constitution, and does not address whether the government is "sovereign enough" to end the occupation. For that, it may be useful to think about some of the normal criteria of sovereignty.

From the point of view of external sovereignty, the occupation ended on June 28. The Interim Government has been widely recognized by other governments in the region and around the world. Security Council Resolution 1546 endorsed its creation, deemed it to be fully sovereign, and noted and endorsed the continued presence of international forces at the request of the new government in Baghdad.[40] While a Security Council resolution does not necessarily create facts, certainly the international community regards the occupation as ended.

From the point of view of internal sovereignty, the picture becomes murkier. It remains unclear whether the Interim Government enjoys the allegiance of any significant portion of the population. It is clear, however, that the government's control over the territory of Iraq is tenuous at best, and only exists by virtue of the continued presence of Coalition forces. To further complicate the picture, it is not certain whether Coalition forces would withdraw if the Interim Government ever requested it. On the other hand, the Security Council's endorsement of the Interim Government as "fully sovereign" suggests that it has the legal capacity to order a Coalition withdrawal, and the question at present is purely hypothetical. The Interim Government does have some legitimacy derived from the Security Council, and there are at present no other claimants to authority besides Saddam himself.

In any case, the question of the precise nature of the Interim Government is secondary to the duties of international forces in Iraq. Assuming, because everyone seems to, that the occupation is over, then the Interim Government has in effect inherited a civil war from the CPA, and American, British, and other forces are assisting that government to quell the insurgency. The Fourth Geneva Convention still applies, whether we are dealing with an occupation, or a counterinsurgency campaign. Article 2 states that the Convention applies in "all cases of declared war or other armed conflict." The international forces remaining in Iraq do not escape their legal duties by a name change. If anything, international forces have

[40] *See* Security Council Res. 1546 (June 8, 2004), paras. 1, 2, 9, and 10.

less, not more, freedom as a consequence of the "transfer of sovereignty." In this sense at least, the occupation most certainly has ended.

While the reality of Iraq may not fit the established definitions of international law well, that reality is nothing new in the modern history of the Middle East. Many nominally independent Arab governments over the years have been subject to extraordinary influence by their European patrons. One need only think of the French in Lebanon or the British in Jordan, Oman, Egypt, and Iraq itself to see the parallels. While Iraq may be sovereign, it is still subject to the United States to a remarkable degree by virtue of the continuing presence of U.S. troops. The new U.S. Ambassador in Baghdad might do well to reflect on the successes and failures of Lord Cromer, the well-known British representative in the Court of the Khedives in the years following the formal British occupation of Egypt. He may find himself in a very similar position.

How else might the occupation have ended? Would there have been an outcome that better fit the existing the law of occupation? One strategy would have been to do as little as possible. This, ironically, would have been most consistent with the letter of the law. The Coalition could have occupied Iraq briefly, ensured that no weapons of mass destruction remained in Iraq, and left, letting Iraqis sort out their own political future. Short of that, the Coalition could have left the legal and political structures in place, and replicated the previous regime, but without Saddam. In other words, find a Ba'athist willing to cooperate with the Coalition on weapons of mass destruction, install him as dictator, and leave.

Obviously, there are problems with such a program. Aside from the moral and practical problems, world opinion would never have stood for it. It is ironic, given the widespread opposition to the policy of "regime change," but having invaded Iraq, the Coalition had to carry through on the promise of democratic transformation. Beyond this practical consideration, so many features of the Ba'athist system were contrary to widely held international legal norms that simply installing a "good" Ba'athist and otherwise leaving the system in place would have run afoul of the law in other ways.

Some experts had suggested looking to older existing Iraqi law as a basis for reviving sovereignty, altering the law only sparingly to bring the

system in line with international norms.[41] This kind of approach would have been more consistent with the law of belligerent occupation, minimizing the need for fundamental legal change. The strategy would have had practical advantages as well. In Iraq, reviving a pre-Ba'athist constitution and electoral law would have been simple, would have lent legitimacy to the process, and the resulting government would have looked familiar to Iraqis. The approach, however, is not without problems. Past Iraqi constitutions by and large had been honored in the breach more often than not, were flawed documents themselves, and did not reflect the present day reality of post-Saddam Iraq. Still, given the unimpressive record of the CPA on the road it did take, there may have been value to doing less and salvaging more.

Assuming that significant departures from the existing law of belligerent occupation were inevitable in Iraq because of the collapse of all civil authority there, how might the law of occupation have better assisted the transition to a sovereign Iraq? One helpful innovation would be to clarify the duties of a long-term occupier. The basic texts assume an occupation of short duration and the eventual return of sovereignty to an existing government. Article 6 of Fourth Geneva Convention provides that many provisions of the Convention cease to apply one year from the "general close of operations," but does not spell out how that cessation affects the powers of the occupier. In particular, Article 6 provides that virtually all of the Convention's requirements respecting the treatment of internees cease after one year, but does not state what will take the place of the articles no longer in force. One would like to think that an occupier must be held to a higher standard of conduct in the course of a long-term occupation, but the Convention never actually says that. In Iraq, the CPA continued to administer Iraq for well over one year from the formal end of hostilities, and treatment of internees was certainly an issue that the CPA confronted. A very clear statement of the duties of an occupier facing a long-term occupation might have minimized the potential for abuse, and could have assisted in formulating a roadmap to ending occupation

[41] *See, e.g.*, Bernard Lewis and R. James Woolsey, *King and Country*, WALL ST. J., Oct. 29, 2003, at A20.

Another useful innovation may be to clarify the relationship between international humanitarian law and general international human rights law in an occupation setting. Iraq under occupation suffered from the lack of a clearly established procedure for the recreation of a sovereign Iraqi government. While existing international human rights law does not provide that roadmap, the general contours of a government that meets current international standards can be glimpsed in such instruments as the International Covenant on Civil and Political Rights (ICCPR). The explicit recognition that an occupier engaging in fundamental legal change to rebuild a collapsed government or state shall abide by the requirements of the ICCPR, for example, would serve as a firm check on the occupier's power, while at the same time widening the occupier's scope of authority to abolish truly unconscionable laws, such as those that the CPA had to deal with in Iraq, and to undertake urgently needed reforms.

VII. CONCLUSION

In sum, while the Fourth Geneva Convention and the Hague Regulations were incomplete guidebooks to the Coalition's duties as an occupier in Iraq, they showed themselves to be quite sound despite the passage of time. In all three of the areas examined in this chapter, where the Coalition ignored the requirements of the conventions, it paid a price in failed policies, escalating violence, and the growing enmity of Iraqis. The Coalition would have done much better to scrupulously observe the requirements of the law of belligerent occupation.

Going back to the dichotomy between "occupation" and "liberation," it is interesting to consider whether the Coalition did itself a disservice by banishing the term "occupation" from its vocabulary. It is always dangerous to believe one's own propaganda; it may well be that by taking the mantle of "liberator," the coalition blinded itself to the realities of occupation and failed to prepare adequately for it. The occupation of Iraq did not go well for the Coalition. During the occupation it failed to restore fully basic public services such as electricity and clean water. It failed to provide basic security to large segments of the population. It failed to restart the Iraqi economy. It failed to quell the anti-Coalition insurgency. Indeed, many Iraqis that initially supporting the Coalition eventually took up arms against it. The growing conflict in Iraq today may rightly be described as a civil war, and the prospects for peace in the future are dwin-

dling. The breakup of Iraq and the ignition of a regional war following the emergence of an independent Kurdistan are both real possibilities. Had the Coalition taken seriously its role as an "occupier," some of these tragedies may have been avoided, with very different long-term results for Iraq and the world at large.