

**“Ius Post Bellum” in Iraq:
A Challenge to the Applicability and Relevance
of International Humanitarian Law?**

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I. Introduction

“[A]s international lawyers update the law of war to the latest conflicts, can the meaning of its rules be sufficiently fixed in time and space to play the role in world affairs that has come to be expected of it?”¹

The war in Iraq has challenged the *ius ad bellum* and the *ius in bello* in several respects. The abiding applicability and relevance of international legal rules regarding the use of force and the conduct of hostilities have been the subject of thorough public debate and will not be rehashed here. What has not been discussed to anywhere near the same extent is the role of international humanitarian law (IHL) in Iraq following the overthrow of Saddam Hussein’s regime. This matter is arguably even more important², or at least more pressing, given the current uncertain state of affairs in that country. If the US government signally failed to think systematically through the occupation of Iraq in advance of its intervention³, so

* The views expressed here are personal and not those of the ICRC unless so cited. Information herein was continuously updated in keeping with events, up to and including the release of the International Court of Justice’s advisory opinion in *Legal Consequences of the construction of a wall in the Occupied Palestinian Territory* on 9 July 2004. References to internet websites are accurate as of this date as well.

¹ *Morgan*, Slaughterhouse Six: Updating the Law of War, *German Law Journal* 5 (2004), 525 (529), available on the Internet: <www.germanlawjournal.com/article.php?id=430>.

² See, for example, Wolfrum, who reviews the *ius ad bellum* and the *ius in bello* in light of events of the past few years and concludes that “[t]he rules on occupation may be the ones which, in particular, require reconsideration.” (*Wolfrum*, The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?, *Max Planck Yearbook of United Nations Law* 7 (2003), 1 (78)).

³ One commentator who was in Washington DC in April 2003 testifies personally to the “lack of agreed and clear policies on such basic matters as how the US presence was to be characterized, how order was to be maintained, and what types of troops would be needed for the work.” (*Roberts*, The End of Occupation in Iraq (2004), Harvard Program on Humanitarian Policy and Conflict Research, 28 June 2004, 1, available on the Internet: <www.ihlresearch.org/iraq/feature.php?a=51>).

have *mutatis mutandis* commentators of IHL.⁴ Limitations in the traditional approach to the matter of military occupation have become all too apparent, especially in connection with United Nations Security Council Resolution 1483 of 22 May 2003 and Resolution 1546 of 8 June 2004 on the rebuilding of Iraq.⁵ The result seems to be an apparent dilemma in the international rules and procedures regarding the occupation of foreign territory after the close of military operations. An internal critique of the existing provisions' applicability (i. e. that they lack determinate content) and an external critique of their relevance (i. e. that they are outdated and/or biased) might suggest that occupation law is powerless and superfluous in the contemporary context.⁶

In the following contribution, we will examine several leading concerns relating to the law of occupation, in the Iraqi test-case and more generally. These concerns include: what exactly amounts to occupation (Section II. 1.); who are the Occupying Powers in Iraq (Section II. 2.); how far do the rights of the civilian population and the obligations of the Occupying Powers extend (Section II. 3.); when does occupation end (Section II. 4.); and potentially most challenging, does IHL in any form apply in such situations (Section II. 5.)?⁷

We do not hope to settle each of these definitively nor to resolve contemporary uncertainty surrounding occupation law fully. These concerns raise many questions, some going to the core of international law, including the changing meaning of the international legal *Grundnorm* of sovereignty. There is, moreover, limited state practice and judicial precedent to draw on in answering them. In short, these

⁴ What attention, moreover, that the matter of occupation has received in past decade or so has tended to relate to the atypically long Israeli possession of the West Bank and the Gaza Strip. This is not to impugn the quality of what was published in this period, just its suitability to the present situation. As Lijnzaad suggests, "the law of occupation may have become somewhat old-fashioned and ill-adapted to contemporary occupations". (Lijnzaad, How Not to Be an Occupying Power: Some Reflections on UN Security Council Resolution 1483 and the Contemporary Law of Occupation, in: Lijnzaad/Van Sambeek/Tahzib-Lie (eds.), Making the Voice of Humanity Heard, 2004, 291 (291)).

⁵ UN Doc. S/RES/1483 (2003), 22 May 2003; UN Doc. S/RES/1546 (2004), 8 June 2004.

⁶ In the context of a conflict that in its leadup witnessed its own moments of severe ambiguity, the character of what followed should perhaps not surprise. A distinct lack of objectivity afflicted the application of the *ius ad bellum* as well, from the uncertain language of "material breaches", "final opportunity" and "serious consequences" in UN SC Resolution 1441 to a group of Member States engaging in a particular interpretation of a UN mandate and unilaterally enforcing a multilateral approach to disclosure and non-proliferation. (Morgan (note 1), 528 and 536).

⁷ It should not be forgotten – but cannot be discussed here further – that IHL is not the only body of law that applies in situations of occupation. As a *lex specialis* for armed conflicts it is presumed to take precedence over any otherwise applicable national laws and international human rights norms. The latter can fill gaps, however, especially as regards monitoring and implementation. (See Frowein, The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation, Israel Yearbook of Human Rights 28 (1998), 1 *et seq.*).

concerns relate – in the fine tradition of the symposia of the Kiel Walther-Schücking Institute – to ‘international law at the frontiers’.

Given this area of international law’s relative complexity and newness, argumentation here tends to be open-textured and to rely on a political/ethical approach rather than on empirical/doctrinal analysis. We will propose a way of approaching these concerns that furthers the protection of the civilian population in Iraq and IHL’s fundamental aim, namely ‘humanity for all’. Such a scientific approach might serve as the basis for resolving the tension between the general terms and the specific developments of late. We like to think of this approach as foundational, even “constitutional”.⁸ Whatever its name, it argues against claims of the inapplicability and irrelevance of IHL in postwar Iraq. It argues instead in favour of upholding the substantial restrictions placed on the conflict parties and in favour of the rule of law for the sake of the individual that IHL, and occupation law in particular, prescribe. Outsiders’ dealings with the lives and possessions of the Iraqi people must be guided by the rules and procedures’ manifest spirit, when not by their occasionally ambiguous terms. The principle of humanity for all sets a “standard of civilisation” in this area of international law, giving effect to which is an essential – if not the essential – function of occupation law.⁹ In order to ensure respect for this standard, the situation on the ground should be viewed pragmatically and, where necessary, the related provisions should be understood progressively.

We hope that by designating the law regarding the occupation of foreign territory as a distinct matter for concern in a greater humanitarian scheme – namely as the ‘*ius post bellum*’ – to draw the political and scholarly attention to this area of international law that it urgently merits. This designation is not obvious and its choice should itself prompt discussion.¹⁰ Any discussion should not, however, dwell on the semantic issue of the preferable legal designation; the focus should be the substantive issue of the content of the law and its observance, especially as the law concerns the relationship between the invading force and the local inhabitants.¹¹ Recent experience in Iraq has plainly demonstrated why it is so important

⁸ For more detail, see *Thürer/MacLaren*, *Might the Future of the ABC Weapons Control Regime lie in a Return to Humanitarianism?*, SZIER 4 (2003), 339 (363 *et seq.*).

⁹ *Schwarzenberger*, *International Law as applied by International Courts and Tribunals: The Law of Armed Conflict*, Vol. 2, 1968, 163.

¹⁰ In the context of Iraq, it could be argued, for example, that the armed conflict is not over (‘post’) but is ongoing. This argument, however, fails to differentiate between war and (internationalized?) internal armed conflict, the latter of which is a possible classification of the current hostilities (see Section II. 4. below). The law of military occupation as here defined is applicable only in international armed conflict, and this type of conflict has definitively ended with the overthrow of Saddam Hussein’s regime.

¹¹ We adopt in this regard Roberts’ comprehensive definition of occupation and anti-formalistic approach: “One might hazard as a fair rule of thumb that every time the armed forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions of the law on occupations are applicable.”

that the legal consequences of an invasion be carefully considered before the invasion. Any deficiencies in implementing the law of occupation (e. g. in the form of doctrinal confusion, lapses in enforcement, failure of the international community to ensure respect for its provisions) come ultimately at the expense of the local inhabitants' well-being.

II. Issues

1. *What exactly amounts to an occupation?*

“[H]aving fought the war, we are now responsible for the well-being of the Iraqi people; we have to provide the resources – soldiers and dollars – necessary to guarantee their security and begin the political and economic reconstruction of their country.”¹²

The first challenge relates to the application of the *ius post bellum* as a matter of fact. It raises an interpretive question in contrast to the politically motivated challenge to its application (see Section II. 5. below). IHL has traditionally been understood to begin to apply with the onset of active hostilities and to stop applying with the general close of military operations or in the case of military occupation with its end, so that the armed conflict and the occupying regime may be regulated for as long as possible.¹³ This understanding recognises that the interests of civilians need protection following as well as during hostilities. For its part, the determination of particular rules' applicability in different phases of armed conflict has necessarily been a factual one, taken on a case-by-case analysis of various criteria. This analysis has long raised difficult questions; the situation in Iraq proves no exception.

Article 42 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land ('Hague Regulations')¹⁴ defines occupation as follows: “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been

(*Roberts*, What is a Military Occupation?, *British Yearbook of International Law* 65 (1984), 249 (250)).

¹² *Walzer*, Just and Unjust Occupations, *Dissent Magazine*, Winter 2004, available on the Internet: <www.dissentmagazine.org/mentest/articles/wi04/walzer.htm>. See more generally, the argument for a “responsibility to rebuild” following a military intervention put forward by the International Commission on Intervention and State Sovereignty (available on the Internet: <www.dfait-maeci.gc.ca/iciss-ciise/pdf/commission-Report.pdf>).

¹³ “The formerly disputed issue whether the rules of military occupation only apply during the course of actual warfare has been overcome by Art. 6 (1) Fourth Geneva Convention according to which the Convention continues to apply to the occupied territory despite the general close of military operation in a conflict.” (*Wolfrum* (note 2), 63 *et seq.* (sic)).

¹⁴ For the texts of multilateral undertakings mentioned in the article, see the ICRC internet databases on international humanitarian law, available at: <www.icrc.org/ihl>.

established and can be exercised.” Article 43 adds that the authority of the legitimate power is to have “in fact” passed. The existence of this situation triggers the application of occupation law, which continues to apply after the military operations. The Fourth Geneva Convention (‘IV GC’), Article 154 of which makes clear that the Convention supplements the Hague Regulations, adds that its terms are to apply from the outset of occupation, “even if the said occupation meets with no armed resistance.”¹⁵

The question becomes what constitutes an establishment and exercise of authority, in particular where occupation meets with armed resistance? At one extreme, it is clear that invaded territories must be considered as militarily occupied since at least the close of large-scale military operations. Ongoing violent opposition (be it sabotage, terrorist attacks, rebellion, guerrilla fighting etc.) that does not challenge the authority of the invader over an area and thereby demand further such operations does not challenge the status of occupation. At the other, mere declarations of occupation, temporary occupations by a raiding party or air supremacy alone cannot amount to occupation. They do not constitute situations in which the invading force can be said to be exercising control and the defending force can be said to be no longer effective, as the former does not have a sustained, physical presence.¹⁶ Within these extremes, two interpretations – an expansive and a restrictive – have been put forward as to the control amounting to occupation: namely either when a party to a conflict is exercising *some* level of authority over enemy territory or when a party is exercising a level of authority sufficient to enable it to discharge *all* the responsibilities of occupation law.

The matter of the correct definition of occupation is now moot in the context of Iraq.¹⁷ The close of military operations – “Mission Accomplished” – was officially announced by President George W. Bush on 1 May 2003, shortly after US troops reached Baghdad. (SC Resolution 1483 three weeks later recognized simply the occupation’s existence.) Nonetheless, it is useful to consider proactively the level of authority over enemy territory that would be appropriate and desirable.¹⁸ We prefer the former expansive interpretation. It is functional, designed to maximize

¹⁵ Art. 2, Para. 2 together with Art. 6 same. The US and UK are Parties to Hague Convention IV of 1907, whereas Iraq is not. The relevant Regulations are, however, considered customary law and thus apply in Iraq. Iraq, the US and UK are Parties to the four Geneva Conventions.

¹⁶ Other rules may then be applicable for the protection of civilians affected by the military operation. According to the basic rule of Art. 4 IV GC, protected persons are persons who “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

¹⁷ The matter of the requisite level of authority is not entirely moot in a different context, namely as regards the characterization of the ongoing hostilities after 28 June 2004 as an (internationalized?) internal armed conflict (see Section II. 4. below).

¹⁸ Not surprisingly, a restrictive interpretation is adopted by several military manuals, whereas an expansive interpretation is preferred by the ICRC Commentary to the IV GC.

the protection afforded by IHL to all persons during hostilities, even in the invasion phase of the conflict. Indeed, the restrictive interpretation raises the disturbing possibility of a gap in legal coverage. In situations where the invading troops were not deemed as a matter of law to exercise complete authority and the defending troops were unable as a matter of fact to exercise the ongoing functions of government and thus to implement the relevant rules and procedures, no power would be responsible for ensuring respect for IHL. Such a gap in coverage cannot be compatible with the humanitarian purpose and object of this body of international law. Civilian populations are most in need of legal protection when their armed forces and governing structures have collapsed and can no longer offer them protection. The administration and the life of the local society must continue on according to some set of laws. The deeming of responsibility on the invading force has, in other words, its basis in the invading force's manifest military supremacy and in its underlying moral obligation to provide for the victims of its campaign.

Two objections may be raised against such an expansive interpretation. First, it may be objected that where competing bases of authority remain in the area in question, the invading force cannot fairly (because it would be unable to fulfil the concomitant responsibilities) or logically (because such a designation would risk clashing jurisdictions) be said to be occupying the area. These alleged difficulties in drawing lines of responsibility may be respectively averted by imposing proportionally lower standards on an invading force exercising some – but not complete – authority and by recognizing that the possible overenforcement of the law – the result of a conflict of jurisdictions otherwise seen – is to be desired rather than averted. Responsibility on the part of the invading force may be assumed and in event of a lapse of protection, good faith efforts to fulfil Occupying Power obligations in the particular circumstances proved and accountability for any breaches disproved. Second, it may be objected that invading forces are not civil administrators – i. e. that the troops cannot be reasonably expected to maintain law and order and provide essential services etc., only to wage war. This objection, however, begs the question: why are the foreign troops only prepared for combat duties or alternatively, why is no trained personnel available to assist or immediately replace the troops upon occupation? The experience of the Iraq war is in this regard instructive: the egregious inability of the US troops to bring the chaos that prevailed after their defeat of the government forces under immediate control demonstrates all too clearly that modern armies must be prepared for their task of running an occupied territory. They must be “trained to do more than just fight and defend themselves. They have to know how to look after the civilian population they control.”¹⁹

¹⁹ *Gasser*, From Military Intervention to Occupation of Territory: New Relevance of International Law of Occupation, in: Fischer *et al.* (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection*, Festschrift für Dieter Fleck, 2004, 139 (154 *et seq.*).

Whenever occupation may be considered to have begun, the invading force must make its control known and indicate the penalties for disobeying any laws and regulations that they promulgate. Moreover, whatever the targets and forms of any ongoing violent opposition – in Iraq, attacks not only on States with troops in the country but also on UN and ICRC workers as well as on Iraqi civilians and civilian objects –, IHL cannot be ignored by international or Iraqi personnel; they remain bound by it. The occupation continues until the armed resistance results in the overthrow of the occupier’s military supremacy and the (re-)establishment of effective authority in opposition to it in a given area. The rule of law may thereby begin to be restored in the war-stricken territory.

2. Who are the Occupying Powers in Iraq?

“The Security Council [...] calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”.²⁰

A question with considerable doctrinal and precedential consequence follows, namely who are the Occupying Powers in Iraq? The answer seems self-evident considering the current situation on the ground and the framework for the actions of the Coalition Provisional Authority (CPA) and the UN set out in Resolution 1483. The applicable law could in fact be clearer, even as regards the particular status of the US and UK. On a strict reading of the Resolution, the argument could be made that the US and UK do not constitute Occupying Powers. The questionable quality of the Resolution’s drafting (or rather the awkward diplomatic compromises behind it) takes on greater significance as regards the other States with armed forces in Iraq (e. g. Poland, Spain and Japan). Should they also be considered Occupying Powers, with full responsibilities under the Hague and Geneva articles?²¹

The Resolution’s preamble and operative paragraphs require close scrutiny. The operative paragraphs, which are to be consulted first according to interpretive practice, are silent as to the particular status of the US and UK as Occupying Powers. Operative paragraph 4 does call upon “the Authority consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people”. However, operative paragraph 5, which expressly recalls the Hague and Geneva articles as among the international law obligations that are to be fully complied with, addresses these obligations generally to “all concerned”. For its part, the preamble, which constitutes a secondary source of meaning for resolutions, does describe the US and UK as Occupying Powers in para-

²⁰ Oper. para. 5, UNSC Resolution 1483.

²¹ If the armed forces of any State were to become engaged in hostilities, they would, of course, have to respect IHL. The question relates to States with troops on the ground in Iraq that have not (yet) engaged in hostilities.

graph 13, “recognizing the specific authorities, responsibilities, and obligations under applicable international law of these States as occupying powers under unified command (the ‘Authority’).” This preambular paragraph, however, does so with reference to a prior letter to the SC President from the British and American Permanent Representatives. In that letter’s opening paragraph, the US and UK did pledge to “strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq.”²² However, the US and UK neither explicitly acknowledged that their presence in Iraq was an occupation nor that the Hague or Geneva articles were applicable to their actions. In short, though the situation on the ground may have been incontestable, use of the term ‘Occupying Power’ in the substantive paragraphs of Res. 1483 would have formally clarified the particular status of the US and UK.²³

The legal position of the other States present in Iraq is more ambiguous than that of the US and UK. Who exactly are the “all concerned” in operative paragraph 5, who are called upon to comply fully with IHL responsibilities? Should the imposition of responsibilities on “all concerned”, a term wider than the otherwise exclusively used form of address “Authority”, be taken to indicate that in the Council’s view, it is not just the US and UK that are Occupying Powers? The substantive section of the Resolution offers no additional clues. As mentioned, preambular paragraph 13 describes the US and UK as Occupying Powers. It is unclear, however, whether the US and UK are to be understood as the only States that are Occupying Powers or whether other States might also qualify as such. Preambular paragraph 14 acknowledges that “other States that are not occupying powers are working now or in the future may work under the Authority”, but in doing so, the provision adds to the semantic confusion. This last paragraph raises the possibility that a *third* category of States exists, namely States not mentioned in preambular paragraph 13 and yet present in Iraq as Occupying Powers per IHL.

Once more, expansive and restrictive understandings of the status of other States present in Iraq are conceivable according to the relative emphasis placed on the object and purpose of occupation law or on the Resolution’s language, respectively. On a restrictive understanding, the preamble speaks only of “occupying powers under the Authority” and of States “that are not occupying powers” that provide support to the Authority. According to the terms of the Resolution, *tertium non datur*. On an expansive understanding, all States whose engagement amounts to exercising authority and that have been assigned responsibility for, and are exercising effective control over, portions of Iraqi territory should be considered Occupying Powers. The overall command structure and the nature of these States’ activities would, in other words, be essential to the determination of their status (States, for example, that participated in the war that preceded the occupation and whose troops remain in the territory would be presumed to be Occupying Powers,

²² UN Doc. S/2003/538.

²³ *Grant*, Iraq: How to Reconcile Conflicting Obligations of Occupation and Reform, ASIL Insight, June 2003, available on the Internet: <www.asil.org/insights.htm>.

whereas those that merely provide experts (such as engineers or medical staff) in the war’s aftermath would not).

In the Iraqi test-case, this issue of which States are to be considered Occupying Powers is arguably of little practical consequence, especially as regards other States present in Iraq.²⁴ The issue may, however, be of significant, longer-term doctrinal (resulting in attenuation or confusion and thereby evasion of responsibility) and precedential consequence (in other cases of occupation where States have not been expressly urged by the UN to comply with IHL). It is partly due to these broader consequences that an expansive approach is to be preferred here as well. Moreover, an expansive approach would be consistent with the preceding functional definition of occupation. Lastly, and most importantly, it would ensure the protected persons concerned the maximum benefit of IHL.²⁵

To confirm the sense behind an expansive approach to the conferral of Occupying Power status on the US and UK, the question posed at the outset of this section might usefully be turned on its head: who would be the governing authority in Iraq if not the US and UK?²⁶ Where no viable alternative locus of authority exists, semantic debate about this designation seems at best moot, at worst potentially harmful to the cause of humanitarian law. No other official entity could prior to 28 June 2004 exercise the responsibilities of local administration in Iraq apart from the CPA itself and as such, the States comprising it should be considered Occupying Powers with all the responsibilities inherent in that status. As regards other States providing troops and exercising assigned authority, would it not be too attenuated a line of responsibility to trace the duty to ensure the fulfilment of IHL obligations *indirectly* back to the CPA rather than assigning this duty *directly* upon these States? Doing so raises a (greater) risk of obligations going unfulfilled. It is true that the label ‘Occupying Power’ can bring with it significant risks (including legal liability)²⁷ as well as political baggage (domestically and/or abroad, as in the case of Japan). In any society that aspires to the rule of law, however, certain maxims must be publicly acknowledged and consistently observed: these include the maxims that with power comes responsibility and that with responsibility comes accountability. The ICRC has on the basis of a similar approach recalled occupation law not only to the US and UK but also to several other (unnamed)

²⁴ “Since any such contributors and their armed forces are still clearly urged to comply with the relevant Hague and Geneva rules, it is hard to see what practical problems might arise from the curious status of participating in an occupation but not being an occupying power.” (*Roberts* (note 3), 6).

²⁵ The argument that all States other than the US and UK are not Occupying Powers may also be doubted within the Resolution’s terms themselves: “One could interpret preambular paragraph 14 as achieving this result, but this would be [a] far-reaching interpretation based on a mere preambular paragraph.” (*Lijnzaad* (note 4), 297).

²⁶ This chain of thought builds on *Grant* (note 23).

²⁷ “Occupation law imposes high performance standards on an occupying military power and liability can quickly arise.” (*Scheffer*, A Legal Minefield for Iraq’s Occupiers, *Financial Times*, 23 July 2003).

States. Significantly for the further development of the customary law, none of these States objected.²⁸

3. *How far do the civilian population's rights and the Occupying Powers' obligations extend?*

“The occupation authorities cannot abrogate or suspend the penal laws for any other reason – and not, in particular, merely to make it accord with their own legal conceptions.”²⁹

Recent developments in the form of novel fact patterns and shifts in international opinion have brought the civilian population's rights and the Occupying Powers' obligations³⁰ into sharp relief. The uncontested bases for these relations are the Hague Regulations (Art. 43–56), the Fourth Geneva Convention of 1949 (in particular Art. 5, 27–34, 47–78), Additional Protocol I of 1977 ('AP I', including Art. 14, 63, 68–79) as well as customary IHL.³¹ Rule of law in the occupied territory is to be secured through these provisions' enforcement.

The law of occupation regulating the relationship between the invading force and the local inhabitants has been aptly compared to “a bill of rights”. The rules and procedures prescribe a series of fundamental rights and obligations that, “immediately upon occupation and without any further actions on the part of those affected, becomes applicable to the occupied territories and limits the authority of the occupying power.”³²

Foremost³³ among their positive obligations Occupying Powers are to:

²⁸ *Lavoyer, Ius in Bello: Occupation Law and the War in Iraq*, Comments delivered to the Lieber Society Interest Group Panel, 98th Annual Meeting of the American Society of International Law, 1 April 2004, 4. See also *Lijnzaad* (note 4), 302 *et seq.*, for an analysis of the position of Poland in postwar Iraq.

²⁹ *Pictet*, Article 64, Commentary, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1958.

³⁰ All States present in the occupied territory, whether or not they qualify as Occupying Powers, are bound by common Art. 1 GC and Art. 29 IV GC as well as by those principles of occupation law that have *ius cogens* or *erga omnes* character. Regarding the position under international law of “other states” during Occupation, see also *Lijnzaad* (note 4), 300 *et seq.*

³¹ Insofar as the provisions of AP I cannot be considered customary international law, they do not apply to the Occupying Powers that are not parties to AP I (in Iraq, the non-parties include the US). Art. 3 (b) AP I is one such provision. (See below).

³² *Gasser*, Protection of the Civilian Population, in: Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, 1995, 209 (242).

³³ For a more extensive review of these obligations (especially provisions regarding transfer of persons from occupied territory; collective penalties; cruel, inhumane treatment, injury and suffering; care for the wounded and sick and provision of food and medicine; prosecution of war crimes and other international crimes) in the context of Iraq, see *Paust*, The U.S. as Occupying Power over Portions of Iraq and Relevant Responsibilities under the

1. protect and meet the needs of the local inhabitants by taking measures to restore and ensure public order, safety, health, provision of food and medical supplies as far as possible;
2. respect public and private property – in particular, the Occupying Power may not confiscate private property or use the assets of the occupied territory for its own benefit;
3. treat all person persons deprived of their liberty properly, with judicial guarantees and minimum conditions of detention (regardless of whether they are POWs, persons accused of crimes against Iraqis, persons accused of hostile acts against the international forces or persons detained for “imperative reasons of security”³⁴).

In turn, the universal, absolute character of the rights provided the civilian population should be appreciated. Article 27 IV GC guarantees respect and humane treatment of protected persons “in all circumstances” and “all at times”, and Art. 75 AP I obligates the Occupying Power to maintain a certain minimum standard of human rights “at any time” “in any place” “without any adverse distinction”. Article 47 IV GC provides that the relevant rights are inviolable: “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation”. For their part, protected persons are in no circumstances entitled to renounce their rights (Art. 8 IV GC). Lastly, certain of these responsibilities, a ‘hard core’, remain incumbent upon the Occupying Power as long as it continues to exercise governmental authority.³⁵ The preceding is not meant to imply that occupation law in its totality constitutes *ius cogens* or has *erga omnes* effect, just that certain provisions do display a foundational character in limiting the discretion of any State.³⁶

Laws of War, ASIL Insight, April 2003, available on the Internet: <www.asil.org/insights.htm>.

³⁴ Per Art. 78 IV GC. For one assessment of whether the Occupying Powers have been meeting their obligations under IHL in Iraq, see *Scheffer*, *Beyond Occupation Law*, AJIL 97 (2003), 842 (853 *et seq.*).

³⁵ These responsibilities are set out foremost in Art. 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 61 to 77 and 143 of IV GC. The 1907 Hague Convention and other customary international law also apply in full to all parties during continued occupation. For those parties subject to it, Art. 3 (b) AP I provides that the application of the Conventions and AP I shall in the case of occupation cease on the end of occupation (except as regards persons whose final release, repatriation or re-establishment takes place thereafter, who continue to benefit from the relevant provisions of the Conventions and AP I). Accordingly, the provisions of IV GC (per Art. 6 (3)) were only applicable in their entirety to all Occupying Powers until 1 May 2004, assuming the close of military operations is dated to 1 May 2003. Thereafter, the applicable rules varied. (Art. 78 IV GC, for example, applies to Occupying Powers that are parties to AP I during the entirety of the occupation but not to parties that are not, in which case the general international human rights regime applies.) (*Wolfrum* (note 2), 64).

³⁶ “Such principles [...] pertaining to occupation law have never been conclusively established, but one would expect them to include the overarching principles of humane treatment

The existing rules and procedures also provide for exceptions and negative obligations. The ground rule of Occupying Power responsibility is established by Art. 43 of the Hague Regulations. According to Art. 43, the Occupying Power must respect the laws in the occupied territory “unless absolutely prevented”. This positive obligation with its qualifier clause embodies a fundamental tension in the Occupying Power’s freedom of action.

If, as the head of the ICRC legal department put it, “[t]he civilian population should be able to live a life as normal as possible”³⁷, how far is the Occupying Power permitted to avail itself of *exceptions*? The Occupying Power’s duty to fulfil its responsibilities under IHL presupposes that the administrative apparatus of the occupied territory continues to function and that the local inhabitants respect its authority. (In occupied Iraq, this latter presupposition seems especially wishful thinking. Iraqis, like the civilian population of any occupied territory, do not owe any loyalty to the Occupying Power, and in the event, many of the ‘defeated’ have made clear that they are unwilling to submit to the CPA’s will by perpetrating violence against it.) As noted, the Occupying Power is allowed to take the pre-existing laws temporarily or permanently out of force when they constitute a threat to its security. Article 27 IV GC adds as regards protected persons that the Occupying Power may take such measures of control and security “as may be necessary as a result of war”. Further, the Occupying Power is entitled to repeal or suspend local criminal laws where they constitute a threat to its security or an obstacle to the application of IV GC (Art. 64 IV GC). Lastly, in recognition of its security imperative, the Occupying Power is not barred from factually enforcing obedience, having for the duration of the occupation an authority to resort to force similar to that of the territorial sovereign. That having been said, the Occupying Power, even in taking measures to ensure the occupation’s security and to maintain local public order and safety, is obligated to respect the restrictions found in Art. 27 itself (which implement the general obligation of humane treatment) as well as in Art. 41 to 43 (concerning internment and assigned residence) and Art. 78 to 135 IV GC (regulations for treatment of detainees). The provisions prescribe, in short, a fine balance between the power’s and population’s legitimate demands, a balance that must be observed at all times.³⁸

A more fundamental question relating to *negative obligations* of the Occupying Power arises out of the temporary nature and transitory effects of occupation fore-

and judicial due process that appear in various codified provisions of occupation law.” (Scheffer (note 34), 843).

³⁷ Lavoyer (note 28), 4.

³⁸ The President of the Israeli High Court recently described this balance so: “the law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to protect the security of his country and her citizens. However, it imposes conditions on the use of this authority. This authority must be properly balanced against the rights, needs, and interests of the local population.” (*Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04 (30 June 2004): opinion of President Barak, para. 34, available on the Internet: <<http://62.90.71.124/eng/verdict/framesetSrch.html>>).

seen by IHL. It is clear under IHL that the Occupying Power cannot in principle exercise the authority housed in the occupied State, since a return to the original territorial sovereign is expected. This constraint may be said to be based on the idea of a trustee administration. This idea, however, is difficult to implement when the pre-existing laws of the occupied territory are in turn based on an ideology that the foreign power seeks by force to eliminate, i. e. when an occupier seeks to overhaul the society as well as to overthrow the regime.

Has the CPA lawfully or unlawfully exceeded the powers typically accorded trustee administrations? The Coalition States did acknowledge the temporary nature of the occupation from the outset, through the suggestive name of the authority itself (“provisional”) and through professions of the “urgent need” to create the conditions for Iraqis to exercise their right to internal self-determination.³⁹ As regards the transitory effects of occupation, however, can the CPA reconcile its own intentions and its apparent UN mandate with its restrictive powers under the law of occupation? Resolutions 1483 and 1546 (and for that matter 1511 as regards the authority of the Multinational Force (MNF) and 1500 as regards the UN Assistance Mission for Iraq (UNAMI)) refer severally to the legal, political and social reform of Iraq. (Operative paragraph 4 of Resolution 1483, for example, calls upon the CPA to create “conditions in which the Iraqi people can freely determine their own political future”. Likewise, operative paragraph 8 describes the mandate of the UN Special Representative for Iraq as including working towards establishing “institutions for representative governance”, “promoting the protection of human rights” and “encouraging international efforts to promote legal and judicial reform”.) Should the apparent inconsistency between the fundamental duty in occupation law to maintain the *status quo ante* and the recognized desirability of changes to laws and government structures in Iraq (as expressed by long-standing international human rights agreements as well as by the newest resolutions) be taken to signify that IHL is no longer relevant in this context?

One means to reconcile the apparent inconsistency between the IHL constraint and the Resolutions’ intentions would be through an expansive interpretation of Hague Art. 43 and a dilution of the obligations imposed. This reading of the obligation to respect the laws in force holds that when military intervention is premised on reform of the existing laws and government structures – or more, when such change is the only effective means to secure the peace –, the victor and military occupant cannot be obligated to uphold the defeated enemy regime.⁴⁰ The case of post-WWII Germany is cited in support of this expansive interpretation.

Another means proposed is to view the Resolutions as “carve outs”: provisions of occupation law that would prevent the CPA from changing the laws, institutions and personnel of the Iraqi State have been suspended by the UN, while the other

³⁹ See, for example, oper. para. 1 of SC Resolution 1511.

⁴⁰ This reading is favoured *inter alia* by Morris Greenspan. (*Wolfrum* (note 2), 65).

Hague and Geneva articles remain in force.⁴¹ As noted, the SC texts refer in several paragraphs to reforming Iraqi society, including introducing representative governance. In support of an *intention* to carve out is the fact that on several recent occasions, the UN has participated in organizing and/or supervising free elections following decolonialization or the demise of a dictatorship. (Resolutions 1483 and 1546 provisions regarding the future political structures of Iraq confirm from this perspective the emergence under international law of a right to democratic governance.⁴²) In support of an *authority* to carve out is the fact that the SC adopted the Resolutions under Chapter VII of the UN Charter. The Charter provides that its obligations preempt pre-existing conventional international law in case of conflicting obligations (Art. 103) and enables the Council to take decisions for the restoration of international peace and security that are binding on all UN Member States (Art. 25). (This “sweeping dispositive authority” has formerly served as a legal basis for “such ambitious programs as independence of East Timor [and] the administration of Kosovo”.⁴³)

Before taking such a drastic step as an expansive interpretation or a carve out, however, we should examine the two sets of instructions in detail. Seeking to override or ignore the law of occupation, like IHL more generally, risks greater harm than any benefits, as it may upset the delicate equilibrium between different interests on which the system of protection is based. Occupation law should be viewed as a coherent whole, “from which a derogation should not be accepted easily.”⁴⁴ In response to a new development that appears to pose a challenge to the law’s applicability or relevance, the development must first be looked at more closely and the ongoing adequacy of the existing provisions to it considered carefully. The possibilities of interpreting and adapting the existing provisions should then, if necessary, be studied. Once these possibilities have been exhausted, the advantages and disadvantages of a step such as an expansive interpretation or a carve out may be weighed. In the Iraqi test-case, this proposed approach confirms that the inconsistency alleged between two sets of instructions is more apparent than real. When Resolutions 1483 and 1546 are looked at more closely and the existing provisions are read with a progressive understanding, the powers thereby granted the CPA are revealed to be reconcilable with those provided by the Hague and Geneva articles.

The degree to which the successive Resolutions prescribe the reform of Iraqi society may be questioned. First, the Resolutions refrain from explicitly referring to democracy as the governing principle of the country’s future constitution and to

⁴¹ *Grant* (note 23).

⁴² See generally *Franck*, *The Emerging Right to Democratic Governance*, *AJIL* 86 (1992), 46 *et seq.* International law has traditionally held that internal self-determination may be exercised according to the given people’s wishes as long as their choice of form of government does not infringe *ius cogens*.

⁴³ As favoured, for example, by *Grant* (note 23).

⁴⁴ *Lavoyer* (note 28), 5.

the protection of human rights according to international standards.⁴⁵ Second, Occupying Powers do not under IHL enjoy a *carte blanche* to rebuild a country in their own (preferred) mode. Nor do they under UN law. Resolution 1483 expressly invokes the Geneva Conventions and the Hague Regulations. (Operative paragraph 4 *inter alia* calls upon the Authority “consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people”. (emphasis own)) Moreover, the UN mandate prescribes a facilitative role for the Occupying Powers – i. e. to effect change for purposes of ensuring an expression of the right to self-determination – not a prescriptive role – i. e. to rewrite Iraq’s legislation and remake its institutions in its own legal, social and economic image. (The same paragraph speaks of the Authority creating “conditions in which the Iraqi people can freely determine their own political future”.) Third, the CPA does not exercise exclusive and total administrative power according to the Resolutions. (Paragraph 8 of Resolution 1483 vests authority in the UN Special Representative; Paragraph 4 of Resolution 1511 states that “the Governing Council and its ministers are the principal bodies of Iraqi administration”.) Fourth, an interpretation of Resolution 1483 and successive Resolutions as a mandate for ‘nation-building’ in Iraq would run squarely up against the UN’s Charter and post-WWII history, which prohibit occupation and colonization as bases for transformational efforts.⁴⁶ It might also exceed the SC’s authority, according to which Chapter VII-resolutions are to relate to the restoration of international peace.⁴⁷ This limit on the Council’s decision-making authority suggests that in designing a framework for reconstructing Iraq, the Council must choose measures that enhance security in the area. Measures, i. e. legal/economic/social reforms, that do not contribute to a stable and viable Iraq – and hence to security – appear *ultra vires*. Finally, the political context in which the UN mandate was agreed advises caution in its interpretation. UN involvement was partly intended to defuse accusations of US self-interest in the reconstruction of Iraq and to accord the process legitimacy inside and outside the country. A UN that was no longer seen to be neutral but to be abetting ‘neo-imperialism’ in its resolutions would hardly further these objectives.⁴⁸

⁴⁵ As noted by *Wolfrum* (note 2), 72.

⁴⁶ *Chesterman*, Bush, the United Nations and Nation-building, *Survival* 46 (Spring 2004), 101 (104).

⁴⁷ For an analysis of the functions and powers of the Security Council in general, see *Delbrück*, Article 24, in: *Simma et al.* (eds.), *The Charter of the United Nations: A Commentary*, Vol. 1, 2nd ed., 2002, 442 *et seq.* For an interpretation of the same in the Iraqi test-case, see *Kirgis*, Security Council Resolution 1483 on the Rebuilding of Iraq, *ASIL Insight*, May 2003, available on the Internet: <www.asil.org/insights.htm>.

⁴⁸ The Star and Stripes has already been long viewed by many in the Middle East as “the symbol not of liberation, but of alien oppression”. (*Howard*, *The Invention of Peace and The Reinvention of War*, 2001, 95). More than that, many Arabs view the SC with suspicion (esp. its Resolutions regarding Israel) – as a creature of Anglo-American interests. The Coalition occupation of Iraq has given concrete form to these views, adding accusations of military imperialism to those of cultural imperialism, and has fuelled regional mobilization against an ‘American-led secular world order’.

Having looked closely – and critically – at the scope of the powers granted by the successive Resolutions, let us consider the ongoing adequacy of the existing provisions to accommodate them. Occupation law proves itself in this respect more flexible than might be expected. In general, the existing provisions prohibit the Occupying Power from effecting changes to the laws in force or government structures in the occupied territory.⁴⁹ Exceptions are, as explained, permitted for the sake of military security and public order. These must arguably be interpreted narrowly and contrary enactments directly justifiable.⁵⁰ However, occupiers do have a certain latitude – some would say duty – to implement fundamental human rights according to standards of the rule of law set out or alluded to in IV GC. As mentioned, Art. 64 IV GC entitles the Occupying Power to repeal or suspend local criminal laws that hinder the application of the Convention. The Occupying Power may accordingly introduce amendments necessary, for example, to ensure the right to self-determination, to end discrimination of certain minorities or to secure basic judicial standards.⁵¹ This latitude reflects basic common-sense as well as positive law: the Occupying Power would otherwise be required to turn a blind eye to – or worse, to perpetuate – injustices in the pre-existing laws, a notion that runs up against the very spirit of humanitarianism and international rule of law that is being promoted. Article 43 is intended to curb abuse of the Occupying Power’s discretionary and legislative powers, not to prevent compliance with its international commitments, especially if of *ius cogens* character.

For the sake of argument, the wisdom of adopting an expansive interpretation to the existing provisions may lastly be weighed. Such a step shows itself to be undesirable, just as it is unnecessary. The exemption that an expansive interpretation provides for in the case of wars waged to overhaul a particular society would make the obligations in question largely contingent upon the occupier’s war aims (see also Section II. 5. below). It would effectively allow the occupier to pick and choose the provisions that apply to him. “As much it was legitimate to overthrow e. g. the totalitarian government of Germany and to reintroduce the rule of law and democracy in Germany there are definite limits of international humanitarian law”⁵² that must be observed. Removing these constraints would throw the door

⁴⁹ Two further situations relating to the issue of strict compliance with IHL in this regard should be distinguished here. First, where a legal vacuum exists, the Occupying Power will out of necessity impose a (N. B. not necessarily its own) legal system. Second, when occupation is long-lasting, administrative necessity often requires adaption of the system to new circumstances. Both situations presume, in other words, a more flexible application of the rules. Neither is relevant in Iraq, Iraq being neither a failed State nor subject to prolonged occupation.

⁵⁰ Gasser (note 32), 255 *et seq.*

⁵¹ Green, *The Contemporary Law of Armed Conflict*, 2nd ed., 2000, 259.

⁵² Wolfrum (note 2), 65 *et seq.* (sic). A doctrinal objection to the comparison with postwar Germany might also be raised. A military occupation as in Iraq is to be distinguished from *debellatio* or consent. When a state of war is terminated by unconditional surrender, as was the situation in Germany in 1945, the invading force may establish his own system of law, regardless of the law of armed conflict, which automatically ceases to apply. (Further, see

wide open to occupiers, well-meaning or otherwise, to abuse their dominant position. In sum, we do not support tyrannical regimes but a decent political order: democratic political theory should guide postwar planning, and ‘debaathification’ remains a political/military prerequisite to establishing an open society in Iraq. However, the scope of discretion that an expansive interpretation would accord the Occupying Power is not appropriate all things considered.

4. *When does occupation end?*

“[R]esolution 1546 contains eight references to the words ‘sovereign’ and ‘sovereignty’ – probably a record for a UN Security Council resolution, and a reflection of the general truth that the more sovereignty is in question, the more it needs to be asserted.”⁵³

The above question about the application of occupation law begets further questions and some uncertain answers. The conventional sources of the law of occupation include no precise definition as to its end. Article 6 para. 3, 1st sentence IV GC provides that “the application of the present Convention shall cease one year after the close of military operations”.⁵⁴ The article goes on to provide, as noted, that the Occupying Power shall remain bound by certain responsibilities protecting the vital rights of the inhabitants as long as it continues to exercise governmental authority. For its part, Art. 3(b) AP I provides that the Conventions and Protocol shall in the case of occupation cease to apply on the end of occupation, but it does not specify when the latter might take place. The Conventions and AP I do not, in other words, prescribe the permitted length of the occupation. As with so many issues in IHL, the end of occupation is ultimately a factual determination, to be made according to the situation on the ground. Various indicia of ongoing foreign involvement may in turn be proposed, but none alone is decisive in the analysis. (For example, occupation has traditionally come to an end when the Occupying Power withdraws from the territory in question or is driven from it. Even if this step is sufficient, however, it is not necessary: the continued presence of foreign troops does not automatically mean a continued state of occupation.⁵⁵) In the case at hand, moreover, the facts have been in constant flux and with them assessments of the legal situation; it has been difficult to determine whether and if so, exactly when Iraq has regained its ‘full sovereignty’.⁵⁶

Schwarzenberger (note 9), 317, 730 *et seq.*). In Iraq, an instrument of surrender was not possible to arrange.

⁵³ *Roberts* (note 3), 11.

⁵⁴ The drafters of the Geneva Conventions apparently believed that twelve months’ time was sufficient to reestablish stability and to wind up an occupation.

⁵⁵ See generally *Roberts* (note 3), 2 *et seq.* or specifically 4: “[i]n Japan and West Germany the continued presence of external forces does not appear to have undermined or threatened the resumption of sovereignty by these states or their independent decision-making capacity.”

⁵⁶ We use quotation marks around the term ‘fully sovereign’ because it is questionable whether any State, especially in today’s formally (and informally) interdependent world, can

In assessing the legal situation, the matter where sovereignty vests in an occupation must first be clarified. Different aspects of the notoriously elusive⁵⁷ and highly charged concept of sovereignty are to be distinguished. The ongoing *international* legal sovereignty of Iraq, namely its capacity to have the rights and obligations of a State on the international level, has never been in doubt. (The juxtaposition here is to subjugation or conquest, which imply a transfer of sovereignty.) Occupation law presupposes the eventual withdrawal of the foreign power and a continuation of the native government. As one commentator wrote shortly after the Hussein regime's overthrow at the height of the CPA's control, "[t]he Security Council has imposed restrictions on some of those rights and obligations [on the international level], and for the time being the occupying powers will act on behalf of Iraq in carrying them out, but Iraq's sovereignty under international law remains intact."⁵⁸ In contrast to its international sovereignty, the *domestic* sovereignty of Iraq was *qua definitione* reduced with the onset of occupation. Iraqis were subject to the control of the Occupying Powers and did not enjoy the same capacity to govern themselves as prior to the military intervention.⁵⁹

UN involvement and international recognition in various forms might have been expected to play a pivotal role in determining when there has "truly been a change from international oversight to independence" in Iraq.⁶⁰ For its part, SC Resolution 1546 has only clarified the factual and legal ambiguity of the issue to some degree. Like many decisions made on the international level, its provisions were subject to various compromises and expediencies, which by modifying preexisting understandings, raise new questions.

At the outset of Resolution 1546, the SC "welcom[es] the beginning of a new phase in Iraq's transition to a democratically elected government" and states that it "look[s] forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004." This opening paragraph of the preamble and the similarly-worded first two paragraphs of the operative part decree that the Occupation is officially over and that the new authority has been formally endorsed as the sover-

be said to act totally independently, completely free from other authorities. The term 'genuine' sovereignty, which does not imply absolutes, might be preferable.

⁵⁷ Attempts to explain sovereignty often confuse more than they clarify. For example, the former British Special Representative for Iraq described in early May 2004 the post-occupation arrangement thus: "[t]he interim government will be fully sovereign, in the sense that every arrangement made by America and the international community will need to be agreed with the Iraqis as equal partners." (*Greenstock*, What must be done now, Economist, 8 May 2004, 24 (25)).

⁵⁸ *Kirgis* (note 47). See in this sense SC Resolution 1483 and 1546, both of which expressly reaffirm the sovereignty and territorial integrity of Iraq, as well as Resolution 1511, which "underscor[es] that the sovereignty of Iraq resides in the State of Iraq".

⁵⁹ Roberts accordingly prefers describing the June handover as a "transfer of administrative authority." (*Roberts*, The day of reckoning, Guardian, 25 May 2004).

⁶⁰ *Greenstock* (note 57), 25.

eign government of Iraq by the SC (and by extension by all Member States per Art. 24(1) UN Charter).

This so far unambiguous legal qualification of the situation in Iraq after 28 June 2004 is, however, complicated, if not contradicted, by the SC’s subsequent authorization of the maintenance of a multinational force to counter ongoing security threats. The occupation in Iraq is officially over, but the current Occupying Powers are permitted to hold onto important (the most important?) state prerogatives.⁶¹ Is it possible to speak credibly of ‘full sovereignty’ as long as an army of occupation remains in Iraq, protecting its inner and outer security?

Other parts of the Resolution attempt to resolve the tension inherent in this alleged change in the normative characterization of the situation and the effective stasis on the ground. Paragraphs 9 and 12 stress that the MNF is present at the invitation of the interim government, which invitation may be rescinded by it at any time. Further, while the SC authorizes the MNF to take “all necessary measures to contribute to the maintenance of security and stability in Iraq” (Paragraph 10), it is to do so in accordance with the letters from the Iraqi Prime Minister and the US Secretary of State annexed to the Resolution. Lastly, the letters provide that the MNF accepts the Iraqi invitation and is (per Colin Powell) “ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection”, including combat operations against and internment of insurgents, but that the forces making up the MNF will “at all times [...] act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.”⁶²

Nonetheless, the ongoing presence of foreign troops on Iraqi territory cannot but for the time being call into question the UN’s assertion of full sovereignty,

⁶¹ The tension in the concept of sovereignty related to this issue took on concrete form in the discussion over which power(s) would exercise ultimate command and control over the MNF. The governments of the respective powers in Iraq sought to clarify whether the interim government after 30 June will be able to exercise a veto over politically sensitive operations of the MNF troops (as recently in Fallujah). (Neue Zürcher Zeitung, 27 May 2004). The provisional compromise reached between the US/UK and the Iraqis was characterized in the annexed letters as a strategic partnership, in which close coordination and cooperation would be the guiding principles in the development and implementation of security policy. Unity of command of military operations in which Iraqi and multinational troops are engaged is to be the objective, but the existing framework governing the status of and jurisdiction over the armed forces as well as the arrangements for and the use of assets are to remain in place.

⁶² This recognition of the continuing applicability of the Geneva conventions is all the more pressing given that even after July 2004, foreign troops are to continue to enjoy immunity from prosecution under Iraqi law. (See *Patel*, The Legal Status of Coalition Forces in Iraq after the June 30 Handover, ASIL Insight, March 2004, available on the Internet: <www.asil.org/insights.htm>; *Schaller*, Die Multinationale Truppe im Irak: Völkerrechtlicher Status nach der Machtübergabe, SWP-Aktuell 2004/30 (July 2004), available on the Internet: <www.swp-berlin.org/common/get_document.php?id=944>).

even leaving aside other, political and economic indicia of foreign support.⁶³ The Resolution's recognition of Iraqi sovereignty takes on a constitutive rather than declarative character in light of the fact that the situation on the ground remains effectively unchanged.⁶⁴ Ultimately, it remains to be seen whether the interim government actually exercises all the attributes of what is traditionally understood to comprise sovereignty. Perhaps the clearest indication that Iraqis do not possess 'full' or genuine sovereignty would come if a subsequent request by the interim government for the withdrawal of foreign troops were not complied with. The foreign troops could then be characterized a "hostile army" per Hague Art. 42, controlling territory without the consent of local authorities. The chances, however, of the interim government making such a request and Iraqi sovereignty being put to the test in this way seem slim, given Iraqis' inability to ensure their inner and outer security by themselves now and for the foreseeable future.

It is tempting to dismiss the issue of when occupation ends as a mere academic concern given the ambiguity of the factual and legal situation in Iraq (and other occupied territories). This would be a mistake: the determination of the locus of authority in post-conflict situations is "a way to identify power and point a finger at it when needed."⁶⁵ This determination is the basis of the various legal responsibilities assigned to occupying/foreign powers and the basis of any international

⁶³ Massive official US and other foreign aid will remain crucial to the Iraqi economy after any alleged transfer of sovereignty. (Congress has, for example, allocated \$ 18.4 billion in aid to Iraq for the current year. (Economist, 22 May 2004, 43)). How far can Washington, its distributor, then be said to possess a 'power of the purse'? In addition, the interim government is largely staffed from the former Governing Council. The fact that the Council had been picked by the CPA, that many members are returned exiles and that few have a popular mandate fuelled widespread accusations in Iraq and abroad that the 'representatives' are effectively creatures of the Americans. Together with the military presence, the ongoing involvement of and dependence on outsiders have led to harsh comparisons of the administration of Iraq to a puppet government.

⁶⁴ Rather than maintaining the increasingly strained traditional understanding, it might be analytically preferable and truer to contemporary international relations to reconsider the concept of sovereignty in light of the situation in present-day Iraq. The diversified global governance activities in Iraq (i. e. the demand that the government established by the Iraqi people to assume the Authority's responsibilities be "internationally recognized" (see e. g. Res. 1483); the UN Resolutions' prescriptions of its political, economic, social structures; the authorization of the MNF; the operations of UNAMI; as well as the global communication about human rights in the country generally) have seriously affected its sovereignty, belying traditional claims of 'independence' and 'territorial integrity'. Iraq, like present-day Afghanistan, is manifestly not an entity outside the global legal system: its sovereignty is subject to definition and constraints from the international community. The present-day situation in Iraq provides further support for a new understanding of sovereignty, according to which "sovereignty is a construction of the political system itself which can be reformulated in juridical rationalities". (*Bothe/Fischer-Lescano, Protego et oblige. Afghanistan and the paradox of sovereignty*, German Law Journal 3 (September 2002), paras. 10 *et seq.*, available on the Internet: <www.germanlawjournal.com/article.php?id=187>).

⁶⁵ *Korhonen*, "Post" As Justification: International Law and Democracy-Building after Iraq, German Law Journal 4 (2003), 709 (722), available on the Internet: <www.germanlawjournal.com/article.php?id=292>.

accountability for events in the territory in question. It decides whether their activities will still be subject to the laws of war. In the Iraqi test-case, as in other occupations, the determination must be made and a clear line of responsibility of the various powers drawn: “[t]he transfer of authority must not become an excuse for an abandonment of responsibility. Indeed, the transfer of authority provides an opportunity [...] to take a clearer, more principled and more determined stand on the application of the rules of international humanitarian law”.⁶⁶

We believe that the end of an occupation should essentially be determined by the same two conditions that trigger occupation law’s application in the first place, namely the control of territory by hostile foreign armed forces and the possibility of these forces exercising authority over the local inhabitants (see Section II. 1. above). In terms of the Iraqi test-case, this approach means that where prerogatives concerning the security of the country have been transferred to the interim government, the concomitant obligations under IHL should be considered transferred as well. Where these prerogatives remain with the foreign powers,⁶⁷ however, so should the obligations: foreign powers should then be bound to respect and protect the rights of persons under their effective control.

Considered more broadly, determinations of the end of an occupation should be governed by reality as well as by particular proclamations. A SC resolution on the subject, while naturally having considerable political importance, need not be accorded decisive legal importance. This approach to determining the end of occupation and the applicability of IHL does not seek to contradict express provisions of a SC resolution under Chapter VII and to claim that an occupation (in Iraq or elsewhere) continues nonetheless: “it is not credible that there will not be a significant change of some kind” in such circumstances.⁶⁸ Instead, this approach tries to reconcile the facts on the ground with the formal terms for the sake of the optimal enforcement of IHL and the effective protection of the occupied people. The SC itself was evidently conscious of IHL’s continued application and relevance: the preamble of Resolution 1546 “not[es] the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law”. It sought thereby to combine the determination of the legal situation suggested by IHL with its own statement on the political transition in Iraq, to resolve the tension between the long-standing general terms of IHL and the specific contemporary developments.

Although the decision as to when exactly the time is right for transferring power remains ultimately a matter for their political judgment (see Section II. 4. above), the Occupying Powers do have certain obligations under IHL and the successive

⁶⁶ *Roberts* (note 3), 19.

⁶⁷ See *Roberts* (note 59): “There could be numerous circumstances are July 1 that constitute a general exercise of authority similar to that of an occupier, or else an occupation of at least part of Iraqi territory.”

⁶⁸ *Roberts* (note 3), 11.

SC Resolutions on reconstructing Iraq to observe regarding the withdrawal of their troops.⁶⁹ As noted, occupation is viewed in humanitarian law and the Resolutions as a temporary period during which the occupied territory is prepared for a return to genuine sovereignty. The Occupying Powers are accordingly entitled to transfer responsibility for the maintenance of peace and human rights only to an entity that is capable of acting.⁷⁰ Occupying Powers cannot simply ‘cut and run’, leaving behind a politically/socially unstable situation or worse, a power vacuum and inevitable descent into chaos, regardless of what their domestic political interests might otherwise urge. At the other extreme, the preparation of a people for a return to genuine sovereignty cannot be used as a pretext to perpetually postpone a transfer of power; prolonging the occupation indefinitely for the sake of ensuring stability and the inhabitants’ effective exercise of their right to choose their own government would belie the temporary nature of occupation foreseen by humanitarian law and the Resolutions. In short, the Occupying Power should be required to continually justify on the basis of proportionality the necessity (as well as propriety) of its ongoing military presence in the foreign territory against the further denial of the occupied people’s right of internal self-determination.⁷¹

Lastly, it should not be overlooked that the declared end of occupation in Iraq might not mean the end of the applicability of other IHL provisions in that country. The ongoing hostilities between security forces (Iraqi and outside armed forces) and insurgents (including former regime elements, foreign fighters and illegal militias) as well as the serious threats to order might be re-qualified as an internationalized internal armed conflict subject to the *ius in bello*. If the hostilities reach a sufficient intensity and sophistication (e. g. in the hot spots of Fallujah and Najaf),⁷² the conventional (esp. common Art. 3 GC, see below) and customary

⁶⁹ See generally *Sutter*, *Völkerrecht und Truppenabzug aus dem Irak: Die Rechte und Pflichten einer Besetzungsmacht*, *Neue Zürcher Zeitung*, 31 March 2004.

⁷⁰ From the perspective of democratic political theory, Walzer adds that transferring power to a puppet government is also offensive to the sense of postwar justice. By denying the population their right to internal self-determination, a satellite regime makes a “moral mess of the aftermath” and its deprivation of sovereignty is an “act of theft”. (*Walzer* (note 12)).

⁷¹ Following *Sutter* (note 69). (See also SC Resolution 1511 of 16 October 2003, which calls upon the CPA “to return governing authorities and responsibilities to the people of Iraq as soon as practicable” and to report to the SC on progress being made.) In cases where the foreign power seeks to overhaul the society as well as to overthrow the regime, Walzer argues that the timetable for self-determination “depends heavily on the character of the previous regime and the extent of its defeat.” If the goal is to ensure that in the resultant society the local population can form civil associations, join parties, make choices etc. without fearing a restoration of the former authoritarian regime, then a quicker transfer of power may be effected where the large majority of the population was not complicit in the regime (as in Iraq rather than postwar Germany). (*Walzer* (note 12)).

⁷² The month of April 2004, for example, saw more casualties among US forces than during the entire invasion phase. (Around this time, a rumour even circulated among US forces that President Bush was going to redeclare war as a prelude to stepping up military operations against the armed resistance (*Time Magazine* (Europe), 3 May 2004, 20). A

rules applicable in non-international armed conflicts would apply to the conflict parties in Iraq.⁷³

In short, the situation in Iraq at the time of writing “does not conform exactly to recognized definitions of either international or civil war or of military occupation.”⁷⁴ It is devoutly to be hoped that the determination of the applicability of the *ius post bellum* (re the end of occupation) and the *ius in bello* (re the state of war) to this situation will be informed by humanitarian interests in order to maximize the international legal protection afforded the local inhabitants. On such an understanding, if the MNF exercises authority in an operational area, if the multinational or Iraqi forces are used in combat against insurgents, or if either take prisoners, they should be held to the terms of IHL.⁷⁵

5. Does IHL in any form apply in such contexts?

“Those who qualify the situation as ‘liberation’ expect gratitude and not obligations under international law.”⁷⁶

One final challenge to the *ius post bellum*, namely that inherent in the idea of ‘democracy building’ as justification for military intervention and occupation, must be examined. Among others, General Tommy Franks has claimed that the US is not an Occupying Power in Iraq, as “[t]his has been about liberation not about occupation.”⁷⁷ A war can, in other words, have such positive societal consequences – here the downfall of a despicable regime and the establishment of a

redeclaration of war would have signified the end of the occupation, and the relations between the CPA forces and the Iraqi population would have once more been governed by the normal rules of armed conflict concerning relations between a belligerent and enemy civilians).

⁷³ Roberts convincingly argues against the claim that the ongoing hostilities in Iraq are purely internal in character given the involvement of non-Iraqi groups in terrorist activities and the non-Iraqi character of the *Multinational Force*. He concludes, however, that Resolution 1546 renders the distinction between internal and internationalized internal armed conflicts moot: its wording “indicates that, regardless of how the situation is characterized, international humanitarian law will apply to it.” (*Roberts* (note 3), 18).

⁷⁴ *Roberts* (note 3), 17.

⁷⁵ The ICRC’s entitlement to undertake protection activities also varies according to the legal qualification of the state of affairs in Iraq: namely occupation, internal armed conflict or neither. If the occupation is deemed continuing, the protection afforded persons deprived of liberty is unchanged, and the ICRC can still base its activities in detention centres on its explicit, conventional right of visit. If the occupation is deemed at an end, detainees of the sovereign authorities will not be protected by IHL at all and be subject to visits by the ICRC. In the latter case, if these persons are arrested in relation to an internal armed conflict, however, ICRC can act on the basis of its general right of initiative in humanitarian matters per common Art. 3 GC.

⁷⁶ *Gasser* (note 19), 154.

⁷⁷ Cited in *Paust* (note 33).

decent political order – that the traditional laws regarding just cause and postwar conduct do not apply. The challenge raised by this argument is, as the moral philosopher Michael Walzer put it squarely, “[h]ow is postwar justice related to the justice of the war itself and the conduct of its battles? Iraq poses this question in an especially urgent way, but the question would be compelling even without Iraq.”⁷⁸

It would be easy to dismiss the alleged justification by alone referring to the UN mandate or to the facts on the ground in Iraq. In terms of the former, Resolution 1483 – whatever its drafting shortcomings otherwise – provides unambiguously that the Hague and Geneva articles apply to the occupation of Iraq (q. v. operative paragraph 4, preambular paragraph 14). In terms of the latter, it is no coincidence that this argument was heard especially often at the outset of the military intervention but infrequently since. (During the occupation, it has become all too clear that large parts of the Iraqi population do not consider the US and UK as liberators; rather than throwing the proverbial roses at the foreign forces, many have been throwing bombs. Moreover, the CPA has itself undermined a claim that it is bringing freedom, human rights and democracy to the Arab world by certain actions during the occupation.⁷⁹) Given that occupiers typically seek to characterize their exercise of authority in another State as something other than occupation⁸⁰, this justification should be addressed in a more deliberate fashion, lest it be put forward in future as mitigating against the full *de jure* application of occupation law.

The first objection that may be raised relates to the resultant doctrinal confusion. The argument of ‘post as justification’ elides the *ius ad bellum*, the *ius in bello* and the *ius post bellum*, three legal categories that should remain distinct for the sake of their integrity and effectiveness. Understandings of the ends (goals), means (facilitation) and consequences (outcome) of armed conflict, respectively get completely muddled in the argument: political opportunism, teleological morality and *post facto* justifications are dangerously collapsed into an inquiry into the ‘sincere beliefs’ of the superior power involved.⁸¹ The traditional, tried and tested paradigm should continue to regulate relations between occupiers and local inhabitants.

⁷⁸ Walzer (note 12).

⁷⁹ The maltreatment of Iraqi prisoners at Abu Ghraib has undoubtedly tarnished the moral legitimacy of the US and UK claim of postwar justice. The manner in which aid for Iraq and the benefits of the occupation generally have been distributed have also tarnished their claim. “If power is tightly held and the procedures and motives of decision-making are concealed, if resources accumulated for the occupation end up in the hands of foreign companies and local favorites, then the occupation is unjust.” (Walzer (note 12)).

⁸⁰ “Using sophisticated claims, all occupants in the past three decades avoided acknowledging that their presence on foreign soil was in fact an occupation to the Hague Regulations or Fourth Geneva Convention (except for Israel, on a *de facto* basis, in parts of the areas occupied in June 1967).” (Benvenisti, *Water Conflicts During the Occupation of Iraq*, AJIL 97 (2003), 860 (860)).

⁸¹ Korhonen (note 65), 710.

Ignoring ‘democracy building’ as a possible *casus belli*,⁸² however, represents an even greater challenge to IHL than that of doctrinal confusion alone, as it risks the exclusion of IHL’s application *ab initio*. A similar argument has been heard during other armed conflicts as regards the relevance of the (un-)lawfulness of the resort to force to the applicability of IHL. The reasoning is as wrong-headed here as it was there. IHL applies to all parties to an armed conflict regardless of the lawfulness of the resort to force; occupation law applies once a situation *factually* amounts to an occupation.⁸³ That the obligations of an Occupying Power exist whether or not it was lawful to use the armed force that resulted in the occupation is indicated by the wording of the relevant provisions. (Common Art. 2 of the Geneva Conventions refers to “all cases of partial or total occupation”, while the preamble of AP I reaffirms “that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused or attributed to the Parties to the conflict”.) Moreover, it is not, as mentioned, for the Occupying Power under occupation law to decide its own status, e. g. through formal proclamation (q. v. *Operation Iraqi Freedom*); the fundamental protections afforded to the local inhabitants are not dependent on the motive or characterization of the occupation. “It makes no difference whether an occupation has received Security Council approval, its aim, or whether it is labelled an ‘invasion’, ‘liberation’, ‘administration’ or ‘occupation’.”⁸⁴ These protections are absolute, subject to no restrictions and non-derogable. The humanitarian purpose of the IHL-regime abides amid the vicissitudes of politics in the wake of armed conflict, just as it does vis-à-vis military necessities amid the hostilities themselves.⁸⁵

Lastly, this argument of ‘post as justification’ is to be resisted from a broader, more functional perspective, that of ‘transitional justice’.⁸⁶ Societies like present-day Iraq undergoing political upheaval, moving from a dictatorship to democracy, are faced with a rule-of-law dilemma in which the positive prescriptions of the

⁸² It should be noted that the humanitarian motive, namely the desire to liberate Iraq, in the Anglo-American decision to invade Iraq became prominent later than the justification that the US and UK were enforcing multilateral law and engaging in anticipatory self-defence. Seen from this perspective, the argument that the Hussein regime was brutalizing the Iraqi people appears insincere and self-serving, an opportunistic excuse for accomplishing an ulterior end.

⁸³ For this reason alone, it cannot be claimed on the basis of Resolution 1483’s effective recognition of the US and UK as Occupying Powers that their invasion of Iraq was implicitly approved by the SC as lawful. (*Kirgis* (note 47)).

⁸⁴ *Lavoyer* (note 28), 2.

⁸⁵ This reasoning holds for assessments of the applicability of the law of occupation to the West Bank and Gaza Strip. The humanitarian purpose of IHL must be kept distinct from the matter of the international status of the territories: the legal protection afforded persons and objects under Israeli authority is not contingent upon which State could legitimately claim sovereignty over the territories.

⁸⁶ *Teitel*, *Transitional Justice*, 2000, 20 *et seq.*

previous regime have lost legitimacy, and natural law understandings cannot (yet) claim legitimacy. Where the upheaval has been prompted by military intervention, occupation law can serve as a useful bridge between systems: IV GC, for example, comprises a set of legal norms that are grounded in positive law (see Section II. 4. above), but that incorporate values of justice associated with natural law. International law as an alternative construction will only be able to facilitate political transformation, however, if it is considered to offer universalized, continuous and enduring justice. To find acceptance and be effective in a postwar society, the law of occupation must be kept independent of transitory politics. The politicization of IHL is accordingly to be resisted for the sake of the local rule of law in an occupied territory.⁸⁷

III. Outlook

“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”⁸⁸

Recent political events – above all the terrorist attacks of September 11 as well as the wars in Afghanistan and Iraq – pose challenges to the doctrine and practice of IHL.⁸⁹ More specifically, several concerns about the law of military occupation have arisen following the invasion of Iraq. The combination of a body of law that has been relatively neglected of late on one hand with novel fact patterns and a shift in thinking since agreement on many of the existing rules and procedures on the other has led to calls for provisions to be revised or even circumvented.⁹⁰

It is important to discuss these concerns, be they related to the law of occupation or to IHL more generally. New threats and needs do require a sensible legal response; the law must take note of changing circumstances in the society it seeks to regulate. Indeed, it is to stimulate just such a discussion that we have argued for occupation law to be henceforth considered a distinct concern of IHL and that we

⁸⁷ For a more detailed discussion of the role of IHL and other critical elements in rebuilding States following armed conflict, see *Froissart*, Legal and Other Factors in Nation-Building in Post War Situations: Example Iraq, in: Fischer *et al.* (note 19), 99.

⁸⁸ Common Art. 1 GC.

⁸⁹ See, for example, Morgan’s concerns for the law of war deriving from the leadup to and following the Iraq war. He argues that “international law’s tendency to mix and match its governing norms to its desired results, produc[es] an ahistorical sense of ‘doctrinal confusion’” and concludes that “[t]he law of war has therefore become entangled in a temporal and interpretive battle of its own. Each pronouncement fights against either a relic from the past or its opposite contemporary number, and often can be seen fighting the war within itself.” (*Morgan* (note 1), 527 and 544, respectively.)

⁹⁰ Scheffer, for example, argues that “the occupation of Iraq, which is intended to be a transformational process [...] requires strained interpretations of occupation law to suit modern requirements. Such unique circumstances are far better addressed by a tailored nation-building mandate of the Security Council.” (*Scheffer* (note 34), 843).

have designated it the *ius post bellum*. The virtues of this scientific approach and designation may be contested; the crucial issue going forward, however, is what exactly constitutes a ‘sensible’ response. Some commentators argue that IHL must undergo wholesale reform. They assert that IHL is not adequate in the ongoing effort to combat international terrorism *inter alia* and even that it is an obstacle to ‘justice’. Whether wholesale reform is the appropriate response to changing threats and needs is, with respect, highly questionable. Critics should be required to demonstrate in which ways the existing provisions are inadequate to present circumstances.⁹¹ Where exactly in this highly-developed legal framework is the alleged gap in coverage leading to legal ambiguity? How precisely do these recent developments evade the constraints of IHL? In which regard is IHL as currently conceived inflexible and incapable of meeting change?

If critics are put to the task, we are very skeptical of their ability to justify wholesale legal reform. IHL, while not perfect, is sufficient to deal with today’s armed conflicts in all their phases. It is not clear to us, for example, why the Hague or Geneva articles relating to the conduct of a military occupant towards the inhabitants of occupied territory are no longer valid and effective in contemporary armed conflict. On their own terms, the related articles are fully applicable to the situations that cause concern among observers; on their principles, they remain as relevant today as in 1907 or 1949.⁹² The *ius post bellum* should be seen as an element of a greater international legal ordering that in seeking to control and limit state power, gives precedence to the principle of humanity for all. Independent of politics and other external influences, all human beings are to enjoy an inviolable ‘humanitarian space’⁹³ during and following armed conflict. Further, it must be understood that attempting to reform IHL substantially in response to the perceived novelties of contemporary armed conflict risks upsetting the fine balance that humanitarian law strikes among the often competing interests of personal security, state security and individual rights and liberties that are at play. Specifically, such attempts threaten to diminish either the quality or quantity of the protection afforded civilians in occupied territories.

In short, it is not necessary and would not be prudent to attempt a wholesale reform of the existing provisions of IHL. The appropriate response to recent devel-

⁹¹ See similarly, Wolfrum, 3: “where the development of new rules would result in the derogation of established ones the onus is on those advocating the development of new rules, to prove that the old rules have fallen into *desuetudo* or have been replaced by new ones.”

⁹² As a last resort, the Martens Clause may be referred to: in cases where the law of occupation is silent, the inhabitants must be considered as remaining (in the words of the preamble to the Fourth Hague Convention of 1907) under “the protection and rule of the principles of the law of nations, as they result from [...] the laws of humanity, and the dictates of the public conscience.”

⁹³ *Thürer*, Das Internationale Komitee vom Roten Kreuz in der Bewährungsprobe: Das humanitäre Völkerrecht vor den Herausforderungen der Gegenwart, Speech, delivered 2 February 2004, Humboldt University, Berlin (unpublished).

opments from concerned observers is renewed effort at the rules and procedures' effective implementation. As a long-time commentator noted, occupation law constitutes a particularly underimplemented area of IHL, "honored more often in the breach than not"⁹⁴. Effort at implementation should in turn focus on realizing shared principles more completely. Specifically, priority should be given to individual rights, accountability of leaders⁹⁵ and the rule of law before traditional doctrines of state sovereignty and non-interference in domestic affairs.

We set out above some of the specific steps that Occupying Powers are obligated to take to give effect to the law of occupation. In addition, the Occupying Powers must generally ensure that the rights of protected persons and their property are fully respected, with breaches prevented or punished (Art. 146 IV GC).⁹⁶ These obligations placed on the Occupying Powers do not absolve the international community of its own, related responsibility. Common Art. 1 of the Conventions and AP I not only mandates respect but also constitutes a solemn undertaking of *all* State parties to "ensure respect" for their provisions (own emphasis). The character of many humanitarian obligations as *erga omnes* confirms States' putative legal interest in the obligations' protection and States' responsibility to take appropriate steps to ensure respect, even if they are not parties to an armed conflict.⁹⁷ In light of the well-known paucity of effective avenues for legal appeal and review in IHL,⁹⁸ accountability for state and individual conduct must be enforced through diplomatic channels or if that fails, through exposure and public censure. What positive action States should take to ensure respect for the Convention is a matter for their discretion, as long as the action

⁹⁴ *Benvenisti* (note 80), 860.

⁹⁵ Scheffer notes an anomaly in the enforcement of IHL, namely that while in other areas individuals have increasingly been held accountable, penalties for violations of occupation law have consisted mainly of actions against States not official personnel. (*Scheffer* (note 34), 856).

⁹⁶ It should not be forgotten that it is in the Occupying Power's own self-interest as well as an end in itself to fulfill their responsibilities. Observing the law of occupation reduces the possibility that the occupied people will resist the occupier's authority. Moreover, showing respect for the other people's rights and dignity in the context of armed conflict increases the likelihood of achieving a shared, lasting peace – and not perpetual war – between the former enemies.

⁹⁷ For an example of judicial reference to this article, see also *dispositif* D of the advisory opinion of the International Court of Justice in *Legal Consequences of the construction of a wall in the Occupied Palestinian Territory* of 9 July 2004, available on the Internet: <www.icj-cij.org>: "all States parties [...] also have an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in Geneva Convention IV." No discursive justification was, however, given for this finding.

⁹⁸ For a discussion of remedies to ensure compliance with IHL, see *Fleck*, Humanitarian Protection Against Non-State Actors, in: Frowein *et al.* (eds.), *Verhandeln für den Frieden* (Negotiating for Peace), Liber Amicorum Tono Eitel, 2003, 69 (82 *et seq.*).

chosen is lawful.⁹⁹ The best official response – legally and politically speaking – may be a collective one in the form of recourse to the UN to enlist the support of the state community and to put pressure on the relevant actors.

Where for their part novelties or ambiguities regarding IHL (be it in the treaties, customs or resolutions) arise, the onus is on the international community as a whole to make clear their own view of the contents of the applicable law and the limits placed on its addressees. (Indeed, no international body exists to determine whether a situation must be legally qualified as occupation.) Understandings as regards armed conflict are constantly evolving, and States have the power to decide whether or not to collectively adopt a particular proposed understanding. In the “world of word politics”, the community of interpretation can prevent “interpretive unilateralism”¹⁰⁰ by any one State. Specifically as regards occupation law, opinions or actions of Occupying Powers that breach the spirit, if not necessarily the letter, of its terms should not simply be accepted and thereby achieve validation; they should be unequivocally condemned by the international community. Such condemnation is not only for the sake of affording protection to the civilian population and property in a particular occupied territory but also for the sake of avoiding the possible precedential effect of the breaches elsewhere.

In the Iraqi test-case, international oversight can and must serve as a check on the use of power by foreign States. Official acquiescence, for example, to the argument that ‘post’ justifies inaction – i. e. that the invasion of Iraq, though possibly illegal, was ‘legitimate’ and that the occupation should not be subject to the usual, established rules and procedures – would severely undermine the cause of IHL in this context. This justification would effectively strip its would-be beneficiaries of the protection promised them by international law in recognition of their dire straits in war’s wake. Official acquiescence for cynical reasons – e. g. national self-interest in securing lucrative reconstruction contracts – would be morally unconscionable: global humanitarian and not narrow political or commercial advantage must be put first in the aftermath of armed conflict. The Iraqi people have experienced several decades of repression, war and deprivation, from the regime of Saddam Hussein, through the war with Iran, the first Gulf war, the international economic sanctions, the second Gulf war to the present occupation. They surely now deserve an unambiguous, principled and determined stand from the international community on the enforcement of IHL.

We believe, in short, that existing occupation law remains both applicable and relevant, even in postwar Iraq. Its force could benefit from an approach that amidst

⁹⁹ For a discussion of the positive action resulting from this obligation that may be expected of States, see *Scobbie*, *Smoke, Mirrors and Killer Whales: the International Court’s Opinion on the Israeli Barrier Wall*, *German Law Journal* 5 (2004), 1107 (1118 *et seq.*), available on the Internet: <www.germanlawjournal.com/article.php?id=496>.

¹⁰⁰ *Scott*, *Iraq and the Serious Consequences of Word Games: Language, Violence and Responsibility in the Security Council*, *German Law Journal* 3 (November 2002), paras. 3 and 5, available on the Internet: <www.germanlawjournal.com/article.php?id=209>.

changing circumstances, emphasizes the facts on the ground, a progressive understanding of the provisions and shared humanitarian principles. Regardless, the *ius post bellum* is in its basic, original conception more than adequate to meet the challenges of military occupation today. As events following the Iraqi war sadly demonstrated, what really demands concerned observers' attention is not effort at wholesale reform but at effective implementation of occupation law, as of the existing provisions of IHL more generally.