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Occupation Law: (Mis)use and Consequences in Iraq

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The great historical irony of the catastrophe unfolding in Iraq is that the shock therapy reforms that were supposed to create an economic boom that would rebuild the country have instead fueled a resistance that ultimately made reconstruction impossible¹.

INTRODUCTION

It is a delicate and pretentious endeavour to examine Iraq in current times. It is delicate in the sense that new facts and consequences of the Coalition's presence in Iraq are broadcast on a daily basis and discussed worldwide. Yet it is also pretentious because of the impressive volume of academic work about Iraq that has appeared during the last four years. There is now a solid body of scholarship on issues such as the Coalition's interpretation and misuse of occupation law, the legality of the use of force, Western imperialistic aspirations over Iraq, and successes and failures of the Coalition Provisional Authority's administration of Iraq in 2003 and 2004². Keeping those concerns in mind, this paper establishes a discursive trajectory across all these topics. I will argue that the modern evolution of occupation law is intertwined with the Coalition's

misinterpretation and misuse of their obligations under international law, and examine how a radical interpretation of occupation law has affected the prospects of democracy and stability in Iraq.

The expected outcomes of a military occupation are to stabilize and to offer security to a territory during a limited period, handing back control of the territory to the local population according to the principles of self-determination and non-intervention. In concert with the very limited circumstances that permit an occupation in modern times, the Hague Regulations of 1907 and the Fourth Geneva Convention set forth the obligations of occupying powers in a restrictive fashion. The obligations of the occupant are to "take all the measures in his power to restore and ensure, as far as possible, public order and civil life"³. Modern interpretations of occupation law have understood the limits imposed by occupation law while attending to the imperatives of international human rights law, which is proactive in essence. On the one hand, an effective protection of human rights implies a proactive reformist attitude by occupying powers not only on the level of human rights enforcement but also towards the

economic failure of the occupied nation. On the other hand, occupying powers should exercise their obligations in an objective manner, cognizant of the people's ultimate authority over their territory. A disruption of the equilibrium imposed by occupation law not only implies a breach of international law, but also threatens the long-term projects of democratic governance and stability in the occupied nation.

The transformative rationale and turbulent consequences of recent events in Iraq contain many lessons on how international humanitarian law and occupation law have evolved at the beginning of the twenty-first century. Iraq was an epitome of a transgressive occupation in terms of the necessity and long-term impact of the reforms carried out by the occupying powers. Once the United States (US) and the United Kingdom (UK) attacked Saddam Hussein's regime on 19 March 2003 and began to exercise control over Iraqi territory, the law of occupation immediately applied to their actions. The two governments soon recognized such obligations. By late May 2003, the US and UK governments and the United Nations (UN) Security Council publicly confirmed the application of occupation law in Iraq rather than opt for the establishment of a UN military deployment and civilian administration⁴. Although the Coalition, the UN and other institutional actors used the discourse of human rights and democracy implicit in occupation law, the Coalition manifestly overstepped the proper scope of an occupying power. The occupation was particularly radical in the terrain of economic governance, where the Coalition's reforms have been described as a 'shock therapy' to Iraq: an upheaval of the *status quo* with the intention of transforming Iraq into

a competitive, market economy, remodelling the economic and social institutions of the country.

SECTION I

Occupation Law emerged in the late eighteenth century as a humanizing trend in the law of war. The initial rationale of occupation law was to restrain full domination of a territory by an occupying power until its territorial rights had been formalized. As a way of preserving the *status quo ante bellum* in a territory, occupation law came to modify the previously unencumbered right to subjugate conquered foreign territories⁵. The development and formalization of occupation law first occurred through codes of conduct. The historical reason behind the appearance of these codes of war was that the assumption of rights over a conquered territory was typically brutal and punitive. Codes of conduct for the occupier offered the possibility to restrain misuses of power and to maintain the distinction between occupation and annexation, which would otherwise effectively collapse⁶. These early attempts to codify occupation show how international law has never historically regarded occupied territories as a governance vacuum.

Occupation law is currently understood as the international law of military occupation, often accompanied by the civilian administration of a foreign sovereign territory. It is governed by relevant portions of the Fourth Geneva Convention, relevant provisions of Hague Regulations, and by peremptory and customary international law. Some of the primary obligations of the occupying power include the prohibition on taking possession of cash, funds, and realizable se-

curities other than those which are strictly the property of the State; the obligation to administer public buildings, real estate, forest and agricultural estates belonging to the hostile State in accordance with the rules of usufruct; and the obligation for the occupier to ensure, to the fullest extent of the means available to it, the food and medical supplies of the population⁷.

At the core of occupation law is the principle that a belligerent occupation is in essence a temporary condition, in which the powers of the belligerent are not without limit⁸. *The Lieber Code: Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of war* Articles 31-47 (1863) and the *Declaration of Brussels* Articles 1-8 (1874) are of how certain government activities have been considered the exclusive legitimate prerogatives of the *de jure* sovereign regime, and cannot be taken over by an occupying power⁹. The constraints over occupying powers have been encapsulated in a more modern fashion in Article 43 of the Hague Regulations, which stipulates:

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 country¹⁰.

Further, the scope of the prescriptive power of the occupant, phrased in the cryptic "unless absolutely prevented", was supplemented by Article 64, second paragraph, of the Fourth Geneva Convention:

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 them¹¹.

It is fundamental to note that while the drafters of the Hague Regulations considered military necessity as the only relevant consideration that could be invoked by occupying powers in order to override the domestic laws in place, the Fourth Geneva Convention considered the welfare of the population of the occupied territory as a legitimate argument to replace legislation. In this sense, the recognition of human rights and the limitation of states' ability to make war –both notable achievements of the twentieth century– have fundamentally altered the practices of war.

Following the Hague Regulations and the Fourth Geneva Convention restrictively, there are two objective criteria that permit and delimit an occupier's power to carry out reforms to the legal environment of an occupied territory. Firstly, actions shouldn't be undertaken "unless absolutely prevented", and secondly, reforms must be limited to the welfare of the population¹². These central pillars impose basic primary obligations on an occupying power. The first obligation is that occupying powers do not acquire sovereignty over territories. The second is to leave the legal and political structures of occupied territory intact so "the occupier only assumes as much as the displaced sovereign's authority as is necessary to administer the territory, but no

more"¹³. The occupying power is only competent to legislate in order to secure basic rights, security and stability for the local population.

Consequently, occupation law has evolved with a strong attachment to a conservationist principle. Occupation law strongly confines the legislative discretion of an occupier during the period of occupation, regardless of the substantive merits of the reforms it is prepared to enact. The limitations imposed on the occupying power are generally considered to be concomitant with the alien occupier's lack of political legitimacy to rule over the inhabitants of an occupied territory. According to GREGORY H. FOX, "the occupier possesses no local legitimacy or necessary stake in the welfare of the territory after it departs, [he] is not competent to enact reforms that fundamentally alter governing structures in the territory and create long-term consequences for the local population"¹⁴. In this way, the traditional view of the occupation law considers that if the exercise of standards imposed by the Fourth Geneva Convention improves the situation of the territory, then those standards should be achieved for the sake of the Convention, and not due to the reformist spirit of the occupying power.

Alternative modern interpretations of the prerogatives and limitation of occupation law have suggested that the welfare of the population may justify deviation from the legislation in force and therefore allow a wider spectrum of activism by an occupying power¹⁵. With the expanding obligation acquired by the model of interventionist state during the twentieth century, international law has embraced the relationship between a population's welfare and the ex-

istence of an operative state. International law has shown an increasing concern with matters previously considered the exclusive prerogative of national governments and identified them as core global concerns. For occupation law, this trend is reflected in the increasing influence of international human rights commitments on the interpretation of the occupier's obligations. The current efforts to regularize international activism have arisen partly because protecting the current framework of human rights is a complex task that requires a certain level of centralized and proactive control¹⁶. The occupying power must fulfil a range of proactive humanitarian responsibilities that go beyond its territorial boundaries, adhering at the same time to explicit limitations in terms of time and matter in the administration of the occupied territory¹⁷.

Notwithstanding the well-recorded development of occupation law, the use of occupation law has proved problematic throughout its history¹⁸. There are three main reasons that are typically invoked to explain the misuse and abandonment of occupation law, all of which are salient to the occupation of Iraq. Firstly, occupation law has often been considered to be inactive since the end of colonialism, the Declaration on Friendly Relations¹⁹ and the prevalence of the general prohibition of the use of force by the UN Charter²⁰. Secondly, the collapse of former colony states was a reality envisaged by the UN as a rationale for a proactive role of international actors. In this scenario, engaged governments were supposed extend their duties beyond military and humanitarian tasks to include a pre-cautious re-establishment of effective governments²¹. From supervision of elections, such as in Cambodia in 1992,

to the full-administration of a state, such as took place in Kosovo, the UN Security Council has approached insecurity and governance failure within nation states with an increasing activism over the last twenty years²². Finally, states are increasingly converging towards similar political and economic values, as well as increasing their engagement with supranational bodies, whereas previously political systems, economic systems and geographical boundaries have been important touchstones for identity and self-determination²³. These three factors have generated considerable difficulties for attempts to apply strict reading of codified occupation law in practice. The diversity of circumstances and proactive obligations has made occupation law an enormously complex legal framework within which to work²⁴.

In recent years, multilateral or humanitarian occupations, particularly those aimed at enforcing international human rights in failed states, have become the more relevant fact in occupation practice²⁵. Regime change in its modern usage means the forcible replacement of the elite/or governance structure of a state by external actors so that the successor regime approximates some purported international standard governance²⁶. If this sounds problematic, it is because the impulses that have gone into this new exercise of power are contradictory²⁷. On the one hand, human rights ideology of the Western world sustains the principle of self-determination, the right of each people to rule themselves free from outside interference. Although contentious, this was the ethical principle that inspired the decolonisation of Asia and Africa after World War II²⁸. More recently, however, the world has witnessed the collapse of

many of these former colonies and therefore seen a reshaping of the principle of self-determination based on the notion of guaranteed international human rights²⁹.

There are thus increasing calls for a re-invigorated framework for occupation law: liberating armies that operate with international authority, advance democracy, and save civilian populations from atrocities should be regulated by a modern occupation regime that can be created under the UN Charter³⁰. This idea resembles the Atlantic Charter in terms of war engagement and its consequences in modern times. Signed by US President FRANKLIN DELANO ROOSEVELT and British Prime Minister WINSTON CHURCHILL in August 1941, the Atlantic Charter calls for 'the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security'³¹. Thus in an increasingly homogenous international scenario, highly proactive occupations have come to be well regarded and have passed the scrutiny required by the former occupation law. The boundary between "humanitarian intervention", basically a short-term initiative aimed only at stopping massive and ongoing human rights violations, and "regime change" which in fact is future-oriented, has become increasingly blurred³².

Even though there continues to be extensive academic discussion about the role and limitations of the Security Council and individual nations in relation to occupation law, the end result of the mismatch between formal and active understandings of occupation law has been what might be called "transformational occupation"³³. Transformational occupations have repeatedly taken place by one or more military pow-

ers acting under the authority of the UN Security Council, or even without explicit Council approval. In the latter case, of which Iraq is a clear example, individual actors have initiated actions when the Council is deadlocked and pursuant nations consider that the threat to survival—or the aspiration for self-determination—is imminent and overwhelming in the target society.³⁴

With the increasing acceptance of proactive use of force for humanitarian objectives, JANE STROMSETH argues that a Responsibility to Protect is beginning to develop as a norm of customary international law in the current environment of occupation law³⁵. The preconditions that she articulates for the nascent Responsibility to Protect are: the UN Security Council is unable to authorize actions; it is necessary to use force to stop atrocities; the force used is proportional to stop ongoing human rights abuses; there is a humanitarian purpose and effect to the intervention; it is a collective action; and finally the intervention is supported by existing law³⁶. The Responsibility to Protect makes an adjustment to state sovereignty by declaring that for a states' sovereignty to be respected, a state must demonstrate responsibility to its citizens³⁷. Since the Responsibility to Protect implies responsibility to prevent, responsibility to react and responsibility to rebuild, understandings of occupation law are undergoing revision. On one hand, international law continues to presume the inappropriateness in all circumstances of the coercive use of force to effect political change in another state, while on the other hand, there is some evidence that where the use of force does occur, there is an emerging obligation to intervene and contribute to reconstruction³⁸. Yet

even in this new conceptualisation of sovereignty, military intervention for humane purposes is still an exceptional and extraordinary measure. The International Commission on Intervention and State Sovereignty emphasises the "just cause threshold" that justifies the use of force as the responsibility to protect a serious and irreparable harm occurring to human beings, or a large scale loss of life or large scale "ethnic cleansing" that is imminently likely to occur³⁹. A right intention of human protection, proportional means in terms of duration and intensity of the military intervention and the prospect of a chance of success in halting or averting the human suffering are not by themselves sufficient reasons for action⁴⁰. Instead of superseding occupation law, the nascent Responsibility to Protect crafts an updated framework for international intervention for humanitarian causes.

There is thus an understandable concern to ensure that occupying powers uphold human rights standards and also that the economic survival of the occupied society should not become the premise for using occupation law as the means to treat the occupied territory as a blank slate. In the post-cold war era, free-market values, respect and protection of property rights and contracts, friendly investment policies and multilateral and bilateral trade agreements are increasingly becoming international standards. With varying degrees of compliance and willingness, developed and developing countries are accommodating their internal legal configurations to satisfy these requirements. Although this process has had a significant impact on the exercise of economic governance domestically and internationally, central and peripheral governments have seen their range of eco-

conomic policy choices shrink dramatically. Civil activism, the growth of non-government organization networks, regional alliances, hard-lobbying policies and economic blocks are a few of the antagonistic responses to the global market ideal. This contentious context affirms the absence of a true global consensus about the liberalization of national markets. There is even a resurgence of the principle of autonomy in choosing economic models⁴¹. Emerging from colonialism, newly developing countries have reacted against Western economic and political power by defending a robust notion of sovereignty enshrined in international law. Economic and political differences have become pillars of the principle of self-determination and subsequently the whole international legal structure⁴². For instance, the role of economic law is still a contested matter of legitimate diversity among states. It is legitimate and meaningful in terms of deliberative democracy, for instance, for a state to decide that utilities, media outlets, natural resource extraction, and other strategically important industries should be government-owned or off-limits to foreign ownership. *Mutatis mutandis*, this situation is predicated of occupied territories and post-occupation government. Otherwise, the autonomy of territories would be vulnerable to intervention by aggressive and benevolent occupying powers alike.

It is important to realise that the ideal of self-determination is not synonymous with support for the continuation of laws that clearly violate core human rights. The degree of complexity with which this principle should be understood gives room for both a respect for human rights principles and for the principle of self-determination.

Even when the primary motive for intervention is the instauration of a government based on the standards implied in international agreed human rights instruments, these standards are expressed in very general principles and norms: the "margin of appreciation" can be malleable to different socio-economic perspectives. The complexity of self-determination is already acknowledged in the Declaration on Friendly Relations, which establishes:

[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the rights freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter⁴³.

An interpretation that calls for a necessary equilibrium is supported by the preamble of the Declaration, where the General Assembly establishes: "Bearing in mind the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development"⁴⁴. Explicit in the Declaration is that even the most well-intended reforms by a benevolent occupying power may become so sweeping and far-reaching that inhabitants lose the opportunity to make important choices about the nature of their own society's development. The equilibrium between securing order while respecting self-determination is based on recognition

that a culture of human rights and economic growth are only compatible when they are engendered by the people of the nation. This shift of emphasis, from political elites to peoples during an occupation, is informed by the Fourth Geneva Convention and the Hague Regulations⁴⁵. The Convention delineates a bill of rights for the occupied population, which serves as an internationally approved bill of rights for the inhabitants of an occupied territory. Both contributions establish guidelines for the lawful administration of occupied territories. They contribute to a growing awareness in international law about the role of peoples in the resurgence of a state. No longer are inhabitants merely regarded as the resources of states, but rather as the worthy subject of protection⁴⁶. Deferring sweeping reforms until the return of an indigenous government allows both objectives to be served: core human rights obligations are respected through narrowly-tailored reforms enacted during occupation, while self-determination remains meaningful for the post-occupation development of the society by prohibiting overreaching systemic changes.

II SECTION

For HILARY CHARLESWORTH, the war in Iraq and its aftermath have shaken the foundations of international law, but at the same time they have underlined the real value of the international legal system. Even though international law has been inadequately equipped to deal with structural injustices in the past, its major strength has been the insistence on a collective, rather than individualised, notion of justice. In Iraq, the flaws of international law were particularly

striking, but its purported strengths were also profoundly distorted⁴⁷.

After months of trying to rally international support for a war and a two-day ultimatum demanding that Iraqi President SADDAM HUSSEIN step down, the US attacked Iraq on March 19, 2003. The goal, US President GEORGE W. BUSH declared in a speech was to disarm Iraq, to free its people and to defend the world from grave danger⁴⁸. The 15-member Security Council did not authorize the March 19, 2003 attack on Iraq. It had unanimously passed Resolution 1441 on November 8, 2002, calling for new inspections intended to find and eliminate Iraq's weapons of mass destruction⁴⁹. The resolution also threatened serious consequences if Iraq failed to comply. Iraq accepted the renewed inspections, which were to be carried out by the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA). Under the terms of the resolution, if Iraq obstructed their work, the chief inspectors were to report promptly back to the Security Council, which would have convene immediately to consider the situation and the need for full compliance⁵⁰. The US, backed by Britain and Spain (subsequently known as the Coalition), began to seek a second UN resolution to declare Iraq in material breach of its obligation to disarm⁵¹. However, permanent members France, Russia and China, as well as a number of other members, preferred to give inspectors more time on the premise that inspections were working, and therefore military action against Iraq would contravene the restraining of use of force.

After the Gulf War of 1991, the US pursued two simultaneous policy objectives

toward Iraq. In the short term, the US aimed to contain SADDAM HUSSEIN by keeping him within the boundaries of Iraq, while, in the longer term, the objective was his overthrow⁵². For his part, SADDAM HUSSEIN manoeuvred to maintain power in Baghdad and keep the country together against the influence of US and UN external policies and popular uprisings by Kurds and Shiite Muslims⁵³. With some degree of stability, the Ba'athist Regime defied predictions of its imminent downfall and remained in power, at times relying on the international necessity of Iraq as a regional counterweight to potentially resurgent Iran. It was within this context that US administration lawyers in 2003 claimed that Iraq had never lived up to the terms cease-fire of the 1991 Gulf War and that the use of force against Iraq was now valid⁵⁴. Against a deeply divided UN Security Council, the US pulled their proposal on March 17 in order to pursue unilateral action. The US administration argued that there was sufficient legal support for its proposed military action⁵⁵. The legal rationale of the Coalition was based on Resolution 1441 as well as the previous Resolution 678, which authorized the UN to take military action against Iraq, and Resolution 687, which set the terms of the cease-fire at the end of the 1991 Gulf War⁵⁶. The disparate political justifications for military action against Iraq included preventive self-defence against existing weapons of mass destruction (according to the US National Security Strategy⁵⁷); the Iraqi ruling regime's connections to Al-Qaeda, and thus an integral part of the war against terrorism; and, somewhat belatedly, relieving the Iraqi people of extensive and continuing human rights violations⁵⁸. None of these three possible bases

for justification were sufficient grounds for multilateral action⁵⁹. However, while there were lengthy discussions about the legality of the use of force and the facts that served as a basis for the invasion, there were also an apparent international political consensus about the desirable outcomes of the invasion and the need for political and economic changes in the region. There was a call for Iraq's transformation into a more democratic nation thus promoting a more stable Middle East— to which the US and its Coalition partners promptly responded⁶⁰.

Following the major military actions against Iraq from March 20 to May 1, 2003, President BUSH signalled the move from a period of war planning and fighting to one of rebuilding⁶¹. From the beginning of Operation Iraqi Freedom, US and UK forces recognized explicitly their condition as occupying powers. Nonetheless, the Coalition, the UN and the international community also mutely accepted that the project in Iraq was a transformational occupation—explicitly contrary to a restrictive reading of occupation law— following liberation from the Ba'athist administration⁶². Although acknowledgment of the status of occupants is the first and the most important initial indication that the occupier will respect the law of occupation⁶³, a reformist agenda of liberal, democratic and free market principles was openly declared before the deployment of forces in Iraq⁶⁴.

The major areas of Coalition reforms in Iraq can be encapsulated in six transformational targets: De-Ba'athification⁶⁵, Reform of Security and Military Institutions⁶⁶, Human Rights Reforms⁶⁷, Criminal Law and Law Enforcement Reforms⁶⁸, Good Government Reforms⁶⁹ and Economic Re-

forms⁷⁰. International support for the reforms was based on their consistency with international legal standards, such as those set out in human rights treaties, as well as prevailing best economic governance practices followed by the most highly developed Western democracies⁷¹. General Secretary Kofi Anan affirmed at the time that while there were disagreements about the way that actions were conducted in Iraq, there was a strong desire to see a stable and democratic Iraq – at peace with itself and with its neighbours, and contributing to the region⁷². A combination of these factors allowed the occupiers to govern as sovereigns, whose actions deposed the governing regime and transformed the country in a permanent fashion.

The unique circumstances in Iraq required a tailor-made mandate from the Security Council to support the occupying powers in the dual process of stabilization and political transition. Regime change and transformation are best accomplished autochthonously, without external intervention and especially without unilateral intervention⁷³. As W. Michael Reisman has observed, "If there must be intervention, it should be persuasive rather than coercive, indirect rather than direct, and inclusively authorized and accomplished rather than exclusively and unilaterally effected"⁷⁴. Ideally, these principles of action should be reflected in any occupation mandate that foresees a regime change and sweeping local transformation. The mandate should subject the compliance of the occupying powers with the Hague Regulations and Fourth Geneva Convention, customary law and peremptory law to serious scrutiny⁷⁵. Furthermore, the mandate should detail the responsibilities and prerogatives of the oc-

cupying powers conceded under the Security Council authority. In the case of Iraq, the Coalition's mandate should have (i) placed the operation under the command and control of the UN, (ii) included those principles of occupation law that remain relevant to the circumstances (including *jus cogens* norms and *erga omnes* obligations), and (iii) included other principles of modern international law pertaining, for example, to human rights, self-determination, the environment, and economic development so as to create a legal regime uniquely suited to the territory⁷⁶. Finally, the mandate should have been enacted prior to the initial occupation of any part of Iraqi territory, or at least after the more complete occupation of the country following the collapse of Baghdad on April 7, 2003⁷⁷. The institutional elements of the UN Security Council Resolution that eventually recognized the occupation of Iraq were far from this ideal prototype.

SECTION III

According to Resolution 1483, it is possible to identify three institutional actors during the period of occupation: the Coalition Provisional Authority in Iraq (CPA), the UN and its Special Representative and Assistance Mission, and the Governing Council of Iraq⁷⁸. The interaction between these institutional agents and the assignation of roles to each of them were symptomatic of the *sui generis* character of the occupation of Iraq⁷⁹. The US and the UK aspired to maintain a distinction between the prerogatives of a *de jure* government; and, at the same time, the limited legislative capacities of an occupier. Ultimately, however, these categories made little sense when the inten-

tions of regime change prevailed over the limitations prescribed by occupation law. In Iraq, the values of national sovereignty and self-determination that are explicitly protected by occupation law became a space for political and economic experimentation.

The principal actor and agent of regime change and transformation during the period of the occupation in Iraq was the CPA. The US and the UK announced the creation of the CPA in a letter to the Security Council on May 8, 2003⁸⁰. The new authority would "exercise powers of government temporarily" in Iraq⁸¹. With this premise, on May 22, 2003, the UN Secretary Council adopted Resolution 1483 that established, the US and the UK as foreign military powers in Iraq⁸². The Council vested the CPA (termed "the Authority" in the Resolution) with the specific authorities, responsibilities, and obligations under applicable international law⁸³. The Security Council called upon the CPA "to work consistently with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working toward the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future"⁸⁴. Citing UN Security Council Resolution 1483, the Geneva Conventions of 1949 and the Hague Regulations of 1907, the CPA Regulation n.º 1 vested itself with executive, legislative, and judicial authority over the Iraqi government from the period of the CPA's inception on April 21, 2003, until its dissolution on June 28, 2004.

The timeframe of the CPA's authority was to be effective until an internationally recognized, representative government was established by the people of Iraq and assumed the CPA's responsibilities⁸⁵. On June 28, when the CPA formally transferred political authority to the Iraqi Interim Government and left the country, it did not intend that its dissolution would also cause its many legislative actions to lapse. Besides taking long-term binding decisions such as the inclusion of Iraq in the World Trade Organization and the signing of reconstruction contracts, the CPA took two further final steps to ensure that its enactments would remain valid after the occupation had ended. First, the Transitional Administration Law (TAL), which came into effect on June 28, 2004 following the official transfer of power, provided that all the laws enacted by the CPA would "remain in force until rescinded or amended by legislation duly enacted and having the force of law"⁸⁶. CPA legislation would thus continue in force unless the new government chose to opt out. Second, the CPA created the Iraqi Interim Government as a caretaker government and issued a number of orders specifically addressing the post-occupation period under the leadership of this body⁸⁷. Most significant of these measures was that the liberal economic reforms did not stop with the change of administration of Iraq. The CPA's liberal economic reform of the Iraq was continued by the TAL, and subsequently by the first, second and final draft of the Iraqi Constitution that was approved in a general referendum held on October 15, 2005⁸⁸.

The second institutional actor in the occupation of Iraq was the UN. The role of the UN was as a facilitator and not as a ruler

in Iraq. As a natural consequence of the agitated discussions in the Security Council, it is more appropriate to read Resolution 1483 as an agreement that consolidated conflicting views about the type of international engagement required in Iraq, rather than as a unilateral expression of will by the international community⁸⁹. From the outset, the Security Council "[r]esolved that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance"⁹⁰. Nonetheless, the UN's institutional presence and the functions delegated to its representatives were weak in comparison with those of the CPA during the occupation. Resolution 1483 created the Special Representative of the Secretary-General (SRSG) to address a wide range of substantive tasks "in coordination with the Authority"⁹¹. The Resolution listed nine responsibilities for the UN in the spectrum of humanitarian assistance, reconstruction and coordination; none of these involved an actual role in governing the occupied territory⁹². In mid-August 2004, the Security Council established the United Nations Assistance Mission for Iraq (UNAMI) by the Resolution 1511. UNAMI was created parallel to the SRSG. Its tasks were as limited as those assigned to the SRSG, but focussed on the elections planned to take place after the CPA's withdrawal from Iraq⁹³. By Resolution 1511, the Security Council also authorized a multinational force in Iraq under the unified command of the U.S. and U.K.⁹⁴. Even though the multinational force enhanced the UN's institutional presence, the Security Council did not have final control over administrative matters, nor any control over military decisions.

The operation was informed and decided by U.S. military commanders and Administrators of the CPA, who reported to the U.S. Secretary of Defence and, through him, to the President of the U.S.⁹⁵.

Resolution 1483 stresses the right of the Iraqi people to exercise control over their own natural resources, determine their own political future freely and encourages efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender⁹⁶. Based on Resolution 1483, the CPA formed the Iraq Interim Governing Council (Governing Council) in August 2003 as part of the Iraqi governing structure for the duration of the occupation⁹⁷. The Governing Council preceded the Iraqi Interim Government, which was subsequently replaced by the Iraqi Transitional Government. Though still subordinate to the CPA, the Iraqi Governing Council was given several key responsibilities in collaboration with the CPA. Its duties included appointing representatives to the UN and appointing interim ministers to Iraq's vacant cabinet positions⁹⁸. The Governing Council also had the responsibility of drafting the TAL.

While the Security Council did call for the creation of "an Iraqi administration", the Governing Council's legitimacy was flawed since inception. Firstly, its twenty-five members were chosen and supervised by the CPA⁹⁹. Although Resolution 1483 ordered the creation of the Governing Council and approved its establishment by the CPA, the Governing Council lacked democratic legitimacy. The Governing Council's subordination to the CPA makes it difficult to construe the Governing Council as a sov-

ereign body of the people of Iraq. Secondly, even though it was part of the structure of an occupying power and as such only had capacities that were limited in time, the Governing Council breached these limitations when it allowed the CPA Orders to exceed the time of occupation. More specifically, in the TAL, Section A of Article 26, the Governing Council established that: "Except as otherwise provided in this Law, the laws in force in Iraq on 30 June 2004 shall remain in effect unless and until rescinded or amended by the Iraqi Transitional Government in accordance with this Law"¹⁰⁰. This complicity with the CPA permeated and undermined the sense of independence and accountability that was required from the Governing Council if it were to act as an effective counterbalance. Thirdly, the international norms that underpin occupation law do not recognize alter-power to the occupying power. Moreover, the Fourth Geneva Convention expressly banned the Governing Council approvals of the CPA Orders and Memorandums. Article 47 of the Convention provides that protected persons shall not be deprived of the benefits of the convention by any agreement concluded between the authorities of an occupied territory and the Occupying Power¹⁰¹. Authority to legislate for the territory is reserved to the *de jure* sovereign, and thus according to the standards of occupation law, the only recognized legitimate representative bodies are those chosen or constituted until after the occupation is over. This was clearly not the case of the Governing Council, which more correctly must be regarded as an advisor to the CPA, rather than a legitimate and democratic voice of the people that it was supposed to represent¹⁰².

Departing from this institutional arrangement, it is possible to draw a preliminary conclusion about the transformational events in Iraq. A pragmatic reading of the political and economic reforms carried out by the CPA is that the Security Council did not intend to alter the authority and transformation exercised by the CPA. This is the best available hermeneutic position to make sense of such a *sui generis* situation. Under Chapter VII of the UN Charter, the Security Council delegated authority to the CPA to respond to the 'threat to international peace and security' that Iraq represented for the Council¹⁰³. Subsequently, the Council ratified the reformist agenda as an exercise of its plenary power¹⁰⁴. From the beginning of the occupation, the Security Council was reluctant to address CPA reforms. Furthermore, the UN as an institution explicitly supported the economic reforms. On July 17th, 2003, Secretary General KOFI ANNAN recalled the deterioration of Iraq's economy caused by successive wars, strict international sanctions and debilitating economic controls, and affirmed that the development of Iraq required a transition from a centrally planned economy to a market economy¹⁰⁵. The Security Council reminded the occupying powers of their humanitarian law obligations and defined broad goals for UNAMI and the SCRG, but it stopped short of creating a binding mandate for the occupation. Furthermore, Resolution 1483 appealed to member states "to assist the people of Iraq in their efforts to reform their institutions and rebuild their country"¹⁰⁶. Such a broad statement can be read either as tacit approval of the actions that would be taken by the CPA, or that the Security Council was recasting the words of the Fourth Geneva Convention in terms

of protection for the local population. Either way, the Security Council obscured the CPA's obligations and responsibilities under occupation law by responding to the CPA's agenda in Iraq with a mixture of pragmatism and oversight.

SECTION IV

Features such as the preventive rationale of the attack, the unilateralism of the decision-making process and activism with regard to regime change that characterize the occupation of Iraq have served to make Iraq a test case for whether Coalition nations can engender a liberal democracy and free-market capitalism within the Arab world¹⁰⁷. In February 2003, President Bush spoke of "a new Arab charter that champions internal reform, greater political participation, economic openness and free trade"¹⁰⁸. A new regime in Iraq, he said, 'would serve as a dramatic and inspiring example of freedom for other nations in the region'¹⁰⁹.

Shortly after the CPA commenced operations, Administrator PAUL BREMER announced that economic reform was the Coalition's 'most immediate priority' and '[a]s we provide for Iraq's security, we have begun its political transformation'¹¹⁰. For ROBERT OWEN, Bremer's vision was a confirmation of how the reconstruction of Iraq was monopolized by senior members of the US Defence Department and how the reconstruction effort was based on a 'wildly over-optimistic scenario developed by the neo-conservative ideologues in Washington egged on by members of the Iraqi opposition in exile'¹¹¹. The CPA's commitment to and methodology for economic transformation was broadly based on the following rationale:

a. According to the CPA's interpretation of the law and usages of war, it had the responsibility to improve the conditions of life, technical skills, and opportunities for all Iraqis and to fight unemployment with its associated deleterious effect on public security. As expressed in its cumbersome Order 39, the CPA was legally bound to develop infrastructure, foster the growth of Iraqi business, create jobs, raise capital, result in the introduction of new technology into Iraq and promote the transfer of knowledge and skills to Iraqis¹¹².

b. In order to fulfil those expectations effectively, the CPA identified problems arising from the domestic legal framework regulating commercial activity in Iraq, and the way in which the relevant legislation had been implemented by the former regime. Consequently, the CPA was necessarily engaged in a process of legal reform in order to underpin its developmental strategy for Iraq.

c. Finally, the CPA was supported in such reforms by the Governing Council and the Report of the Secretary General to the Security Council on July 17, 2003. The latter affirmed explicitly 'the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect'¹¹³.

From 16 May 2003 to 28 June 2004, the CPA enacted one hundred binding orders, a substantial number of which concerned the reformation of Iraq's economy. Mistaking the dimension of such a task, combined with a lack of local knowledge and a naïve underestimation of Iraqi opposition to the

economic reforms¹¹⁴, the CPA's orders collapsed the four traditional phases of economic transformation –stabilization, liberalization, privatisation and legal and regulatory reform– into a single exercise¹¹⁵. The CPA simply ignored dissenting opinions that its policies were not only rather blatant attempts to shape Iraq's economy in the interests of the countries belonging to the Coalition and other foreign investors, but also against the interests of Iraqis themselves¹¹⁶.

Announced as an "exciting economic transformation", the areas of the CPA's economic reforms in Iraq mirrored the eight-point action plan presented by the CPA administrator Paul Bremer at the World Economic Forum 2003 in Davos (see Annex 1, Table 1). The reforms covered eight broad areas: banking, taxation, foreign trade and investment, private economic transactions, securities regulation, regulatory reforms, state-owned enterprises and economic governance and performance. As such, the reforms emulated the "Washington consensus" prescriptions: fiscal discipline, public expenditure contraction, tax reform, financial liberalization, floating exchange rates, trade liberalization, friendly foreign direct investment policies, privatization of state-owned enterprises, market deregulation and sanctity of property rights¹¹⁷.

According to these criteria, the CPA issued its binding orders updating Iraq's economy with standards of Western economic law. These included opening Iraq to the flows of the international market¹¹⁸, reforming finance and bank law and consolidating the figure of a central bank¹¹⁹, granting all foreign contractors operating in Iraq immunity from Iraqi legal pro-

cesses¹²⁰, suspending all tariffs¹²¹, and establishing mechanisms of anti-corruption governance on a national and industrial level¹²². The most iconic of the reforms was the establishment of a sturdy liberal regime of foreign direct investment. Introduced by CPA Order 39, this reform has become a flashpoint for the major critiques against the economic reforms and, more generally, US political aspirations in Iraq. The new treatment for investors in Iraq was put forth in this way: "A foreign investor shall be entitled to make foreign investments in Iraq on terms no less favourable than those applicable to an Iraqi investor", and "[t]he amount of foreign participation in newly formed or existing business entities in Iraq shall not be limited". Additionally, it states that the foreign investor "shall be authorized to... transfer abroad without delay all funds associated with its foreign investment, including shares or profits and dividends"¹²³.

Order 39 encapsulates all key provisions of trade and investment agreements that are heavily contested by countries, regions and multilateral fora¹²⁴. As MARY LOUI MALIG has observed, although it is no more than six pages long, Order 39 "disguises its true weight, for it carries with it the same impact of an investment agreement that usually take years for countries to agree upon"¹²⁵. KAMIL MAHADI, for instance, argues that the CPA Regulations, Orders and Memorandums, and the subsequent crystallization of the economic reforms in the new Iraqi Constitution, have helped to create a society based largely on speculation and profiteering, to the sole benefit of interest groups associated with such activities¹²⁶. In the same vein, he argues that the occupying powers in Iraq failed to create conditions in which domes-

tic industry –public and private– might regenerate and left the country immersed in a vicious circle of poverty and insecurity. A clear example is the disbanding of the Iraqi army and the radical process of De-Ba'athification in the public service, which left a large number of men without income or purpose. This not only multiplied the number of unemployed in Iraq, but also added strength to the organization of insurgency and intensified ethnic conflict¹²⁷.

Unlike the former Soviet states, Iraq had a private sector and a strong business culture prior to the occupation. A market-oriented reform programme would not have found many enemies if it had aimed to support the private sector while rehabilitating the public sector, and if it had left the issue of privatisation until the restoration of normality and constitutional government¹²⁸. Nonetheless, severe financial constraints imposed in abnormal circumstances, together with price and foreign exchange measures, have ruined the Iraqi public sector and prepared it for a "bargain sale"¹²⁹. Even though there are signs of economic revitalization in certain sectors¹³⁰, Iraqi companies are struggling to compete after years of severe shortages of key inputs such as capital and technology. Moreover, although the surge of imports under the new government's free trade policies have helped to keep inflation down, it has placed a severe strain on existing companies and discouraged investment by new Iraqi entrepreneurs.

The provision on national treatment in Order 39, which forbids discrimination between national investors and foreign investors, instead could have ordered investors to utilize a certain percentage of domestic content in goods, to employ locals, or to revitalized national industries so

as to build the domestic capacity. Governments have traditionally used measures such as joint ventures or technology transfer to help the local economy and to spread the benefits of foreign investment to local communities. Promoting private-sector growth in post-conflict environments requires more than removing legal barriers to private economic activity. Private sectors that have been ravaged by war and repressed by state control cannot recover without aggressive assistance to provide credit, training, and opportunities¹³¹. Yet under the economic conditions introduced in Iraq, there was no requirement to reinvest corporate profits or to ensure that at least a portion of the profits was recycled into the Iraqi economy. In October 2003, Iraq's interim trade minister and now Minister of Trade Ali Abdul-Amir Allawi warned against forcing his nation's economy to mould itself rapidly into a free-market system, saying that a swift change would fuel unemployment and heighten political instability. For him, "we suffered through the economic theories of socialism, Marxism and then cronyism ... [n]ow we face the prospect of free-market fundamentalism"¹³².

The new Iraqi Constitution, approved on 15 October 2005, epitomises the outcomes of the Coalition's interpretation of occupation law and its impact upon the stability and security of Iraq. The priority of economic reform for the CPA permeated the Constitutional drafting process. The sections of the Constitution that fully embrace the liberalization of Iraq's economy differ somewhat to earlier drafts of the Constitution. As late as June 30 2005, drafts of the Constitution made repeated calls for "social justice" as the basis of building a new Iraqi

society. These early intentions embraced every Iraq's right to education, health care, housing and other social services, placing the state as the Iraq people's collective instrument for achieving development. However, in many ways, the approved Constitution continues the controversial reforms enacted by the CPA and the norms that the Iraqi Governing Council set on the TLA¹³³. The Constitution shifted during the negotiations from an emphasis on social security towards a focus on striving to achieve high levels of economic efficiency¹³⁴. According to an August 2005 survey conducted by the International Republican Institute, 60.80% of Iraqis from across the country wanted the Constitution to establish "a strong central government"¹³⁵. Furthermore the Constitution's treatment of oil production and revenues is linked with the federal structure of the new Iraqi state. This situation presents a number of unattractive scenarios to the Sunnis, who live mostly in the oil-dry centre of Iraq between both the northern Kurdish and southern Shi'a rich oil-regions¹³⁶. More precisely, the main concern is that the Constitution as currently worded could lead to several autonomous zones so that a central government in Baghdad would not have complete control over oil resources. In the longer term, it is possible that decentralized government could lead to faster development of Iraq's oil and gas fields. On the other hand, Sunni dissatisfaction with the Constitution, and the underlying sense of legal instability and contractual chaos, have agitated insurgency and discouraged foreign investment¹³⁷.

Over and above the breaches of occupation law in Iraq, it is problematic that the relationship between economic growth and

democracy in Iraq was understood in a ready-made and determinist way by the CPA¹³⁸. The occupation was characterised by optimistic conceptions of modernisation as mutually reinforcing sequences of economic growth, social and political stability, national integration and democratisation. There was an implicit assumption by the Coalition that capitalist development would mobilize society in a way that alters traditional political, cultural, and social organization and the informal institutional frameworks of the Iraqi people. That self-determination is a pivotal value implying ownership was not recognised. A further central assumption by the Coalition was the autonomy of the political system vis-à-vis the rest of society. The CPA adopted the contested premise "development first, democracy later", which assumes that poor countries must develop economically before they can democratise¹³⁹. Departing from these considerations, the Coalition believed that CPA's economic reforms could be carried out in a vacuum of legitimacy and still ensure stability and economic progress¹⁴⁰.

Even though the CPA's economic plans acknowledged the dire impact of increasing economic inequality on democracy, it failed to interrogate the distributional implications of its own market-reform policies. The CPA Orders, and the broader narratives used by its counterparts, assumed that democratic prospects are enhanced when economic inequality decreases and the balance of class power moves in favour of subordinate interests¹⁴¹. Yet the reality is that such efforts in Iraq have produced superficial forms of democratisation that do not make sense for common people¹⁴². It was not for the US, or any other country or coalition of countries, to determine what

trade laws Iraqis must live by, and there was a total failure to recognise that such rules can only be legitimate if they are passed initially by an elected Iraqi government free of foreign occupation and domination¹⁴³. The Coalition believed that invading Iraq would be easy, that Saddam Hussein's military would crumble, and that the troops would be welcomed as a liberator. They failed to comprehend that Iraq has long been an occupied and externally manipulated country with complex ethnic realities. Consequently, Iraqis understandably regard the occupation, and the suite of imported economic and legal transformations, as yet another episode of outside exploitation¹⁴⁴.

Prior to the occupation of Iraq, the assumption that there is a direct link between economic growth and democracy had already revealed as flawed in a number of different political and cultural contexts. When the Berlin Wall fell, the countries of Eastern Europe and the former Soviet Union began transitions to a market economy, with heated debates over how this should be accomplished. One choice for Eastern Europe was "shock therapy" –quick privatization of state-owned assets and abrupt liberalization of trade, prices, and capital flows– while the other was gradual market liberalization to allow for the rule of law to be established at the same time¹⁴⁵. With the intention of paring back state control over the country's economies, radical liberalizing reforms neglected the interdependencies between economic growth, security, democracy, and social well-being.

The reduction of state activity in Eastern Europe was often confused or deliberately misconstrued as an effort to reduce state capacity overall, in order to propel

market solutions. JOSEPH STIGLITZ saw these same contradiction repeated in the whole process of occupation and reconstruction in Iraq. It was clear to STIGLITZ that the most important task –beyond creating a democratic state and restoring security– was reconstructing the economy. Nevertheless, STIGLITZ affirmed that during the period of occupation, the Coalition was "blinded by ideology" and seemed determined to continue its record of dismal failures by ignoring the appalling outcomes of shock therapy in such dissimilar countries as Bolivia and Russia¹⁴⁶. Instead of countries that have undertaken a gradualist approach to the process of economic reform, shock-therapy countries have typically seen incomes plunge and poverty soar¹⁴⁷. By trying to leapfrog into a *laissez-faire* economy, these countries have witnessed social indicators, such as life expectancy, fall at the same time as producing dismal GDP figures¹⁴⁸. More than a decade after the beginning of transition, many postcommunist countries have not returned to pre-transition income levels. Unfortunately, the prognosis for establishing a stable democracy and the rule of law in most shock-therapy countries remains bleak¹⁴⁹.

Contemporary economic literature is replete with examples of problems stemming from the shock therapy in South America and Eastern Europe than can now be applied to Iraq. These include: (1) increased concentration of wealth in the hands of the very rich¹⁵⁰; (2) increased unemployment and underemployment; (3) wages that remain low for those who still have jobs; (4) decreased power of trade unions under the pressure of economic globalization¹⁵¹; (5) increased crime as more people become economically marginalized¹⁵²; (6) increased

numbers of police and prisons to combat the increase in crime¹⁵³; (7) increased homelessness and street begging; (8) an erosion of civil liberties; (9) rural depopulation as small farmers are put out of business by corporate agribusiness which, with free trade can take full advantage of its economies of scale sweeping away agriculture of means as a mean of subsistence¹⁵⁴; (10) armed resistance by traditional cultures put under economic siege¹⁵⁵; (11) increased skilled and unskilled migration to more economically developed countries by those who no longer have land to work and/or cannot find work in the cities¹⁵⁶; (12) an increasingly irrelevant political system that is unable and/or unwilling to start a genuine, democratic debate because it is controlled by interlocking corporate interests that have the most to gain from the status quo¹⁵⁷; and (13) finally, an alarming decrease in social solidarity¹⁵⁸.

FINAL REMARKS

A literal interpretation of Article 43 of the Hague Regulations, which prohibits change to the laws in force in an occupied territory 'unless absolutely prevented', suggests the CPA's economic reforms were contrary even to modern interpretations of occupation law¹⁵⁹. While some changes to the legislation and administrative structures of Iraq may have been permissible on the basis of security, public order, or furthering humanitarian objectives, on the basis of the Fourth Geneva Convention, more wide-ranging reforms in terms of economic governance in Iraq were not lawful. Besides changes in security and law enforcement, which directly affected the CPA's ability to keep civil order and deal with the ongoing insurgency challenging its authority, a lit-

eral reading of the Hague Regulations and the Fourth Geneva Convention would hold that the CPA economic actions were unrelated to the orderly administration of the territory. All of the changes were significant, transformative and intended to last. The CPA believed that Iraqi prosperity required abandoning the old central planning model in favour of liberal market policies. But this economic paradigm shift was not essential to providing basic means of subsistence to Iraqis. Had the old economic structures remained in place, the CPA would still have been able to provide for Iraqi people's basic needs.

Even taking into account that the Fourth Geneva Convention imposes affirmative obligations on occupying powers, the Convention does not give enough support for such changes. Claims of necessity are restricted in the terms of the Geneva Convention and can only address conditions that exist during the occupation¹⁶⁰. Virtually none of the CPA legislation was rescinded after the transition to Iraqi rule. Post occupation administration should not be constrained, *a fortiori*, to a specific political or economic template. This is effectively what happened in Iraq. The Transitional Administration Law and CPA's Order No. 100 created an opt-out system. They ensured that CPA laws would continue in force unless affirmatively repealed. The economic reforms were not intended solely (or even primarily) to prevent the CPA from transgressing rights of economic subsistence. Instead, they were long-term and forward-looking, intended primarily to catapult the political and economic reforms after the occupation had ended.

The Security Council Resolution 1483 was thus far from the ideal version of a

mandate with respect to both the institutional arrangement of the occupation and the substantial changes that it allowed to take place in Iraq during the occupation period. The Resolution and its effects were basically antagonistic to the core of occupation law. Four features of the Resolution are especially salient:

(i) Even though the Coalition and Security Council's intentions in Iraq were for regime change and a transformational operation, Resolution 1483 and later Resolution 1511 recognized the US and UK as occupying powers bounded by the restrictive obligations under the Geneva Conventions of 1949 and the Hague Regulations of 1907¹⁶¹.

(ii) On the other hand, the UN did not have a leading role in Iraq. Instead, the Security Council and the Secretary General mutely accepted the CPA's actions that were in breach of the Hague Regulations and the Fourth Geneva Convention.

(iii) The Resolution did not establish the principles that should have governed the relationship and limitations between the CPA and the people of Iraq during the period of occupation. A proper representation of the Iraqi people, and a better appreciation of the circumstances of Iraq, could have improved the CPA drastic mishandling of occupation law¹⁶².

(iv) Finally, the CPA initiated a radical process of reform in Iraq during the occupation, disregarding the intrinsic danger of such caustic reforms in an already fragile society.

There is still a strong argument that the body of occupation law best protects the civilian population, because that is what it was originally designed to accomplish¹⁶³. The increasingly prevalent view that (i) there is a "responsibility to protect", (ii)

humanitarian intervention is an international commitment, (iii) well-intentioned governments should be able to rescue civilian population at risk, and (iv) democracy, human rights and the free market are global values, do not and should not point to a new interpretation of occupation law.¹⁶⁴ There is a convincing case for retaining occupation law as a principle in order to guard the self-determination of people and discipline aggressor armies and hold them accountable for their actions on foreign territory. It is vital to recognize the importance of a territory's people as the very basic argument that sustains the structure of occupation law, and confers the UN Charter, Fourth Geneva Convention, peremptory law and customary law with an intrinsic logic. If the main purpose of the international community's involvement in the internal affairs of countries is the well-being of the local population in holistic terms, then transformational occupation should attend to that angle of self-determination that recognizes the people themselves as the key to a real process of reconstruction. This recognition must go beyond vague calls for democracy, human rights, good governance and economic growth. In the context of state-building, it is difficult and indeed culturally arrogant to determine what sort of contextually workable regime should replace an overthrown local government.

As EDWARD AMADEO and TARIQ BANURI note, the failure of the state does not derive from its refusal to adhere to a theoretical dogma. Rather, 'it derives, in the short run, from its abandonment of the goal of governance in favour of theoretical certitude, and in the long run, from its inability or unwillingness to create or modify institu-

tions to facilitate the management of conflicts which are forever changing in form and intensity¹⁶⁵. In Iraq, the ideological premises of the CPA's reforms severely limited attempts at democratic governance by foreclosing debates on a wide range of issues in political economy, such as income

distribution, taxation, and protection or non-protection of certain economic activities. In a society where democracy and stability are aims, the outcomes of such debates cannot be fixed *a priori*¹⁶⁶ but must themselves must be subject to democratic contestation¹⁶⁷.

ANNEX 1.

TABLE. KEY TOPICS OF CPA'S ECONOMIC GOVERNANCE REFORMS IN IRAQ

Key Topics of the Economic Reform ¹⁶⁸	Key Areas	CPA Orders ¹⁶⁹
1. Start a thoroughgoing reform of Iraq's financial sector in order to provide liquidity and credit for the Iraqi economy; 2. Simplify the regulatory regime so as to lower barriers to entry for new firms, domestic and foreign; 3. Review Iraq's body of commercial law to determine which changes are needed to encourage private investment; 4. Lift unreasonable restrictions on property rights; 5. Develop anti-trust and competition laws; 6. Develop an open market trade policy providing for a level playing field with regional partners; 7. Encourage the adoption of laws and regulations to assure that Iraq has high standards of corporate governance; 8. Develop accelerated training programs for business managers in best practices and business ethics.	Banking	Order n.º 40: Bank Law Order n.º 56: Central Bank Law Order n.º 94: Bank Law
	Taxation	Order n.º 37: Tax Strategy 2003 Order n.º 49: Tax Strategy 2004 Order n.º 38: Reconstruction Levy
	Foreign Trade and Investment	Order n.º 12: Trade Liberalization Order n.º 20: Trade Bank of Iraq Order n.º 39: Int. Private Ownership, National Treatment, Free-Flow of Funds, Leases of Real Property to Foreigners.
	Private Economic Transactions	Order n.º 64: Corporate Law Order n.º 78: Amendment commerce Code & correlated. Order n.º 80: Intellectual Property Law Order n.º 83: Copyright Law
	Security Regulation	Order n.º 18: Interim Law on Security Markets.
	Regulatory Reforms	Order n.º 65: Communication & Media Commission Order n.º 66: Traffic Code
	State-Owned Enterprises	Order n.º 76: State Owned-Enterprises Order n.º 75: Military Industrial Enterprises.
	Governance & Market Performance	Order n.º 55: Public Integrity Commission Order n.º 57: Iraqi Inspector General Order n.º 59: Incentives for Whistleblowers Order n.º 77: Board of Supreme Audit Order n.º 87: Public Contracts Order n.º 93: Anti-Money Laundering Order n.º 95: Financial Management Law & Public Debt Law

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- 148 OWEN, above n 111; GUILLERMO O'DONNELL. *Poverty and Inequality in Latin America* (1998); DANI RODRICK. "Understanding Policy Reform" (1996) xxxiv (1) *Journal of Economic Literature*; J. NELSON (ed.), *Economic Crisis and Policy Choice: The Politics of Economic Adjustment in the Third World* (1990); J. NELSON, et al. *Fragile Coalitions: The Politics of Adjustment* (1989). See opposite, A. ALESINA and D. RODRIK. "Distributive politics and economic growth" (1994), *Quarterly Journal of Economics* 109, 465; M. BRUNO, M. RAVALLION and L. SQUIRE. "Equity and growth in developing countries: old and new perspectives on the policy issues" (*Working Paper*, n.º 1563, World Bank Policy Research, January 1996).
- 149 STIGLITZ, above 145. See e.g. on the case of Bosnia and Herzegovina; *Bosnia and Herzegovina: Post-Conflict Reconstruction and the Transition to a Market Economy*, World Bank Operations Evaluation Department, The World Bank, (2004), xiii.
- 150 See e.g.; DEEPAK LAL. "Political economy of economic policy making in developing countries", in MATS LUNDAHL and MICHAEL L. WYZAN (eds.), *The Political Economy of Reform Failure* (2005), 241.
- 151 See e.g.; OZAY MEHEMET. *Westernizing the Third World, The Eurcentricity of economic development theories* (2th ed., 1999), 163. See especially in Iraq, Workers Liberty at [<http://www.workersliberty.org/taxonomy/page/or/320>].
- 152 See e.g.; JAMES HIDER. "Violence in Iraq verges on civil war", *The Australian* (Canberra), Jan 7, 2006, 11.
- 153 See e.g.; *Jail inspections finds number of problems* (2005) CNN.com International [<http://edition.cnn.com/2005/WORLD/meast/12/12/iraq.main/>] Jan. 16, 2006.
- 154 See e.g.; SABRI ZIRE AL-SAADI. *Iraq's Post-War Economy: A Critical Review* (April 5, 2004), Global Policy Forum [<http://www.globalpolicy.org/security/issues/iraq/attack/consequences/2004/0405econreview.htm>] at Jan. 25, 2006; *Iraq: Economic Structure* (Dec. 2004), The Economist Intelligence Unit, Country Briefings, July 31, 2004, at [<http://www.economist.com/countries/Iraq/profile.cfm?folder=Profile-Economic%20Structure>] at Dec. 25, 2005.
- 155 See especially on Iraqi resistance; BARNES, above n 114, 5; Dodge, above n 114, 30; Chehab, above n 114, 1.
- 156 See e.g., STEPHEN GLAIN. "Land of Tycoons", *Newsweek, International Edition* (New York), June 27, 2005, 46.
- 157 THANDIKA MKANDAWIRE. "Crisis management and the Making of 'Choiceless Democracies'", in RICHARD JOSEPH (ed.), *State, Conflict and Democracy in Africa* (1999), 123.
- 158 ROBERT LOONEY. "The neoliberal model's planned role in Iraq's economic transition" (2003), 57(4) *The Middle East Journal*, 568.
- 159 See especially on the heated discussion about bridges to Articles 47 on Pillage, and 48 Tax and revenue mismanagement by the CPA, Fourth Geneva Convention.
- 160 ZWANENBURG, above 15, 750.
- 161 S.C. Res. 1483 pars. 1-5.
- 162 See on the political and strategic mistakes during Iraq's invasion; LARRY DIAMOND. *Squandered Victory* (2005), 314.
- 163 SCHEFFER, above n 4, 851.
- 164 Ibid., 852.
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- 167 MKANDAWIRE, above 157, 123.
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- 169 See for all of the CPA Regulations [<http://www.iraqcoalition.org/regulations/index.html#Regulations>].