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Occupation Law During and After Iraq: The Expedience of Conservationism Evidenced in the Minutes and Resolutions of the Iraqi Governing Council

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ARTICLES

OCCUPATION LAW DURING AND AFTER IRAQ: THE EXPEDIENCE OF CONSERVATIONISM EVIDENCED IN THE MINUTES AND RESOLUTIONS OF THE IRAQI GOVERNING COUNCIL

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I. INTRODUCTION

A. *Theoretical Framework*

The legality of the 2003 invasion of Iraq has been the subject of extensive scholarly attention.[1] The *jus in bello* of the Iraq War, on the other hand, has received comparatively less scholarly interest,[2] especially with regard to the manner and degree to which the United States—the de facto occupying power in Iraq—adhered to its responsibilities under the international law of occupation.[3] Although the media,[4] and even governments,[5] played an important role during the

1. *E.g.*, Andru E. Wall, *Was the 2003 Invasion of Iraq Legal?*, *in* 86 INT'L LAW STUDIES, THE WAR IN IRAQ: A LEGAL ANALYSIS 69-80 (Raul A. Pedrozo ed., 2010); James D. Fry, *Remaining Valid: Security Council Resolutions, Textualism, and the Invasion of Iraq*, 15 TUL. J. INT'L & COMP. L. 609 (2007); Tomasz Iwanek, *The 2003 Invasion of Iraq: How the System Failed*, 15 J. CONFLICT & SEC. L. 89 (2010); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004); Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT'L L. 691 (2004); Owen Bowcott, *Was the War Legal? Leading Lawyers Give Their Verdict*, THE GUARDIAN (Mar. 2, 2004, 3:28 AM), http://www.guardian.co.uk/politics/2004/mar/02/uk.internationaleducationnews.

2. *But see* Christian Enemark, *'Non-Lethal' Weapons and the Occupation of Iraq: Technology, Ethics and Law*, 21 CAMBRIDGE REV. INT'L AFF. 199 (2008).

3. *But see* David Glazier, *Ignorance Is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121 (2005); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006); Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT'L L. 661 (2005); Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom,"* 95 CALIF. L. REV. 2295 (2007); Dennis Mandsager et al., Jus in Bello*: Occupation Law and the War in Iraq*, 98 AM. SOC'Y INT'L L. PROC. 117 (2004).

4. *See, e.g.*, Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 197 n.5 (2005). The media examined various legal questions,

> includ[ing] the proper role of the United Nations Security Council in authorizing the war, prosecution of deposed Ba'ath Party leaders, alleged torture of Iraqi detainees, misconduct by private contractors, the status of United States and other foreign forces after the return of an Iraqi government, the awarding of reconstruction contracts, and the protection (or lack thereof) of Iraqi cultural heritage.

early phases of the war by introducing and investigating important legal issues relating to the occupation of Iraq, the critical legal questions relating to the occupation of Iraq, including those pertaining to the lawfulness of the reforms proposed and undertaken by the Coalition Provisional Authority (CPA), the legal relationship between the CPA and the Iraqi Governing Council (IGC), and the legal authority exercised by both the CPA and IGC during the occupation of Iraq, have yet to receive the same scholarly attention that scholars have paid to the legal questions surrounding the resort to force itself.

In many respects, this lack of critical attention to the *jus in bello* dimensions to the Iraq War is understandable, especially given the horrific crimes committed by Saddam Hussein and the deplorable standard of living that many in Iraq experienced as a result of Saddam's policies. Indeed, very few individuals, reporters, or even government officials felt inclined to question in any meaningful way the positive reforms initiated by the U.S.-led coalition in post-Saddam Iraq.[6] In general, public opinion seemed to subscribe to the view that the United States and the United Kingdom were liberators, not occupiers, perhaps as a result of the U.S. authorities' deliberate avoidance of the term "occupying power."[7] The United States "[had] come as liberators, not occupiers," stated General Tommy Franks, commander of the coalition forces, as U.S. forces entered Baghdad on April 9, 2003.[8]

Yet, from an academic perspective, the lack of serious attention given by scholars and the media to the legal issues attendant to the U.S. occupation of Iraq is perplexing, if not troubling. After all, the law of occupation, despite being initially codified in 1907 in the Hague Conventions, is a rather rudimentary, if not nascent, body of international law, as very few states, during the time period from World War II until the 2003 invasion of Iraq,[9] acknowledged the applicability

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Id.; Guy Gugliotta, *Pentagon Was Told of Risk to Museums: U.S. Urged to Save Iraq's Historic Artifacts*, WASH. POST, Apr. 14, 2003, http://www.washingtonpost.com/ac2/wp-dyn/A19691-2003Apr13?language=printer; Jackie Spinner, *Only Allies to Help with Rebuilding, U.S. to Deny Contracts to Firms from Nonsupporting Nations*, WASH. POST, Dec. 10, 2003, at A1.

5. Paul Bowers, IRAQ: LAW OF OCCUPATION (House of Commons Library Research Paper No. 03/51, 2003), *available at* http://www.parliament.uk/briefing-papers/RP03-51.

6. Fox, *supra* note 4, at 197.

7. *Id.* In public use, the United States avoided the term "occupying power," but before the United Nations and in the quasi-legal documents associated with the United Nations, the United States acknowledged itself as being bound by all of the responsibilities attendant to occupation. Roberts, *supra* note 3, at 609.

8. *Id. See also* Katherine Butler & Donald Macintyre, *The Iraqi Conflict: General Franks Strides into His Baghdad Palace*, THE INDEPENDENT (London), Apr. 17, 2003, at 6 (quoting General Tommy Franks: "This has been about liberation, not about occupation.").

9. *See* S.C. Res. 1483, pmbl., U.N. Doc. S/RES/1483 (May 22, 2003) ("[R]ecognizing the specific authorities, responsibilities, and obligations under applicable international law of [the United States and the United Kingdom] as occupying powers under unified command . . .").

of occupation law to their respective occupational endeavors.[10] This lack of state practice prevented scholars and judges from further refining the doctrine of occupation law, and, as a result, the law of occupation in 2003 was, in a sense, ripe for molding.

Given its geopolitical importance and influence in the Westphalian[11] system of international law and politics, the United States was positioned to play a formidable role in shaping the contours of the law of occupation, for better or worse. In addition, given the shadow of illegality that hung over the actual invasion, one would have expected that America's post-invasion objectives would have been much more scrutinized, however innocuous they may have appeared at the outset. That the United States insisted that it assume the lead in post-war Iraq—explicitly acknowledging itself as an occupying power subject to the international law of occupation[12]—should have prompted scholars to examine more closely the legal questions attendant to the choice to occupy Iraq. This is especially true given the history and culture of Iraq, which speak to the need for exercising caution in choosing whether to occupy any part of the region, let alone in pursuing an overtly transformational occupational agenda.[13]

More importantly, and casting aside for a moment General Franks political platitudes, as a matter of law "there is no liberation law, only occupation law."[14] Indeed, as international law professor Yoram

10. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 4, 6 (1993) (most states since 1907 have refused to officially adopt the moniker of "occupier" in their occupational activities, and "[m]ost contemporary occupants ignored their status and their duties under the law of occupation"); Jordan J. Paust, *The United States as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War*, 27 SUFFOLK TRANSNAT'L L. REV. 1, 1 (2003). *See* Fox, *supra* note 4, at 238-39 (the Israeli occupation of Palestine is one of the few pre-2003 occupation cases acknowledged by the international community, though not by Israel itself).

11. DAVID MALAND, EUROPE IN THE SEVENTEENTH CENTURY 180 (1966). In 1648, the treaties of Osnabrück and Münster—known collectively as the Peace of Westphalia—were signed, concluding the wars of religion in 17th-century Europe and significantly altering the system of international law and relations that had previously governed Europe. *See generally* D. H. PENNINGTON, EUROPE IN THE SEVENTEENTH CENTURY (1989). Technically, fighting did not stop in 1648, as France and Spain remained at war with each other until the signing of the Treaty of the Pyrenees in 1659. *Id.* Prior to 1648, Europe was heavily influenced by tribal, religious, ethnic, familial, feudal, and economic loyalties. Following the treaties of Westphalia, these feudal-religious loyalties were subsumed by the "state system," in which the nation-state emerged as a unitary, sovereign agent to which loyalty was obliged. *Id.* The result was the birth of an international system in which non-intervention and territorial sovereignty emerged as sacrosanct principles of international law. *Id.*

12. S.C. Res. 1483, *supra* note 9.

13. *E.g.*, CHARLES TRIPP, A HISTORY OF IRAQ (2000).

14. Fox, *supra* note 4, at 198. *See also* Paust, *supra* note 10, at 1 ("[R]egardless of the purpose of the overall mission, the United States is an occupying power with competencies and responsibilities under the laws of war . . ."); Zahawi, *supra* note 3, at 2347 ("A state infringing

Dinstein noted, from the day President George Bush infamously declared an end to combat operations in Iraq, "the legal status [pursuant to international law] of the Coalition Forces in Iraq [was] not that of liberators but that of belligerent occupants."[15] Thus, regardless of *why* the United States invaded Iraq, the question of *how*—legally speaking—it would occupy Iraq was of utmost importance.

Some scholars have explored various aspects of the *jus in bello* components of the Iraq war.[16] Yet many of these studies limit their utility insofar as they either (1) confine their analyses merely to the relevance, or applicability, of the traditional law of occupation to contemporary occupations,[17] thereby truncating serious investigation into the legal questions surrounding the occupation of Iraq, or (2) rely solely on United States or CPA sources to substantiate claims that the United States either adhered to or violated the law of occupation in its occupation of Iraq.[18]

In an attempt to address these weaknesses in the existing literature, this Article makes a distinctive contribution: it relies primarily on the minutes kept and resolutions adopted by the IGC to examine the relevance of occupation law to contemporary, state-building occupations and, in turn, to determine the degree to which the United States adhered to its responsibilities as the occupying power in Iraq. Given that the entire purpose of the law of occupation is to protect and uphold the human rights of the occupied population,[19] it is only natural that scholars examine the occupation of Iraq from the perspective of the right-holders themselves—that is, in this case, the Iraqis, of whom the IGC was the principal representative entity. The IGC was the quasi-governmental body established by the CPA in June 2003 and officially recognized by the U.N. General Assembly Resolutions 1483[20] and

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on the sovereignty of another, regardless of the circumstances, is still legally an occupier and must abide by occupation law.").

15. Yoram Dinstein, Jus in Bello *Issues Arising in the Hostilities in Iraq in 2003*, 1 ISR. Y.B. HUM. RTS. 12, 12 (2004) (quoted in Zahawi, *supra* note 3, at 2315).

16. *E.g.*, Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721 (2005); James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491 (2004); Conor McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq*, 10 J. CONFLICT & SECURITY L. 43 (2005); David J. Scheffer, *Agora (Continued): Future Implications of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT'L L. 842 (2003); John Yoo, *Iraqi Reconstruction and the Law of Occupation*, 11 U.C. DAVIS J. INT'L L. & POL'Y 7 (2004).

17. *E.g.*, Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451 (2005).

18. *E.g.*, Zahawi, *supra* note 3.

19. *See infra* Part II.

20. S.C. Res. 1483, *supra* note 9.

1511.[21] The IGC minutes and resolutions[22] provide invaluable insights into the occupation of Iraq during the period between July 13, 2003, when the IGC was officially formed, and June 1, 2004, when the IGC was dissolved and authority transferred by the CPA to the Iraqi Interim Government.

Perhaps more importantly, the IGC minutes and resolutions offer valuable insights into the important moral and philosophical questions surrounding occupation in general: what is occupation and what laws should govern occupation? Should transformative occupations be permitted under international law? If so, what principles should govern such laws? If not, how can "failed states" best be guided through the necessary transformations into self-governing, sovereign states, while simultaneously upholding human rights? These broader, theoretical questions will be addressed in the context of the ensuing analysis.

Relying on the insights provided by the IGC minutes and resolutions, this Article argues that the traditional law of occupation is eminently relevant to contemporary, state-building occupations, and that the United States exceeded liberal interpretations of occupation law in its transformational agenda in Iraq. Extending the arguments of other scholars, this Article also proposes modifications to the traditional law of occupation that would enable states to more effectively balance the tension between traditional occupation law and the realities of contemporary, state-building occupations that require drastic transformations to the economic, political, and legal infrastructure of the occupied state. Specifically, this Article contributes to the growing body of literature on the international legal doctrine of *jus post bellum* by outlining three fundamental principles that must supplement the existing proposals related to the *jus post bellum* law of transformative occupations. Foremost among these principles is the necessity for the preservation of popular sovereignty during transformative occupations in the form of an executive council made up of elected citizen representatives from the occupied state that have veto power over all proposed reforms to the legal, economic, and political infrastructure of

21. *See* S.C. Res. 1511, ¶ 4, U.N. Doc. S/RES/1511 (Oct. 16, 2003) ("Determines that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration . . .").

22. These resolutions, which number roughly 230, were obtained by Professor Stefan Talmon of St. Anne's College, Oxford. Professor Talmon obtained the resolutions through the assistance of a colleague in Baghdad, who located them in a local bookshop. STEFAN TALMON, THE OCCUPATION OF IRAQ, VOL. II: THE OFFICIAL DOCUMENTS OF THE COALITION PROVISIONAL AUTHORITY, THE IRAQI GOVERNING COUNCIL AND RELATED DOCUMENTS (forthcoming 2012). As an intern for Professor Talmon, the author translated these resolutions from Arabic into English. With the assistance from Hamida Khalil, an Iraqi PhD. student in Political Science at the University of Utah, the author also translated many of the minutes kept by the IGC in their weekly meetings.

the occupied state.

B. *Outline of Article*

Part II examines the history and fundamental tenets of the traditional law of occupation and its status under international law prior to the 2003 invasion of Iraq. Part III examines how the CPA's reforms complied with the traditional law of occupation using the minutes and resolutions of the IGC. Following a brief introduction to the IGC, its establishment and envisioned authority, Part III presents key findings from the resolutions adopted and minutes kept by the IGC to further and more accurately demonstrate how the United States acted contrary to its obligations under the international law of occupation during its occupation of Iraq.

Scholars have argued that despite the CPA's apparent violations of the law of occupation, the CPA reforms were nonetheless lawful under international law, and several theories have been presented to this end. Part IV outlines a few of the more prominent of these theories, and concludes by critiquing several of their premises and conclusions. Once again, the IGC minutes and resolutions provide unique insights. Combining the conclusions from Parts II-IV, Part V proposes three principles that must accompany a more practical international legal standard for transformative occupations—a *jus post bellum*—against which contemporary, transformative occupations can be measured.

II. THE TRADITIONAL LAW OF OCCUPATION

A. *Historical Overview*

The international law of occupation emerged as a norm of customary international law in the late eighteenth century in response to what was previously the somewhat unencumbered state practice of conquering and subjugating foreign territories.[23] Prior to the late eighteenth century, conquest was viewed by the community of nations as a legitimate tool of statecraft, and states exercised almost absolute entitlement to the spoils of conquest.[24] In practice, the assumption of control over

23. *See generally* OPPENHEIM'S INTERNATIONAL LAW 432-33 (H. Lauterpacht ed., 7th ed. 1952); Fox, *supra* note 4, at 228-31 (providing a brief overview of the evolution of the law of occupation prior to 1907); Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution-Making: Toward a* Jus Post Bellum *for "Interim Occupations,"* 51 N.Y.L. SCH. L. REV. 496, 503 (2007) ("[T]he concept of belligerent occupation was distinguished from the older 'right of conquest' which ipso facto ascribed full sovereignty over conquered territory and the total subjugation of its inhabitants--absolute dominion to the victor in a war.").

24. SHARON KORMAN, THE RIGHT OF CONQUEST 109-11 (1996).

conquered territory had devastating consequences for the conquered territory, with "'rape and pillage' being the harsh but common consequence of foreign control over territory."[25] The rise of standing armies and more standardized codes of conduct in the nineteenth century led to the emergence of international norms that limited the excesses of conquest, thereby attempting to preserve the status quo *ante bellum* in the conquered territory.[26]

The standardized codes of conduct relating to occupation were initially categorized under the rubric of "belligerent occupation." The concept of belligerent occupation "refers to the possession or control of territory acquired under an occupation that is deemed provisional . . . and thus involves temporary and limited prerogatives of administration rather than outright sovereignty and, by implication, a special legal status."[27] The first usage of the concept of "belligerent occupation" was by a German publicist in 1844, although "[t]he original articulation of the idea behind the modern concept of 'belligerent occupation' is attributed to Emmerich de Vattel."[28] The first codification of the law of belligerent occupation was the Lieber Code, which was issued to Union Forces on April 24, 1863 at President Lincoln's request, and which addressed *inter alia* belligerent occupation.[29]

The limits on an occupier's powers that emerged in the nineteenth century sought to delay the vesting of sovereignty to the occupying power until its territorial rights were formalized, usually via a peace treaty.[30] The occupying power was "prohibited from engaging in certain government activities deemed [to be] the legitimate prerogatives of the then-still de jure sovereign regime."[31] Occupation was thus considered to be a provisional custodianship of territory, or the temporary assumption of certain governmental prerogatives, until full sovereignty was returned to the *de jure* government or vested in the occupying power itself under international approbation.

The international law of occupation continued to evolve during the nineteenth century and was eventually codified in the 1907 Hague

25. *See* Fox, *supra* note 4, at 229.

26. *Id.*

27. Cohen, *supra* note 23, at 503. *See also* BENVENISTI, *supra* note 10, at 8 n.9; Daphna Shraga, *Military Occupation and UN Transitional Administrations--The Analogy and Its Limitations*, *in* PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW 479, 481 (Marcelo G. Kohen ed., 2007).

28. *Id.* (quoting DORIS GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914: A HISTORICAL SURVEY 14 (1949)).

29. *Id.* (quoting Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 245 n.22 (2000)).

30. *See, e.g.*, Am. Ins. Co. v. Canter, 26 U.S. 511, 542 (1828).

31. Fox, *supra* note 4, at 229.

Regulations on Land Warfare.[32] Following World War II and the subsequent brutal Nazi and Japanese occupations, the Hague Regulations were substantially expanded in the Fourth Geneva Convention[33] and, later, in Additional Protocol I, adopted in 1977.[34] The provisions contained therein—including those pertaining to the responsibilities and limits of the occupying power—are binding on parties and non-parties to both treaties as customary international law.[35]

The concept of belligerent occupation fell somewhat into desuetude during World War II and throughout the Cold War.[36] It was during the transformative occupations of the latter that occupation law reached its nadir.[37] Because the occupations of the 1990s were administered by the United Nations, occupation law remained in the background—that is, until the 2003 invasion of Iraq.[38] Combined with U.N. Security Council Resolution 1483, which recognized the United States and the United Kingdom as occupying powers subject to the international law of occupation,[39] the United States' explicit adoption of the moniker occupying power revived the law of occupation in a poignant fashion.[40]

The development of the law of occupation can be seen as a branch of international humanitarian law.[41] As Cohen notes: "Legal rules were deemed necessary because the ousted sovereign no longer has the ability to protect the local population; and the occupier, precisely because his occupation is seen as temporary, has no interest in doing so."[42]

B. *Occupation Law Defined: The Conservationist Principle*

"Occupation" was defined in Article 42 of the Annex to the 1907

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32. Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 88-89 (2003).

33. *Id.* at 89.

34. Cohen, *supra* note 23, at 509.

35. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257, ¶ 79 (July 8) ("These fundamental rules [of Hague and Geneva Law] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 89 (July 9) (holding that Israel is subject to the Hague Convention in the occupied territories despite the fact that Israel is not a signatory to the Hague Convention).

36. *See* BENVENISTI, *supra* note 10, at 59-184.

37. *Id.*

38. *See* Cohen, *supra* note 23, at 499 n.6 ("U.N. Security Council sponsored interim administrations are not to be subject to the law of belligerent occupation.").

39. S.C. Res. 1483, *supra* note 9.

40. Cohen, *supra* note 23, at 499.

41. *Id.* at 503.

42. *Id.* at 502.

Hague Convention IV Respecting the Laws and Customs of War on Land: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends . . . where such authority has been established and can be exercised."[43] The 1907 Hague Convention, the Fourth Geneva Convention, and Additional Protocol I of 1977 outline the basic legal parameters to an occupying power's authority. Article 43 of the Hague Regulations states:

> 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.[44]

Article 64 of the Fourth Geneva Convention elaborated upon Article 43 of the Hague Regulation as follows:

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

43. Hague Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague Convention]. The International Committee of the Red Cross (ICRC) Commentary on the Geneva Civilian Convention, along with Paragraph 2 of Article 2 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (The Geneva Civilian Convention), has reinforced and elaborated upon this definition. Paust, *supra* note 10, at 2. The International Court of Justice (ICJ) has reaffirmed the "effective control" test. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 78 (July 9) ("[T]erritory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.").

44. Hague Convention, *supra* note 43, art. 43.

used by them.[45]

The Fourth Geneva Convention specifically mentions the need for the continuation of penal laws, while the Hague Regulations require the occupying power to respect the laws in force in the country. Taken together, these restrictions constitute what has come to be known as the "conservationist principle." In general, the conservationist principle stands for the proposition that the occupying power is prohibited from instituting significant changes to the legal, political, economic, and social institutions of the occupied state.[46] Accordingly, the occupying power "assumes only as much of the displaced sovereign's authority as is necessary to administer the territory, but no more."[47] Moreover,

> [t]he occupying power is competent to legislate both to maintain security while it exercises governing authority and to fulfill the obligations under occupation law that secure basic rights for the local population. But because the occupier possesses no local legitimacy or necessary stake in the welfare of the territory after it departs, it is not competent to enact reforms that fundamentally alter governing structures in the territory and create long-term consequences for the local population.[48]

The United Nations has not elaborated on the legal obligations of occupying powers, with two exceptions: The Israeli occupation of Palestine[49] and, to a degree, the U.S. occupation of Iraq.[50] The reluctance of occupying powers to acknowledge occupation law as binding on them[51] has also hindered scholars' ability to determine the precise contours of occupation law, as least as it pertains to contemporary state practice.

The foundation of the conservationist principle is the concept of "inalienability of sovereignty through the actual or threatened use of force."[52] Indeed, the conservationist principle presumes that "occupations are temporary, non-transformative, and limited in scope."[53] Thus, the "occupying competencies under the laws of war

45. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

46. Cohen, *supra* note 23, at 498.

47. Fox, *supra* note 4, at 237.

48. *Id.* at 240.

49. *See id.* at 231.

50. *See infra* Parts III & V.

51. *See* BENVENISTI, *supra* note 10, at 6.

52. *Id.* at 4.

53. Kristen E. Boon, *Obligations of the New Occupier: The Contours of a* Jus Post Bellum, LOY. L.A. INT'L & COMP. L. REV. 57, 61 (2009).

(*e.g.*, to arrest non-prisoners of war and to use force for law and order purposes) are legally coextensive with the rights of individuals and the general population under laws of war applicable during occupation."[54] Foremost among these rights are human rights, including the right of protection from torture and cruel or inhumane treatment,[55] due process guarantees for those accused of a crime,[56] freedom from collective penalties,[57] and access to food and health care services.[58] These rights apply to all individuals under occupation, whether they are prisoners of war (protected by the Third Geneva Convention) or civilians (protected by the Fourth Convention).[59]

The conservationist principle also enjoins occupying powers and private companies working under the auspices of an occupying power from appropriating private and state-owned property,[60] including natural resources.[61] Occupying powers and private companies therefore may not "privatiz[e] oil or the state-owned oil production and distribution industry and must not tolerate rates of extraction beyond prior 'normal' rates of extraction or excessive fees or profits by others administering such properties."[62] Transformations to the economic infrastructure, alteration of tax methods, abolition of the death penalty, and changes to labor laws have also been condemned by the international community as being violations of occupation law.[63]

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54. Paust, *supra* note 10, at 2.

55. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

56. *See, e.g.*, International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also* Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 678-79 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L. L. 1, 5, 12 (2001).

57. Paust, *supra* note 10, at 7. Article 50 of the Annex to the 1907 Hague Convention IV expressly affirms: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible." Hague Convention, *supra* note 43, art. 50.

58. Third Geneva Convention, *supra* note 55, art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 14(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

59. Cohen, *supra* note 23, at 510.

60. Hague Convention, *supra* note 43, art. 56; Fourth Geneva Convention, *supra* note 45, arts. 46, 50.

61. *See* ICCPR, *supra* note 56, art. 1(2) ("All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.").

62. Paust, *supra* note 10, at 12.

63. As noted by Fox, "the Israeli Supreme Court has upheld many such acts . . ." Fox, *supra* note 4, at 239. The Security Council has nonetheless "unequivocally condemned Israel's

Both Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention provide for exceptions to the conservationist principle. These exceptions are for military necessity, preservation of public order, and when needed to fulfill other obligations under the convention.[64] All existing legislation is to be respected by the occupying power unless, as outlined in Article 43 of the Hague Regulations, the occupier is "absolutely prevented" from doing so.[65] Although such exceptions have the potential to substantially alter daily life in the occupied territory, the underlying goal of occupation law is to secure stability and peace through preserving existing political and legal institutions.[66]

III. IGC RECORDS AND THE CONSERVATIONIST PRINCIPLE

While the CPA[67] orders and regulations alone cast doubt upon the CPA's compliance with the conservationist principle,[68] they are incomplete insofar as they often fail to adequately account for the voice

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introduction of its own laws into the territories and affirmed the application of the Fourth Geneva Convention to its actions." *Id. See also* S.C. Res. 465, U.N. SCOR, 35th Sess., 2203d mtg., U.N. Doc S/RES/465 (1980) (condemning as a "flagrant violation of the Geneva Convention . . . all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967") (quoted in Fox, *supra* note 4, at 239 n.264).

64. Fourth Geneva Convention, *supra* note 45, art. 64.

65. Hague Convention, *supra* note 43, art. 43.

66. *Id.* at 237.

67. The precise origins of the CPA remain unclear. "[The CPA] was not created by any specific act of U.S. or U.K. law, and a thorough study of its creation concluded that 'detailed information that explicitly and clearly identifies how the authority was established, and by whom, is not readily available.'" Fox, *supra* note 4, at 203 (quoting L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL 32370, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES 4 (2004), *available at* http://fpc.state.gov/documents/organization/32338.pdf).

68. Zahawi, *supra* note 3, at 2321-23. The CPA orders, although motivated by laudable goals and bringing about many important economic, political, and legal reforms to Iraq, nonetheless reveal a systematic disregard for the conservationist principle. Via its approximately 100 Orders, which covered an array of political, social, legal and economic matters and which were issued over the course of the first year of the occupation of Iraq, the CPA sought to "overhaul Iraq's existing criminal, economic, and civil legal systems," with the goal of "transforming Iraq into a politically decentralized and economically liberal state." *Id.* at 2324. *See also* Fox, *supra* note 4, at 240 ("A literal interpretation of article 43 of the Hague Regulations, prohibiting change to the laws in force 'unless absolutely prevented' from doing so, would likely find most of the CPA's reforms invalid."); Scheffer, *supra* note 16; *see generally* Peter Galbraith, *Iraq: The Bungled Transition*, N.Y. REV. OF BOOKS, Sept. 23, 2004, http:www.nybooks.com/articles/17406/; Naomi Klein, *Baghdad Year Zero: Pillaging Iraq in Pursuit of a Neocon Utopia*, HARPERS (Sept. 2004), http://www.harpers.org/BaghdadYearZero.html.

of the Iraqi people during the U.S. occupation of Iraq. Because the underlying purpose of the law of occupation is to protect the occupied people from violations of sovereignty by foreign powers, scholars should examine *Iraqi* records to more fully appreciate the degree to which the United States complied with the law of occupation in its occupation of Iraq. This Part attempts to incorporate Iraqi records into the scholarly record using the minutes kept and resolutions adopted by the IGC.

A. *The Establishment of the IGC and its Relationship with the CPA*

The IGC was established by L. Paul Bremer, the American diplomat appointed by President Bush as the Administrator of the CPA.[69] Bremer and the CPA replaced the Office for Reconstruction and Humanitarian Assistance (ORHA), the governing body initially established by President Bush immediately following the U.S. invasion of Iraq and headed by Jay Garner, a retired U.S. Army General.[70] ORHA oversaw the post-invasion administration of Iraq from the invasion in March until May 11, 2003, when Bremer and the CPA took control over the day-to-day administration of the occupation of Iraq.[71]

Several factors contributed to the establishment of the IGC as a quasi-representative of post-Saddam Iraq, the first of which was Bremer's refusal to allow the so-called Group of Seven, or G-7, to function by itself as the de facto interim government.[72] The G-7 was a group of seven Iraqi representatives[73] who, to one degree or another, had opposed Saddam Hussein during his brutal reign over Iraq. Bremer met with the G-7 shortly after arriving in Baghdad.[74] The G-7 sought for a rapid transition of authority from the CPA to the Iraqis,[75] and had interpreted General Garner's statements of the previous weeks as indicating that the CPA would establish a transitional government within a few weeks following the CPA's assumption of control.[76] Bremer flatly denied these assertions, arguing that the process of

69. CHIBLI MALLAT, IRAQ: GUIDE TO LAW AND POLICY 28 (2009); Steven R. Weisman, *U.S. Set to Name Civilian to Oversee Iraq*, N.Y. TIMES (May 2, 2003), http://www.nytimes.com/2003/05/02/international/worldspecial/02POST.html.

70. MALLAT, *supra* note 69, at 228-29.

71. *Id.*

72. L. PAUL BREMER III WITH MALCOLM MCCONNELL, MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE, 78-79 (2006).

73. *Id.* at 46. The group included four Shi'i Muslims (Ahmad Chalabi, Ayad Allawi, Ibrahim al-Jaafari, and Abdul Aziz Hakim) and three Sunni Muslims (Naseer Chaderchi and the two Sunni Kurds, Massoud Barzani and Jalal Talabani). *Id.*

74. *Id.* at 45.

75. *See, e.g., id.* at 48-49.

76. *Id.* at 49. *See also* MALLAT, *supra* note 69, at 228.

transferring authority to the Iraqis would be "incremental."[77] Bremer's chief concern was that the G-7, in spite of all of its assistance, was simply not representative enough of the Iraqi people.[78] "There is only one Sunni leader among you," stated Bremer. "There are no Turkmen here, no Christians, no women."[79]

A second factor behind the establishment of the IGC was Bremer's refusal to allow Iraqis to hold elections to vote for an interim government.[80] "[W]e're not going to rush into elections because Iraq simply has none of the mechanisms needed for elections — no census, no electoral laws, no political parties, and all the related structure we take for granted," said Bremer shortly after arriving in Baghdad.[81] Bremer stated that there was "no blanket prohibition" on self-rule, only that "[he] want[ed] to do it [in] a way that takes care of [the CPA's] concerns . . . Elections that are held too early can be destructive. It's got to be done very carefully."[82]

Under the direction of Bremer, a joint U.S.–U.K. Governance Team, comprised of about 50 individuals, worked "[20] hours a day for more than two months to come up with the initial [25] Iraqis for the [IGC]."[83] The CPA worked tirelessly to ensure that key individuals were included on the IGC,[84] and that the body itself was representative—from an ethnic, religious, and gender point of view—of all Iraqis.[85] On Sunday July 13, 2003, Bahr al-Uloum, one of Shi'a Islam's most respected Imams and a member of the IGC, introduced the newly created IGC to all Iraqis.[86]

CPA Regulation 6 outlined the anticipated authority of the IGC. It states: "The CPA recognized the formation of the Governing Council as the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq, consistent with Resolution 1483."[87] It

77. BREMER WITH MCCONNELL, *supra* note 72, at 49.

78. *Id.*

79. *Id.*

80. *Iraqi Governing Council*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/iraq/igc.htm (last modified Sept. 7, 2011) [hereinafter *Iraqi Governing Council*]; *see also* BREMER WITH MCCONNELL, *supra* note 72, at 89.

81. BREMER WITH MCCONNELL, *supra* note 72, at 19.

82. *Iraqi Governing Council*, *supra* note 80.

83. BREMER WITH MCCONNELL, *supra* note 72, at 171. Some members of the IGC were killed prior to the transfer of authority. *E.g.*, *id.* at 359.

84. *Id.* at 96-98 (the CPA employed various efforts to have influential Shi'ites, Abdul Aziz Hakim and Sayyid Mohammad Bahr al-Uloum, agree to sit on the IGC).

85. *Id.* at 93.

86. *Id.* at 100-03 (outlining Bremer's account of the event).

87. Governing Council of Iraq, *Coalition Provisional Authority Regulation Number 6* (July 13, 2003), http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf [hereinafter *Regulation 6*]. It is not clear, however, whether there were

is clear in both Bremer's record and in the minutes of the IGC that one of the principle responsibilities "given" to the IGC by the CPA was to oversee the preparations needed to write a constitution.[88] Once it became clear that the IGC would be succeeded by an interim Iraqi government, to whom the CPA would transfer sovereignty, the IGC assumed the responsibility of assisting the CPA in drafting the Transitional Administrative Law (TAL), which would govern the country until a constitution could be written by an elected body.[89] In his introductory remarks at the press conference in which the IGC introduced itself to the public, Bahr al-Uloum stated that the IGC's objectives were to provide security for Iraqis, "eliminating the consequences of political tyranny," de-Ba'athification, "uprooting . . . [Ba'ath] ideology from society," and beginning "the process of writing a constitution, leading to elections for a parliament."[90] Regulation 6 also outlined the IGC's relationship to the CPA.

> In accordance with Resolution 1483, the Governing Council and the CPA shall consult and coordinate on all matters involving the temporary governance of Iraq, including the authorities of the Governing Council.
>
> All officials of the CPA are hereby instructed promptly to respond to all requests for experts, technical assistance or other support requested by the Governing Council.[91]

Theoretically, then, the CPA was supposed to consult with the IGC "on all matters involving the temporary governance of Iraq," including security. In practice, however, this was rarely realized.[92] The IGC

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any official guidelines regarding the relationship between IGC resolutions and CPA orders and regulations. In practice, the CPA had considerable oversight of the IGC activities, although the IGC minutes demonstrate that the CPA, at times, attempted to circumvent IGC influence in order to further its agenda. *See infra* Part III.B.

88. *See* BREMER WITH MCCONNELL, *supra* note 72, at 97-98.

89. *Id.* at 269.

90. *Id.* at 101.

91. *Regulation 6*, *supra* note 87.

92. Fox, *supra* note 4, at 248 n.285.

> Acknowledgment of consultations was mostly limited to the economic reforms and usually consisted of the same general boilerplate rather than specific delineations of a legislative path for a given reform. *See e.g.*, Coalition Provisional Authority Order 39 . . . (order promulgated "[i]n close consultation with and acting in coordination with the Governing Council"); Coalition Provisional Authority Order 40 . . . (noting that the CPA had "worked closely with the Governing Council to ensure that economic change occurs in a manner acceptable to the people of Iraq"); *see also* Coalition Provisional Authority

passed several resolutions that were, for the most part, substantive contributions to the governance of Iraq during the first year of the occupation.[93] Yet Bremer essentially held veto power, and used it.[94] In effect, the IGC wielded only marginal authority.

The IGC had a rotating presidency in which one member of the IGC would serve for one Gregorian month.[95] Originally, the IGC also had an executive council that was supposed to be composed of five individuals. However, bickering over equal representation among different ethnic and religious factions on the IGC necessitated a nine-member executive council that, in the end, was unworkable.[96] The IGC conducted its regular meetings on Monday through Thursday, usually at 10 a.m.[97] Bremer or a CPA representative usually attended one of these meetings each week.[98] The IGC also conducted irregular meetings as needed.[99] The most influential members of the IGC were Ibrahim al-Jaafari, Abdul Aziz Hakim, Jalal Talabani, and Ahmad Chalabi.[100]

B. *The Minutes of the IGC and the Conservationist Principle*

The minutes kept and resolutions adopted by the IGC provide

Order 56 . . . ; Coalition Provisional Authority Order 64 . . . (same language in preamble to amendments to Company Law); Coalition Provisional Authority Order 18 . . . (same language in preamble to Interim Law on Securities Market); Coalition Provisional Authority Order 75 . . . (same language as in preamble to Realignment of Military Industrial Companies); Coalition Provisional Authority Order 76 . . . (same language as in preamble to Consolidations of State-Owned Enterprises); Coalition Provisional Authority Order 78 . . . (virtually same language as in preamble to reform of bankruptcy procedures); Coalition Provisional Authority Order 80 . . . (same language as in preamble to amendments to Trademarks and Descriptions Law).

Id.

93. *See supra* text accompanying notes 108–11.

94. *See* BREMER WITH MCCONNELL, *supra* note 72, at 292-93. The most oft cited example of Bremer vetoing an IGC decision occurred when Bremer vetoed an IGC resolution to make Shari'ah Law the basis for personal status legal matters. *Id.* This decision was likely in keeping with the law of occupation, as it was necessary to ensure that the provisions of the Fourth Geneva Conventions were complied with, and likely necessary to preserve public order.

95. *Id.* at 123-24, 148; *Iraqi Governing Council*, *supra* note 80.

96. BREMER WITH MCCONNELL, *supra* note 72, at 124.

97. *Id.* at 123.

98. *Id.* at 194.

99. The IGC minutes, for example, often referred to special sessions held by the IGC to discuss pressing matters. *E.g.*, MAJLIS AL-HUKM, AL-IRAQ FI-ZILL AL-IHTILAL: MAHADIR MAJLIS AL-HUKM AL-INTIQALI 19/11/2003-25/2/2004 [THE IRAQI GOVERNING COUNCIL, IRAQI IN THE SHADOW OF OCCUPATION: MINUTES OF THE INTERIM GOVERNING COUNCIL 11/19/2003 to 2/25/2004] (Ahmed al-Haj Hashim al-Difa'I ed.) [hereinafter 2004 IGC Minutes].

100. For a list of all members of the IGC, see *Iraqi Governing Council*, *supra* note 80.

scholars with unique insights into the transformational agenda adopted by the CPA. Specifically, these minutes and resolutions enable scholars to make more nuanced assessments of the CPA's respect for and adherence to the international law of occupation during its occupation of Iraq.

The IGC minutes reveal, for example, that in February 2004, Ambassador Bremer requested that the IGC meet outside of its regularly scheduled meetings to discuss the upcoming G8 summit, which the Iraq Central Bank was scheduled to attend.[101] During the meeting, the IGC chairman noted that "Ambassador Bremer [had] encouraged [the IGC to issue] the banking law, which would prove that Iraqi financial institutions were now working in accordance with specific laws."[102] Yet the banking law that the IGC had been presented with by the CPA mirrored provisions in the laws governing the American Federal Reserve Bank—laws that "emphasized the independence of the Bank and the transparency of its work."[103] This proposed law had not been given to the financial committee established by the IGC, and the financial committee had objections to the details of the law.[104] It was further noted in the IGC minutes that the law, when translated from the English back into the Arabic, reflected in some instances "the opposite meaning of the original words."[105] Despite the IGC's reservations about the substance of the law, its translation, and the CPA's lack of consultation with the IGC in drafting the law, the minutes demonstrate that Bremer wanted to sign the law into effect on February 7, 2004, and that he wanted the IGC to approve the law before this date.[106]

On another occasion, the IGC minutes speak of the CPA's involvement in forming the election committee, which was, according to CPA Order 92, to be charged with "organiz[ing], oversee[ing], conduct[ing], and implement[ing] all elections set forth in the TAL."[107] This commission was "structured to ensure complete independence from political influence and to benefit from close consultation with international entities, such as the United Nations, that have impartially and effectively administered genuine and credible elections in nations emerging from periods of tyranny, conflict, and violent strife."[108] Given the important role that the election commission would play in Iraq's

101. 2004 IGC Minutes, *supra* note 99, ¶ 46.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. The Independent Electoral Commission of Iraq, *Coalition Provisional Authority Order 92* (May 31, 2004), http://www.iraqcoalition.org/regulations/20040531_CPAORD_92_Independent_Electoral_commission_of_Iraq.pdf.

108. *Id.*

transition into a self-governing, sovereign state, the IGC had obvious concerns over its makeup.

The principal sentiment expressed by IGC members was that the election commission needed to remain independent of all political, religious, or ethnic influences.[109] The minutes record: "The situation is tense now in the streets and either we [will] have an independent committee or we wait until there is a sovereign state to do this."[110] The chief concern among IGC members was that Iraqis would perceive the commission as being illegitimate.[111] The minutes of the IGC record the following:

> Hav[ing] Bremer form[] the [election] committee will make the process subject to a lot of criticism . . . even if the committee is neutral. The governing council can form this committee or it can be formed by the government[,] but [it cannot be formed] by Bremer. This is not suitable. The [IGC] does not want this committee to be formed by the CPA[;] they want it to be initiated and formed by [the IGC]. Their objection to hav[ing] it be[] formed by the CPA is due to the following[.] [F]irst . . . any elections or results of elections done by a committee formed by the CPA are going to be illegitimate from the public and the international point of view. It will not be a real representation of the Iraqi people. Second, when the CPA forms this commission, it will not be neutral. There will be a pre-engineering of the results which implies that the results will be preplanned and biased from the beginning.[112]

Ironically, it was an instance of the CPA's abrogation of the law of occupation that, in the end, turned out to be one of its biggest Achilles' heels. The United States chose to engage in a policy of de-Ba'athification to rid Iraq's leadership of any traces of Ba'athist influences.[113] To be sure, the IGC was, for the most part, on board with this policy.[114] Yet the IGC did make its case for allowing low-level Ba'athists to retain their employment in the new Iraq. In one particular meeting in 2004, the IGC discussed the fate of the employees who lost

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109. MAJLIS AL-HUKM, AL-IRAQ FI-ZILL AL-IHTILAL: MAHADIR MAJLIS AL-HUKM AL-INTIQALI 2003 [THE IRAQI GOVERNING COUNCIL, IRAQ IN THE SHADOW OF OCCUPATION: MINUTES OF THE INTERIM GOVERNING COUNCIL 2003] ¶ 135 (Ahmed al-Jah Jashim al-Difa'I ed., 2003) [hereinafter 2003 IGC Minutes].

110. *Id.*

111. *Id.*

112. *Id.*

113. BREMER WITH MCCONNELL, *supra* note 72, at 39-42.

114. *See* Majlis al-Hukm, *Qarrarat 'Aam 2003* [IGC General Resolutions, 2003], Resolutions 21, 58 [hereinafter 2003 IGC Resolutions] (in the possession of the author).

their employment as a result of the CPA's dissolving of several Iraqi institutions and agencies.[115] The minutes from this meeting reveal that the IGC mentioned thirty-five individuals who had lost their jobs as a result of the de-Ba'athification order given by the IGC on May 16th of 2003.[116] Among those who lost their job as a result of this resolution were "senior staff and professors, engineers and doctors."[117] The minutes go on to state:

> Some of these staff members who were fired are in the prime of their age and have a lot of potential for this country in [the event they are permitted] to return back to the public service. They can contribute to the rebuilding of this country instead of having them leav[e] the country and contribute to the building of another country. Iraq needs people like these[,] and also these former employees are living under very bad conditions due to their loss of income.[118]

Not only do these minutes from the IGC meetings reveal the CPA's seeming disregard for the parameters established by the law of occupation, but they also indicate the effectual hollowness of the CPA's own regulations. Regulation 6, for example, provided that "the Governing Council has certain authorities and responsibilities as representatives of the Iraqi people, including ensuring that the Iraqi people's interests are represented in both the interim administration and in determining the means of establishing an internationally recognized, representative government."[119]

The minutes of the IGC also reveal that the CPA involved itself in such matters as paying teachers' salaries,[120] governing the use and production of passports,[121] and influencing the appointments of security and police force authorities[122]—issues arguably outside the parameters of an occupier's authority under traditional occupation law. In addition, the minutes reveal that Bremer pressured the IGC to sign the administrative law prematurely.[123]

Overall, the IGC minutes and resolutions reveal a systematic effort by the CPA to transform Iraq in a manner that was, at times, inconsistent with its obligations as an occupying power under the law of

115. 2004 IGC Minutes, *supra* note 99, ¶ 42.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Regulation 6*, *supra* note 87.
120. 2003 IGC Minutes, *supra* note 109, ¶ 83.
121. *Id.* ¶ 86.
122. *Id.* ¶ 67.
123. *Id.* ¶ 108.

occupation. While many of the CPA's reforms were no doubt motivated by good intentions and resulted in positive changes, several of these reforms nonetheless contravened the historical parameters of the law of occupation insofar as they altered Iraq's legal and political institutions. To be sure, many such reforms were not absolutely necessary to secure public order or to ensure adherence to other international legal obligations, and therefore do not fall within the exceptions outlined in the Article 43 of The Hague Convention and Article 64 of the Geneva Convention. Furthermore, attempts by the CPA to grant a measure of sovereignty to the Iraqis, primarily through the establishment of the IGC, were, at best, ineffectual. The IGC was a creation of the CPA, and the Iraqi people had little input into its composition or organization. Even if the IGC was a legitimate representative body, the IGC minutes and resolutions reveal that the desires of the IGC were at times stifled by the CPA and demonstrate that the IGC was often unable to perform the functions reserved for the *de jure* sovereign representative as mandated by the law of occupation.

IV. IGC MINUTES AND RESOLUTIONS: A REBUFF TO ALTERNATIVE THEORIES OF LEGITIMACY

Some scholars have argued that despite the apparent violations of the law of occupation by the United States in its occupation of Iraq, the transformative agenda pursued by the United States was nonetheless legitimate.[124] These arguments take various forms.[125] This Part outlines the central tenets of these alternative theories of legitimacy, and measures the integrity of these claims against the insights provided by the IGC minutes and resolutions.

A. *The Work of the IGC Legitimized the CPA's Transformational Agenda*

The most basic argument for the proposition that America's transformative occupation in Iraq complied with international law is that by creating and working with the IGC, the CPA legitimized its transformational agenda.[126] In other words, because the IGC represented the Iraqi people, and because the CPA worked with the IGC in pursuit of its transformative agenda, the CPA's actions are therefore legitimate.

The IGC minutes and resolutions do indeed point to some significant

124. *See infra* Parts IV.A, IV.B, & IV.C.

125. *Id.*

126. This seems to be the general thinking of Bremer and the CPA in their administration of the occupation. *See, e.g.*, BREMER WITH MCCONNELL, *supra* note 72, at 123.

contributions made by the IGC during the first year of the U.S. occupation of Iraq. The IGC minutes speak of successful joint committees between the IGC and the CPA[127] and effective collaboration between the IGC and the CPA on important issues,[128] including the Transitional Administrative Law.[129] The IGC also passed several resolutions that either substantively contributed to portions of the CPA's agenda or otherwise reflect broad powers exercised by the IGC.[130] Yet any temporary manifestations of sovereignty by the IGC were outweighed by the CPA's systematic usurpation of authority and the inability of the IGC to actually dictate the trajectory of the Iraqi polity in post-Saddam Iraq. Indeed, the work of the IGC cannot be invoked to legitimize the CPA's transformative agenda for several reasons.

To begin with, many reforms were initiated long before the IGC was even established.[131] Moreover, the IGC was arguably not even a legitimate representative body and therefore was incapable of exercising its sovereign powers during the occupation. Despite assertions to the contrary (even by IGC members themselves),[132] the IGC was a creation of the CPA,[133] with little input from Iraqi people. The CPA tried to portray a semblance of legitimacy throughout the whole process by, in the words of Bremer, "choreograph[ing]" a process by which the IGC would "constitute" or "self-anoin[t]" itself,[134] then "summon the U[nited] N[ations], U[nited] S[tates], and U[nited] K[ingdom] for a

127. 2003 IGC Minutes, *supra* note 109, ¶ 19.

128. 2004 IGC Minutes, *supra* note 99, ¶ 149.

129. *See* BREMER WITH MCCONNELL, *supra* note 72, at 269, 288, 292–93.

130. The following IGC resolutions are worth noting: 2003 Resolutions 4, 21, and 58 (orders pertaining to the de-Ba'athification process); Resolutions 5 and 6 (giving the IGC oversight of its organization and operations); 2003 Resolutions 10, 11, and 13 (establishing ministries and choosing ministers); 2003 Resolutions 13, 14, 29, 30, 33, 35-36, 42-45, 73, 85 (significant changes in the administrative structure of the state); 2003 Resolution 19 (setting aside a day for commemorating the death of Fatima); 2003 Resolution 22 (changes to Iraqi citizenship law); 2003 Resolutions 40 and 74 (decisions regarding Iraq's dealings with international organizations); 2003 Resolutions 48 and 137 (personal status matters); 2004 Resolution 33 (approval of the TAL); 2004 Resolution 38 (revocation of law from previous regime); 2004 Resolution 41 (regulation of property questions); 2004 Resolution 51 (establishment of Iraqi intelligence services); 2004 Resolutions 53, 54, and 55 (further changes to administrative structure of state); 2004 Resolution 72 (approval of new flag design); and 2004 Resolutions 87 and 90 (changes in election system). 2003 IGC Resolutions, *supra* note 114; Majlis al-Hukm, *Qarrarat 'Aam 2004* [IGC General Resolutions, 2004] [hereinafter 2004 IGC Resolutions] (in the possession of the author).

131. BREMER WITH MCCONNELL, *supra* note 72, at 85 (describing reforms relating to cell phones, currency, oil, and the economy).

132. *Id.* at 101 (during an IGC introductory press conference, Bahr al-Uloum stated that the IGC "had been 'established through an Iraqi national initiative' . . .").

133. *Id.* at 171.

134. *Id.* at 100 ("This became known to [the CPA] irreverently as the 'immaculate conception' option.").

private meeting at which they would inform us that they had formed the [IGC]."[135] Then, together, they "would all repair to a large hall where [the IGC] would present themselves to the world's press."[136] Yet Bremer's actions did not go unnoticed. During the press conference in which the IGC introduced itself to all Iraqis, the first question posed was by a BBC reporter, who asked the IGC: "'Isn't it true that' the Council was just a creature of the Americans, had no powers, and was essentially useless?"[137]

The Iraqi public knew that the IGC was a creation of the CPA and that it did not possess the capacity that a sovereign, representative entity ought to have possessed. The IGC minutes record that the Iraqi public had voiced "hard criticism against the council,"[138] and that the IGC members themselves were concerned with their ability to gain the support of the Iraqi people.[139] Throughout the first year of the occupation, the Iraqis were skeptical of the IGC's legitimacy and the CPA's heavy hand in running the affairs of the country. The minutes indicate that the IGC was concerned that the public would consider the TAL to be merely a product of the Americans, despite the IGC's input.[140] However, Bremer was adamant that the "transfer" of sovereignty to the Iraqis be "incremental,"[141] and therefore he resisted efforts by Iraqis—including the IGC—to turn over a measure of sovereignty to a representative body.

An additional reason as to why the work of the IGC cannot be invoked to legitimize the CPA's transformative agenda is because even if the IGC was a legitimate representative body, its activities were largely controlled by the CPA. The CPA did consult the IGC on important matters, including, for example, the TAL[142] and how to deal with the increasing threat that was Muqtada al-Sadr.[143] Yet, the IGC minutes and resolutions reveal a process in which the IGC was relegated to advisor to the CPA or to executor of the CPA's demands.[144] When the IGC did not perform according to the CPA's desire, the CPA simply stepped in and took over.[145]

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135. *Id.*

136. *Id.*

137. *Id.* at 102.

138. 2004 IGC Minutes, *supra* note 99, ¶ 42.

139. *Id.*

140. *Id.* ¶ 117.

141. BREMER WITH MCCONNELL, *supra* note 72, at 49.

142. *See id.* at 269, 288, 292–93.

143. *Id.* at 135.

144. 2003 IGC Minutes, *supra* note 109, ¶ 61 (noting that Bremer threatened to simply appoint deputies to positions of minister on his own if the IGC couldn't agree on a process to do so).

145. *Id.*

Rarely did the IGC act with true autonomy or sovereignty. Dozens of IGC resolutions, for example, include "notices" at the end of the resolution that reveal the thinking of the IGC regarding its relationship with the CPA.[146] Perhaps the most common notice is the one that simply states: "There is no need for CPA intervention [regarding this resolution]."[147] Similar notices reveal even more deference to the CPA: "This resolution is in need of CPA approval."[148] Some notices simply reveal the oversight that the CPA had in the drafting of the resolution: "The CPA recommends [submitting] this resolution to [a particular] committee [for further review or implementation]."[149] Others merely state: "The CPA has agreed to this resolution."[150]

The minutes reveal that the CPA was heavily involved in the activities of the IGC by overseeing the IGC's decisions and dictating the parameters of its powers.[151] Even in the process of creating the IGC, the CPA, according to the IGC minutes, acted in such a way so as to cause the IGC members to feel as if they were not present.[152] The IGC minutes reveal, for example, that the real discussions pertaining to the composition of the Governing Council took place between Bremer and Grand Ayatollah Ali al-Sistani, not between the CPA and the IGC.[153]

Once established, the IGC made sure to refrain from making any significant decisions without obtaining approval from Bremer.[154] Yet even decisions clearly within the jurisdiction of the IGC were struck down by Bremer. For example, the minutes speak of the IGC's decision

> to establish the National Commission of Media to supervise the media in Iraq. This commission will issue licenses and will be independent from the Government. Also, the council wants to give authority to the Ministry of Communication to issue licenses related to waves of broadcasting and the ministry wants to have control the policies, cultural, and media issues in addition to licenses to be given by the commission that they want to form.[155]

However, the CPA refused to sign off on the IGC's decision, "because [the CPA] wanted this authority to be for an independent

146. *E.g.*, 2003 IGC Resolutions, *supra* note 114, Resolutions 19, 22, 25, 32, 85.

147. *Id.*

148. *E.g.*, *id.* Resolutions 29, 30, 45, and 49.

149. *Id.* Resolution 50.

150. *Id.* Resolutions 52, 54.

151. *E.g.*, 2003 IGC Minutes, *supra* note 109, ¶ 135.

152. *Id.* ¶ 27.

153. *Id.* ¶ 78.

154. *See id.* ¶ 135 (noting that the IGC agreed to discuss election committee issues with Bremer to make sure there was "no misunderstanding between [the IGC and the CPA]").

155. *Id.* ¶ 27.

agency."[156] This reflects the broader trend of the CPA's treatment of the IGC, which is that the CPA exercised a *de facto* veto over Council actions,[157] relegating the IGC to a mere advisory body.

From the beginning, Bremer sought to prop up the IGC in the eyes of the public, often through creative initiatives. This was no doubt a strategic decision, as Bremer knew that the CPA's success hinged largely on its ability to further its reforms while simultaneously managing to convince the Iraqi public that the IGC was behind these reforms. For example, even before the IGC was created, Bremer had "asked [his] staff to come up with a long list of 'early wins' for the [c]ouncil."[158] According to Bremer, these "early wins" "were decisions [the IGC] could announce quickly to show the Iraqi people that the [IGC] was indeed assuming responsibility."[159] Another example took place following the horrific bombing on August 19, 2003 on the U.N. Compound in Baghdad, in which the then-coordinator of the U.N. Assistance Mission in Iraq, Sergio Vieira de Mello, was killed.[160] After speaking with the IGC about the event, Bremer suggested six steps that the IGC should take immediately to promote a calm and resolute response to the bombing.[161] According to Bremer, the IGC was "shocked into silence," by Bremer's words.[162] "Gradually it dawned on them that the moment to act had arrived," said Bremer.[163]

The IGC minutes reveal that the CPA also used the IGC to promote its transformative agenda. For example, the CPA pressured the IGC to

156. *Id.*

157. *See* Fox, *supra* note 4, at 207 (citing Rajiv Chandrasekaran, *Iraq Occupation Faces New Challenge; Shiite Demand to Elect Constitution's Drafters Could Delay Transfer of Power*, WASH. POST, Oct. 21, 2003, at A20 (observing that in crafting a process to draft a new Iraqi constitution, "[t]he occupation authority is allowing the Governing Council to choose how the drafters will be selected, but Bremer reserves the right to veto the decision"); Richard A. Oppel, Jr. & Robert F. Worth, *After the War: Politics*, N.Y. TIMES, July 19, 2003, at A7; Vivienne Walt, *Iraq Schools Trying to Close Book on Ba'athist Regime*, BOSTON GLOBE, Oct. 1, 2003, at A15 ("The U.S. administrator in Iraq, L. Paul Bremer III, who has veto power over the Governing Council, has not approved the council's decision to fire teachers who were Ba'ath Party members."); Edward Wong, *The Struggle for Iraq: The Government*, N.Y. TIMES, Feb. 22, 2004, at A11).

158. BREMER WITH MCCONNELL, *supra* note 72, at 123.

159. *Id.* For example, Bremer "suggested that [the IGC] publicly 'demand' the Coalition to restore electricity generation to prewar levels by October 1 and also find urgent ways to deal with unemployment." *Id.* Since the CPA already had these plans in place, "this would be a win-win operation," said Bremer, "in which the [IGC] would get the public credit when it made the demand of the CPA and when we responded." *Id.*

160. *Top UN Envoy Sergio Vieira de Mello Killed in Terrorist Blast in Baghdad*, UN NEWS CENTRE (Aug. 19, 2003), http://www.un.org/apps/news/story.asp?NewsID=8023#.UJK-grTh98s.

161. BREMER WITH MCCONNELL, *supra* note 72, at 142.

162. *Id.*

163. *Id.*

sign the Iraq Central Bank law, despite reservations from some of the IGC members.[164] The minutes state that one member of the IGC suggested that the council just "pass the law . . . and then go back later to review and modify it."[165] Another member of the IGC retorted: "[But] all the laws that Ambassador Bremer asked the council to pass for signature are presented in this way!"[166]

The CPA also made important decisions without consulting with the IGC. For example, the minutes speak of an incident that occurred when portions of the communication network in Iraq were failing.[167] The IGC expected to oversee the problem in cooperation with the CPA.[168] According to the IGC minutes, there was a company that was charged to oversee the communication network,[169] and a CPA Employee—an American—was tasked with supervising this company.[170] "[T]he [IGC] heard via the media that the contract [to oversee the communication network] was awarded to another company."[171] The minutes state that "[t]his issue was discussed with Ambassador Bremer and the council expressed its concern that this is not a cooperation between partners and that the council feel that they are not within the decision-making circle."[172]

The minutes also speak of an incident regarding the issue of federalism in relation to the TAL. The IGC was meeting "on a daily basis" to discuss important issues relating to the TAL, and were involved in "tense discussions" with the CPA regarding the issue of federalism.[173] In the midst of these discussions, the IGC was notified that the CPA would be holding a press conference on important issues relating to the TAL.[174] Worried that they were not notified of this press conference, the IGC sent a delegate to the CPA to discuss their concerns with them.[175] Several IGC members expressed their frustrations over the CPA's actions, with one member complaining that "this [was] the general policy of the CPA"—namely, "that they go with their decision regardless of the council's orientations."[176] This member felt that it was the role of the IGC to make these important decisions regarding the

164. 2003 IGC Minutes, *supra* note 109, ¶ 48.
165. *Id.*
166. *Id.*
167. *Id.* ¶ 27.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* ¶ 77.
174. *Id.*
175. *Id.*
176. *Id.*

future of Iraq.[177] Overall, the IGC felt undermined in their efforts to exercise any measure of authority over the reconstruction of Iraq.[178]

The IGC minutes, as well as Bremer's record, reveal that there was also serious interpersonal discord between the IGC and the CPA. The IGC was known to go to the press, including the *New York Times*, to express their frustrations.[179] As for the CPA, Bremer stated early on that he felt the IGC was lazy,[180] ineffective,[181] unfocused,[182] and disorganized.[183] He said that working with the IGC was "like playing tee-ball with players who couldn't hit the ball teed up for them,"[184] and that the IGC "couldn't organize a parade, let alone run the country."[185] As early as October 2003, Bremer wondered if the IGC even "[had] a future."[186]

Yet, putting aside for a moment whether the IGC was actually competent, it should be noted that legal scholars are highly skeptical of the notion that the occupying power can appropriate authority from the *de jure* sovereign merely by creating a local governing body.[187] This skepticism is based primarily upon Articles 7 and 47 of the Fourth Geneva Convention. Article 7 provides that individuals in occupied territories "may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention."[188] Article 47 expands on this injunction:

> Protected persons who are in occupied territory shall not be deprived, in any case or manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying

177. *Id.*

178. *See id.*

179. *See* BREMER WITH MCCONNELL, *supra* note 72, at 181-82.

180. *Id.* at 123, 189. Bremer said the IGC "works fewer hours in a week than the CPA works every day." *Id.* at 123. He also stated that "nothing ever emerged from the council," and they were the "Committee of the Black Hole." *Id.* at 195.

181. *See id.* at 168.

182. *Id.* at 195.

183. *Id.* at 123.

184. *Id.*

185. *Id.* at 171.

186. *Id.* at 188-89.

187. *See, e.g.*, Fox, *supra* note 4, at 248.

188. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 7, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter First Geneva Convention].

Power . . .[189]

Thus, as Fox states, occupying powers "cannot accomplish indirectly through agreements or pliant local administrators what they are prohibited from accomplishing directly: changing existing laws or institutions so as to diminish the rights of the protected persons."[190] In other words, even if the IGC was a legitimate representative body of the Iraqi people,[191] they could not have relinquished their sovereign rights via agreement nor consultation with the CPA.

B. *IGC Consent*

Assuming for a moment that the IGC could in fact relinquish its sovereign rights under the Geneva Convention and the law of occupation, they still would have had to actively consent to do so by, *inter alia*, approving the CPA reforms. IGC consent, the argument goes, "operates to waive any claims of infringement on the rights of the post-occupation de jure regime, whose interests the CPA, as de facto temporary authority, was bound to protect."[192] In other words, "[e]ven if the CPA exceeded its authority under occupation law . . . the right-holder potentially injured by such acts renounced any claim of injury or illegality."[193] But the IGC did not fully consent to the panoply of reforms instituted by the CPA.

To be sure, the IGC occasionally made statements in support of certain CPA reforms. Adnan Pachachi, speaking to the Security Council as an IGC representative on July 22, 2003, stated, for example, that there were several "pressing issues to be addressed by the interim Governing Council," including the need to "re-examin[e] the legislation enacted by the previous regime . . . rebuild its economy, modernize its industrial sector, reform its educational system, improve its sanitation services and provide basic necessities to all its citizens."[194] Yet these can hardly be seen as statements of support for the CPA Agenda; rather, they demonstrate the obvious exigencies facing post-Saddam Iraq. Regardless, the IGC minutes clearly indicate that the IGC had significant reservations over many of the CPA's reforms and the manner in which the CPA went about enacting those reforms.

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189. Fourth Geneva Convention, *supra* note 45, art. 47.

190. Fox, *supra* note 4, at 250.

191. *See* S.C. Res. 1511, *supra* note 21, ¶ 4 (noting that the IGC embodied "the sovereignty of the State of Iraq during the transitional period").

192. Fox, *supra* note 4, at 247.

193. *Id.*

194. U.N. SCOR, 58th Sess., 4791st mtg. at 9, U.N. Doc. S/PV.4791 (July 22, 2003) *quoted in* Fox, *supra* note 4, at 248-49.

For example, the IGC did not approve of the reforms enacted by the CPA relating to the elections of the provincial councils.[195] These councils were relatively influential insofar as they were charged with electing the provincial governors.[196] CPA Order 71 ("Local Governmental Powers") stipulated that "members of each [Provincial] Council shall be selected in accordance with criteria agreed upon by the Governing Council and the CPA."[197] The IGC minutes, however, reveal a process that was completely dominated by the CPA. Granted, the IGC failed at times to adequately fulfill part of its responsibilities relating to the process of selecting candidates who would supervise the provincial council elections.[198] Nevertheless, the minutes point out that "[t]he CPA as usual disregard[ed] this issue and went for the practical change in its own way."[199] The IGC pressured the CPA to repeat the elections.[200] Yet, "[w]hen the CPA was told about this repeating the elections, the CPA blamed the council and told the council that they did not do their job."[201] In addition, the minutes state that it was a matter of "Iraqi dignity" for the IGC to stand up to the CPA and have more oversight in the selection of representatives who supervise the provincial council elections.[202] One IGC member stated, "the CPA assigned a person to be the chair of the council in Gazaliyah in Baghdad when that person is not even from that area; in addition he is a thief."[203]

Moreover, the IGC did not agree with the CPA's refusal to hold elections.[204] Nor did they consent to the makeup of the election committee[205] or to the strong role of the CPA in the drafting of the TAL.[206] Taken together, these examples from the IGC minutes undermine assertions that the IGC consented to the CPA's reforms.

C. *The Conservationist Principle is an Anachronism*

Scholars have argued that the imperatives of contemporary occupations render the conservationist principle anachronistic in

195. 2003 IGC Minutes, *supra* note 109, ¶ 78.

196. *Id.*

197. Local Government Powers, *Coalition Provisional Authority Order Number 71* (Apr. 6, 2004), http://www.iraqcoalition.org/regulations/20040406_CPAORD_71_Local_Governmental_Powers_.pdf.

198. 2003 IGC Minutes, *supra* note 109, ¶ 78.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* ¶¶ 78-79.

203. *Id.*

204. *Id.* ¶ 135.

205. *Id.*

206. *Id.* ¶ 117.

contemporary international law.[207] Scholars have suggested that, in practice, the conservationist principle has "been demonstrated to be a fiction"[208] and is "irrelevant"[209] or "inadequate."[210] State practice since World War II—particularly the sweeping reforms instituted in Japan and Germany in the aftermath of World War II—lend credence to this proposition.[211] Other scholars argue that because very few states have acknowledged being bound by the law of occupation, the law is essentially obsolete, or at least outdated.[212]

In making these arguments, scholars and government authorities point to the differences between the historical context in which the law of occupation emerged and the circumstances in which the law of occupation is applied today.[213] When occupation law was codified in the late nineteenth and early twentieth centuries, wars were waged among Western states primarily to secure geopolitical advantage, "not to affect the quality of governance in other states."[214] "'Misrule' by a defeated regime was only rarely of concern to a victorious occupying power," whereas "[m]isrule by occupiers . . . occurred with regularity."[215] Contemporary occupations, on the other hand, have been directed more toward transformational state-building in an attempt to further the principals of international human rights law.[216]

According to this theory, the *raison d'état* of the law of occupation is to prevent abuses by the occupying power. Yet, contemporary occupations are more often oriented toward changing the political,

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207. *E.g.*, CARL SCHMITT, THE *NOMOS* OF THE EARTH IN THE INTERNATIONAL LAW OF THE *JUS PUBLICUM EUROPAEUM* 207-09 (G.L. Ulmen trans., 2003); Neehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721 (2005); Cohen, *supra* note 23; Scheffer, *supra* note 16.

208. Boon, *supra* note 53, at 61.

209. Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 9 (2006).

210. Boon, *supra* note 53, at 63.

211. *Id.* at 62. However, as noted by Boon, only the Hague Convention applied to these occupations, as "[t]he occupations of Germany and Japan took place before the Geneva Conventions were codified." *Id.* at 62 n.22. Some scholars have argued that the Hague provisions relating to occupation law did not apply to the occupations of Germany and Japan. GREGORY FOX, HUMANITARIAN OCCUPATION 8-12 (2008).

212. *See e.g.*, McGurk, *supra* note 17, at 459. McGurk was an attorney for the General Counsel to the CPA and the Office of the Legal Advisor at the U.S. Embassy in Baghdad. McGurk stated that the traditional law of occupation, with its status quo presumption, "reflects a state-centered, nineteenth-century conception of European warfare and bears no relation to modern military conflict or the contemporary thrust of public international law." *Id.* at 458. McGurk's thesis necessitates the question as to why the United States agreed to be bound by the law of occupation in the first place.

213. *Id.*

214. Fox, *supra* note 4, at 262.

215. *Id.*

216. McGurk, *supra* note 17, at 464.

economic, and legal institutions of the occupied country, not annexation or pillage.[217] By invading and subsequently occupying Iraq, the United States, for example, sought to "buil[d] transparent institutions, establis[h] conditions for economic growth, remov[e] the vestiges of tyranny, establis[h] a rule of law that protects human rights, and creat[e] the framework for competitive multi-party elections."[218] According to these theorists, then, the paradox, if not quixotry, is clear: the law of occupation, which was historically designed to uphold the status quo in order to prevent abuses by the occupying power, requires in modern times upholding the discriminatory legal and political systems of ousted tyrants, while simultaneously preventing reforms by the occupying power that would actually prevent these abuses from persisting.[219]

Moreover, the law of occupation, these scholars argue, should be interpreted in line with the developments in international human rights law since World War II, especially considering that the international law of occupation includes very few examples of state practice and has remained virtually ossified since its codification in the early twentieth century.[220] After all, they argue, the full implementation of the transformational agenda adopted by the United States in Iraq would have significantly *enhanced* human rights in Iraq.[221] As a matter of precedent in this regard, the Israeli Supreme Court upheld many of Israel's administrative changes in the occupied territories by interpreting article 43 of the Hague Regulations as imposing only a "duty to act as a proper government that looks after the local population in all fields of life,"[222] leading one scholar to describe this as the "benevolent occupation" approach.[223]

The assertion that the conservationist principle is anachronistic on the basis that it would be unjust, if not immoral, to strictly apply the principal to contemporary occupations of failed states, is mostly incorrect, for at least four reasons. First, this assertion rests on the incorrect assumption that the ousted government—as opposed to the people themselves—is the rightful holder of sovereignty.[224] Critics of the conservationist principle assert that it protects the interests of the *de jure* sovereign, and, the thinking goes, if the *de jure* sovereign has been ousted by its people or by foreign invasion, then there is no *de jure*

217. Roberts, *supra* note 3, *passim*.

218. McGurk, *supra* note 17, at 458.

219. *See* Cohen, *supra* note 23, at 499.

220. Fox, *supra* note 4, at 246-47.

221. McGurk, *supra* note 17, at 454.

222. Ja'amait Ascan v. IDF Commander in Judea and Samaria, (1982) 37(4) PD 785, 800, *quoted in* DAVID KRETZMER, THE OCCUPATION OF JUSTICE 68 (2002).

223. DAVID KRETZMER, THE OCCUPATION OF JUSTICE 69 (2002).

224. Cohen, *supra* note 23, at 522.

sovereign, the interests of whom must be protected. And even if the interests of the *de jure* sovereign were to be protected, the fact that the *de jure* sovereign was a dictator or tyrant makes those interests illegitimate and therefore unworthy of protection under the law.

These assertions miss a critical development in international law during the last century, which is that international law "recognizes the principle that sovereignty lies in a people, not in a political elite."[225] Thus, whether or not an ousted leader or government was tyrannical, the occupying power, even in transformational occupations, is obligated to respect rightful holders of sovereignty—that is, the people. Considering the axiomatic nature of this proposition to U.S. constitutional history and jurisprudence, it is surprising that the United States, in its occupation of Iraq, was so quick to assume responsibilities legally reserved for the sovereign people of Iraq.[226] "[R]egime collapse does not extinguish the sovereignty" of the occupied state,[227] nor does "total defeat and disintegration of the governing regime" lead to a transfer of sovereignty to the occupying state.[228] Regardless, international law has evolved such that it can penetrate state sovereignty in order to protect individual rights, and the rights outlined in the Fourth Geneva Convention, for example, were clearly directed toward securing the rights of individuals, not regimes.

Second, the doctrine of "sovereign equality" cautions against allowing one nation to dictate the social, legal, economic, and political makeup of another state.[229] The doctrine of sovereign equality stands for the proposition that "every state has an equal standing in international law" and that each state contributes to a plural international society.[230] Under sovereign equality, "all states have an equal entitlement to participate in the formation of international law . . . [and] [a]ny state claiming a right under international law has to accord all other states the same right."[231] By eliminating the conservationist principle, we open the Pandora's box of allowing some states to dictate the internal affairs of

225. BENVENISTI, *supra* note 10, at 95.

226. Granted, not all states adhere to the proposition that sovereignty lies with the people rather than the regime. Yet even so, if such a regime was removed from power, the sovereignty previously exercised by the regime would, *ipso facto*, transfer to the people. At issue here is the representative of popular sovereignty; the principle of "international legal sovereignty" for the state remains a separate issue. *See* Cohen, *supra* note 23, at 525-26.

227. BENVENISTI, *supra* note 10, at xi.

228. *Id.*

229. *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 (XXV), U.N. GAOR, 24th Sess., Supp. No. 28, U.N. Doc. A/5217, at 123-24 (Oct. 24, 1970).

230. Cohen, *supra* note 23, at 527.

231. *Id.* at 527-28.

another state, while prohibiting concomitant reciprocity.

The third reason why the conservationist principle is not anachronistic is because although the law of occupation has not been "practiced" *per se* by states (insofar as states have refused to be bound by it in their occupational endeavors), occupation law has nonetheless been widely recognized by States as a binding norm in international law. States have, for example, published guidelines in their national military manuals that provide insight into that state's perception of the nature of acceptable conduct by their armed forces during occupation.[232] Perhaps the most notable among these is the so-called Lieber Code, a text[233] written by Dr. Francis Lieber in 1863 during the American Civil War. Moreover, to rescind the conservationist principle would "largely eviscerate the important assumption of non-annexation at the heart of occupation law,"[234] while also "impermissibly blend[ing] *jus in bello* and *jus ad bellum* principles."[235]

Accordingly, the Iraq War stands as the preeminent case study of how occupation law is and should be applied in contemporary occupations, especially given the explicit U.S. acknowledgment that it would be bound by the law of occupation in the lead up to the invasion. Just because the circumstances surrounding the application of this law differ from those in which the law developed over a century ago does not lessen the relevance of the underlying principles. To argue otherwise would be akin to arguing, *mutatis mutandis*,[236] that an important domestic law ought to be struck down simply because the historical circumstances giving rise to its original legislation are different from the contemporary circumstances in which it is applied.

The fourth reason why the conservationist principle is not anachronistic is because it is essential to upholding fundamental principles of international law, including the principle of self-determination. The critical assumption underlying the U.S. approach in Iraq and the theory that the conservationist principle is anachronistic is that the occupying power knows what is in the best interests of the occupied people and that it will act accordingly. Besides hearkening back to the colonialist shadows of yesteryear, this assumption is simply incorrect, as demonstrated in the minutes of the IGC. The following

232. Fox, *supra* note 4, at 231-32.

233. *The Lieber Code: Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War*, arts. 31-47 (1863), *reprinted in* THE LAW OF WAR: A DOCUMENTARY HISTORY 158, 164-67 (Leon Friedman ed., 1972).

234. Fox, *supra* note 4, at 296.

235. *Id.*

236. The most important difference, of course, being that a domestic law is binding on all citizens, whereas international law is binding only to the extent that a sovereign state consents, with the major exceptions being laws governing gross violations of human rights and other peremptory norms (*jus cogens*), to which all states are bound.

exchange between Bremer and Ibhrahim al-Jaafari, a member of the IGC, is illustrative. Bremer stated to al-Jaafari, "We simply have to improve the performance of the Council."[237] Al-Jaafari replied, "With respect, Ambassador . . . [i]f the Council is weak you have no one to blame but yourself, since you appointed it. And we cannot expect the Council to act responsibly if it doesn't have authority."[238]

Another example comes from the 2004 IGC minutes, which indicate that the IGC encountered difficulties in working with other Iraqi authorities because these other authorities were also working with the CPA, and these other authorities sensed that the CPA was the real powerbroker.[239] The minutes note that IGC member Sami al-Askari attended a meeting of the Iraqi Council of Ministers. Mr. al-Askari stated that the Council of Ministers was "uncomfortable dealing with the [IGC],"[240] partly because the Council of Ministers was inclined to believe that they were equal to the IGC in authority based largely on the manner in which Bremer and the CPA had interacted with the Council of Ministers.[241]

One final example of how the conservationist principle supports the doctrine of self-determination relates to the CPA's involvement in the drafting of the TAL. The IGC minutes indicate that the IGC was concerned over the public's perception that the CPA was essentially writing the future constitution of Iraq in its involvement in drafting the TAL.[242] One member of the IGC, Dr. Hashim al-Hasani, mentioned that he was involved in the drafting of the TAL and that he knew that Bremer was not personally involved in the process.[243] Nonetheless, Dr. al-Hasani stated that "people are saying that Bremer and his advisors wrote the law."[244] This incident demonstrates the inherent relevance of the conservationist principle to contemporary occupations, insofar as it illustrates how self-governance is hampered when sovereignty is temporarily usurped—or merely appears, in the eyes of the occupied population, to be usurped—by the occupying power.

That the United States sought to improve the economic, political, and human rights situation in Iraq is undisputed, and there can be little doubt that many of the reforms instituted by the United States in Iraq yielded or will eventually yield positive results in Iraq. Yet, as the IGC minutes demonstrate, good-intentioned and even positive reforms can

237. BREMER WITH MCCONNELL, *supra* note 72, at 201.
238. *Id.* at 117.
239. 2004 IGC Minutes, *supra* note 99, at 140.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* at 117.
244. *Id.*

still have long-lasting, negative effects on the occupied state, including wide-spread mistrust of reforms that would otherwise have been accepted by the occupied population had there not been a suspicion of foreign involvement. Moreover, the temporary usurpation of sovereignty, even to implement positive reforms, inevitably fosters an aura of elitism among the "expert" occupiers. Such arrogance was evident in the IGC minutes.[245]

The CPA was arguably more qualified than many Iraqi authorities on several matters of governance. Yet many qualified Iraqis had been repressed by Saddam for over thirty years, and had little opportunity to hone their professional skills. Regardless, it may be argued that the object of self-governance is not necessarily to get things perfect the first time. Indeed, by stripping the Iraqis of the opportunities to be the principal decision makers in the reconstruction of their country, the CPA stifled growth and, more importantly, robbed Iraqis of responsibility. No matter how "expert" the reforms instituted by the CPA were, they were inherently more likely to fail than they would have been had the Iraqis instituted them, simply because future responsibility for these reforms cannot be ascribed to the Iraqis themselves. This, in turn, thwarts long-term accountability.

Finally, to argue that the conservationist principle is anachronistic is to render the entire Iraq experience incoherent. After all, the United States explicitly agreed to be bound by the law of occupation. To argue *post hoc* that the central component to the law of occupation was anachronistic and thus inapplicable is tantamount to undermining one of the axiomatic principles of international law—namely, state practice. Indeed, the law of occupation was recognized as an international legal doctrine of sufficient merit to impel the United States,[246] the United Kingdom,[247] and the United Nations[248] to acknowledge its existence in the lead up to the war. Not only did the United States, at least initially modify its practice to conform to the law of occupation, but it did so explicitly out of a legal obligation,[249] satisfying the *opinio juris*

245. *E.g.*, *id.* at 159-62 (U.S. authorities telling the Iraqi authorities how to set up their defense intelligence systems, encouraging the Iraqis to establish an intelligence system "like the one in Britain"); *id.* at 123 (Bremer said that working with the IGC was "like playing tee-ball with players who couldn't hit the ball teed up for them"); *id.* at 171 (Bremer stated that the IGC "couldn't organize a parade, let alone run the country").

246. Permanent Representatives of the United Kingdom of Great Britain and the United States of America, Letter Dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003) [hereinafter Letter from the Permanent Representatives].

247. *Id.*

248. S.C. Res. 1483, *supra* note 9.

249. Letter from the Permanent Representatives, *supra* note 246.

requirement for state practice to arise to the level of customary international law. That the law of occupation was considered by all parties involved in the Iraq War—including, remarkably, the occupying power itself—to constitute a binding legal obligation under international law speaks conclusively to the status of the conservationist principle in international law during the lead up to the Iraq War.

Regardless, scholars who argue that the conservationist principle is anachronistic have failed to outline a nuanced analysis of the implications concomitant to their argument. That is, if the law of occupation is in fact dead, then what legal norms are in place to protect the occupied population from abuses of authority by the occupying power? If there are no legal norms in place, how should the international community work to ensure that contemporary occupations are conducted in accordance with international human rights law and state sovereignty? If transformative occupations are to be allowed, what checks are or should be put in place to restrain tendencies by more powerful states to effect changes in smaller, less powerful states? By failing to properly consider or address some of these basic issues, these scholars obfuscate the fundamental issue in the occupation of Iraq, which is whether the United States acted lawfully in its occupational endeavors, and, in turn, how the international community can best foster democratic change while upholding the sovereign rights of the occupied state.

V. PRINCIPLES TO GUIDE A *JUS POST BELLUM* FOR TRANSFORMATIVE OCCUPATIONS

Even if the conservationist principle was maintained in its entirety, critics of the conservationist principle are correct in stating that the application of the conservationist principle to contemporary, transformative occupations potentially creates as many problems as it prevents. Indeed, even if the principle of the inalienability of sovereignty by force *was* deemed to be relevant to contemporary occupations in failed or post-conflict states, it would nonetheless be unworkable or, at best, impractical. To wit, it would have been impossible for post-Saddam Iraq—a state lacking a functioning government and suffering from the effects of thirty years of dictatorship, which included two wars—to have accomplished even a fraction of the necessary reforms that were overseen and directed by the CPA. Indeed, had the United States or the international community withheld assistance to Iraq on the grounds that such assistance contravened the law of occupation, it would have constituted a strikingly immoral and formalistic decision.

Yet, in acknowledging that in some circumstances it may not be feasible to preserve the status quo *ante bellum* as mandated by the law of occupation, it is not necessary to alter this law altogether, as some scholars have argued.[250] Rather, the question, posed by one scholar, must be asked: "How can the 'transformative aspects of occupation' required by human rights principles . . . be reconciled with the spirit of the conservation principle and its core premise of the inalienability of sovereignty by force?"[251]

Drawing on the insights provided by the minutes kept and resolutions adopted by the IGC, this Article outlines several principles essential to a *jus post bellum* that more effectively balances the tension between human rights-based, transformative occupations and popular sovereignty. To be sure, these principles are not exhaustive; nor should they be examined in isolation from other principles outlined in the emerging literature on *jus post bellum*, some of which were examined above. The ensuing analysis seeks merely to incorporate the lessons learned from the IGC minutes and resolutions into the emerging literature on *jus post bellum*.

This Article proposes that the *jus post bellum* law of transformative occupation be anchored by three fundamental propositions: (1) where possible, the military command of the occupying state should be separate and distinct from a multinational civilian command; (2) this multinational civilian command should be headed by an executive council composed of citizen representatives from the occupied state, who, as the de facto sovereign, may authorize transformative reforms; and, (3) the multinational civilian command should refrain, where possible, from enacting reforms until all major hostilities have ceased.

Regarding the first proposition, the IGC minutes and resolutions clearly outline the dangers inherent in allowing the occupying state to monopolize the decision-making process pertaining to reforms. In states that require transformative occupations, the potential for wide-scale violence—as realized in Iraq—is constant, primarily because there is often a power vacuum, there are varied factions competing for power, there is usually foreign interference, and the rule of law is often subjugated to the exigencies of post-conflict survival.[252] Yet, as evidenced by the IGC minutes and resolutions, when the occupying state has control over both military operations and civilian operations (*i.e.*, the process of democratic reforms), the potential for dangerous confluence of the two lines of authority increases. In these instances, decision makers overseeing legal, economic, and political reforms risk

250. *See, e.g.*, McGurk, *supra* note 17; *see also* BENVENISTI, *supra* note 10, at xi.

251. Cohen, *supra* note 23, at 522.

252. *See generally* THOMAS RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 149-297 (2006) (detailing the breakdown in security in post-Saddam Iraq).

basing their decisions primarily on military considerations as opposed to non-lethal factors that would otherwise govern the decision-making process.

The CPA often made decisions regarding the dissolution of key agencies that were influenced by military concerns, even against the strong pushback by IGC members[253] and other experts.[254] It is not unreasonable to think that in weighing competing interests, the CPA would have occasionally elevated the interests of fellow American soldiers over the Iraqi people. Bremer was, at times, intimately engaged in military decisions.[255] Undertaking significant reforms pertaining to democratization, economic liberalization, and the advancement of human rights is hard enough in peacetime; to allow these decisions to be made by the same entity engaged in overseeing security in the country would result in unpalatable situations where occupation officials make decisions regarding the future of the occupied country based on factors that may have limited relevance to the occupied population.

As for the second proposition, the IGC minutes and resolutions speak of the need to give the occupied population a voice in any transformational agenda.[256] This is perhaps the most important lesson derived from the IGC minutes, and ought to occupy an axiomatic position in a *jus post bellum*. It is, after all, the right of the occupied people to determine what reforms to enact and how to enact them. Self-determination stands for the proposition that all people have a voice in their own self-government.[257] The authority given to the IGC was token authority, and this hampered the CPA's and Iraq's ability to effectively stabilize and govern Iraq. The transfer of sovereignty by the CPA to the Iraqi Interim Government was commendable, even if it was late in coming. In the proposed *jus post bellum*, this type of transition has to occur earlier in transformational occupations in order to uphold the principles of self-determination and popular sovereignty.

How a particular "interim sovereign" will look will depend on the circumstances of the occupation. At a minimum, however, the interim sovereign should be headed by an executive council composed of indigenous citizen representatives. These representatives should be capable of leading their country during the transition period, and should

253. *E.g.*, 2004 IGC Minutes, *supra* note 99, ¶ 42.

254. Disbanding the Iraqi army is popularly discussed only in the context of simply "dumping 1.4 million men into a shattered economy" without an afterthought of the consequence. RICKS, *supra* note 252, at 72.

255. Dexter Filkins, *Desert Sturm*, N.Y. TIMES, Feb. 26, 2006, http://www.nytimes.com/2006/02/26/books/review/26filkins.html.

256. *See supra* Part III.B.

257. The terms "self-determination" and "people" have received extensive attention in the literature. *See generally* Ved P. Nanda, 29 DENV. J. INT'L L. & POL'Y 305 (2001).

be representative of the ethnic, religious, and political makeup of their country.[258] This body should be chosen by election. Its primary goal and responsibility should be to oversee preparations to form a representative government capable of standing on its own, and to authorize reforms necessary to achieve that goal.

Because the executive council will be ill-equipped to function on its own, likely due to a lack of resources, expertise, and enforcement mechanisms, they will need assistance from foreign entities. Ideally this entity will be a multilateral authority that enjoys broad international support and, again, is distinct from the military power that is in charge of the day-to-day security in the occupied state. The state responsible for the invasion and occupation may have a place on the multinational authority. Regardless, the executive committee would have final say—veto power, essentially—over all proposed reforms.

The third and final principle of the proposed *jus post bellum* is that, where possible, reforms should be undertaken only when major hostilities have ceased. The purpose of this proposition is two-fold: first, it reduces the likelihood that security concerns will influence transformational decision making; and, second, it will encourage those states who do attempt to invade another state and initiate belligerent occupations—whether as a result of a legitimate invocation of self-defense or unlawful unilateralism—to plan in a manner that will enable them to provide security to the occupied state sufficient to initiate the anticipated reforms. As evidenced in Iraq, conducting elections and instituting political and economic reforms are difficult in the midst of hostilities.[259]

It is acknowledged that the foregoing principles will be successful only to the point that states adopt and implement them. After all, states will be reticent to adhere to limitations imposed on an occupying power, as they hitherto have been in regards to the traditional law of occupation. Yet, this proposal has several identifiable benefits that make it more likely that states will be more inclined to adhere to it.

First, these principles will reduce the ability of powerful states to co-opt the United Nations for nefarious purposes, primarily because all U.N. members will know the state of the law and the different requirements that must be met for transformative occupations to materialize. The upshot of this will be that smaller states will be more inclined to publicly endorse the proposed *jus post bellum*, and larger states—particularly those with proclivities toward unilateral intervention—will exercise caution when realizing that unilateral

258. The CPA performed admirably in this regard.

259. Although, to be sure, much of the violence in Iraq did not commence until several months after the United States initiated many of its reforms.

intervention will not necessarily allow for a subsequent transformational occupation that implements reforms sought by the invading state.

The foregoing principles will also reinforce the conservationist principle and its application to regular occupations insofar as they will apply only in transformational occupations, and when applied in transformational occupations, they will uphold the central tenets of the conservationist principle. This is especially important given the uncertainty over the principle that has occurred as a result of the U.S. occupation of Iraq. Thus, the proposed principles of *jus post bellum* will serve to reinforce the conservationist principle and vice versa.

Finally, and perhaps most importantly, the proposed principles of *jus post bellum* will clearly articulate the rights available to the *right-holders* in regular and transformative occupations *prior* to unilateral or multilateral invasions. Skeptics will be quick to point out that the foregoing principles, had they been implemented prior to 2003, may have made little difference in the occupation of Iraq, primarily because America's determination to depose Saddam, to locate and neutralize weapons of mass destruction, and to "democratize" Iraq were of such paramount importance to America as to justify the attendant violation of international law. However, had the Iraqis had a clear understanding of their rights under occupation law, the United States would have likely exercised greater caution in executing its transformational agenda because the Iraqis' resistance to the reforms would have been arguably more pronounced than otherwise indicated in the IGC minutes and resolutions.

As evidenced by the IGC minutes and resolutions, the IGC—as well as most Iraqis—were unaware of the full extent of their rights during the occupation of Iraq.[260] Had the IGC been advised of the inherent right of popular sovereignty afforded to Iraqis, they may have been much more insistent that certain reforms be scaled back or altered, and more forceful in articulating their role as stewards of Iraqi sovereignty. This may have given more legitimacy to the plethora of otherwise positive reforms initiated by the CPA. At a minimum, this fourth point will more effectively outline the rights of occupied peoples during occupation, thereby giving right-holders more leverage in the post-conflict period, encouraging more transparency in the occupation process, and providing a deterrent to unilateral invasion and occupation.

VI. CONCLUSION

The IGC minutes and resolutions demonstrate that the CPA often

260. Indeed, nothing in the minutes or resolutions forcefully speak to the fact that the IGC was aware of its rights under international law.

contravened its obligations under the international law of occupation by implementing a transformational agenda in Iraq with only token deference to the IGC or Iraqis themselves. The IGC minutes suggest that, in practice, the IGC was an advisory body to the CPA, not the representative of Iraqi sovereignty. Although it appears that the IGC was not totally aware of its rights under the law of occupation,[261] the IGC minutes and resolutions reveal that the IGC opposed certain CPA reforms and the manner in which certain reforms were instituted.

Given Iraq's incorporation of many of the CPA's orders and regulations,[262] it may be said that Iraq has acquiesced to the transformational agenda implemented by the United States. In any case, there is little doubt that the status of the law of occupation today is uncertain.[263] Although the occupation of Iraq could potentially set a precedent for transformational occupations in the future, the proximity to the Iraq experience prevents conclusory analysis for the time being. However, in our age of "'humanitarian' and 'democratic' interventions, the 'war against terror,' U.N. sponsored 'regime change' and 'nation-building' for 'failed' or 'outlaw' states, and the prolonged and highly transformative foreign occupations that all of these tend to entail," the need for a clear legal paradigm for international transformative

261. To be sure, Bremer was at times forceful with the IGC, encouraging them to rise to the occasion and assume leadership over the transitional process. 2004 IGC Minutes, *supra* note 99, ¶ 108.

262. On June 28, 2004, the CPA transferred full sovereignty to the Iraqi Interim Government, and the CPA ceased to exist. MALLAT, *supra* note 69, at 29. Following the adoption of the new Constitution in 2005 and the transfer of authority from the transitional government to the Government of Iraq in 2006, many wondered whether the CPA legal instruments remained valid law. FLORIAN AMERELLER ET AL., LEGAL GUIDE TO DOING BUSINESS IN IRAQ 3 (5th ed. 2010). The Constitution of Iraq does not refer explicitly to CPA Orders or Regulations, but Article 130 of the Constitution perpetuates the validity of existing laws, "presumably including CPA Orders that were not rescinded by the Interim and Transitional Governments." *Id.* Since 2006, the GOI has expressly repealed certain CPA Orders, such as Order 39, which was repealed by the new Investment Law (2006). *See* Zahawi, *supra* note 3, at 2329 (CPA Orders remained valid as a whole until and only if repealed by the GOI). Many CPA Orders have also been officially incorporated by the GOI, most of which relate to economic matters. Among the CPA Orders related to economic matters in Iraq that remain valid are Order 54 (Trade Liberalization Policy, amended per Order 70), Order 56 (Central Bank Law), Order 64 (Amendment to Iraqi Company Law No. 21 of 1997), Order 74 (Interim Law on Securities Markets), Order 80 (Amendment to the Trademarks and Descriptions Law No. 21 of 1957), Order 81 (Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law), and Order 94 (Banking Law of 2004). *See CPA Official Documents*, THE COALITION PROVISIONAL AUTHORITY, http://www.iraqcoalition.org/ regulations/#Orders (last visited Nov. 11, 2012). Thus, in addition to pre-Saddam and Saddam-era legislation, the current Iraqi legal framework includes several CPA Orders.

263. Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 9 (2006).

occupations has never been greater.[264]

This Article has sought to further refine the parameters of this paradigm, and in this regard supplements the existing literature on the *jus post bellum* law of transformative occupations. Relying on the minutes and resolutions of the Iraqi Governing Council, this Article has argued that the conservationist principle is as relevant today as when it was codified in the 1907 Hague Regulations, the Fourth Geneva Convention, and Additional Protocols I and II. What is needed today is not a revision of the conservationist principle, but a modification of its *application* to transformative occupations, where the conservationist principle and its corollary doctrine of popular sovereignty must be integrated with the equally important mandate of upholding basic human rights.

To this end, this Article proposes three principles that ought to govern transformative occupations under *jus post bellum*. They are: (1) the military command of the occupying state should be separate and distinct from a multinational civilian command; (2) this multinational civilian command should be headed by an executive council composed of citizen representatives from the occupied state, who, as the *de facto* sovereign, may authorize transformative reforms; and, (3) the multinational civilian command should refrain, where possible, from enacting reforms until all major hostilities have ceased.

By proposing principles to guide the development of *jus post bellum*, in no way does this Article seek to undermine the positive contributions made by the United States in Iraq, not only during the first year of CPA governance, but throughout the subsequent years of U.S. involvement in Iraq. The minutes themselves speak of these contributions.[265] Most of the reforms proposed and implemented by the United States were no doubt necessary. However, the manner in which those reforms were implemented should give scholars and policy makers pause given the concomitant implications for future occupations.

Indeed, not all occupiers are innocent bedfellows, and, as indicated by the IGC resolutions and minutes, even positive reforms can have lingering repercussions on effective self-governance. At the core of the proposed principles to guide a *jus post bellum* law for transformative occupations is the notion that self-governance is most effective when overseen by those whose interests are most at stake. Although self-governance does not always—at least initially—equate to effective governance, international proclivities toward intervention should be tempered by the conservationist principle, applied in post-conflict

264. Cohen, *supra* note 23, at 498.

265. The author is familiar with many of these contributions from first-hand experience, having conducted dozens of ethnographic research missions in Iraq in 2008 and 2009 as an embedded civilian Social Scientist with the U.S. Army's 1st Armored Division.

occupations under the advisorship of citizen representatives of the occupied state.