OCCUPATION LAW, SOVEREIGNTY, AND POLITICAL TRANSFORMATION: SHOULD THE HAGUE REGULATIONS AND THE FOURTH GENEVA CONVENTION STILL BE CONSIDERED CUSTOMARY INTERNATIONAL LAW?

MAJOR NICHOLAS F. LANCASTER*

I. Introduction

Has customary international occupation law changed as a result of actions taken by the Coalition Provisional Authority (CPA) in Iraq under authority of United Nations (UN) Security Council Resolution 1483?[1] The CPA legislated extensively in the areas of government and economics, using its authority under Resolution 1483.[2] Although justified by the goals expressed by the UN Security Council in Resolution 1483, much of this legislation is inconsistent with existing customary international occupation law as reflected in the Hague Regulations[3] and the Geneva Convention.[4] This article argues that

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* Judge Advocate, U.S. Army. Presently assigned as Professor, Criminal Law Department, The Judge Advocate General's School, Charlottesville, Virginia. LL.M. 2005, The Judge Advocate General's School, Charlottesville, Virginia; J.D. 1999, Indiana University at Bloomington; B.A., 1992, Xavier University, Cincinnati, Ohio. Previous assignments include Deputy Staff Judge Advocate, 19th Sustainment Command (Expeditionary), Taegu, Republic of Korea; Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault) & Fort Campbell, Kentucky, 2001-2004 (Administrative Law Attorney, 2001; Trial Counsel, 2001; Detention Facility Legal Advisor, Kandahar, Afghanistan, 2002; Chief of Justice 2002-2003; Liaison Officer to the Coalition Provisional Authority, 2003-2004; Chief of International & Operational Law 2004); Office of the Staff Judge Advocate, Fort Riley, Kansas, 1999-2000 (Trial Counsel); Funded Legal Education Program Student, Bloomington, Indiana, 1996-1999; Infantry Officer, 1st Battalion, 8th Infantry Regiment, Fort Carson, Colorado, 1993-1996 (Rifle Platoon Leader, 1993-1994; Mortar Platoon Leader, 1995; Assistant S-3, 1996). Member of the Indiana state bar and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 53d Judge Advocate Officer Graduate Course.

[1] S.C. Res. 1483, U.N. SCOR, 57th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003) [hereinafter UNSCR 1483].

[2] *See generally* David J. Scheffer, *Agora (continued): Future Implication of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT'L L. 842 (2003); Michael Ottolenghi, Note: *The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation*, 72 FORDHAM L. REV. 2177 (2004).

[3] Hague Convention No. IV Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV].

[4] Geneva Convention (IV) for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

customary international occupation law has changed as a result of state practice, culminating in the Coalition occupation and administration of Iraq. Customary international law no longer requires adherence to the principle that an occupier is a mere trustee, without authority to transform the occupied state's form of government and economy to reflect democratic values, particularly when the transformative goals are authorized by the UN Security Council.

This article discusses the relevant international agreements and treaties considered to make up the conventional international law of occupation. It then discusses the ways international rules become part of customary law, before citing two examples of occupations since 1949, one where customary international law is thought to apply, and another where the rules were dictated by the UN Security Council. There is a brief discussion of what portions of Hague and Geneva might reflect customary as well as conventional international law on occupations. Lastly, this article argues that customary international law has changed as a result of state practice culminating in the UN sanctioned coalition occupation of Iraq.

II. Background

Before the late nineteenth century, when one country defeated another in battle, the contested territory and its people belonged to the victor.[5] As the concept of state sovereignty emerged in the 1800s, rules developed to govern the victor's behavior upon occupying another's land. The Hague Convention of 1907 is the baseline document codifying customary occupation law.[6] The Fourth Geneva Convention of 1949 supplements the Hague Convention where it pertains to occupation law.[7] The Additional Protocols of 1977 add to the protections for civilian populations contained in the Fourth Geneva Convention.[8] Although the United Nations Charter does not address occupation law, its terms have

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[5] GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 7 (1957) [hereinafter VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY].

[6] Hague IV, *supra* note 3.

[7] GC IV, *supra* note 4, art. 154.

[8] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 16 I.L.M. 1492 [hereinafter AP II].

provided the primary justification for most occupations since its creation in 1945.[9]

A. Hague Regulations of 1907

In 1899 and 1907, two international conferences were held at The Hague for the purpose of creating agreements to prevent wars in the future.[10] The conferences also codified the rules of warfare, in the event that prevention failed.[11] The documents that resulted from these conferences are known as the Hague Conventions and include annexed Regulations respecting the Laws and Customs of War on Land.[12] Convention IV and its annexed Regulations, adopted by the 1907 Convention, are virtually identical to Convention II adopted in 1899.[13] The Hague Regulations codified the core of customary international law respecting armed conflict, and include a section devoted to occupation law entitled: Military Authority Over the Territory of the Hostile State.[14]

The Hague Convention of 1907 reflects its drafters' purpose to maintain state sovereignty in the wake of battlefield defeat. The convention is a product of its times, where states fought mainly limited wars with minimal impact on civilian populations.[15] The idea was that although an army might be defeated in battle, the sovereign still existed and would sue for peace, reaching some negotiated settlement whereby the occupied territory would return to the status quo ante.[16]

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[9] U.N. Charter.

[10] 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 671 (Rudolph Bernhardt ed., 1995) [hereinafter EPIL].

[11] *Id.*

[12] Hague IV, *supra* note 3.

[13] EPIL, *supra* note 10, at 671.

[14] *Id.* at 674.

[15] Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 IDF L. REV. 19, 20 (2003). The most famous expression of this idea was the statement of King William of Prussia on 11 August 1870, "I conduct war with the French soldiers, not with the French citizens." *Id*. at 20. This is also known as the Rousseau-Portales doctrine, according to which "wars were directed against sovereigns and armies, not against subjects and civilians." NISUKE ANDO, SURRENDER, OCCUPATION, AND PRIVATE PROPERTY IN INTERNATIONAL LAW 35 (1991).

[16] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 11 (1993).

This idea of state sovereignty is reflected in Article 43 of the Hague Regulations of 1907:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[17]

The power of the occupant to legislate is clearly restricted by Article 43 to those areas that affect its security. In fact, not only is the occupant's power to legislate restricted, but he is also required to respect the laws already in force in the occupied area, the laws of the rightful sovereign.[18]

Occupation is seen as a temporary condition, where the occupant functions almost like a trustee of the occupied territory and population until the sovereign can return.[19] Article 55 of the Hague Regulations continues the emphasis on fiduciary duties of an occupier, calling the occupier an "administrator and usufructuary" of most public property and requiring the preservation of natural resources.[20] The clear import of these provisions is that the occupier may not change the existing laws in the main to reflect his will, let alone change the form of government in the occupied nation.[21]

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[17] Hague IV, *supra* note 3, art. 43.

[18] *Id.* art. 43.

[19] VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY, *supra* note 5, at 31; BENVENISTI, *supra* note 16, at 6.

[20] Hague IV, *supra* note 3, art 55. The complete Article reads: "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." Usufruct is defined as "the right of enjoying all the advantages derivable from the use of something that belongs to another, as far as is compatible with the substance of the thing not being destroyed or injured. A usufructuary is a person who has a usufruct property." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998).

[21] COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 303-308 (Jean S. Pictet et al. eds. 1958) [hereinafter GC COMMENTARY]; Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS 104, 113 (1978); ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 5 (1978).

In addition to the two provisions cited above, the Hague Regulations contain rules governing the occupier's use of property[22] and protecting the civilian population from abuse.[23] The occupier may generally seize state property that can be used for military purposes, but may not seize private property, even of a military character, without paying compensation.[24] The occupier may collect the normal taxes due in the occupied territory, but must collect them in the manner provided for by their own law, and use the proceeds for the purpose of governing the area.[25] If the occupier levies additional funds or even services from the population, they must be used only for the needs of the occupying force.[26] Protections for the civilian population include forbidding oaths of allegiance to the occupier,[27] rules for respecting private property and family honor,[28] and a prohibition against pillage.[29]

The Hague Regulations provided a baseline codification of customary international law pertaining to armed conflict. However, they failed to prevent the wide-spread suffering sustained by civilian populations in the first half of the 20th century.

B. Geneva Conventions of 1949

The impetus behind the Fourth Geneva Convention of 1949 was the suffering of civilian populations in World War I (WWI) and World War II (WWII), and the desire to prevent such suffering in future conflicts.[30] The Hague Regulations had proven inadequate to regulate the behavior of states in the conduct of total war.[31] As discussed previously, the Hague Regulations were drafted at a time when war was still considered a discrete event, fought by soldiers, with minimal effect on the civilian population.[32] The advent of the world wars, with widespread use of tactics implicating civilian populations, changed understanding of the concept of war itself, and highlighted the need to protect civilians during

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[22] Hague IV, *supra* note 3, arts. 46, 47, 53, 54, and 56.
[23] *Id.* arts. 45 and 46.
[24] *Id.* arts. 46, 53.
[25] *Id.* art. 48.
[26] *Id.* art. 49.
[27] *Id.* art. 45.
[28] *Id.* art. 46.
[29] *Id.* art. 47.
[30] VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY, *supra* note 5, at 16.
[31] BENVENISTI, *supra* note 16, ch. 4.
[32] *See* discussion *infra* Part II.A. (discussing the Hague Regulations of 1907).

armed conflict.[33] After WWII, the International Committee of the Red Cross called for a conference, held in Geneva from 21 April to 12 August 1949, entitled the Diplomatic Conference for Establishment of International Conventions for the Protection of Victims of War.[34] This conference resulted in the four Geneva Conventions of 1949. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) deals specifically with the protection of civilians in armed conflict. [35]

The Fourth Geneva Convention reflects an emphasis on the civilian population itself, rather than the state.[36] There are few rules granting authority to the occupier, and many provisions enumerating the occupier's obligations to the civilian population. This reflects the overarching purpose of the Fourth Geneva Convention to protect the civilian population from harm during periods of armed conflict and occupation.[37] It also reflects a shift in the way the concept of sovereignty is understood. Instead of sovereignty vested in the government or state, there seems to be an emphasis on sovereignty vested in the population itself. This concept of popular sovereignty, along with the principle of self-determination, had taken center stage in the United Nations Charter, created four years earlier.[38]

One way the Geneva Conventions' drafters tried to protect civilians was to increase the scope of the Conventions to cover more situations and more persons who could be affected by war.[39] Under the Hague Regulations, the rules only applied between states who had signed the Regulations, and even then, only to signatories when all parties to the conflict had signed.[40] The Hague Regulations also do not contain a provision stating when they will apply.[41] The assumption was that the Regulations would apply during wartime, and that wartime would be

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[33] GC COMMENTARY, *supra* note 21, at 3.
[34] VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY, *supra* note 5, at 16.
[35] GC IV, *supra* note 4.
[36] BENVENISTI, *supra* note 16, at 6.
[37] GC COMMENTARY, *supra* note 21, at 3.
[38] U.N. Charter art. 1. Article 1 states in pertinent part, "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *Id.*
[39] GC COMMENTARY, *supra* note 21, at 17-21.
[40] Hague IV, *supra* note 3, art. 2. This is known as a *si omnes*, or "general participation" clause.
[41] GC COMMENTARY, *supra* note 21, at 17.

defined by a declaration of some kind by the parties.[42] Experience subsequent to the Hague Regulations showed that there were many circumstances where hostilities were not preceded by a declaration, and yet there was still a need for protection of civilian populations.[43] This effort to broaden the scope of protections in the law of war is evident in Article 2 common to all four Geneva Conventions of 1949.[44] Common Article 2 says that the Geneva Conventions will apply to all cases of armed conflict between states, even if not declared, and also in all cases of occupation, even where the occupation is unopposed.[45] Common Article 2 also says that the Convention will apply to all signatories, even if there is a party to the conflict that is not a signatory.[46]

The Fourth Geneva Convention contains many provisions concerning food,[47] medical care,[48] and overall treatment of the civilian population.[49] In contrast, there are few provisions related to legislation by the occupant, aside from changes to the penal laws.[50] One explanation for why there is little discussion of the powers of the occupant is that the Fourth Geneva Convention was not intended to replace the Hague Regulations, but rather to supplement its provisions.[51] This is explicit in Article 154 of the Fourth Geneva Convention, which

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[42] *Id.*
[43] *Id.*
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> In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

GC IV, supra note 4, art. 2.
[45] *Id.*
[46] *Id.*
[47] *Id.* art. 55.
[48] *Id.* arts. 55-57.
[49] *Id.* arts. 27, 29, 31, 32.
[50] *Id.* arts. 64-77.
[51] GC COMMENTARY, *supra* note 21, at 274.

says the Convention supplements Sections II (Hostilities) and III (Military Authority over the Territory of the Hostile State) of the Hague Regulations.[52] The general editor of the International Committee of the Red Cross Commentary on the Geneva Conventions of 1949, Jean S. Pictet,[53] explains the relationship between the Hague Regulations and the Fourth Geneva Convention by saying the Fourth Geneva Convention basically "amplifies" the provisions contained in the Hague Regulations.[54]

The Fourth Geneva Convention uses the term "protected person" to describe persons in the occupied territory that do not qualify for treatment under one of the other three Conventions.[55] The Fourth Geneva Convention does not use or define the word civilian.[56] Article 3, common to all four Geneva Conventions, lays out the minimum standard for treatment of all noncombatants.[57] Common Article 3 calls for the

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> In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29 July 1899, or that of 18 October 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

GC IV, *supra* note 4, art. 154.

[53] GC COMMENTARY, *supra* note 21, at 1.

[54] *Id*. at 274.

[55] GC IV, *supra* note 4, art. 4.

[56] The word "civilian" is not defined until Article 50 of AP I in 1977. AP I, *supra* note 8, art. 50. Even then, it is defined by exception, as "any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." Basically, a "civilian" is anyone who does not fall into one of the categories loosely defined as "combatants." *See* discussion *infra* Part I.C. (discussing the 1977 Additional Protocols to Geneva Convention of 1949).

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> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

wounded and sick to be collected and cared for,[58] and prohibits violence, murder, torture, hostage taking, humiliating treatment, and executions in the absence of conviction by a regular court.[59]

Part II of the Fourth Convention contains provisions that apply to the entire populations of the nations in conflict, and is concerned mainly with the protection of the wounded, sick, aged, mothers, and children.[60] Part III of the Fourth Convention details protections that apply depending on the nationality of the person and where they are located.[61] Within Part III, Sections I and III apply specifically to occupied territories.[62]

Provisions in Section III list specific obligations of the occupier with regard to public health,[63] religion,[64] children,[65] labor conditions,[66] and relief shipments.[67] There is a provision specifically addressing relief of judges and other public officials,[68] and several provisions devoted to changes the occupier may make in the penal laws in force in the

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> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
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> (b) taking of hostages;
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> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
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> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
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> (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id. art. 3.

[58] *Id.*

[59] *Id.*

[60] *Id.* pt. II.

[61] *Id.* pt. III.

[62] *Id.* pt. III, sec. III.

[63] *Id.* arts. 55-57.

[64] *Id.* art. 58.

[65] *Id.* art. 50.

[66] *Id.* arts. 51, 52.

[67] *Id.* arts. 59-63.

[68] *Id.* art. 54.

occupied land.[69] Of particular interest is Article 54 devoted to relief of judges and public officials. Article 54 states in part,

> The Occupying Power may not alter the status of public officials or judges in the occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience. This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.[70]

This is consistent with Article 43 of the Hague Convention, in cautioning the occupying power that it must preserve the status quo in the occupied territory as much as possible.

Similarly, the Geneva Convention provisions related to the penal laws in force in the occupied territories also focus on preserving the legal system already in place, rather than allowing the occupier to substitute its own system.[71] Article 64 says the penal laws remain in force, and the regular criminal courts still function, subject only to change when necessary for the occupier's security.[72]

Article 64 also contains a paragraph analogous to Article 43 of the Hague Regulations, limiting the occupier's authority to enact legislation in the occupied state. The third paragraph of Article 64 reads:

> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain 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

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[69] *Id.* arts. 64-77.
[70] *Id.* art. 54.
[71] *Id.* arts. 64-77.
[72] *Id.* art. 64.

> likewise of the establishments and lines of communication used by them.[73]

Any penal laws enacted by the occupier may not apply retroactively.[74] Additionally, imposition of the death penalty is greatly restricted.[75] The death penalty may only be imposed on persons eighteen or older,[76] for espionage,[77] "serious acts of sabotage against the military installations of the Occupying Power or of intentional offenses which have caused the death of one or more persons,"[78] and only if those crimes carried the potential of death prior to the occupation.[79] The occupier must also observe certain criminal due process norms including the rights to present evidence,[80] consult with an attorney,[81] call witnesses,[82] and appeal any sentence.[83] To this end, a sentence of death may not be executed until at least six months after trial.[84]

The Geneva Conventions of 1949 expanded the scope of protections for civilian populations beyond that provided by the Hague Regulations in 1899. In 1977, the Protocols further extended those protections by supplementing the Geneva Conventions, with a focus on protecting the victims of armed conflict.

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[73] *Id.* Pictet says article 64 limits the occupier to legislating in three areas:

> (a) It may promulgate provisions required for the application of the Convention in accordance with the obligations imposed on it by the latter in a number of spheres: child welfare, labour, food, hygiene and public health etc.
> (b) It will have the right to enact provisions necessary to maintain the "orderly government of the territory" in its capacity as the Power responsible for public law and order.
> (c) It is, lastly, authorized to promulgate penal provisions for its own protection.

GC COMMENTARY, *supra* note 21, at 337.
[74] GC IV, *supra* note 4, art. 65.
[75] *Id.* arts. 68, 71, 75.
[76] *Id.* art. 68.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* art. 72.
[81] *Id.*
[82] *Id.*
[83] *Id.* art. 73.
[84] *Id.* art. 75.

C. 1977 Additional Protocols to the Geneva Conventions of 1949

By the 1970's, there was general agreement in the international community on the need for future development of rules on the conduct of combatants and protection of civilian populations from the effects of hostilities.[85] This concern culminated in the Swiss government convening the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. This took place in four sessions between 1974 and 1977.[86] The products of these four sessions are called the Additional Protocols of 8 June, 1977 to the Geneva Conventions of 12 August, 1949 (AP I and AP II).[87]

Protocols I and II go further than the Geneva Conventions in shifting the focus of occupation law from the state to the civilian populations in occupied territory.[88] By 1977, when the Protocols were drafted, political theories for the sovereignty of civilian populations independent of their former state alignments were fully developed.[89] Article 1 of Protocol I indicates that it applies to international armed conflict, including "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . ."[90] National liberation movements and the

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[85] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1949, General Introduction (Yves Sandoz, et al. eds. 1987) [hereinafter AP COMMENTARY].

[86] *Id.*

[87] AP I, *supra* note 8; AP II, *supra* note 8.

[88] *Id.*

[89] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (Oct. 24, 1970) (codifying the principle of equal rights and self-determination of peoples). *See also* S.C. Res. 2160, U.N. SCOR, 20th Sess., 1482d mtg., U.N. Doc. S/RES/2160 (1966) ("Reaffirming the right of peoples under colonial rule to exercise their right to self-determination and independence and the right of every nation, large or small, to choose freely and without any external interference its political, social and economic system.").

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> 3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those conventions.
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> 4. The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of

principle of self-determination enshrined in the United Nations Charter clearly affected the drafters' efforts at constraining potential occupiers.[91]

Seemingly, the concept of sovereignty has shifted from a focus on states and their governments, to the idea of popular sovereignty expressed as the will of people in the exercise of their right of self-determination.[92] Even so, the guiding principle of occupation law remains the "inalienability of sovereignty through the actual or threatened use of force."[93] Whether the focus is on the defeated government, or the population of an occupied territory, current occupation law calls for the occupier to behave as if it has a fiduciary duty with regard to the occupied.[94]

The US has not signed or ratified either Protocol of 1977. However, the United States does consider the majority of their provisions to reflect customary international law.[95] The Protocols, as they pertain to occupation law, supplement the Fourth Geneva Convention of 1949, primarily by defining the term "civilian"[96] and by adding additional protections for civilian populations. Protocol I defines the term "civilian" in the negative, as any person who does not qualify as a combatant.[97] Article 51 explains the general protection from attack

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> International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

AP I, *supra* note 8, art. 1.

[91] AP COMMENTARY, *supra* note 85; Benvenisti, *supra* note 16, at 32-34.

[92] G.A. Res. 2625, *supra* note 89; s*ee also* S.C. Res. 2160, *supra* note 89.

[93] BENVENISTI, *supra* note 16, at 5.

[94] *Id.* at 6; VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY, *supra* note 5, at 31.

[95] *See* Michael J. Matheson, Remarks, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, *in* 2 AM. UNIV. J. INT'L L. & POL'Y 419 (Fall 1987). Michael J. Matheson was the Deputy Legal Advisor, U.S. Department of State at the time he made these remarks at a workshop convened by the American Red Cross and the Washington College of Law in 1987. *Id.*

[96] AP I, *supra* note 8, art. 50.

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> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

Id. Article 4(A)(1), (2), (3), and (6) of the Third Geneva Convention reads:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
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> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
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> (a) that of being commanded by a person responsible for his subordinates;
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> (b) that of having a fixed distinctive sign recognizable at a distance;
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> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
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> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
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> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 43 of AP I reads:

> 1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
>
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to

enjoyed by civilians, stating, "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[98] The article goes on to stress the principles of discrimination, distinction, military necessity, and proportionality, when considering a military attack.[99] Article 75 of Protocol I is analogous to Common Article 3 of the Geneva Conventions, setting a baseline for treatment of all persons during conditions of international armed conflict.[100] Protocol II supplements and expands the guarantees of humane treatment expressed in Common Article 3 of the Geneva Conventions.[101]

D. United Nations Charter

Written nearly contemporaneously with the Geneva Conventions, the United Nations Charter[102] does not mention occupation at all. However, it does provide the framework for most of the military interventions since WWII that have resulted in occupation.[103] The overarching purpose of the UN Charter is to ban the use of force except in cases of self-defense and to provide a mechanism for nations to work together in preserving international security.[104] Under the UN Charter, there are only two instances in which nations may resort to the use of force. First, a country may use force in self defense under Article 51 of the Charter.[105] Second, a country may use force when operating under authority of the UN Security Council as expressed in Chapter VII of the Charter.[106] The

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participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

AP I, *supra* note 8, art. 43.
[98] *Id.* art. 51.
[99] *Id.*
[100] *Id.* art. 75; GC IV, *supra* note 4, art. 3.
[101] AP II, *supra* note 8, art. 75; GC IV, *supra* note 4, art. 3.
[102] U.N. Charter.
[103] Ottolenghi, *supra* note 2, at 2177; Adam Roberts, *What Is a Military Occupation?*, 54 BRIT. Y.B. INT'L L. 249 (1985).
[104] U.N. Charter pmbl.
[105] *Id.* art. 51.
[106] *Id.* ch. VII.

Charter also contains a supremacy article that says obligations under the Charter are superior to any other international agreement.[107]

Article 51 of the UN Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[108] This is the justification for the use of force offered by most countries when resorting to military action against another.[109] Self defense under Article 51 was the justification for the US invasion of Afghanistan in 2001.[110]

Other provisions of Chapter VII empower the Security Council to determine when there has been a breach of the peace and decide what action should be taken by the world community as a result.[111] The Security Council may decide on a wide range of options, from mere condemnation, all the way up to the use of military force in attempting to restore peace and security.[112] A Security Council resolution under Chapter VII provided the mandate for the Coalition occupation of Iraq beginning in April 2003.[113]

Article 103 of the UN Charter operates as a supremacy clause, at least with regard to statutory international law.[114] Article 103 reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[115] Though, as stated in Article 103, UN Security Council resolutions take precedence over other international treaties, it is not clear whether such resolutions also trump customary international law.

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[107] *Id.* art. 103.
[108] *Id.* art. 51.
[109] *Id. See generally* John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004) (discussing use of force in self-defense, including pre-emptive self-defense, and arguing for a cost-benefit approach focused on the goals of the international system, rather than a strict doctrinal approach based on the UN Charter).
[110] *Letter of 7 October 2001 from the Permanent Representative of the United States of America to the President of the Security Council*, U.N. SCOR, 56th Sess., U.N. Doc. S/2001/946 (2001).
[111] U.N. Charter arts. 39-42.
[112] *Id.* arts. 41, 42.
[113] UNSCR 1483, *supra* note 1.
[114] U.N. Charter art. 103.
[115] *Id.*

E. Customary International Law

There are two basic types of international law, conventional and customary. Conventional international law is that which is contained in various treaties and international agreements.[116] Customary international law, in contrast, comes from the practices of states over time, out of a sense of legal obligation.[117] The sense of legal obligation is known as *opinio juris*.[118] When states conduct themselves consistently over a period of time, the rules that govern their actions can be recognized as customary international law, so long as states follow the rules because they believe they have a legal obligation to do so.[119] If states follow a rule because it is convenient, or simply out of habit, it does not necessarily become customary international law.[120] Rules do not become customary international law until they are followed because states believe they are legally obligated to do so.[121] That being said, states do not have to state publicly that they are following a rule out of legal obligation; the existence of *opinio juris* may be inferred from their actions.[122]

Although there are generally only two types of international law, conventional and customary, there are at least four significant sources of international law:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) [J]udicial decisions and the teachings of the most highly

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[116] GERHARD VON GLAHN, LAW AMONG NATIONS 13 (6th ed., 1992) [hereinafter VON GLAHN, LAW AMONG NATIONS].

[117] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102 (1987) [hereinafter RESTATEMENT]. *See generally* Jean-Marie Henckaerts et al., *Introduction* to CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxi-xliv (2005) (State practice includes both physical acts and verbal acts. Verbal acts include military manuals, court decisions, and other manifestations of state positions on rules of international law).

[118] *Id.*

[119] RESTATEMENT, *supra* note 117, § 102.

[120] *Id*.

[121] *Id*.

[122] *Id*.

> qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[123]

Within the category of general principles of law, there are also peremptory norms of general international law, defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[124] These peremptory norms are called *jus cogens*.[125] The importance of rules with the status of *jus cogens* is that they cannot be abrogated by treaty,[126] and states cannot avoid them through persistent objection.[127] The concept of *jus cogens* is generally accepted in the international community; however, there is little agreement on which particular rules have achieved that status.[128] An example of rules that are generally accepted as *jus cogens* are the principles contained in the United Nations Charter that prohibit the use of force except in self-defense.[129]

In many cases, customary international law becomes conventional international law, as states codify their customary behavior in treaties.[130]

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[123] Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945). *See generally* VON GLAHN, LAW AMONG NATIONS, *supra* note 116, at 12-24.

[124] Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331, 8 I.L.M. 679, May 23, 1969 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

[125] RESTATEMENT, *supra* note 117, at § 102.

[126] Article 64 of The Vienna Convention on the Law of Treaties states: **"**If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Vienna Convention, *supra* note 124, art. 64.

[127] Through persistent objection, a state intentionally violates a purported rule of international law for the purpose of preventing the rule from being recognized as binding customary international law. Although the term persistent objection is not used, the concept is discussed in the Restatement of Foreign Relations as follows: "in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures." RESTATEMENT, *supra* note 117, § 102. A related concept is the idea that in order to change customary international law that has been codified, a state must violate the conventional international law in an attempt to forge a new state practice and *opinio juris*, which over time could ripen into new customary law. *See* Jonathan I. Charney, *May the President Violate Customary International Law?: The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 A.J. INT'L L. 913 (1986).

[128] RESTATEMENT, *supra* note 117, § 102.

[129] *Id*; VON GLAHN, LAW AMONG NATIONS, *supra* note 116, at 583.

[130] *Id.* at 13.

In other cases, a few countries sign a treaty, which over time is observed by most other countries, until its provisions become, through force of state practice, customary international law.[131] The Hague Regulations are an example of statutory international law that codified mainly existing customary law.[132] The first three Geneva Conventions also codified mainly existing international law.[133] The Fourth Geneva Convention and the Protocols are examples of statutory international law that contain many provisions which have become customary law over time. [134]

Presumably, if the behavior of nations changes, then customary international law may also change to reflect changing state practice.[135] In the same way, states may repudiate or amend various treaties to change conventional international law.[136] States may change customary international law that has become memorialized in a statute simply by amending the statute, so long as the changes do not impact rules considered *jus cogens*.[137]

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131 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.

132 1 Trial of the Major War Criminals 254 (1947)[Can't access this citation. Citation form looks OK.]; VON GLAHN, *supra* note 116, at 13; Hague IV, *supra* note 3, pmbl.

133 Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 364 (1987).

134 *Id*; *see* Matheson, *supra* note 95.

135 VON GLAHN, LAW AMONG NATIONS, *supra* note 116, at 20; H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 132 (1972).

136 VON GLAHN, LAW AMONG NATIONS, *supra* note 116, at 13.

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> Customary law and law made by international agreement have equal authority as international law. Unless the parties evince a contrary intention, a rule established by agreement supercedes for them a prior inconsistent rule of customary international law. However, an agreement will not supercede a prior rule of customary law that is a peremptory norm of international law; and an agreement will not supercede customary law if the agreement is invalid because it violates such a peremptory norm.

RESTATEMENT, *supra* note 117, § 102.

F. Occupations since 1949 (Customary Law of Occupation v. UN Security Council Resolutions)

No occupant since 1949 has recognized either Hague or Geneva as explicitly binding under customary international law, although most occupiers have honored at least the fundamental humanitarian provisions relating to care for civilian populations.[138] Most occupiers prefer not to characterize their behavior as classic belligerent occupation both because of the negative connotation of the term, and more importantly, because they do not want to abide by the restraints on their actions inherent in strict compliance with Hague and Geneva.[139]

Occupations since 1949 can be divided into two categories, those that occur under UN mandate, and those outside UN supervision.[140] The best example of the latter is the Israeli occupation of territory captured in the 1967 War. A good example of the former is the UN sanctioned and supervised occupation of East Timor.

1. The Israeli Occupied Territories

The most prominent example of an occupation conducted without UN authorization or participation is the Israeli occupation of the Golan Heights, the West Bank, Gaza, and the Sinai in 1967.[141] The Israeli occupation began immediately following the six day war in June 1967, and continues in the Golan Heights and the West Bank today.[142] The Israeli government has never recognized the *de jure* application of Hague or Geneva,[143] although it has consistently followed most of their provisions on a *de facto* basis.[144]

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138 *See* BENVENISTI, *supra* note 16, chs. 5, 6.

139 *Id.* at 107.

140 BENVENISTI, *supra* note 16, at 107; Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44 (1990) [hereinafter Roberts].

141 BENVENISTI, *supra* note 16, at 107; Roberts, *supra* note 140, at 58-60.

142 Roberts, *supra* note 141, at 44. Israel withdrew from the Sinai in 1979, and from Gaza in 2005.

143 BENVENISTI, *supra* note 16, at 109; Roberts, *supra* note 141, at 62.

144 Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262, 266 (1971). Meir Shamgar served as the Israeli Attorney General and later as the President of the Israeli Supreme Court. *See* Nissim Bar-Yaacov, *The Applicability of the Laws of War to Judea and Samaria (The West Bank) and to the Gaza Strip*, 24 IS. L. REV. 487-8 (1990).

The Israeli government takes distinct positions regarding Hague and Geneva, respectively, stemming from the status of each as customary international law. The Israeli Supreme Court has stated, "Customary international law is automatically incorporated into Israeli law, and becomes part of it except when it is in direct conflict with enacted Israeli law, in which case, Israeli law takes precedence."[145] This means that, if the Hague Regulations are considered customary international law, the Hague Regulations apply to the territories occupied by Israel after the six day war in 1967 unless in direct conflict with Israeli law. The court also said, however, "Conventional international law does not become part of Israeli law through automatic incorporation, but only if it is adopted or combined with Israeli law by enactment of primary or subsidiary legislation from which it derives its force."[146] Therefore, if Geneva is not considered customary international law, but merely treaty law, and has not been explicitly incorporated into Israeli law, then the Geneva Conventions do not apply to the occupied territories. In any event, the Israeli government has consistently denied the *de jure* application of both Hague and Geneva to the occupied territories, while generally conducting the occupations in accordance with the dictates of Hague and the humanitarian provisions of Geneva on a *de facto* basis.[147]

Israel maintains the Hague Regulations and Geneva Conventions do not apply by law to the West Bank and Gaza because there was no existing sovereign government at the time of the 1967 war.[148] The West Bank was administered by Jordan beginning in 1948, and even purportedly annexed in 1950. Few countries, however, recognized the annexation.[149] Gaza was occupied by Egypt from 1948 until 1967, but Egypt never officially claimed it as part of its territory.[150] The Hague Regulations apply by their own terms only to contracting parties,[151] and since Jordan and Egypt were not recognized as the sovereigns in the West Bank and Gaza, respectively, there could be no contracting parties

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[145] H.C. 69/81, Bassil Abu Aita v. The Regional Commander of Judea and Samaria, 37(2) P.D. 197, 201.

[146] *Id.*

[147] BENVENISTI, *supra* note 16, at 114; Roberts, *supra* note 141, at 62-3; Bar-Yaacov, *supra* note 144, at 485-6.

[148] BENVENISTI, *supra* note 16, at 109; VON GLAHN, *supra* note 116, at 771; Roberts, *supra* note 141, at 64.

[149] BENVENISTI, *supra* note 16, at 108; David John Ball, Note: *Toss the Travaux?: Application of the Fourth Geneva Convention to the Middle East Conflict—A Modern (Re)assessment*, 79 N.Y.U. L. REV. 990, 996 (2004).

[150] BENVENISTI, *supra* note 16, at 108.

[151] Hague IV, *supra* note 4, art. 2.

within the meaning of the Hague Regulations. Similarly, since Article 2 common to the Geneva Conventions says "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance,"[152] the West Bank and Gaza had no sovereigns cognizable as High Contracting Parties under the Conventions.[153] This Israeli interpretation has been criticized as a strained reading of the Conventions,[154] since Common Article 2 also states "the present convention shall apply to all cases of declared war or of any other armed conflict. . . ."[155] Israel's arguments do not apply to the Golan Heights or the Sinai, since Israel has never denied that these were areas belonging to Syria and Egypt before 1967.[156] However, Israel did not recognize in the case of the Sinai, and does not recognize in the case of the Golan Heights, the de jure application of Hague or Geneva.[157]

Although not conceding the *de jure* application of Hague and Geneva, one way in which the Israeli government has conducted the occupations *de facto* in accordance with the Hague Regulations is the maintenance of whatever law existed in the territories at the time of the occupation, subject to security considerations.[158] This means, for example, that even though Israel did not recognize Jordan's claims to the West Bank, Jordanian law applied there so long as not inconsistent with Israeli security.[159]

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[152] GC IV, *supra* note 4, art. 2. See text quoted *supra* note 44.

[153] This is known as the "missing reversioner" argument, i.e., occupation law anticipates that an occupied country will "revert" back to the sovereign when the occupation is over. According to this argument, there was no legitimate sovereign in Gaza or the West Bank before the six day war, since the land was actually seized from Israel in 1948. Therefore, the Geneva Conventions do not apply. Kathleen A. Cavanaugh, *Theoretical and International Framework: Selective Justice: The Case of Israel and the Occupied Territories*, 26 FORDHAM INT'L L.J. 934, 944 (2003). *See also* Y. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968).

[154] BENVENISTI, *supra* note 16, at 109; Dinstein, *supra* note 21, at 107; Roberts, *supra* note 141, at 66.

[155] GC IV, *supra* note 4, art. 2.

[156] BENVENISTI, *supra* note 16, at 110.

[157] *Id.* at 110; Roberts, *supra* note 141, at 66.

[158] BENVENISTI, *supra* note 16, at 114.

[159] The military commander of the West Bank issued Proclamation No. 2 the day Israel entered the occupied territories. It states:

> The law which existed in the area on the 7th of June, 1967, shall remain in force in so far as there is nothing therein, repugnant to this proclamation, any other proclamation or order which will be enacted by me, and subject to such modifications as may result from the

Another area where the Israeli occupation has arguably been in compliance with Hague Article 43 has been in the economic arena.[160] At the beginning of the occupation, Israel was faced with two choices regarding economic development of the occupied territories. It could either operate them as independent economies, or treat them as part of the Israeli economy as a whole.[161] Treating them independently would likely mean economic stagnation, as there were few resources or engines of economic growth located in the territories, and the overall standard of living was lower than in Israel.[162] Linking the territories to the greater Israeli economy would raise the standard of living and presumably benefit the people living under the occupation,[163]thereby enhancing "public order and safety" in accordance with Hague Article 43. Of course, there were also economic benefits to Israel in taking this approach, namely a source of labor,[164] a market for consumer goods,[165] and later on, a source of tax revenue.[166] At the same time, since the territories were occupied but never annexed, the Israeli government never suffered the burden of caring for the population in the way it had to care for Israeli citizens.[167]

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establishment of the rule of the I.D.F. in the area.

> All powers of government, legislation, appointment, and administration in relation to the area or its inhabitants shall henceforth vest in me alone and shall be exercised by me or by whomsoever shall be appointed by me in that behalf or act on my behalf.

Shamgar, *supra* note 144, at 267.

[160] BENVENISTI, *supra* note 16, at 124.

[161] *Id.* at 141.

[162] *Id.* at 124.

[163] *Id.* at 141.

[164] *Id.* at 127.

[165] *Id.* at 142.

[166] *Id.* at 125.

[167] Ball, *supra* note 149, at 997. If Israel were to annex the occupied territories, then presumably the rights of citizenship would be extended to the inhabitants, including government healthcare and employment benefits. An additional reason Israel would not want to annex the occupied territories is the fact that Israelis would be a minority to Palestinians in the territories. *See id.*

2. East Timor

Indonesia annexed East Timor in 1975 after nearly 400 years of Portuguese rule as a colony.[168] The population did not entirely welcome the annexation, and fighting between Indonesian occupation forces and groups seeking an independent East Timor continued throughout the occupation until 1999.[169] In May 1999, the governments of both Portugal and Indonesia asked the United Nations for assistance in ending the fighting and settling the future governance of the province.[170] The United Nations first conducted a referendum to determine whether the population would prefer independence or autonomy within Indonesia.[171] After autonomy was rejected in favor of independence, pro-Indonesia militia groups initiated a campaign of violence, resulting in several hundred refugees and thousands of civilian deaths.[172] Under significant international pressure, Indonesia consented to the intervention of a UN-authorized multinational force sent to end the violence.[173]

On 15 September 1999, the UN authorized the deployment of a multinational peacekeeping force under Chapter VII to "restore peace and security, protect UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance . . . ."[174]. Roughly a month later, on 25 October 1999, the Security Council passed Resolution 1272, establishing the United Nations Transitional Administration in East Timor (UNTAET) to administer the province during the transition to independence.[175] The resolution also created a special representative vested with the power to "enact new laws and regulations and suspend or repeal existing ones."[176] The first regulation promulgated by UNTAET designated applicable law as "the laws applied in East Timor prior to 25

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[168] United Nations, *East Timor—UNTAET Background*, *at* http://www.un.org/peace/etimor/UntaetB.htm (last visited May 2, 2005) [hereinafter UNTAET Web Site]; Joel C. Beauvais, Note, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1102 (2001).

[169] UNTAET Web Site, *supra* note 168; Beauvais, *supra* note 168, at 1102.

[170] S.C. Res. 1236, U.N. SCOR, 53rd Sess., 3998th mtg., U.N. Doc. S/RES/1236 (1999); Beauvais, *supra* note 168, at 1102.

[171] UNTAET Web Site, *supra* note 168.

[172] *Id*; Beauvais, *supra* note 168, at 1102.

[173] UNTAET Web Site, *supra* note 168.

[174] S.C. Res. 1264, U.N. SCOR, 53rd Sess., 4045th mtg., U.N. Doc. S/RES/1264 (1999).

[175] S.C. Res. 1272, U.N. SCOR, 53rd Sess., 4057th mtg., U.N. Doc. S/RES/1272 (1999) [hereinafter UNSCR 1272].

[176] *Id*.

October 1999."[177] Presumably this law was chosen in recognition of the fact of twenty-four years of Indonesian occupation immediately preceding the establishment of UNTAET.[178] These laws were to be applied only where they did not conflict with international standards of human rights and where they complied with the goals of the transitional administration as laid out in Resolution 1272.[179] This reliance on existing law is reminiscent of the requirements of Hague Regulation 43, although neither the Hague Regulations nor the Geneva Conventions are mentioned in Resolution 1272.[180]

There are interesting parallels between the UN-sanctioned occupation of East Timor in 1999 and the Coalition occupation of Iraq in 2003. In both cases, the stated objective was the transformation and establishment of representative government.[181] In both Iraq and East Timor, the structures of government had virtually ceased to exist.[182] In East Timor, most government ministries evaporated when the Indonesian military began to pull out right after the independence referendum.[183] In Iraq, the government ceased to function after Baghdad was taken by coalition forces, and was fatally attrited by the de-ba'athification order[184] issued by the CPA, resulting in the ineligibility of most experienced government bureaucrats to remain in their positions.[185]

Another similarity was the UN designation of a Special Representative holding all executive, legislative, and judicial authority as

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[177] United Nations, *Regulation No. 1999/1 On the Authority of the Transitional Administration in East Timor*, 27 Nov. 1999, *available at* http://www.un.org/peace/etimor/untaetR/etreg1.htm.

[178] Beauvais, *supra* note 168, at 1151.

[179] *Id*.

[180] UNSCR 1272, *supra* note 175.

[181] *Id*; UNSCR 1483, *supra* note 1.

[182] "The population that emerged from the conflagration of August, 1999 had a literacy rate of thirty percent and included only about sixty lawyers, thirty-five doctors, and a handful of engineers." Beauvais, *supra* note 168, at 1137. *See also* Trudy Rubin, *Move over, Hawaii—Now We've Got a New State, Named Iraq*, PHIL. INQ., June 1, 2003, at C05.

[183] *See* Beauvais, *supra* note 168, at 1137.

[184] Coalition Provisional Authority, *Coalition Provisional Authority Order Number 1, De-Ba'athification of Iraqi Society*, 16 May 2003, *at* http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf [hereinafter *CPA Ord. 1*].

[185] *See* Peter Slevin, *U.S. Bans More Iraqis From Jobs; Move Called Necessary to Purge Party Members*, WASH. POST, May 17, 2003, at A01.

the Transitional Administrator in East Timor.[186] This pattern was followed by the Coalition in forming the CPA[187] and designating L. Paul Bremer as the Administrator, vested with preeminent authority.[188] Although these parallels existed, there were two primary differences in the two situations. First, UNTAET occupied and administered East Timor at the invitation of Portugal and Indonesia,[189] whereas the Coalition occupied and administered Iraq following invasion.[190] Second, and more germane to this article, the authority for the occupation of East Timor was solely Chapter VII of the UN Charter,[191] and the customary international law of occupation was never mentioned,[192] whereas the resolution authorizing the administration of Iraq explicitly referenced the Hague Regulations and Geneva Conventions.[193]

III. The CPA and the Occupation of Iraq

The United States, Great Britain, and the coalition of the willing, invaded Iraq on 21 March 2003, for the purposes of eliminating weapons of mass destruction (WMD) and liberating the Iraqi people from the vicious regime of Saddam Hussein.[194] By the end of April 2003, Saddam Hussein's government and army had deteriorated to the point where President George W. Bush declared the end of active hostilities on 1 May 2003.[195] The coalition invasion was officially justified by the U.S. as enforcing a series of previous UN resolutions whose terms had never been complied with satisfactorily by Iraq following the first Gulf war in

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[186] UNSCR 1272, *supra* note 175; UNTAET Web Site *supra* note 168.

[187] *Letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council*, UN Doc. S/2003/538 (2003) [hereinafter 1483 Letter].

[188] Coalition Provisional Authority, *Coalition Provisional Authority Regulation Number 1*, 16 May 2003, *available at* http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf [hereinafter *CPA Reg. 1*].

[189] UNTAET Web Site, *supra* note 168.

[190] White House, Office of the Press Secretary, *Global Message* (Mar. 21, 2003), *available at* http://www. whitehouse.gov/news/releases/2003/03/20030321.html (announcing the beginning of Operation Iraqi Freedom).

[191] U.N. Charter ch. VII.

[192] UNSCR 1272, *supra* note 175.

[193] UNSCR 1483, *supra* note 1.

[194] President's Radio Address, White House, Office of the Press Secretary, *President Discusses Beginning of Operation Iraqi Freedom* (Mar. 22, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/03/print/20030322.html.

[195] *President: 'The Battle of Iraq Is One Victory in a War on Terror'*, USA TODAY, May 2, 2003, at 2A.

1991.[196] As soon as coalition troops advanced into Iraq, the international law of occupation applied by its own terms, at least to areas controlled by the coalition.[197] However, the legal framework for the occupation was firmly established by UN Security Council Resolution 1483, adopted on 22 May 2003.[198]

A. United Nations Security Council Resolution 1483

United Nations Security Council Resolution 1483 is the mandate for the coalition occupation of Iraq. The resolution generally tracks previous UN resolutions authorizing transitional administrations.[199] However, it is unusual in specifically calling for the United States and Great Britain to comply with the law of occupation as reflected in Hague and Geneva.[200]

Prior to the adoption of Resolution 1483, the United States and Great Britain circulated a letter styled "Letter from the Permanent Representatives of the UK and US to the UN addressed to the President of the Security Council, dated May 8, 2003."[201] This letter laid out the objectives of the Coalition in Iraq and officially informed the Security Council of the creation of the CPA as the organization responsible "to exercise powers of government temporarily, and, as necessary, to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction."[202] The letter also stated, "The States participating in the Coalition will strictly accept their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq."[203] The letter never uses the word "occupation," nor does it mention the Hague Regulations or the Geneva Conventions.[204] The stated goal of the Coalition was the creation of "an

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[196] *U.S. Cites 1991 U.N. Cease-Fire Resolution as the Legal Basis for Its Invasion*, L.A. TIMES, Mar. 21, 2003, at 18; *see* S.C. Res. 660, U.N. SCOR, 44th Sess., 2932nd mtg., U.N. Doc. S/RES/660 (1990); S.C. Res. 678, U.N. SCOR, 44th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990); S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991); S.C. Res. 1441, U.N. SCOR, 56th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).

[197] GC IV, *supra* note 4, art. 2.

[198] UNSCR 1483, *supra* note 1.

[199] *See, e.g.*, UNSCR 1272, *supra* note 175.

[200] UNSCR 1483, *supra* note 1.

[201] 1483 Letter, *supra* note 187.

[202] *Id.*

[203] *Id*.

[204] *Id.*

environment in which the Iraqi people may freely determine their political future."[205] The end of the letter welcomes the appointment of a special coordinator by the UN Secretary General, with responsibility to coordinate the efforts of UN agencies with the CPA.[206]

Resolution 1483 refers explicitly to international law three times in the first two pages of the resolution. First, it takes notice of the letter from the United States and Great Britain and recognizes "the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command."[207] Second, under the subheading:

> Acting under Chapter VII of the Charter of the United Nations,
>
> 4. Calls upon the Authority, consistent 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 towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;
>
> 5. Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.[208]

This is unusual and unprecedented because previous occupations operated under either customary international occupation law or UN supervision, but not both. For the first time, in Resolution 1483, the UN called specifically for the application of customary international occupation law alongside measures specifically authorized by the Security Council.[209] On the one hand, this inclusion of specific reference to Hague and Geneva is confusing, since the document itself authorizes

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[205] *Id.*
[206] *Id.*
[207] UNSCR 1483, *supra* note 1.
[208] *Id*.
[209] BENVENISTI, *supra* note 15, at 36.

measures that conflict with both the Hague Regulations and the Geneva Conventions.[210] On the other hand, it could be read to mean that the CPA must comply with the strictly humanitarian provisions of Hague and Geneva, those most likely accepted as customary international law, while allowing deviation from those provisions not considered customary, namely those provisions regarding government transformation.

Resolution 1483 begins by "reaffirming the sovereignty and territorial integrity of Iraq,"[211] and "stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources."[212] The resolution then recognizes the status of the United States and Great Britain as occupying powers (the "Authority")[213] and calls on the Secretary General to appoint a UN special representative for Iraq[214] to work with the Authority to assist the people of Iraq.[215] Among the duties UNSCR 1483 assigns to the special representative are "working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq,"[216] and "encouraging international efforts to promote legal and judicial reform."[217] These are clearly not merely restorational goals, but rather, transformational.

Resolution 1483 is not unusual in calling for transformational change in government. Previous resolutions contain similar language.[218] What is unusual is its calling for political transformation and self-

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[210] UNSCR 1483, *supra* note 1; BENVENISTI, *supra* note 15, at 19; Ottolenghi, *supra* note 2, at 2177; Scheffer, *supra* note 2, at 842. *See* Brett H. McGurk, *Essay, Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA J. INT'L L. 451, 460 (2005) (describing UNSCR 1483 as inherently contradictory).

[211] UNSCR 1483, *supra* note 1.

[212] *Id*.

[213] *Id*.

[214] S.C. Res. 1483, U.N. SCOR, 57th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003). Although the special representative, Sergio Vieira de Mello, was in fact appointed, the UN mission in Iraq was devastated and never fully recovered following the bombing of its headquarters building in Baghdad on 19 Aug. 2003. United Nations, *Top UN Envoy Sergio Viera de Mello Killed in Terrorist Blast in Baghdad*, Aug. 19, 2003, *at* http://un.org/av/photo/unhq/demello.htm.

[215] UNSCR 1483, *supra* note 1.

[216] *Id*.

[217] *Id*.

[218] *See, e.g.*, UNSCR 1272, *supra* note 175.

determination while using the language of occupation and urging compliance with the Hague Regulations and Geneva Conventions.

Two other significant provisions in Resolution 1483 provide for the dissolution of the UN Oil for Food program within six months, and note the establishment of the Development Fund for Iraq.[219] The Development Fund for Iraq contained money from seized Iraqi funds[220] and was to be used "in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the Iraqi people."[221]

B. The CPA Orders and Regulations

The CPA was established in May 2003, as the successor to the Office of Reconstruction and Humanitarian Assistance (ORHA), the organization originally charged with the administration of Iraq following the invasion.[222] L. Paul Bremer, former ambassador-at-large for counter-terrorism, was appointed to head the organization, with the title of Administrator of the CPA.[223] The CPA immediately began administering Iraq through the issuance of orders and regulations.[224] Strikingly, although in compliance with the stated goals of UNSCR 1483, many CPA actions contradict provisions of the Hague Regulations and Geneva Conventions.[225] Examples of CPA actions in conflict with Hague and Geneva, further discussed below, include legislation coming into force before publication,[226] restrictions on employment opportunity,[227]

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[219] UNSCR 1483, *supra* note 1.

[220] *Id.* Seized Iraqi funds were Iraqi funds frozen in other countries, including money stashed by Saddam Hussein and his officials in anticipation of the coalition invasion.

[221] *Id.*

[222] L. ELAINE HALCHIN, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES, RL 32370, at CRS 1-3 (2004).

[223] Press Release, White House, Office of the Press Secretary, *President Names Envoy to Iraq* (May 6, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/05/20030506-5.html (last visited Mar. 14, 2005).

[224] *See* Coalition Provisional Authority, *CPA Official Documents*, *at* http://www.iraqcoalition.org (last visited Mar. 14, 2005).

[225] Ottolenghi, *supra* note 2, at 2177.

[226] *CPA Reg. 1*, *supra* note 188.

significant economic reform,[228] and fundamental changes in government institutions.[229]

1. Effective Date of Legislation

The CPA issued its first regulation, *Coalition Provisional Authority Regulation Number 1*,[230] (*CPA Reg. 1*) on 16 May 2003. *CPA Reg. 1* lays out the legal authority of the CPA and its administrator, describes the law applicable during the occupation, and explains how the CPA will issue regulations and orders from time to time in carrying out its authority for the administration of Iraq.[231] *Coalition Provisional Authority Reg. 1* begins with the following statement: "Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war, I hereby promulgate the following: . . . ."[232] This opening statement clearly recognizes legal authority coming from both the UN Security Council Resolution and the customary laws of war, although the words "occupation," "Hague," and "Geneva" are notably absent. The first numbered paragraph reads:

> The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and

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[227] *CPA Ord. 1*, *supra* note 184; Coalition Provisional Authority, *Coalition Provisional Authority Order Number 2, Dissolution of Entities*, 23 May 2003, *available at* http://www.iraq.coalition.org/regulations/20030823_CPAORD_2_Dissolution_of_Entities_with_ Annex_A.pdf [hereinafter *CPA Ord. 2*].

[228] *See, e.g.*, Coalition Provisional Authority, *Coalition Provisional Authority Order Number 39, Foreign Investment*, 19 Sept. 2003, *at* http://www.iraqcoalition.org/regulations/20031220_CPAORD_39_Foreign_ Investment_.pdf [hereinafter *CPA Ord. 39*].

[229] Coalition Provisional Authority, *Coalition Provisional Authority Order Number 13, The Central Criminal Court of Iraq (Revised)(Amended)*, 22 Apr. 2004, *at* http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_The_Central_Criminal_Court_of_Iraq_(Revised)_(Amended).pdf [hereinafter *CPA Ord. 13*].

[230] *CPA Reg. 1*, *supra* note 188.

[231] *Id*.

[232] *Id*.

> local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.[233]

This paragraph states the general goals of the CPA, and identifies some level of political and economic transformation as among them. The second numbered paragraph states the legal authority for the CPA, reading: "The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator."[234] Under the heading "The Applicable Law,"[235] *CPA Reg. 1* says:

> Unless suspended or replaced by the CPA or superceded by legislation issued by *democratic institutions* of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA. [236]

This is another example of evidence that the CPA goals are transformational in nature, citing potential legislation by *democratic institutions* of Iraq, which did not exist at the enactment of this regulation.

Coalition Provisional Authority Reg. 1 also contains a provision describing the brief process required for promulgation of CPA orders and regulations.[237] Coalition Provisional Authority orders and regulations

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[233] *Id.*
[234] *Id*.
[235] *Id*.
[236] *Id*. (emphasis added).
[237] *Id*. The complete text of paragraph 2 of section 3 of CPA REG 1 states:

> The promulgation of any CPA Regulation or Order requires the approval or signature of the Administrator. The Regulation or Order shall enter into force as specified therein, shall be promulgated in the relevant languages and shall be disseminated as widely as possible. In the case of divergence, the English text shall prevail.

require only "the approval or signature of the Administrator"[238] to be valid, and enter into force whenever the particular order or regulation says it will.[239] The provision also calls for the documents to be translated into "the relevant languages,"[240] presumably Arabic and Kurdish, and widely disseminated, although the controlling language will remain English. The reference to legislation becoming effective is important because Article 65 of GC IV says: "The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive."[241] Though the use of the word "penal" might lead one to believe that this article only applies to the criminal law, Pictet's commentary makes clear that the intent of the drafters was to prevent the imposition of ex post facto laws by an occupier.[242] In fact, virtually all CPA orders and regulations contain a final section titled "Entry into Force," that says, "This Order shall enter into force on the date of signature."[243] This means that, in almost all cases, CPA orders and regulations were in effect long before they had been translated into Arabic or Kurdish, and certainly before they had been published anywhere other than on the CPA website.[244] Clearly the inhabitants of Iraq were seldom on notice with regard to CPA legislation in a timely fashion.[245]

Id.

[238] *Id*.

[239] *Id*.

[240] *Id*.

[241] GC IV, *supra* note 4, art. 65.

[242] GC COMMENTARY, *supra* note 21, at 339, 341.

[243] *See, e.g.*, *CPA Reg. 1*, *supra* note 188; *CPA Ord. 1*, *supra* note 184.

[244] An early analysis by Amnesty International found long delays between CPA Administrator signature on Orders and their posting in Arabic on the CPA website, one of only two methods of publicizing CPA legislation. The other method was periodic printing in a hardcopy compilation of laws known as the Iraqi Gazette. Examples of long lag time between signature and publication included the following: CPA Order 10, "Management of Detention and Prison Facilities," signed 8 June 2003, posted in Arabic on CPA website on 29 Oct. 2003 (143 days); CPA Order 13, "The Central Criminal Court of Iraq," signed 18 June 2003, posted to the website in Arabic on 2 Sept. 2003 (44 days); CPA Order 15, "Establishment of the Judicial Review Committee," signed 23 June 2003, posted on the website in Arabic on 29 Oct. 2003 (126 days); CPA Regulation 6, "Governing Council of Iraq," signed on 13 July 2003, posted on the CPA website in Arabic on 2 Sept. 2003 (50 days). Amnesty International, *Iraq, Memorandum on Concerns Related to Legislation Introduced by the Coalition Provisional Authority*, 4 Dec. 2003, *available at* http://web.amnesty.org/library/index/ENGMDE141762003.

[245] *See id*.

2. Economic Reforms

Restriction of employment opportunity illustrates another area of conflict between CPA orders and international law. The second paragraph of Article 52, GC IV reads: "All measures aimed at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited."[246] Inarguably, the CPA contributed to unemployment on a massive scale, through the disbanding of the Iraqi Army and other entities of the Iraqi government tainted by misconduct during Saddam Hussein's regime,[247] as well as the effort to remove former members of the Ba'ath Party.[248] The CPA initiative privatizing Iraqi state-owned enterprises also contributed to unemployment, by removing workers from the protection of state employment.[249] Though the stated purpose of these orders was never to induce Iraqi citizens to work for the CPA, the effect was to increase unemployment at a time when the CPA was hiring for Iraqi security forces.[250] Although the CPA orders did not expressly seek an increase in unemployment, the CPA began recruiting heavily for the New Iraqi Army, Police, and other security forces shortly after the orders' implementation.[251] In fact, *CPA Order 2*, "Dissolution of Entities," actually contains a section describing a "New Iraqi Corps" as the first step in building a new army.[252]

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[246] GC IV, *supra* note 4, art. 52.
[247] *CPA Ord. 2*, *supra* note 227.
[248] *CPA Ord. 1*, *supra* note 184.
[249] David Bacon, *The Bush Administration War Against Iraqi Workers and Unions*, L.A. TIMES, Nov. 9, 2003, *available at* http://reclaimdemocracy.org/articles_2003/iraqi_workrs_unions.html.
[250] *CPA Ord. 1*, *supra* note 184; *CPA Ord. 2*, *supra* note 227.
[251] *See Bremer: Stakes 'Extremely High' in Iraq*, WASH. POST, Aug. 27, 2003, at A20; John Daniszewski, *Hundreds Line Up to Join New Iraqi Army*, L.A. TIMES, July 22, 2003, at 11; Eric Schmitt, *U.S. Is Creating an Iraqi Militia to Relieve G.I.'s*, N.Y. TIMES, July 21, 2003, at A5.
[252] Section 5 of *CPA Ord. 2*, entitled "New Iraqi Corps," states:

> The CPA plans to create in the near future a New Iraqi Corps, as the first step in forming a national self-defense capability for a free Iraq. Under civilian control, that Corps will be professional, non-political, militarily effective, and representative of all Iraqis. The CPA will promulgate procedures for participation in the New Iraqi Corps.

CPA Ord. 2, *supra* note 227.

An area that received significant attention in the media during the occupation was privatization of Iraqi state-owned industries, and foreign investment in Iraq.[253] The starting point for any discussion of the legality of CPA legislation is Article 43 of the Hague Regulations, stating the occupier must maintain the laws in force in the occupied territory "unless absolutely prevented from doing so.[254] The Iraqi Constitution as it existed in 2003 prohibited foreigners from owning Iraqi businesses and did not permit private ownership of key industries.[255] All this changed, however, in *CPA Order 39*, signed by the Administrator on 19 September 2003.[256] *Coalition Provisional Authority Order 39* states up front that its provisions are consistent with

> the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy 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.[257]

The order "replaces all existing foreign investment law,"[258] and allows foreign investors to acquire interests in Iraqi companies to the same extent as Iraqi investors.[259] The only apparent limits are prohibitions on acquiring private real property and "ownership of the natural resources sector involving primary extraction and initial processing."[260] Also, the order does not apply to banking and insurance investments.[261]

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[253] *See* Robert D. Tadlock, *Comment, Occupation Law and Foreign Investiment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations*, 39 U.S.F. L. REV. 227 (Fall 2004)(discussing the limited role for foreign investment in customary occupation law, and arguing for an approach that allows foreign investment in ways and at levels similar to nearby countries with similar social structures).

[254] Hague IV, *supra* note 3, art. 43.

[255] IRAQI CONSTITUTION art. 18 (1990 interim version).

[256] *CPA Ord. 39*, *supra* note 228.

[257] *Report of the Secretary General Pursuant to Paragraph 24 of Security Council Resolution 1483 (2003*), July 17, 2003, S/2003/715 [hereinafter Paragraph 24 Report].

[258] *CPA Ord. 39*, *supra* note 228.

[259] *Id.*

[260] *Id*.

[261] *Id*.

Along with the general limits on occupier legislation contained in Article 43 of the Hague Regulations, Article 55 specifically constrains the occupier with regard to public property. Article 55 of the Hague Regulations states: "The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."[262] Basically, this means the CPA is a mere caretaker of Iraqi public property, and although it may use the products generated by the natural resources in Iraq, the CPA may not sell or otherwise dispose of Iraqi public property.[263] *Coalition Provisional Order 39*, however, clearly evinces an intent to allow Iraqi state-owned enterprises to be sold to private interests.[264]

In addition to legislation affecting unemployment and privatization, the CPA promulgated other rules in the economic arena that represent significant changes in the Iraqi economic system. These rules include *CPA Order 51*, suspending the Iraqi State Company or Water Transportation's monopoly as "the exclusive maritime agent in Iraqi ports,"[265] and several orders affecting the Iraqi system of taxation.[266]

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[262] Hague IV, *supra* note 3 art. 55.

[263] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 402 (18 July 1956) (Change 1, 15 July 1976).

[264] *CPA Ord. 39*, *supra* note 228.

[265] Coalition Provisional Authority, *Coalition Provisional Authority Order Number 51, Suspension of Exclusive Agency Status of Iraqi State Company for Water Transportation*, 14 Jan. 2004, *at* http://www.iraqcoalition.org/regulations/20040114_CPAORD51_Suspension_of_Exclusive_Agency_Status_of_Iraqi_State_Company_for_Water_Transportation.pdf.

[266] Coalition Provisional Authority, *Coalition Provisional Authority Order Number 40, Bank Law with Annex*, 19 Sept. 2003, *available at* http://www,uraqcoalition.org/regulations/20030919_CPAORD40_Bank_Law_with_ Annex.pdf, rescinded by Coalition Provisional Authority, *Coalition Provisional Authority Order Number 94, Banking Law of 2004*, 7 June 2004, *available at* http://www.iraqcoalition.org/regulations/20040607_CPAORD94_Banking_Law_of_2004_with_Annex_A.pdf; Coalition Provisional Authority, *Coalition Provisional Authority Order Number 49, Tax Strategy for 2004 with Annex A and Explanatory Notes*, 19 Feb. 2004, *at* http://www.iraqcoalition.org.regulations/20040220_CPAORD_49_Tax_Strategy_of_2004_with_Annex_and_Ex_Note.pdf, amended by Coalition Provisional Authority, *Coalition Provisional Authority Order 84 Section 3*, 30 April 2004, *available at* http://www.iraqcoalition.org/regulations/20040430_CPAORD_84_Amendments_of_CPA_Order_37_and_49.pdf; Coalition Provisional Authority, *Coalition Provisional Authority Order Number 37, Tax Strategy for 2003*, 19 Sept. 2003, *available at* http://www.iraqcoalition.org/regulations/20040220_CPAORD_

3. Institutional Changes

In general terms, there is a broad prohibition on occupying powers changing the fundamental nature and institutions of government.[267] This prohibition is expressed by Hague Article 43[268] and GC IV Article 47.[269] Despite these prohibitions, the CPA engaged in widespread changes in institutions during the occupation of Iraq.[270] In fact, the primary goal of the occupation was the transformation of Iraq from dictatorship to democracy.[271] Consistent with the change in political system was the plan to transform the economy from a command directed to a free-market system.[272] Some of the economic initiatives pursued by the CPA were discussed earlier. Two examples of how the CPA went about transforming the Iraqi political system are the creation of the Central Criminal Court of Iraq,[273] and the change from centralized government to a more federal system.[274]

The Central Criminal Court of Iraq was created by *CPA Order 13*.[275] This was not a military court created by the CPA as part of its security apparatus, but rather an Iraqi court created by the CPA to try Iraqis accused of serious offenses against Coalition forces and the provisional government, and to serve as a model for the rest of Iraq.[276] Article 64 of the Fourth Geneva Convention says the courts in the occupied state will continue to function, and apply their own law, although the occupier can

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37_Tax_Strategy_for_2003.pdf, amended by Coalition Provisional Authority, *Coalition Provisional Authority Order 84 Section 3*, 30 April 2004, *available at* http://www.iraqcoalition.org/regulations/20040430_CPAORD_84_Amendments_of_CPA_Order_37_and_49.pdf.

[267] GC COMMENTARY, *supra* note 21, at 303-8; Dinstein, *supra* note 21, at 113; GERSON, *supra* note 21, at 5; *see* Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195 (2005) (referring to the limited powers of occupiers as the "conservationist" principle of the customary international law of occupation).

[268] Hague IV, *supra* note 3, art. 43.

[269] GC IV, *supra* note 4, art. 47.

[270] Sir Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L. & COMP. L.Q. 27 (Jan. 2005); Scheffer, *supra* note 2, at 842; Ottolenghi, *supra* note 2, at 2177.

[271] UNSCR 1483, *supra* note 1.

[272] Paragraph 24 Report, *supra* note 156.

[273] *CPA Ord. 13*, *supra* note 229.

[274] Coalition Provisional Authority, *Coalition Provisional Authority Order Number 71, Local Governmental Powers*, 6 Apr. 2004, *available at* http://www.iraqcoaltion.org/regulations/ 20040406_ CPAORD_71_ Local_ Governmental_Powers.pdf [hereinafter *CPA Ord. 71*].

[275] *CPA Ord. 13*, *supra* note 229.

[276] *Id.*

step in where existing law contradicts provisions of the Convention itself.[277] The occupier may also set up its own courts where the local judges have quit for reasons of conscience, although the applicable law remains that of the occupied state.[278] By creating the Central Criminal Court of Iraq, the CPA exceeded the bounds set forth in Geneva Article 64, since the predicates for displacing indigenous courts and law did not exist.[279]

Coalition Provisional Order 71 lays out the powers of the local governments for the first time since the invasion. The document explains

> that the system of government in Iraq shall be republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates (also known as provinces), municipalities, and local administrations and that each Governorate shall have the right to form a Governorate Council, name a Governor and form municipal and local councils and that regions and governorates shall be organized on the basis of the principle of de-centralization and the devolution of authorities to municipal and local governments.[280]

This is a sweeping change in a country that has only experienced centralized government in the recent past. Under Saddam, virtually all government authority and certainly decision-making power came directly from Baghdad. Therefore, the CPA transformation contradicts the Hague and Geneva prohibitions on changing the fundamental nature and institutions of government.

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[277] GC IV, *supra* note 4, art. 64.
[278] *Id*; *see also* GC COMMENTARY, *supra* note 21, at 335-6.
[279] *But see* John Yoo, *Iraqi Reconstruction and the Law of Occupation*, 11 U.C. DAVIS J. INT'L L. & POL'Y 7, 17 (Fall 2004) (arguing "[b]y the end of World War II, state practice had established the authority of an occupying power to implement fundamental changes in the laws and government of an occupied country.").
[280] *CPA Ord. 71*, *supra* note 274.

IV. What Qualifies as Customary International Occupation Law?

Customary international law is determined by looking to multiple sources to determine norms that are respected by most if not all nations.[281] Customary law is found in treaties, court decisions, military manuals, and documents generated by occupation administrations.[282] If something considered customary is abrogated often enough, it can lose its status as customary international law. In fact, while conventional international law can be changed by amending treaties, the only way to change customary international law is to judiciously violate its rules until the rules are considered to have changed.[283]

Though occupation law is generally accepted to consist of the Hague Regulations and Geneva Conventions, some provisions have been followed more than others. A broad recitation of the provisions of Hague and Geneva considered customary could only include those portions actually respected through state practice since the Regulations and Conventions were adopted.[284] The provisions actually honored by states are those generally related to human rights. Provisions seldom if ever honored include those related to transformation of governments and economies of occupied countries.[285]

Complicating the issue of what portions of occupation law should be considered customary is UN guidance in some occupations. Most occupations since 1949 have avoided this issue by being conducted under either customary international law[286] or UN supervision,[287] but not both. The Coalition occupation of Iraq, however, complicates the issue

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[281] VON GLAHN, LAW AMONG NATIONS, *supra* note 116, at 17; RESTATEMENT, *supra* note 117, § 102.

[282] *See* Meron, *supra* note 133, at 362; Davis P. Goodman, Note: *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573 (1985); RESTATEMENT, *supra* note 117, § 102.

[283] Charney, *supra* note 127, at 914.

[284] Meron, *supra* note 133, at 348; Goodman, *supra* note 282, at 1573.

[285] *See* discussion *infra* Part II. (section on Israeli occupied territories). For an extensive discussion of the tension between the conservationist principle of occupation law and the transformative goals of many occupations since 1945, *see also* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM .J. INT'L L. 580 (2006).

[286] *See* discussion *infra* Part II.F.1 (discussing the the UN supervised occupation of East Timor and the Israeli occupied territories).

[287] *See* discussion *infra* Part II.F.2 (pertaining to the UN supervised occupation of East Timor).

because the UN authorized the occupation and set the transformational goals to be achieved, yet also cited contradictory, customary law of occupation as applicable.[288] Therefore, this is an appropriate time to recognize that portions of the Hague Regulations and Fourth Geneva Convention are no longer reflective of customary international law.

Not all provisions of the Hague and Geneva Conventions should be considered customary international law, in the wake of nearly fifty years of being "honored mainly in the breach,"[289] capped by the Coalition occupation of Iraq in 2003. The provisions aimed mainly at the humanitarian concerns of the civilian population should still be considered valid expressions of conventional and customary international law. However, provisions dealing more specifically with the economic and political conditions of the occupied population, striving to maintain the status quo ante, have never been fully honored, and should not be considered customary international law.

Current occupation practice, evidenced by the recent experience of the CPA in Iraq, governed by both customary international law and Security Council Resolution 1483, allows for much wider scope of legislation than permitted by the language of the Hague Regulations and Fourth Geneva Convention. Article 43 of the Hague Regulations, calling for maintenance of the status quo ante, only binds states to the extent that changes in the law have a negative effect on civilian populations.[290] Similarly, Article 64 of the Fourth Geneva Convention, limiting the legislative authority of an occupier, constrains the occupier only in legislation detrimental to the occupied population.[291] Current occupation practice indicates that provisions of the Hague Regulations and Fourth Geneva Convention restricting the authority of an occupier to legislate in the economic and political arenas, while still valid as conventional international law, should no longer be considered reflective of customary international law.

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[288] UNSCR 1483, *supra* note 1.
[289] BENVENISTI, *supra* note 16, at 34.
[290] Hague IV, *supra* note 3, art. 43.
[291] GC IV, *supra* note 4, art. 64.

V. Conclusion

Customary international occupation law has changed as a result of state practice, culminating in the Coalition occupation and administration of Iraq. Customary international law should no longer reflect adherence to the principle that an occupier is a mere trustee, without authority to transform the occupied state's form of government and economy to reflect democratic values, particularly when the transformative goals are authorized by the UN Security Council.