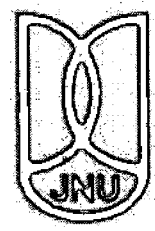
BELLIGERENT OCCUPATION UNDER INTERNATIONAL LAW WITH REFERENCE TO IRAQ

Dissertation submitted to Jawaharlal Nehru University
in partial fulfilment of the requirements
for award of the degree of

MASTER OF PHILOSOPHY

SANTOSH KUMAR UPADHYAY



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DECLARATION

I declare that the dissertation entitled "BELLIGERENT OCCUPATION UNDER INTERNATIONAL LAW WITH REFERENCE TO IRAQ" submitted by me for the award of the degree of Master of Philosophy of Jawaharlal Nehru University is my own work. The thesis has not been submitted for any other degree of this University or any other university.

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CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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DEDICATED
TO
MY PARENTS
AND
KHUSHI, AYUSH AND HARSH

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Any error that remains in the dissertation is, however, solely my responsibility.

Santosh Kumar Upadhyay

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Abbreviations

CPA	Coalition Provisional Authority
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for former Yugoslavia
IHL	International Humanitarian Law
MNF	Multi National Forces
TAL	Transitional Administrative Law
UK	United Kingdom
UN	United Nations
USA	United States of America

INTRODUCTION

Introduction

The twentieth century witnessed an unprecedented quest by the international community to save the succeeding generations from the scourge of war. This led to human society to work on two planes. Firstly, to bring the use of force within the regulatory ambit of international law and thus it was sought to be declared illegal with some specific exceptions. Secondly, efforts were made to provide rules and regulations for the conduct of hostilities and their aftermath. The body of rules belonging to the first category is known as *jus ad bellum.* It is related to the lawfulness of use of force while the rules relating to the second category are known as *jus in bello* and it forms the corpus of body of rules now known as international humanitarian law (hereinafter mentioned as IHL). This branch of law is independent of *jus ad bellum* and it applies to the parties in conflict independent of the fact whether the use of force has been lawful or not.

IHL is a substantial body of international law comprising general principles flexible enough to accommodate unprecedented developments in weaponry. It could command to command the allegiance of all members of the community of nations.[1] It has been developed and designed to conciliate the necessities of war with the laws of humanity.[2] Thus it enjoys unique combination of permissible and prohibitive measures. These measures are the customary principles of international law and the obligations under them are now considered as obligations *erga omnes*.

Laws relating to belligerent occupation are parts of the IHL. These laws are contained in the Hague Regulations Respecting the Laws and Customs of War on Land 1907, annexed to the Hague Convention [No.IV] of 1907[3], the Fourth Geneva Convention Relative to

[1] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (1996) *ICJ Reports*. Dissenting opinion of judge C.Weeramantry, p 444.
[2] *ibid.*
[3] Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907), [Online: Web] Accessed 25 July 2009, URL: http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument.

the Protection of Civilian Persons in Time of War 1949[4], and 1977 Additional Protocol I to the Geneva Convention[5] as well as in customary international law. This body of laws is sometimes also called the "law of belligerent occupation" and in more simple terms "law of occupation". However, the terms belligerent occupation and military occupation have often been used interchangeably. They connote the same meaning.

The law of belligerent occupation is based upon the principle of inalienability of sovereignty through the actual or threatened use of force. Conquest does not alter the sovereignty. Effectiveness of control or occupation by foreign military force can never bring about by itself a valid transfer of sovereignty. These laws only recognise the factual military supremacy of the belligerent forces over the concerned territories. In fact the status of occupied territories has been regarded as *trust* in the hands of the occupying power. As such occupation remains a temporary measure for re-establishing order and civil life after the end of active hostilities for the benefit of civilian population. Thus irrespective of length of period, military occupation can not confer title to territory.

It is widely accepted fact that behind almost all occupations there is a conflict of interest between the occupier and the occupied. Occupier has upper hand due to its proved military supremacy in the concerned territories for the time being. The law of belligerent occupation is an effort to reduce such conflicts by providing certain rights, duties and liabilities to occupying power. They provide restraints on the legislative and penal capacities of occupier. It is an attempt, "to substitute for chaos some kind of order, however harsh it may be".[6]

However, the history of the applicability of these laws has been remained troublesome. These laws have been observed more in breach than in compliance. The continuance of this trend could also be perceived from the recent developments at international level, particularly during occupation of Iraq. Problems in this regard are of two kinds: Firstly,

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[4] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), 75 *UNTS* 287.
[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 1125 *UNTS* 3 (1979).
[6] Lord McNair and A.D. Watts (1966), *The Legal Effects of War*, Cambridge: Cambridge University Press, p 371.

problems pertaining to factual situations and secondly, problems related to philosophical hypothesis behind these laws.

The first set of problems comprise the issues of commencement and termination of occupation, identification of occupying powers particularly in multilateral occupations and corresponding duties and obligations of occupants. The second is the philosophical challenge to this body of laws from the concept of "transformative occupation"[7]. This notion of transformative occupation argues for non-applicability of the laws of occupation on various grounds.

The recent occupation of Iraq is one of the best examples of this concept. The occupying powers had changed the political and economic system of Iraq in a manner best suited to them. The laws of belligerent occupation were deliberately put in abeyance. Various arguments had been put forward to support such setting aside of the laws. Generally, the arguments advanced are as follows: firstly, the mandate from the Security Council; secondly, the consent of the body comprising individuals of the occupied territory as constituted by the occupying powers; thirdly, the developments in other areas of international law and insufficiency of laws of occupation to comply with those developments.

Both the above mentioned problems need to be analysed. This study deals with these issues. It starts with the discussion on the concept of belligerent occupation and concludes with the arguments to support and preserve these principles of international law. It argues that the occupation is a question of fact and hence its commencement, termination and identification of occupying powers should be decided by taking note of factual situation on the ground. It analyses the conventions relating to belligerent occupation and further discuss those changes in Iraq which are in their nature hostile to the preservationist approach of these conventions.

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[7] This term is used in this work to denote the concept which argues for setting aside the body of laws of belligerent occupation in favour of occupant's ambition to infuse transformative changes in occupied territory on various grounds. This means the wholesome transformation of the occupied territory in its political, legal and economical structure. In latter chapters, this study will analyse this concept with respect to the occupation of Iraq in little detail. See, Roberts, Adom (2006), "Transformative Military Occupation: Applying the law of War and Human Rights", *American Journal of International Law*, 100 (3): 580-622; Bhuta, Nehal (2005), "The Antinomies of Transformative Occupation", *European Journal of International Law*, 16(4): 721-740.

This work, further, analyse the arguments made in support of the transformative occupation. It discusses their fragility and vagueness particularly in case of Iraq. It also analyse the concerned Security Council resolutions and argues that the language of the Security Council resolutions was vague and it never mandated such changes in unambiguous terms.

Scope of the Study

This work deals with both practical as well as philosophical notions of law of belligerent occupation. It will try to deduce the rights and duties of occupying powers under international law. This study focuses on some problematic issues like commencement and termination of occupation, identification of occupying powers (particularly in case of multilateral occupation). It also tries to understand the notion of transformative occupation. This work presents a comparative study of both notions of debate. The work, except some conceptual issues, seeks to focus upon the occupation of Iraq.

Research Questions

This work tries to find out the answers of the following questions.

- What is belligerent occupation and how does it take place?
- When the law of belligerent occupation commence as well as cease to be applied?
- What is the status of laws relating to belligerent occupation under International Law?
- What are the rights and duties of the occupying powers in International Law?
- When did the occupation of Iraq commence and cease?
- What were the important changes made in Iraq during its occupation?
- What is the concept of transformative occupation and what is its legal basis?
- What is the legality of changes made in Iraq by occupying powers in their occupational capacity?

Research Hypothesis

- Though new developments have raised questions concerning laws of belligerent

occupation, but this branch of law in its conservationist approach is still valid and flexible enough to regulate the post war conduct of occupying powers.

- The concept of transformative occupation is too vague to demarcate rights, duties and liabilities of the occupants.

Research Methodology

The present study is mainly analytical one. It is based upon both primary and secondary sources. It seeks to decipher both the treaty based as well as customary principles of international humanitarian law. This study also takes cognisance of concerned United Nations Security Council resolutions and declarations pertaining to occupation of Iraq. Apart from these, books, journals and relevant website materials will also be consulted.

Framework of the Study

The present work has been divided into five chapters.

Chapter I focuses on the applicability of the law of belligerent occupation and their basic nature. It discusses the basic nature, purpose and status of laws of belligerent occupation under international law. It analyses the issues of commencement and termination of occupation and the identification of occupying powers along with effects of the termination of the occupation. This chapter has been structured under the title "**Concept of Law of Belligerent Occupation**".

Chapter II explains on rights, duties and liabilities of occupying powers as per relevant treaties as well as customary international humanitarian law. It analyses the basic corpus of laws of belligerent occupation and issues related to them under the title "**Basic Tenets of Law of Belligerent Occupation**".

Chapter III elaborates the notion of transformative occupation with particular reference to occupation of Iraq. It discusses the various changes made in Iraq's political and economic structure during its occupation. It put under scanner the activities of occupying powers in Iraq. This chapter also deals with the issues of commencement and termination

of occupation in Iraq. This chapter has been structured under the heading "**Notion of Transformative Occupation: Iraq Situation**".

Chapter IV discusses the vulnerability and inherent fragility of the various arguments made in favour of the changes made in Iraq by occupying powers. It also discusses the basic contradictions of the transformative occupation. This chapter has been structured under the heading **"Law of Belligerent Occupation and Transformative Occupation".**

Chapter V encompasses "**Conclusions** and **Suggestions**".

CHAPTER I

CONCEPT OF LAW OF BELLIGERENT OCCUPATION

Chapter I

Concept of Law of Belligerent Occupation

Introduction

It appears that the occupation of an enemy territory is a unique situation both for the inhabitants and for the occupiers. Both remain hostile to each other. The occupier has upper hand due to its proved supreme military capabilities in the concerned territories. It enjoys its capabilities to make its will felt in the occupied territories within reasonable period of time. This makes the situation of the inhabitants vulnerable. The law of belligerent occupation, as a part of IHL, protect concerned individuals by providing limits on the occupying power's supreme factual military capabilities in the concerned territories. It is expected to maintain the delicate balance between rules of humanity and the security of the occupying power. The law of belligerent occupation support the normative continuity of the economic and political structures of the occupied territory. The occupying powers are prohibited to introduce any long lasting and ambitious changes in the occupied territory. They only have some limited rights for their security and daily administration in the occupied territory.

Apart from this, these laws apply from the outset of the occupation. However, the time of the commencement of the occupation and its termination is important one. These issues have been in the discussion from the inception of this system of law. This chapter studies these issues in little detail. This chapter also put light on the nature and status of the law of belligerent occupation under international law.

Development of Law of Belligerent Occupation

The law of belligerent occupation has been developed as a part of laws of war, to regulate war and its aftermaths.[1] Initially, enemy territory occupied by armed forces immediately became part of the territory of the occupying state.[2] The unqualified allegiance of the inhabitants of such area was demanded by the occupant.[3] In a self serving view, convenient to a colonial power, an English court stated (1814) that "no point is more clearly settled in the Courts of Common Law than that a conquered territory forms immediately part of the King's dominions".[4]

This situation started to change gradually. In fact after the Congress of Vienna,[5] the theory and practice of belligerent occupation emerged, though slowly, as a way to preserve the 19th century European territorial order.[6] This development was mostly concentrated around the issues of position of occupant with respect to ousted sovereign and the politico economic idea of sanctity of private property.[7] It is believed that August Heffter, a German publicist, was the first writer to draw the distinction between the real acquisition of territory and its military occupation. [8]

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[1] Eyal Benvenisti, (2004), *The International Law of Occupation,* Princeton: Princeton University Press, p. 1.

[2] Richard R. Baxter (1950), "The Duty of Obedience to the Belligerent Occupant", *The British Yearbook of International Law*, (27) 235-266, p. 236. Also see, H. Lauterpacht, (ed.) (1952) *Oppenheim's International Law a Treatise vol.II Disputes war and neutrality*, London: Longman Group. Limited, p. 432. Author observes: "in former times, enemy territory occupied by belligerent was in every point considered his State property, so that he could do what he liked with it and its inhabitants. He could devastate the country with fire and sword, appropriate all public and private property therein, and kill the inhabitants, or take them away in to captivity, or make them an oath of allegiance. He could . . . dispose of the territory by ceding it to a third state; . . . that an occupant could force the inhabitants of the occupied territory to serve in his own army, and to fight against their own legitimate sovereign, was indubitable."

[3] Richard R. Baxter (1950), n. 2, p. 236.

[4] *ibid.*, p. 237. Also see, G. Von Glahn, (1957*), The Occupation of Enemy Territory _ _ _ A Commentary on the Law and Practice of Belligerent Occupation,* Minneapolis: The University of Minnesota Press, p. 7.

[5] Congress of Vienna was a congress of great powers of Europe met at Vienna (from 1 November 1814 to 8 June 1815) to settle the future boundaries of continent. It adopted the policy of *status quo ante bellum* i.e. the situation as it was before the war; Fenwick, G. Charles (1975), *International law*, Bombay: Vakils feffer and simons private ltd, pp. 17-21.

[6] Nehal Bhuta, (2005), "The Antinomies of Transformative Occupation", *European Journal of International Law, 16*(4): 721-740, pp.724-733.

[7] Julious Stone, (1959), *Legal Controls of International Conflict,* London: Stevens and Sons Limited, pp. 693-694; Nehal Bhuta, (2005), n. 6, p. 726.

[8] H. Lauterpacht (1952), n. 2, p. 432-433.

The concept of occupation by armed forces made its appearance, in a concrete form, during the second half of the eighteenth century in the form of Lieber Code of 1863[9], the Brussels Declaration of 1874[10], and the Oxford Manuel of 1880[11]. These attempts proved persuasive to prepare universally recognised set of rules for the laws of war in general and administration of occupied territory in particular.[12]

The scope of authority of the occupying power in managing conquered territory found its first codified expression in treaty form in the Hague Regulations Respecting the Laws and Customs of War on Land 1907, annexed to the Hague Convention [No.IV] of 1907 (hereinafter mentioned as the Hague Regulations IV).[13] Articles 42-56 of this regulation discussed the basic features of administration of occupied territory and imposed certain obligations and limitations upon occupying powers. These provisions were further supplemented and expanded by the Fourth Geneva Convention 1949 relative to the protection of civilian persons in time of war[14] (hereinafter mentioned as the Geneva

[9] Leiber code was the first attempt to codify the laws of war. It was a manual named "Instructions for the armies of the United States in the field", drafted by Professor Francis Leiber and were issued to the U.S. army on April 24, 1963. These regulations strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states. To know the basic text of the Code, see, D. Schindler and J. Toman (ed.) (1988), *The Laws of Armed Conflict*, Dordrecht: Martinus Nijhoff Publishers, pp. 3-24. Also see, [Online: Web] Accessed 25 July 2009, URL: http://www.icrc.org/IHL.nsf/Intro/110?OpenDocument.

[10] The Brussels Declaration of 1874 was the result of the Brussels Conferences held in Brussels in 1874 to examine the draft of an international agreement concerning laws and customs of war. However this declaration was not ratified. To know the basic text of the Declaration, see, D. Schindler and J. Toman (ed.) (1988), n. 9, p. 25-34. Also see, [Online: Web] Accessed 25 July 2009, URL: http://www.icrc.org/IHL.nsf/Intro/135?OpenDocument.

[11] The Oxford manual of 1880 was the result of efforts of the Institute of International law to lay down the manual of laws and customs of war. Many of the provisions of the Hague Conventions can be traced back to the Brussels Declaration and the Oxford Manual. To know the basic text of the Manual, see, D. Schindler and J. Toman (ed.) (1988), n. 9, p. 35-48. Also see, [Online: Web] Accessed 25 July 2009, URL: http://www.icrc.org/IHL.nsf/Intro/140?OpenDocument.

[12] To know more about development of the law of occupation, See, G. Von Glahn, (1957), n. 4, pp. 7-26; Karma Nabulsi (2004), *Traditions of war, occupation, resistance and the law*, Oxford: Oxford University press pp. 4-18.

[13] Convention (IV) Respecting the Laws and Customs of war on land and its annex: Regulations concerning the Laws and Custom of war on Land, The Hague, 18 October, 1907. (hereinafter mentioned as Hague Regulation IV), also available at [Online: Web] Accessed 25 July 2009, URL: http:// www.icrc.org/ihl.nsf/FULL/195?OpenDocument.

[14] The Geneva Convention Relative to the Protection of the Civilian Persons in time of War of August 12, 1949, 75 (*UNTS*) 287, also available at [Online: Web] Accessed 25 July 2009, URL: http:// www.icrc.org/ihl.nsf/FULL/380?OpenDocument.

Convention IV).[15] The related provisions of the Geneva Convention IV were further supplemented by its Additional Protocol I of 1977 (hereafter mentioned as Additional protocol I).[16]

These treaties are further supplemented by the customary international law which has developed through state practices, decision of judicial tribunals and writings of various jurists. Thus the entire gamut of laws of belligerent occupation comprises with Hague Regulations IV (particularly article 42-56), the Geneva Convention IV (particularly articles 27-34 and 47-78), and Additional Protocol I as well as in customary international law.

Framework of the Law of Belligerent Occupation

The law of belligerent occupation become applicable from the beginning of the occupation. Article 6[17] of the Geneva Convention IV provides that the application of this convention in case of occupied territory ceases one year after the general close of military operations. Moreover, as long as the occupying power exercises the function of the government Articles 1 to 12, 27, 29 to 34, 47, 49, 51 to 53, 59, 61 to 77 and 143[18] of the

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[15] H. Lauterpacht (1952), n. 2, p. 451. Commenting upon the nature of relationship between the Hague Regulations 1907 and the Geneva Conventions 1949, author observes: "they are to a large extent declaratory of existing international law though in some ways they go beyond the provisions of the Hague Regulations and supersede them as between the Contracting Parties."

[16] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (Protocol I), of 8 June 1977, available at URL: http://www.icrc.org

[17] Geneva Convention IV, n. 14, Article 6. This Article provides general rules about the beginning and end of the application the Geneva Convention IV.

[18] *ibid.* These provisions are of immense importance for the inhabitants of the occupied territory. They provide absolute rights to the inhabitants of the occupied territory. Articles 1-12 come under the heading of "General Provisions" and delineates basic framework for the application of the convention like, identification of the protected persons (Article 4), protecting powers (Article9), activities of the ICRC (Article 10), non renunciation of the rights by protected persons (Article 8) etc. Further, Articles 27 and 29-34 provide basic minimum rights to the inhabitants of the occupied territory. These provisions are common to both the territories of the parties to the conflict and to the occupied territories. They protect inhabitants of the occupied territory from coercion (Article 31), corporeal punishment and torture (Article 32), collectively penalties and pillage (Article 33) and from hostages (Article 34). Apart from this they also ensure dignified treatment to the protected persons in all circumstances (Articles 27, 30). Furthermore, Articles 47, 49, 51 to 53, 59, 61 to 77 are specifically applied to the occupied territory. These Articles are an attempt to provide maximum protection to the inhabitants of the occupied territory, for example: rights of the protected persons are declared "inviolable" (Article 47); any deportation, transfers and evacuations from the occupied territory is prohibited unless required by the absolute security considerations for such inhabitants (Article 49); special care has been taken for the labours (Articles 51,52); destruction of property

convention remain applicable. However, for those persons whose final release, repatriation or re establishment are to take place later, the benefits of the relevant provisions of the Geneva Convention IV and its Additional Protocol I would remain to apply.[19] Apart from this the obligations of occupying powers can also be traced from other conventions and declarations. The Hague Convention on the Protection of Cultural Property 1954 and its Protocol could be mentioned as a part of this legal framework.

Nature of Law of Belligerent Occupation

Belligerent occupation is a control of foreign territory, where administration of a territory is carried by an entity that is not its sovereign government.[20] The legal sovereignty still remains vested in the prior sovereign though he is unable to exercise his ruling power in such territory.[21]

Thus it is in essence a temporary condition in which the belligerent occupant enjoys limited power.[22]The principle of inalienability of sovereignty through the actual or threatened use of force supports these laws and further provides a firm foundation for them.[23] Control of foreign military force can never bring transfer of sovereignty.[24] Thus,

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is prohibited (Article 53); special arrangements have been made for relief consignments and their distribution (Articles 59, 61, 62, 63). Apart from this, Articles 64-77 provide the guidelines for penal procedures in the occupied territory. They are of immense importance and serve as a basic guarantee in favour of the inhabitants of the occupied territory against the tyranny of the occupying power. Article 143 deals with the supervision of the implementation of the convention. Thus these Articles are very important and remain applicable for the whole period of the occupation.

[19] Additional Protocol I, n. 16, Article 3 (b).

[20] Eyal Benvenisti, (2004), n. 1, p. 4. Also see, Felice Morgenstern, (1951), "Validity of the Acts of Belligerent Occupant", *The British Yearbook of International Law* 28:291-322, p. 302; Michael Bothe (1997), "Occupation, Belligerent", in R. Bernhardt (eds.) *Encyclopedia of Public International Law*, Vol. III, Amsterdam: Elsevier Science Publishers, p764.

[21] Morris Greenspan (1959), *The Modern Law of Land* Warfare, Berkeley and Los Angeles: University of California Press, p. 217. Also see, Jean S. Pictet (1958), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in time of War*, Geneva: The International Committee of the Red Cross, p. 275. Author observes: "the occupation of territory in wartime is essentially a temporary, de facto situation, which deprives the occupied power of neither its state hood nor its sovereignty; it merely interferes its power to exercise its right".

[22] Ardi Imseis (2003), "On the Fourth Geneva Convention and the Occupied Palestinian Territory", *Harvard International Law Journal*, 44(1):65-138, p. 65.

[23] Article 2(4), UN (2005), United Nations, *Charter of the United Nations and Statute of the International Court of Justice*, New York: UN. It states: "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations"; 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states in accordance with the

military occupation does not displace or transfer sovereignty.[25]As such states do not cease to exist as a legal entity even if its entire territory is occupied by the enemy.[26] Even the unclear status of occupied territory does not prevent the applicability of the laws of occupation.[27] It is sufficient that territory in question does not belong to the occupying power when occupation takes place.[28]

Thus, occupant is not entitled to treat the country as its own territory or its inhabitants as its own subjects.[29] Similarly, the occupying power cannot force the inhabitants of the occupied territory to swear allegiance towards him though he may seek obedience for his lawful regulations.[30] Thus, it seems, that the inhabitants of the occupied territory are bound by legal duty of the obedience towards the occupant. However, this duty of obedience towards occupying power does not have its legal basis under international law.[31] This inhabitant's duty of obedience arises neither from their own municipal law nor from international law but from the martial law of the occupant to which they are

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Charter of the United Nations. It states: "the territory of the state shall not be the object of the acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal."

[24] Additional Protocol I, n. 16, Article 4. It states: "Neither occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question". Also see, Malcolm N. Shaw (2003), *International Law,* Cambridge: Cambridge University Press, p. 422. Author observes: "Conquest, the act of defeating the opponent and occupying all or parts of its territory, does not itself constitute a basis of the title to the land. It does give the victor certain rights under international law as regards the territory, the right of the belligerent occupation, but the territory remains the legal possession of the ousted sovereign. Sovereignty as such does not merely pass by conquest to the occupying forces... ". Also see, Eyal Benvenisti (2004), n. 1, p. 5.

[25] Lord McNair and A.D. Watts (1966), *The Legal Effects of War,* Cambridge: Cambridge University Press, p. 368-369. Also see, Siobhan Wills (2006), "Occupation Law and Multy-National Operations: Problems and Perspectives", *The British Yearbook of International Law,*77: 256-332, p. 257; Morris G. Shanker (1952), "The law of the Belligerent Occupation in the American Courts", *Michigan Law Review,* 50(7): 1066-1083, p. 1069. Author observes: "it is something less than full sovereignty, yet obviously more than a completely illegal and void venture".

[26] Michael Bothe (1997), n. 20, p764.

[27] *ibid.*

[28] *ibid.*

[29] Lord McNair and A.D. Watts (1966), n. 25, p. 369.

[30] Julious Stone (1959), n. 7, p. 697; Lord McNair and A.D. Watts (1966), n. 25, p. 369; H. Lauterpacht (1952), n. 2, p. 439.

[31] Michael Bothe (1997), n. 20, p764. Also see, Nehal Bhuta (2005), n. 6, p. 727. Author observes: "the population was deemed to owe a factual, rather than legal, duty of obedience to the occupant, arising out of an acceptance of the occupant' power to enforce his command and in return for the preservation of public order."

subjected.[32] In the context of the occupying power's ability to demand obedience from the population of the occupied territory, it has been contended that:

> The occupying power's ability to enforce respect for its legitimate interests is not an authority to create law. The ability to enforce respect springs instead from superior military power and from the factual capacity to compel obedience. The occupying power is allowed to enforce obedience of its orders within the limits of Geneva Convention IV and Hague Regulations, but this does not make violations against these orders internationally wrongful acts; it only makes non compliance risky.[33]

Thus, the law of belligerent occupation has both permissive as well as prohibitive trends. The permissive part enables the belligerent occupant to undertake some obligations which are not permitted to do under the law of peace. The prohibitive part also seeks to limit the exercise of abnormal powers of the belligerent.[34] Thus, the acts of the belligerent occupant beyond the limits of the law of occupation will not have any legal effect.[35] Any transformation of the political and legal structures of an occupied territory runs against the basic principles of the law of belligerent occupation.[36]

It can be argued that the belligerent occupation only gives temporary *de facto* power based on existing factual situation in favour of the occupant for the security of its own forces and for carrying daily administration of the occupied territory on temporary basis.[37] The exercise of this *de facto* and temporary power of the occupant is limited and

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[32] H. Lauterpacht (1952), n. 2, pp. 438-439.

[33] Michael Bothe (1997), n. 20, p764.

[34] G. Von Glahn (1957), n. 4, pp. 5-6. Also see, Felice Morgenstern (1951), n. 20, p. 295. Author observes: "the Hague Regulations have not only placed legal limits on the factual power of the occupant, but have, by inference, recognized certain rights and have imposed upon him positive duties in relation to the population"; Adom Roberts (1990), "Prolonged Military Occupation: The Israeli – Occupied Territories since 1967", *American Journal of International Law,* 84(1): 44-103, p. 46; I. Maxine Marcus (2002), "Humanitarian Intervention without Borders: Belligerent Occupation or Colonization", *Houston Journal of International Law*, 25(1): 99-139, p. 137.

[35] Julious Stone (1959), n. 7, p. 697. Author observes: "beyond the limits of quality, quantum and duration . . . the occupants' act will not have legal effect. . . He (occupant) is thus not entitled to treat the country as his own territory or its inhabitants as his own subjects or force them to swear allegiance to him, and over a wide range of public property, he can confer rights only as against himself, and within his own limited period of *de facto* rule".

[36] Simon Chesterman (2004), "Occupation as Liberation: International Humanitarian Law and Regime Change", *Ethics and International Affairs*, 18(3): 51-64, p. 52. Also see, B. N. Mehrish (2007), *The Iraq War and Legal Issues The Trial of Saddam Hussein,* Delhi: Academic Excellence, p. 35.

[37] Simon Chesterman (2004), n. 36, p. 52. Also see, Lord McNair and A.D. Watts (1966), n. 25, p. 369. Author mentions three parameters for the occupying powers to issue orders. Author observes: "it

governed by the international law.[38] As Professor Rowe observes that the occupying power:

> [B]ecomes administrator rather than sovereign and this implies that his law making power is more limited. It was certainly the intention of those who framed the Hague Convention that the occupier's law making powers could be exercised only where it was a matter of military necessity that they should and not merely where the occupier considered it expedient to do so.[39]

In this regard H. Lauterpacht also observes:

> [T]he occupant requires a temporary right of administration over the territory and its inhabitants . . .as the right of an occupant in occupied territory is merely a right of administration, he may neither annex it . . . nor set it up as an independent state, nor divide it into two administrative districts for political purposes.[40]

Thus, it seems, the occupant enjoys only temporary managerial power over the occupied territory for the period of occupation.[41] He administers the territory on behalf of the

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(occupation) is definitely a military administration and he (occupant) has no right to make even temporary changes in the law and the administration of the country except in so far as it may be necessary for the maintenance of order, the safety of his forces and realization of the legitimate purpose of his occupation"; H. Lauterpacht (1952), n. 2, p. 437. Author observes "he (the occupant) has no right to make changes in the laws, or in the administration, other than those which are temporarily necessitated by his interest in the maintenance and safety of his army and realization of the purpose of war."

[38] Michael Bothe (1997), n. 20, p764. Author observes: "International law does not grant rights to the occupying powers, but limits the occupant's exercise of its *de facto* powers."; Also see, Hilaire McCoubrey and Negel D. White (1992), *International Law and Armed Conflict,* Aldershot: Datrmouth Publishing Company Limited, p. 283. Author observes: "the powers of occupation authorities are limited precisely by the presumed temporary nature of the occupation regime and in particular by need to avert creeping annexation through the imposition of the legal regime and the administrative structure of the enemy power"; Felice Morgenstern (1951), n. 20, p. 293. Author, while commenting upon legal character of Hague Regulations, observes: "section of the Regulation (Hague Regulation) which bears on belligerent occupation . . . is intended exclusively to limit the factual power of the occupant"; Lord McNair and A.D. Watts (1966), n. 25, p. 369; Julious Stone (1959), n. 7, p. 694. [Author has opposite view and observes: "international law attributes to him (occupant) legal power which merely as a belligerent he (occupant) does not have, touching almost all aspects of the government of the territory and the lives of its inhabitants".]

[39] Rowe, P. (1987), *Defence: The Legal Implication,* Brassey's Defence Publishers, p. 184, Quoted in *Hiliary* Mc Courby and Negel D. White (1992), n.38, p. 283.

[40] H. Lauterpacht (1952), n. 2, pp. 436-437.

[41] Marten Zwanenburg (2004), "Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation",p. 750, [Online: Web], Accessed 25 July 2009, URL: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/Section_ihl_occupied_territory

legitimate sovereign and thus his status is similar to be that of a *trustee* to preserve *status quo ante bellum.*[42] Therefore it could be argued that:

> [E]nemy territories in the occupation of the armed forces of another country constitute a sacred trust, which must be administered as a whole in the interests both of the inhabitants and of the legitimate sovereign or the duly constituted successor in the title.[43]

However, it is important to note that the legal authority exercised by the occupant in the occupied territory is an authority created by its own legal system.[44] It is precisely a military administration and can not be compared with ordinary administration.[45]

These elements of legal principles, based on state practice, have been declared as customary principle of international law by the Nuremberg tribunal.[46] It has also been described as intransgressible principles of international customary law and hence must be observed by all states irrespective of the fact whether they have been ratified it or not.[47] These principles are fundamental to the respect of human person and elementary

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[42] Adom Roberts (1984), "What is Military Occupation?", *The British Yearbook of International Law*, 55 : 249-305, p. 295. Also see, Hans-Peter Gasser (1997), "International Humanitarian Law", in M. K. Balachandran and Rose Varghese (eds.), *Introduction to International Humanitarian Law,* New Delhi: International Committee of the Red Cross, p.39.

[43] Arnold Wilson (1933), "The Laws of War in Occupied Territory", *Transactions of the Grotius Society,* 18, Quoted in Adom Roberts (1984), n. 42, p. 295.

[44] Michael Bothe (1997), n. 20, p.764.

[45] H. Lauterpacht (1952), n. 2, p. 437.

[46] *International Military tribunal (Nuremberg) judgment and sentences, 1 October 1946,* published in 1947, *The American Journal of International Law,* 41(1): 172-333, pp. 248-249. Tribunal observes: "these rules laid down in the convention (Hague Convention) were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war." Also See, H. Lauterpacht (1952), n. 2, p. 234; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* (1996), *ICJ Reports*, p. 258, para. 80. The court observes: "The Nuremberg international military tribunal had already found . . . that the humanitarian rules included in the regulation annexed to the Hague Convention IV of 1907 'were recognised by all civilized nations and were regarded as being declaratory of the laws and customs of war'." Also see, Marco Sassoli (2005), "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *European Journal of International Law*, 16(4): 661-694, pp. 663 and 681.

[47] *Legality of the threat or use of Nuclear Weapons* (1996), n. 46, p. 257, Para. 79. The court observes: "these fundamental rules (the Hague Regulations 1907 and the Geneva Conventions 1949) are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgresssible principles of international customary law." Also see, Vincent Chetail (2007), "The Contribution of the International Court of Justice to International Humanitarian Law", in Benarji Chakka and Larry Maybee (eds.), *International Humanitarian Law A Reader for South Asia*, New Delhi: The International Committee of the Red Cross, pp. 506 – 514.

considerations of humanity.[48] Thus, it seems that this set of laws has acquired the status of the peremptory norms of international law.[49]

In its advisory opinion of July 9, 2004, on the *Legal consequences of the construction of a wall in the occupied Palestine territory*[50], the International Court of Justice confirmed the applicability of human rights law to the occupied territory. The court held that the rights arising from Covenant on Civil and Political Rights 1966[51], the Covenant on Economic, Social and Cultural Rights 1966[52] and the Convention on Rights of Child 1989[53] are applicable in the occupied territories.[54] The court even elevated some of the occupant's obligations related to occupied territories under international humanitarian law to be *erga omnes*[55] obligations.[56] Furthermore, the application of the human rights

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[48] *Legality of the threat or use of Nuclear Weapons* (1996), n. 46, p. 257, para 79.

[49] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion,* (1951), *ICJ Reports*, p. 23. Commenting upon *jus cogens,* ICJ observes: "the principles which are recognised by civilized nations as binding on states even without any conventional obligation". Also see, ICTY, Prosecutor v. Zoran Kupreki (Case No. IT-95-16-T) Trial Chamber Judgment of 14 January, 2000, p. 203, Para 520. Tribunal observes: "most of the norms of international humanitarian law, in particular those prohibiting war crimes, crime against humanity and genocide, are also peremptory norms of international law or *jus cogens* i.e. of a non-derogable and overriding character". To know opposite view see, David J. Scheffer (2003), "Beyond Occupation Law", *American Journal of International Law*, 97(4): 842-860 p. 843. Commenting on the occupation authorized under chapter VII of the UN Charter, author observes "indeed it would be mistaken to regard the totality of occupation law as reflecting *jus cogens* and *erga omnes* obligations in the context of such authorized military interventions and occupations"; Robert Kolb (2008), "Occupation in Iraq since 2003 and the power of the UN Security Council", *International Review of the Red Cross,* 90(869): 29-50, pp. 46- 47. Commenting upon the arguments that only some norms of the international humanitarian law has acquired the status of *jus cogens,* Kolb observes: "if a single provision of substantive law has peremptory status, the norm that defines the scope of application of that fundamental rule and therefore constitutes the first condition of its application must also have peremptory status."

[50] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* (2004), *ICJ Reports.*

[51] International Covenant on Civil and Political Rights (1966), UN Doc.A/6316 (1967).

[52] International Covenant on Economic, Social and Cultural Rights (1966), 993 *UNTS* 3.

[53] Convention on the Rights of the Child, 1989. [Online: Web] Accessed 25 July 2009, URL: http://www2.ohchr.org/english/law/crc.htm.

[54] *Legal Consequences of the Construcion of a Wall in the Occupied Palestinian Territory,* (2004) n. 50, pp. 191-192, para 134.

[55] *Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* (1970) *ICJ Reports*, p. 32 Para 33-34. The court described obligations *erga omnes* as such obligations that are by their very nature 'the concern of all states' and, 'in view of the importance of the rights involved, all sates can be held to have a legal interest in their protection'. Further in Para 34 the court observes: "Such obligations derive, for example, in international law, from the outlying of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination". To know more about *erga omnes* obligations, see, Jochen Abr. Frowein (1997), in R. Bernhardt (eds.) *Encyclopedia of Public International Law*, Vol. III, Amsterdam: Elsevier Science Publishers, p. 757.

laws in the occupied territory has also been upheld by the International Court of Justice in its judgment in the *Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda).*[57]

The law of belligerent occupation is *lex specialis*[58], and it forms an exception to the more general rule of municipal law.[59] As such the obligations and limitations created by this system of law can not be waived even by the ousted sovereign. The rules of the conventions must be applicable in all sorts of the occupation and sanction of such occupation by the United Nations does not change the legal regime applicable to such factual situation.[60] As corollary, the applicability of this body of laws does not depend upon lawfulness or unlawfulness of occupation.[61] The morality and immorality of the occupation is irrelevant and once a situation exists which factually amounts to an occupation, the law of occupation applies, regardless of its justness.[62]

Apart from this, the law of occupation also serve some basic purposes of humanity and friendly relations among nations. Adom Roberts has mentioned some of these purposes as follows: "Firstly, it ensures that those who are in hands of the adversary are treated with humanity. Secondly, it harmonizes the humanitarian interests of the inhabitants of

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[56] *Legal Consequences of the Construcion of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* (2004), n. 50, p. 199, para 157. About international humanitarian law rules, the court observes: "these rules incorporate obligations which are essentially of an *erga omnes* character". Previously in para.155, court has also observed: "the obligations *erga omnes* violated by Israel are the obligations to respect the right of the Palestinian people to self determination, and certain of its obligations under international humanitarian law"; Eyal Benvenisti (2004), n. 1, p. xvii.

[57] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* (2005), *ICJ Reports*, p. 60, Para 178.

[58] *Lex specialis means* 'where there are two bodies of law that cover a general subject but one of these addresses a circumstances or matter in specific terms, or one body is general and one specific, then the specific provisions control the situation'.

[59] Felice Morgenstern (1951), n. 20, p. 300. Author observes: "the rules governing belligerent occupation... be regarded as a *lex specialis*, which forms an exception to the more general rule of municipal law".

[60] Loukis G. Loucaides (2004), "The Protection of the Right to Property in Occupied Territories", *International Comparative Law Quarterly,* 53(3): 677-690, p. 678; B. N. Mehrish (2007), n. 36, p. 36. Author observes: "relevant principles of the international humanitarian law will apply to an occupied territory regardless of the Security Council action".

[61] Knut Dorman and Laurent Colassis, "International Humanitarian Law in the Iraq Conflict", [Online: Web] Accessed 25 July 2009. URL: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/Section_ihl_occupird_territory

[62] Lord McNair and A.D. Watts (1966), n. 25, p. 371. Author observes: "The morality or immorality of the occupation is irrelevant. When territory is invaded and held, it must have some kind of government or there will be state chaos. The law of belligerent occupation is an attempt to substitute for chaos some kind of order".

the occupied territory with the military needs of the occupant. Thirdly, it preserves the imposition of disruptive changes in occupied territory and thus preserves the right of the sovereign there. Fourthly, it reduces the risk of renewed conflict between occupant and occupying powers. Fifthly, it helps to maintain the friendly relations between the occupying power and foreign states. Sixthly, it facilitates the prospects for an eventual peace agreement".[63]

Commencement of Occupation

When does belligerent occupation starts is a question of fact.[64] It is a factual situation and depends upon the ground reality of each case. There is no need of formal declaration that territory is under occupation. It does not depend upon legality or illegality of the use of force or coercion.[65] Initially, occupation was considered as a phenomenon which only took place during war or after cessation of active hostilities. The Hague Regulation IV links occupation to war.[66] It states that:

> Territory is considered occupied when it is actually placed under the authority of hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.[67]

The experiences of the Second World War show that occupation may take place without any war or armed struggle. Thus the common Article 2 of Geneva Conventions 1949 attenuated this link of war to occupation. This Article states that "the convention shall apply to all cases of partial or total occupation of territory of a High contracting party, even if the occupation meets with no armed resistance".[68] It universalises the application of this set of laws on existence of factual situation of occupation irrespective of the

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[63] Adom Roberts (1990), n. 34, p. 46.
[64] G. Von Glahn (1957), n. 4, p. 29. Also see, Julious Stone (1959), n. 7, p. 696; Simon Chesterman (2004), n. 36, p. 53; Eyal Benvenisti (2003), "Water Conflicts during the Occupation of Iraq", *American Journal of International Law*, 97(4): 860-872, p. 861; ICTY, Prosecutor V. Mladen Naletilic (Case No. IT-98-34-T), Trial Chamber Judgment of 31 March 2003, p. 72, para 211; Siobhan Wills (2006), n. 25, p. 258.
[65] Knut Dorman and Laurent Colassis, n. 61.
[66] Eyal Benvenisti (2004), n. 1, p. 4.
[67] Hague Regulation IV, n. 13, Article 42.
[68] Geneva Convention IV, n. 14, Article 2.

means of its occurrence.[69] Thus, the occupation may take place without any active hostilities.

However, the degree of authority established, as mentioned in the second paragraph of Article 42 of the Hague Regulation IV, by the occupant leads to two different interpretations. Firstly, it could mean that a situation of occupation exists whenever a party to a conflict exercises some level of authority or control over territory belonging to the enemy. Thus advancing troops can be considered as occupying forces. Jean Pictet in the ICRC commentary to the Geneva Convention IV observes that:

> There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Convention in its dealings with the civilians it meets.[70]

Secondly, it could be also mean that occupation commences when the belligerent occupant is in a position to fulfil its obligation under convention i.e. he should be in a position to substitute his own authority to govern the territory according to the convention.[71]

The exact point of commencement of occupation is crucial one and there is a serious debate among scholars about its occurrence. The focal point of this debate mainly concentrates upon the distinction between invasion phase and occupation. According to H. Lauterpacht, there are two conditions which must be fulfilled to prove the existence of occupation, firstly, the legitimate sovereign is prevented from exercising his powers and secondly, the occupant being able to assert his authority, actually establishes an administration over occupied territory.[72]Though, he differentiates between occupation

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[69] Eyal Benvenisti (2004), n. 1, p. 4. Author observes: "the rational for the inclusive definition is that at the heart of all occupations exists a potential . . . conflict of interest between occupants and occupied. This special situation is the result of the administration of affairs of a country by an entity that is not its sovereign government. The issues that this type of administration raises are characterized by this possible conflict of interest, and are largely independent of the process through which the occupant established its control."

[70] Jean S. Pictet (1958), n. 21, p. 60.

[71] See, Allan Gerson (1977), "War, Conquered Territory and Military Occupation in the Contemporary Legal System", *Harvard International Law Journal,* 18(3): 525-555.

[72] H. Lauterpacht (1952), n. 2, p. 435.

and invasion yet he does not deny the possibility that both may occur simultaneously in some cases. He emphatically observes:

> Occupation is invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent from the fact that an occupant sets up. Some kind of administration, whereas the mere invader does not . . . However this may be, as a rule occupation will be coincident with invasion. The troops march into a district, and the moment they get into a village or town . . . unless they are actually fighting their way . . . they take possession of the municipal offices, the post office, the police stations and the like, and assert their authority there. From the military point of view, such villages and towns are then occupied.[73]

Similarly, G Von Glahn opines:

> As long as the territory as a whole is in the power and under the control of occupant and as long as latter has the ability to make his will felt everywhere in the territory within a reasonable time, military occupation exist from a legal point of view.[74]

Explaining further, Morris Greenspan also observes:

> Effective military occupation arises when the organised resistance has been overcome in the area and the troops in position have established their authority to such an extent that they are in a position to assert that authority within a reasonable time in any part of the occupied area . . . The prerequisite is that they can make their authority felt when and where it is required.[75]

Several other writers have also expressed similar views.[76] Differentiating occupation from invasion, International Criminal Tribunal for Former Yugoslavia, in the *Naletilic*

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[73] *Ibid.*, pp. 434-435. This view is supported by some other authors also; G. Von Glahn (1957), n. 4, p. 28. Author observes: "invasion as such does not ordinarily constitutes occupation, although it precedes it and may coincide with it for a limited period of time. While invasion represents mere penetration of hostile territory, occupation implies a definite control over the area involved. In the former case, the invading forces have not yet solidified their control to the point a thoroughly ordered administration can be said to have been established."

[74] G. Von Glahn (1957), n. 4, p. 29.

[75] Morris Greenspan (1959), n. 21, p. 214.

[76] Julious Stone (1959), n. 7, p. 696. Author observes: "Occupation of an area begins when there is a sufficient force to retain command of the situation, following cessation of substantial local resistance. Often but not necessarily, cessation of resistance will have been preceded by formal surrender of local military forces, and possibly even by the surrender of the entire national forces in existence, though the state concerned usually retains some power of resistance elsewhere"; Michael Bothe (1997), n. 20, p. 764. Author observes: "The application of laws of belligerent occupation begins after an invasion, with the establishment of actual control over the territory."

case defined occupation as "transitional period following invasion and preceding the agreement on the cessation of the hostilities".[77] The International Court of Justice, while commenting on the determination of the status of the occupation has observed:

> Court must examine whether there is sufficient evidence to demonstrate that the said Authority was in fact established and exercised by the intervening state in the area in question.[78]

Thus, though there is a debate about situations which amount to occupation the practical solution lies in the fact that protection available in the concerned body of law must be applied in its full essence and logic. There may be situations which demand different degree of control and authority to fulfil various obligations under the convention but this does not make the convention absurd or inapplicable.[79] Individuals come directly in contact with the troops irrespective of the fact whether the situation amounts to invasion or occupation. Legal nomenclatures must not take away the benefit of basic rights from the concerned individuals. Thus, as for as individuals are concerned, the application of the law of occupation does not require that occupying power should have the actual authority.[80]

Acknowledgement of the status of occupation is an important initial indication that the occupant will respect the laws of occupation. But in any case failure to do so does not relieve the occupant of its duties under these laws. Once a situation exists the occupant is

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[77] Prosecutor v.Mladen Naletilic (ICTY 2003), n. 64, p. 73, Para 214.

[78] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, (2005), n. 57, p. 59, Para 173.

[79] Adom Roberts (1984), n. 42, p. 251. Author observes: "the applications of quite basic practical and humanitarian rules can not be made to depend on an endless series of definitional wrangles and legal niceties...Even if the application of single set of rules to a wide variety of situations presents some difficulties it not necessarily, it is not necessarily absurd or impossible."

[80] Jean S. Pictet (1958), n. 21, p. 60. Author observes: "so for as individuals are concerned, the application of the fourth Geneva Convention does not dependent upon the existence of the state of the occupation within the meaning of the article 42 (the Hague Regulation) . . . The relation between the civilian population of the territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention (the fourth Geneva Convention); *Prosecutor v.Mlladen Naletilic* n. 64, p. 75 Para 221. Tribunal observes: "the application of the law of occupation as it effects 'individuals' as civilians protected under Geneva Convention IV does not require that the occupying power have actual authority. For the purpose of these individuals' rights, a state of occupation exists upon their falling into the hands of the occupying power"; Marten Zwanenburg (2004), n.41, p.749.

obliged to fulfil its obligations. Establishment of the occupation administration or any delay in such administration does not affect the definition of the occupation.[81]

Doctrine of *debellatio*

Doctrine of *debellatio* is an old doctrine and not applicable now a days. However it is pertinent to discuss this doctrine in short to understand the modern practice about the applicability of laws of occupation. *Debellatio* was also called subjugation. It referred to a situation in which a party to a conflict had been totally defeated in war, its national institutions had been disintegrated, and none of its allies continued militarily to challenge the enemy on its behalf. This doctrine implied a certain quality of subordination that was achieved by the invader and which permitted him to re-found the political order of the territory afresh. In such a situation the defeated state was considered not to exist any longer and thus annexation could took place, rendering the provisions pertaining to occupied territory inapplicable.

However, with the existence of U.N. Charter this doctrine has become obsolete. In this context Eyal Benevenisti observes:

> This doctrine has no place in contemporary international law, which has come to recognise the principle that sovereignty lies in the people, and not in a political elite. The fall of government has no effect whatsoever on the sovereign title over occupied territory, which remains vested in the local population. The fact that their army has been totally defeated can not divest them from their entitlement.[82]

Interestingly, the formal demise of this doctrine can also be gathered from the common Article 2 of the Geneva Conventions 1949. This article defines the scope of application of the convention without making any specific exception with respect to *debellatio*.[83] Article 6 of the Geneva Convention IV is also relevant in this regard. It extends the application

[81] Eyal Benvenisti (2004), n. 1, p. 5.
[82] *ibid.*, p. 95.
[83] Geneva Convention IV, n.14, Article 2. This Article universalizes the application of the law of occupation without making any exception for the situation of complete demise. Thus, it can be argued that this Article considers the demise of the doctrine of *debellatio*.

of the Convention beyond the general close of military operation for one year without any exception.[84]

Moreover, Article 47 of the Geneva Convention IV (under the headings of "inviolability of rights") states that:

> Protected persons who are in the 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 a result of the occupation of the territory, nor by any agreement concluded between the authorities of the occupied territory and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Thus the laws pertaining to occupation is applicable in all cases of occupation without any exception including the cases of complete defeat.

Termination of Occupation

In general, the state of occupation comes to an end when the foreign forces leave the territory. Since occupation is a question of fact, its termination also depends upon factual situation. So occupation could be considered as terminated at the actual dispossession of the occupant, regardless of the source or cause of such dispossession.[85] It ends with the withdrawal of the occupying forces either by a native uprising or by regular enemy forces of the ousted sovereign or through provisions of an armistice or through peace treaty at the end of the conflict.[86] Thus the native uprising is recognised as a lawful means to terminate the occupation.[87] Hence, the participants in a lawful *levee en masse* should not be punished, if the occupant subsequently reconquests the area, for the act of rebellion but only for such violations of the law of war as might have been committed by them.[88]

About the termination of occupation H. Lauterpacht has observed:

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[84] *Ibid.,* Article 6. This Article also does not make any exception for the doctrine of *debellatio*. Thus, the law of occupation will apply even in the case of complete demise of the occupied state.
[85] G. Von Glahn (1957*)*, n. 4, p. 29.
[86] *ibid*, pp. 30 and 257. Also see, Julious Stone (1959), n. 7, p. 721.
[87] G. Von Glahn (1957*)*, n. 4, p. 29.
[88] *ibid.,* pp. 29-30.

> Occupation comes to an end when an occupant withdraws from a territory, or is driven out of it . . . But occupation does not cease because the occupant, after having disarmed the inhabitants, and having made arrangements for the administration of the country, is marching on to overtake the retreating enemy, leaving only comparatively few soldiers behind.[89]

However withdrawal of foreign forces from the occupied territory is not the only criterion for the termination of occupation. There could be instances where an occupation is declared or widely presumed to have ended, but the occupant's forces remain in the country.[90] This can happen, for example, if a treaty ending an occupation is accompanied by another one permitting the presence of foreign forces. This treaty should be entered by the incoming sovereign of the territory and that sovereign must have the right to withdraw any such permission at any time it pleases. Any limitation on the incoming sovereign's capacity in respect of the presence and operation of foreign forces does not end the occupation.

Legal Effects of Termination of Occupation

Termination of occupation could throw up various issues. These include, mainly the return of sovereignty and the validity of the acts of belligerent occupant in respect of returned sovereignty of the concerned territory and third states. This section deals these two issues in brief.[91]

A. Return of Sovereignty

Termination of occupation follows the return of the sovereignty to the occupied territory. The sovereignty which has been rendered dormant due to the factual situation of occupation returns back. It is the return of sovereignty and not the transfer of sovereignty because the occupant does not possess sovereign title in respect of the occupied territory. The return of the sovereignty is a crucial test to determine the time of the end of the occupation. This requires some more elaboration of the concept of sovereignty.

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[89] H. Lauterpacht (1952), n. 2, p. 436.
[90] Adom Roberts (2005), "The End of Occupation: Iraq 2004", *International Comparative Law Quarterly*, 54(1): 27-48, pp. 28-30.
[91] There are others effects also and those will be dealt with in the next chapter along with the discussion on rights and duties of occupying power.

The idea of sovereignty connotes a situation in which there is a centre of a decision making power over a specific territory, not subject to the higher sovereign. Explaining the notion of sovereignty Judge Huber in the Island of Palmas arbitral award observed:

> Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of the state.[92]

Further, a commentary on the Charter of the United Nations presents two criteria for assessing sovereignty:

> Sovereignty has two complementary and mutually dependent dimensions: within a state, a sovereign power makes law with the assertion that this law is supreme and ultimate . . . Externally, a sovereign power obeys no other authority.[93]

However, it is also important to note that independence in decision making does not mean the violations of the legitimate rights of other states and the developments of international law in other fields compromising the principle of absolute sovereignty. In this respect M. N. Shaw states:

> Sovereignty has both positive and negative aspect. The former relates to the exclusivity of the competence of a state regarding its own territory, while the later refers to the obligation to protect the right of other states.[94]

Thus, sovereignty is the proposition that, within a given area of a globe, a particular constitutional and governmental structure has the prime responsibility for reaching and implementing decisions, including the response to international and external pressure.[95] The test is factual one and mere declaration of termination of occupation does not immune the occupant from its obligation as occupying power. There should also not be any intermediate period between termination of occupation and resumption of sovereignty.

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[92] Huber, Max (1928), "Island of Palmas Arbitral Award", *American Journal of International law,* 22(4): 867-912, p. 875.
[93] B Fassbender (2002), in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary,* Oxford: Oxford University Press, p. 70.
[94] Malcolm N. Shaw (2003), n. 24, p. 412.
[95] Adom Roberts (2005), n. 90, p. 38.

B. Legality of the Acts of the Occupying Power

All the orders issued by the occupant under its authority of occupying power become devoid of any legal and binding force on the inhabitants of the occupied territory after the date of the cessation of occupation.[96] Legality of those orders under international law does not alter this position.

However, there is a debate about the validity of acts of the belligerent occupant which created some obligations for the incoming sovereign towards occupant or any third countries. This issue seems debatable and involves some crucial questions. The powers of the returning sovereign to rescind retroactively the acts of the occupant can be discussed in two respects: firstly, the power of the returning sovereign to rescind the lawful acts of the occupant; and secondly, the power of the returning sovereign to rescind unlawful acts of the occupant.

As regards the first issue, scholarly writings show that the returning sovereign should not abrogate at will retrospectively, those legislations which the occupant was (by the Hague Regulation IV and the Geneva Convention IV) entitled to enact.[97] However, the issue is not clear and demands subtle studies due to its vulnerability to be used in both the way, either for the benefit of the inhabitants of the occupied territory or for their detriment. In the case of *Aboitiz & Co. v. Price*,[98] an American court held that the valid regulations of the belligerent occupant should be given effect after the termination of the occupation.[99]

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[96] G. Von Glahn (1957), n. 4, p. 30.

[97] Felice Morgenstern (1951), n. 20, pp. 298-300. Author observes (p. 299): "legitimate acts of the occupant produce legal effects the retroactive annulment of which would, in accordance with the general notions, be contrary to the legal principles". Also see, Lord McNair and A.D. Watts (1966), n. 25, p. 388. Author observes: "while the returning sovereign may, in the exercise of his normal legislative sovereignty, annul with retroactive effect aws which were thus validly made, it is not customary, and it is probably contrary to legal principle, for him to do so".

[98] *Aboitiz & Co. v. Price* (D.C. Utah 1951) 99 F. Supp. 602 at 629, in Morris G. Shanker (1952), n. 25, p. 1067; Edgar Bodenheimer (1952), "United States and Belgium: Validity of the Belligerent Occupant's Decrees", *American Journal of Comparative Law*, 1(1/2): 119-122, p. 119.

[99] The facts of the case are as follows: "Defendant, a U.S. national, working in the Philippines, was held captive and put in internment camp, during Japanese occupation of the Philippines. He managed to obtain a loan from the plaintiff bank in the form of military pass money issued by the Japanese Government for the period of occupation. This loan was secured against the promissory notes given by the plaintiff. After the cessation of occupation, this suit was brought on those promissiory notes. However, Japanese army prohibited any such currency traffic with American prisoners of war, with death penalty."

Defendant took the plea of the Japanese prohibition on such transaction and hence argued for the nullity of such a transaction. But court ordered in favour of the plaintiff. It held that "the war currency measures of occupying power which are designed to keep the economic life of the occupied territory going and to enable its inhabitants to engage in the daily transaction of the trade and commerce" were the lawful measures by the occupant under international law. On the other hand, "a measure which prohibited the help of the citizens of the enemy country" was declared as outside of the authority of the occupants and hence devoid of any legal effect.

As regards the second issue, it seems, that the invalid acts of the occupant have no effect.[100] Unlawful acts of the occupant are void *ab initio*. It was held by the Court of Appeal of Liege that the measures of the occupant that were gone beyond the limits of the Hague Regulation IV lacked legal force.[101] It was observed that "the decrees of an occupant are not enactments of a legitimate power and they do not become incorporated in to the national laws or the national institutions".[102] The court further argued on the notion that "no transaction entered into by the people of the occupied country pursuant to the law passed by the occupant would be safe from the legal challenge after the occupation had been terminated".[103]

Further, if an occupant undertook an act in violation of international law, then subsequent acts stemming from the initial violation but valid in themselves lose their legality for the returned sovereign.[104]The same is true in respect of the recognition of the acts of the occupant by the foreign courts.[105]

Thus, it seems, harmonious to draw the conclusion that measures implemented to benefit the population by "maintaining public order and normal economic intercourse" in the occupied territory should be respected and should not be abrogated retrospectively by the

[100] Felice Morgenstern (1951), n. 20, pp. 300-322.
[101] Edgar Bodenheimer (1952), n. 98, p. 120. The facts of the case are as follows: "the German army of occupation requisitioned a building from the plaintiffs a Belgian Partnership. The German ordinance imposed the payment of compensation for the requisition made by the German army on the Belgian state. This suit was brought by the plaintiff for the recovery of the compensation against the Belgian state."
[102] *ibid,* p. 121.
[103] *ibid.*
[104] G. Von Glahn (1957), n. 4, p. 258.
[105] Felice Morgenstern (1951), n. 20, pp. 315-319.

occupant.[106] However on the other hand, "measures of political complexion designed to hurt enemy" do not have any legal force.[107]

Occupying Powers

As occupation is a factual matter the designation of occupying power is also a factual mater. This issue is not a problem when states are engaged in military operations individually but when military operations are carried out jointly as a group of some members the designation of occupying power becomes important. This issue is a crucial one and should be resolved considering the ground level reality of command structure of the occupying powers. Army of any state which involve in exercising authority on the ground, however small it may be, should be considered as occupying power. Any authorisation in this regard only has declaratory value.

Conclusion

It can be concluded that an act of occupation is a question of fact. Its commencement and termination both are factual in nature. The acceptance or non acceptance of these situations only has declaratory value and could not alter the factual conditions existing on the land. Thus the commencement of occupation and its termination should always be inquired by relying on existing factual situation rather on any such declaration. Law of belligerent occupation is now part of the customary principles of international law and has been declared as intransgressible principles international law. It has been elevated to the level of *jus cogens* norm of international law. The obligations of the occupant under these laws are now considered as obligations *erga omnes*.

An act of occupation does not transfer sovereign rights in the hands of the occupant. But it only creates *trusts* which should be administered in accordance with the conventional principles of laws of belligerent occupation. The occupant could not demand the allegiance but only ask for obedience for its lawful orders. Delinquency towards such orders do not ensue the liability under international law. Inhabitants in the occupied

[106] Edgar Bodenheimer (1952), n. 98, p. 121.
[107] *Ibid.*

territory have no duty in international law to obey occupant orders. Termination of occupation should always followed by the resumption of sovereignty in occupied territory and the incoming government should have the right to rescind all or any of the legislations enacted by the occupant. It seems from the writings of the various scholars that the legitimate orders of the occupant should be given effect.

CHAPTER II

BASIC TENETS OF LAW OF BELLIGERENT OCCUPATION

Chapter II

Basic Tenets of Law of Belligerent Occupation

Introduction

The belligerent occupant has a duty to restore and ensure public order and civil life in the occupied territory. Primarily, this should be done with the help of the laws in force in the country. However, the occupant can make new laws in this respect if he is absolutely prevented by old laws to restore and ensure public order and civil life. This capacity of the occupant to legislate is further circumscribed by the basic condition that occupation does not alter sovereignty. Thus the authority of the occupant demands a delicate balance between permissive and prohibitive measures. Though the line is thin but it is important to maintain. This chapter examines the same in some of the important areas.

Legislative Capacity of Occupying Powers

Article 43 of the Hague Regulation IV states:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[1]

[1] Convention (IV) Respecting the Laws and Customs of war on land and its annex: Regulations concerning the Laws and Custom of war on Land, The Hague, 18 October, 1907, (herein after mentioned as Hague Regulation IV) [Online: Web], Accessed 25 July 2009, URL: http:// www.icrc.org/ihl.nsf/FULL/195?OpenDocument.

This concise statement is the gist of the law of occupation.[2] It protects the separate existence of state, its institutions and its laws.[3] This Article was designed to limit the legislative power of the occupant.[4]This limitation applies to the entire field of legislation undertaken by occupant.[5] Thus, generally, occupant is prevented to legislate in occupied territory. However, there are some exceptions to this principle which demand legislation from the occupying power for the maintenance of law and order under some exceptional circumstances. It is also important to note that the general prohibition on legislation refers to entire legal system but exceptions apply only to the individual provisions that allow an occupying power to legislate.[6]

This Article applies to all set of laws including constitution, bylaws, decrees, orders, court precedents and ordinances.[7]The limitations imposed by this Article are also applicable in the case of delegated legislation.[8] The occupant is obliged and duty bound to ensure public order, peace and safety.[9] This must be done in accordance with the laws of ousted sovereign which the occupant finds in force at the time of occupation.[10] Even if legislation becomes necessary, the changes that are undertaken by the occupying power must be carried out in a manner that stays as close as possible to the local cultural, legal and economic traditions.[11] Thus any transformation of occupied territory is prohibited. In this context, E. H. Feilchenfeld observed:

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[2] Eyal Benvenisti (2004), *The International Law of Occupation,* Princeton: Princeton University Press, p. 7. Also see, Jean S. Pictet (1958), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in time of War,* Geneva: The International Committee of the Red Cross, p. 335, Siobhan Wills (2006), "Occupation Law and Multy-National Operations: Problems and Perspectives", *The British Yearbook of International Law,* 77: 256-332, p. 264.

[3] Jean S. Pictet (1958), n.2, p. 273.

[4] Edmund H. Schwenk (1945), "Legislative Power of Military Occupant under Articles 43, Hague Regulation", *The Yale Law Journal,* 54(2):393-416, p. 393.

[5] *ibid.,* p. 397.

[6] Marco Sassoli (2005), "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *European Journal of International Law,* 16(4): 661-694, p. 669.

[7] Edmund H. Schwenk (1945), n.4, p. 397. Also see, Marco Sassoli (2005), n.6, pp. 668-669.

[8] Marco Sassoli (2005), n. 6, pp. 668-669. However some authors have taken opposite view, see, Edmund H. Schwenk (1945), n.4, p. 408.

[9] Julious Stone (1959), *Legal Controls of International Conflict,* London : Stevens and Sons Limited, p. 699.

[10] *ibid.*

[11] Siobhan Wills (2006), n. 2, p. 273. Author observes: "a State can not transform another State into one that supports its aim and ideals, except in so for as the changes are necessary in order to provide for rights protected by international law".

> [I]t would seem that an occupant has no right to transform a liberal in to a communistic or fascist economy, except in so for as military or public orders needs should require individual changes.[12]

The restoration of public order and civil life should aim towards interest of the inhabitants of the occupied territory.[13] The occupant does not bring his own general system of law with him.[14] He is barred from extending his own legislation over the occupied territory or from acting as a sovereign legislator.[15]

However, it is important to note that occupant does not enjoy any such specific legislative power in the occupied territory under international law. International law only recognizes the factual situation that the legislative power comes under the occupant's control and thus, it imposes a duty on the occupant to restore and ensure public order and safety. This is to limit the abuse of power on the part of the occupant and to provide some relief to the concerned inhabitants. Prohibition on legislation is a rule and legislation under some conditions is exception, which should be applied rarely.

The above mentioned position has been reiterated in *Mathot v. Longue* as:

> [I]t is inaccurate to say that by virtue of the Hague Convention the occupant has been given any portion whatever of the legislative power . . . it appears from the text of the convention itself and from the preliminary work that all that was intended . . . was to restrict the abuse of force by the occupant, and not to give him or recognize him as possessing any authority in the sphere of law.[16]

All the residuary legislative powers remain with the ousted sovereign.[17] All those laws which occupant is not permitted to change or annul remain applicable in the occupied territory. Mere the fact that the orders of the ousted sovereign (which are outside the legal domain of the occupying power) can not be given effect in the occupied territory due to

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[12] E. H. Feilchenfeld (1942), *The International Economic Law of Belligerent Occupation,* quoted in, Siobhan Wills (2006), n. 2, p. 273.
[13] Edmund H. Schwenk (1945), n.4, p. 400.
[14] G. Von Glahn (1957*), The Occupation of Enemy Territory _ _ _ A Commentary on the Law and Practice of Belligerent Occupation,* Minneapolis : The University of Minnesota Press, p. 94.
[15] Marco Sassoli (2005), n.6, p. 668.
[16] *Mathot v. Longue* Annual Digest (1919-1922) Case No. 329, quoted in Felice Morgenstern (1951), "Validity of the Acts of Belligerent Occupant", *The British Yearbook of International Law,* 28: 291-322, p. 294. Some authors have also argued differently, see, Julious Stone (1959), n.9, p. 698. Author observes: "the occupant's legislative power has the dual basis of his duty to ensure public order and safety under Article 43, and his right to pursue his own military ends."
[17] Julious Stone (1959), n.9, p. 694.

the occupation does not make such orders devoid of legal effects. In the case of *State of the Netherlands v. Federal Reserve Bank*, it was observed that "the legitimate sovereign should be entitled to legislate over occupied territory in so for as such enactments do not conflict with the legitimate rule of the occupying power".[18]

Further, Article 64 of the Geneva Convention IV ensures the continuity of legal system in occupied territory subject to some conditions.[19] Though it specifically mentions about only "penal laws"[20], some authors argue that it also applies to civil laws impliedly.[21] This is an application of the basic principle of the laws of occupation and thus, it expresses the terms of Article 43 of the Hague Regulation IV in a more precise and detailed form.[22]

Similar provision exists in Article 47 of the Geneva Convention IV under the heading of "inviolability of rights". This Article asserts that protected persons shall not be deprived of the benefits of the present convention by any change introduced by the occupying power in the institutions or government of said occupied territory.[23] This is an absolute situation and can not be changed either by any agreement between authorities of the occupied territory and the occupying power or by any attempt of annexation of whole or part of occupied territory.[24]

Thus the belligerent occupant by any legislative measure or any change introduced can not take away the benefit accrues to the protected persons under the convention. Thus it

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[18] State of the Netherlands v. Federal Reserve Bank, 99 F. Supp. 655 (S.D.N.Y. 1951).

[19] Article 64, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), 75 *UNTS* 287, (hereafter mentioned as Geneva Convention IV). This Article provides two conditions under which the penal laws of the occupied territory may be altered or suspended by the occupying power: Firstly, if they constitute threat to the security of occupant and secondly if they are as an obstacle to the application of the present convention.

[20] Jean S. Pictet (1958), n.2, p. 335. About the meaning of the term 'penal laws', author observes: "the words "penal laws" means all legal provisions in connection with the repressions of offences: the penal code and rules of procedure proper, subsidiary penal laws, laws in the strict sense of the term, decrees, orders, the penal clauses of administrative regulation, penal clauses of financial laws etc."

[21] Jean S. Pictet (1958), n.2, p. 335. Author observes: "the idea of the continuity of the legal system applies to the whole of the law (civil and penal laws) of the occupied territory. The reason for the Diplomatic Conference making express reference only to respect for penal laws was that it had not been sufficiently observed during past conflicts; there is no reason to infer a *contrario* that the occupant authorities are not also bound to respect the civil laws of the country, or even its constitution".

[22] Jean S. Pictet (1958), n.2, p. 335. Also see, Siobhan Wills (2006), n. 2, p. 273.

[23] Geneva Convention IV, n.19, Article 47,

[24] *ibid.*

can be said that all and every measures taken by the occupant should conform to the right enjoyed by the protected persons under the Geneva Convention IV.

It is clear from the above discussion that the legislative power of the belligerent occupant as the power responsible for applying the convention and temporary holder of the authority is limited to the following matters.[25] Firstly, he may legislate for the application of the convention in accordance with the obligation imposed upon him. Secondly, he can enact provisions necessary to maintain the "orderly government of the territory" in its capacity as the power temporarily responsible for law and order. Thirdly, he may promulgate penal provisions for his own protection.

Courts in Occupied Territory

As a general principle, the organisation of the court in occupied territory remains intact though special tribunal may be constituted for military necessity.[26] The occupant has the right to remove the judges but the working judges has the right not to be interfered with in passing judgements.[27] They are also not compelled to pronounce judgements on the name of the occupant, although he need not allow them to pronounce judgement on the name of the legitimate government.[28]

Power of Courts to Judge Occupant's Order

Two questions about the power of courts in occupied territory are very interesting, firstly, the power or lack of power of indigenous courts to enforce the lawful orders of the

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[25] Jean S. Pictet (1958), n.2, p. 337. Also see, Geneva Convention IV, n. 19, Article 64 para 2; Alwyn V. Freeman (1947), "War Crimes by Enemy Nationals Administrating Justice in Occupied Territory", *American Journal of International Law*, 41(3): 579-610, p. 583.

[26] H. Lauterpacht (ed.) (1952), *Oppenheim's International Law a Treatise*, London: Longman Group. Limited. (volume II) Disputes war and neutrality, pp. 445-447. Also see, Morris Greenspan (1959), *The Modern Law of land Warfare*, Berkeley: University of California Press, p. 241; G. Von Glahn (1957), n.14, pp. 110-114. Author discusses three situations under which special tribunals can be constituted by the occupying powers. These are as follows. Firstly, when the judicial system of the territory has been broken down and can not operate, secondly, to deal with the offences committed by native inhabitants against occupation personnel, and thirdly, to deal with native violations of the various orders, proclamations, laws and other manifestations of the occupant's authority over occupied territory; Edmund H. Schwenk (1945), n.4, p. 405.

[27] Edmund H. Schwenk (1945), n.4, p. 406. Also see, H. Lauterpacht (ed.) (1952), n.26, p. 447.

[28] *ibid.*

occupant and secondly whether such courts have the right to review legislative acts of the occupant with respect to their validity under the Hague Regulations IV and the Geneva Convention IV.

On the first question, it seems that law courts in occupied territory have enforced such orders and regulations of an occupant which are lawful under the Hague Regulations IV and the Geneva Convention IV.[29] Any conflict between the previous municipal legislation and the occupant's legislation (within his power to enact) may be solved by considering the *lex specialis* nature of the law of belligerent occupation.[30]

On the second question, it appears that, generally, courts have right to review the legislative acts of the occupant and declare them null and void if they are not in concurrence with occupant's power to legislate.[31] This power runs common to both the jurisdictional capacity of occupant as well as prescribed procedural manner to execute such legislation.

Legal System in Occupied Territory

The fundamental provision for continuation of legal system in occupied territory is Article 64 of the Geneva Convention IV.[32] It expresses the fundamental notion that the penal legislation in force must be respected by the occupying power. This is an application of a basic principle of the law of occupation.[33] However, the principle that the occupying power must not intervene in the administration of justice in the occupied territory is subject to the following two conditions. Firstly, he can abolish such courts and tribunals which have been instructed to apply the laws which are against the spirit of the Geneva Convention IV.[34] Secondly, he may also intervene to ensure the effective

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[29] G. Von Glahn (1957), n.14, p. 109. Also see, Felice Morgenstern (1951), n.16, pp. 296-298.
[30] Felice Morgenstern (1951), n.16, p. 300.
[31] Felice Morgenstern (1951), n.16, pp. 300-309. Also see, G. Von Glahn (1957), n.14, p110. Admitting such power to the courts in occupied territory, author mentions about the problem of their implementation and capacity of courts to gather evidence in this respect. Author observes "in view of conditions usually existing during belligerent occupation, native courts are at best ill equipped to decide, on scanty factual information, whether or not the given order or act of an occupant conforms to necessity".
[32] Geneva Convention IV, n.19, Article 64,
[33] Jean S. Pictet (1958), n.2, p. 335.
[34] *ibid.*, p. 336.

administration of justice as in the case of shortage of judges.[35] In the latter case, he may call upon the inhabitants of the occupied territory or former judges.[36] He may set up courts composed of judges of his own nationality, but in any case the penal laws in force in the country must be applied.[37]

A. New Penal Provisions in Occupied Territory

Article 64 of the Geneva Convention IV empowers the belligerent occupant to enact new penal provisions or to repeal or suspend old one if they constitute threat to its security or an obstacle to the application of the Geneva Convention IV. These penal provisions should be published and brought to the knowledge of the inhabitants in their own language.[38] They can not come into force before such publication and knowledge of the inhabitants.[39] Publication should be made in national language of the territory or in the language in which prior laws were being published in such territory.[40]

The occupying power can not enact penal provisions with retroactive effect.[41] The non retroactivity of penal laws is absolute and it provides the population of the occupied territory with an important safeguard against persecution.[42]

B. Penal Jurisdiction of the Belligerent Occupant

The occupying power can exercise penal jurisdiction in the occupied territory only in respects of those acts which occur during the period of occupation subject to some specific offences.[43] Article 70 of the Geneva Convention IV prohibits the occupying power to arrest, prosecute or convict protected persons for acts committed or opinion

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[35] *ibid.*
[36] *ibid.*
[37] *ibid.*
[38] Geneva Convention IV, n.19, Article 65.
[39] *ibid.*
[40] Jean S. Pictet (1958), n.2, p. 338.
[41] Geneva Convention IV, n.19, Article 65. This can also be inferred from another Article 67 of the Convention according to which the Occupying power's court "shall apply only those provisions of law which were applicable prior to the offence"
[42] Jean S. Pictet (1958), n.2, p. 339.
[43] Geneva Convention IV, n.19, Article 70.

expressed before the occupation.[44] However, the occupying power is entitled to arrest and prosecute the protected persons for the breaches of "laws and customs of war", irrespective of the date of the offence. These expressions cover the whole of the rules relating to conduct of hostilities and to the treatment of war victims, particularly under the Geneva Conventions, the Hague Regulations and customary international law.[45]

C. Military Courts in Occupied Territory

According to Article 66 of the Geneva Convention IV, the persons who breaches the penal provisions promulgated by the occupant may be produced before its own non – political military courts. This article recognises the right of the occupying power to check the breach of penal provisions promulgated by him. The occupant, however, must fulfil certain imperative conditions in exercising this power.[46] These are as follows. Firstly, the military courts must be non political. The members of the court must have military status and they should be subordinate to the military authorities. Secondly, these courts must be "properly constituted". Such courts should be set up in accordance with the recognised principles of administration of justice. Thirdly, courts in question must sit in occupied territory. However the courts of appeal should preferably sit in the occupied territory.

These duly "constituted courts"[47] shall apply only those provisions of law which were applicable prior to the offence committed.[48] As per the provision of Article 67 of the Geneva Convention IV, general principles of law should be adhered.[49] The principle that penalty shall be proportionate to the offence can not be abrogated.[50] These courts must

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[44] Jean S. Pictet (1958), n.2, p. 349. Author observes: "it covers not only the action of private individuals, but also legal action taken by magistrate or official of the occupied territory in carrying out his public duties. The rule limiting the jurisdiction of the occupying power to the period during which it is in actual occupation of the territory is based on the fact occupation is in principle of a temporary nature".

[45] Jean S. Pictet (1958), n.2, p. 349.

[46] *ibid.*, p. 340.

[47] *ibid.*, p. 341. Author observes: "Article 67 relates to the military courts before which the occupying power may bring accused persons under the terms of the preceding Article (Article 66)".

[48] G. Von Glahn (1957), n.14, p. 117. About the specificity of this article author observes: "it imposes an obligation not upon the party to the convention but upon courts of the contracting party".

[49] Geneva Convention IV, n.19, Article 67. Also see, G. Von Glahn (1957), n.12, p. 341. Author observes: "the object of this provision is to limit the possibility of arbitrary action by the Occupying Power by ensuring that penal jurisdiction is exercised on a sound basis of universally recognized legal principles".

[50] Geneva Convention IV, n.19, Article 67.

take in to consideration the fact that the accused is not the national of the occupying power and consequently does not owe allegiance towards it.[51]

D. Offences against the Occupying Power

The offences committed by the protected persons against occupying powers can be classified in two heads: Firstly, the minor offences which are solely intended to harm the occupying power, and secondly, the grave offences against occupying power.[52] The first category of offences comprise with the offences which are solely[53] intended to harm occupying power but which does not constitute (i) attempt on life or limb of the member of the occupying forces or its administration, (ii) grave collective danger or serious damage to the property of the occupying forces or administration or installations used by them. However, the second category of offences comprise with the offences of espionage, of serious acts of sabotage against the military installations of the occupying power or of intentional offences which have caused the death of one or more persons.

The first category of such offences is only punishable by simple imprisonment or internment. The duration of such imprisonment or internment must proportionate to the offence committed.[54] Courts may convert the sentence of imprisonment into one of the internment for the same period.[55] The duration of period, for which protected person is under arrest awaiting trial or punishment, must be deducted from the period of imprisonment awarded.[56]

The second category of offences may be made punishable with death penalty subject to some conditions.[57] These are as follows. Firstly, occupant can give death penalty only for

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[51] *ibid.*, Also see, Jean S. Pictet (1958), n.2, p. 342. While commenting on this Article, author observes: "the patriotic sentiments which animate him and may have caused him to act in a manner detrimental to the enemy of his country, deserves consideration. His honourable motives must be taken into account when deciding on the penalty for an act which the laws of war authorize the Occupying Power to punish".
[52] Geneva Convention IV, n.19, Article 68.
[53] Jean S. Pictet (1958), n.2, p. 343. While commenting on article 68 author observes: "the minor offences must have been "solely" intended to harm the Occupying Power. The inclusion of the word "solely" excludes acts which harm the Occupying Power indirectly".
[54] Geneva Convention IV, n.19, Article 68.
[55] *ibid.*
[56] *ibid.*, Article 69.
[57] *ibid.*, Article 68.

three categories of offences like: firstly, espionage, secondly, serious acts of sabotage against military installations of the occupying power and thirdly, intentional offences which have caused the death of one or more persons.[58] Secondly, such offences must be punishable by death under the law of the occupied territory before the commencement of occupation.[59]

Attention of the court must be brought to the fact that the accused is not the nationals of the occupying power and he is not bound to it by any duty of allegiance.[60] This constitutes an acknowledgement of the fundamental principle that occupation does not sever the bond existing between the inhabitants and conquered state.[61] Further in any case death penalty can not be pronounced against any protected persons who are under eighteen years of age.[62] Person condemned with death has the right to petition for pardon or reprieve.[63]

E. Penal Procedures and the Rights of the Accused

Accused persons must be told the reasons of his arrest. He must be brought to trial as soon as possible.[64] The nature and ground of the charges must be promptly communicated to the accused, in writing and in language known to him.[65] He has right to present evidence and call witnesses in his defence.[66] He also has the right to be assisted by qualified advocate of his own choice.[67] Such advocate shall be able to visit the accused and enjoy the necessary facilities for preparing the defence.[68] An accused person can also call on the services of interpreter during the preliminary investigations as well as

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[58] *ibid.*
[59] *ibid.*
[60] *ibid.*
[61] Jean S. Pictet (1958), n.2, p. 346.
[62] Geneva Convention IV, n.19, Article 68.
[63] *ibid.*, Article 75.
[64] *ibid.*, Article 71.
[65] *ibid.*
[66] *ibid.*, Article 72.
[67] *ibid.*
[68] *ibid.*

during the hearing of the court.[69] Sentences should be pronounced only after regular trial.[70]

The protecting power must be notified "properly"[71] by occupying power about all the proceedings instituted by it against protected persons in respect of charges involving death penalty or imprisonment for two years or more.[72] This notification must be sent immediately and should reach the protecting power three weeks before the date of first hearing.[73] At the opening of the trial, evidence must be produced to prove that these provisions have been complied with and in particular the formal notification has been made within required time limit to the protecting power.[74] Trial does not proceed without this.[75] A notification must also be communicated to the protecting power in case of any judgment involving sentences of death or imprisonment for two years or more.[76] Representatives of protecting power have right to attend the trial of any protected person.[77]

A convicted person has the right to appeal provided the law applied by the court permits it.[78] He must be informed about this right and prescribed time limit for exercise of this right.[79] Where the law applied by court has no provision for appeal, the convicted person has the right to petition against the finding and sentence to the competent authority of the occupying power.[80]

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[69] *ibid.*
[70] Geneva Convention IV, n.19, Article 71.
[71] *ibid.* Article 71. It states that this information shall include following: firstly, description of the accused secondly, place of residence or detention thirdly, specification of the charge or charges fourthly, designation of the court which will hear the case and fifthly, place and date of the first hearing. It is important to note that this definition is inclusive and occupying power may add further particulars.
[72] *ibid.*
[73] *ibid.*
[74] *ibid.*
[75] *ibid.*
[76] *ibid.*, Article 74.
[77] *ibid.*
[78] *ibid.*, Article 73.
[79] *ibid.*
[80] *ibid.*

Protected persons accused of any offence may be detained and if proved guilty, must serve their sentence only in such occupied territory.[81] They should be separated from other detainees.[82] Treatment given to the protected persons in detention must take into account the principle of humanity and respect of human dignity in all places and all circumstances.[83] They have right to have medical and spiritual assistance as required respectively by their state of health or by them.[84] Women can only be confined in separate cells and can only be put in to the supervision of women.[85] Minors enjoy special treatment. Detained protected persons have the right to be visited by the delegates of the protecting power and of the International Committee of the Red Cross.[86] They also have the right to receive at least one relief parcel monthly.[87]

All the protected persons detained by the occupying power must be handed over to the authorities of the liberated territory with relevant records after the termination of the occupation.[88] This is an absolute obligation and no exception is permitted.

Right of the Inhabitants to take Recourse in the Court of Law

Article 23 (h) of the Hague Regulation IV forbids ''to declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party''.[89] There is a serious controversy about the interpretation of Article 23(h).[90] This article may be interpreted in two ways. Firstly, it may mean that enemy aliens could not be forbidden to access the courts of the belligerent nation in which they resided. Secondly, it may also mean that it is an instruction to the commander of occupying forces

[81] *ibid.*, Article 76.
[82] *ibid.*
[83] Jean S. Pictet (1958), n.2, p. 364.
[84] Geneva Convention IV, n.19, Article 76.
[85] *ibid.*
[86] *ibid.*, Article 143.
[87] *ibid.*, Article 76.
[88] *ibid.*, Article 77.
[89] Hague Regulation IV, n. 1, Article 23(h).
[90] G. Von Glahn (1957), n.14, p. 108.

in the enemy territory. However it seems that most of the writers agree upon the latter view.[91]

A belligerent is also forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country.[92] This limitation works even if such nationals were in the belligerent's services before the commencement of the war.[93]

Local Officials in Occupied Territory

The occupant can not change the fundamental structure of occupied territory.[94] He may not alter the status of public officials[95] or judges in occupied territory.[96] The officials in the occupied territory may decide either to remain in office or to resign.[97] The officials so decided to continue in office must not be compelled to work in the name of the occupant.[98] It is prohibited to invoke any measure of sanctions, coercion or discrimination against those officials who abstains themselves from their duties for reasons of conscience.[99] The occupant can not demand allegiance from the officials of the occupied territory since they retain their citizenship towards prior government, though he may demand obedience.[100]

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[91] *Porter v. Freudenberg* Great Britain, Court of Appeal, 1915, quoted in G. Von Glahn (1957), n.14, p. 108. It was held that Article 23(h) forbids "any declaration by the military commander of the belligerent force in the occupation of enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or protect their civil rights". Also see, Morris Greenspan (1959), n.26, p. 241. Author observes: "Article 23(h) forbids the occupant to declare abolished, suspended or inadmissible the rights of the subjects of the hostile party to institute legal proceedings". Also see, H. Lauterpacht (ed.) (1952), n. 26, p. 445. Author observes: "Article 23(h) of the Hague Regulation IV . . . prohibits an occupant of enemy territory from declaring extinguished, suspended, or unenforceable in a court of law the rights and the rights of actions of the inhabitants."

[92] Hague Regulation IV, n. 1, Article 23(h).

[93] *ibid.*

[94] Edmund H. Schwenk (1945), n.4, p. 403. He observed: "an occupant has no right to transform a liberal into a communist or fascist economy"

[95] The term 'public officials' has not been defined in the Convention. See, Jean S. Pictet (1958), n.2, p. 304. Author observes: "the term public officials generally designate people in state or local government service, who will fulfil public dutie".

[96] Geneva Convention IV, n.19, Article 54.

[97] G. Von Glahn (1957), n.14, p. 132.

[98] *ibid.*

[99] Geneva Convention IV, n.19, Article 54.

[100] Hague Regulation, n. 1, Article 45. It states: "it is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile power." Also see, Edmund H. Schwenk (1945), n.4, p. 404. Also see, Morris Greenspan (1959), n.26, p. 262. Also see, Jean S. Pictet (1958), n.2, p. 305. Author observes:

However, it does not affect the right of the occupying power to remove public officials from their post.[101] The occupying power can also appoint new and additional officials in occupied territory.[102] The occupant must pay the salaries of the local officials who continue in office from the public revenue collected in occupied territory.[103] If the officials remained in same post after occupation, his rates of salary should not be reduced.[104]

About the extent of independence of public officials J. Pictet observes that:

> [T]hey must be in a position of sufficient independence to act according to their conscience and not to run the risks of being called to account for disloyalty when the national authority assumes their right after the occupation ceases . . . occupation does not involve a transfer of sovereignty and does not sever the ties of allegiance; public officials and judges therefore continue to be responsible before national opinion for their actions.[105]

Apart from this, it has also been contended that the obligation of the population to comply with the lawful orders of occupant is derived from the law of the occupant and not from the international law.[106] Thus it is the occupant only who is concerned with punishment for disobedience and incitement to disobedience is not an international delinquency.[107]

Humanitarian Measures in Occupied Territory

Occupying power is under an obligation to fulfil the basic needs of the population of the occupied territory. He should establish measures in this regard immediately. He is also prohibited to use vulnerability of inhabitants fallen into his hand for his own benefit. This section discusses these measures in little detail. The basic essence behind all such

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"this duty of obedience does not cancel out the duty of allegiance which subsists during the period of occupation."

[101] Geneva Convention IV, n.19, Article 54.

[102] G. Von Glahn (1957), n.14, p. 136. Also see, Morris Greenspan (1959), n.26, p. 262.

[103] Hague Regulation IV, n. 1, Article 48. Also see, Morris Greenspan (1959), n.26, p. 263; G. Von Glahn (1957), n.14, p. 134.

[104] Morris Greenspan (1959), n.26, p. 263. There is opposite view also, see, G. Von Glahn (1957), n.14, p. 135. Author observes: "the rate of pay, however, may be fixed by the occupant, and that rate does not have to correspond to pre occupation level for the positions in question."

[105] Jean S. Pictet (1958), n.2, p. 304.

[106] Felice Morgenstern (1951), n.16, p. 296.

[107] *ibid.*

provisions is to provide maximum security and dignity to the inhabitants of such territories and to attempt to minimise the harsh realities of the occupation period.

A. Essential Supplies and Health Conditions

The occupying power is bound to provide food and material supplies to the population of occupied territory.[108] The protecting powers are entitled to verify the status of public supplies in occupied territories.[109] If the supplies are not satisfactory, the authority in occupation shall permit other state or ICRC to carry out relief schemes.[110] An occupant should also ensure and maintain the clothing, bedding, means of shelter and other supplies essential for the survival of the civilian population of the occupied territory.[111] The occupying power shall facilitate the distribution of the incoming parcels and other consignments.[112]

The occupying power has duty to ensure and maintain the conditions of public health and hygiene in the occupied territory.[113] Medical personnel must not be prevented from carrying out their duties.[114] Occupying power should facilitate the transportation and distribution of relief consignments. Free passage should be given to these consignments subject to security measures.[115] Such consignments are exempted from all charges, taxes or customs duties unless these are necessary for the economy of the occupied territory.[116]

B. Deportation Prohibited

Individuals or mass forcible transfers, from the occupied territory for any reason whatsoever, to the territory of occupying power or to that of any other state is

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[108] Geneva Convention IV, n.19, Article 55.
[109] *ibid.*
[110] *ibid.*, Article 61.
[111] Article 69, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 1125 *UNTS* 3 (1979). (hereafter mentioned as Additional Protocol I)
[112] *ibid.*
[113] Geneva Convention IV, n.19, Article 56.
[114] *ibid.*
[115] Geneva Convention IV, n.19, Article 59. However the party which allow the passage may prescribe arrangements for search he may also make his permission conditional on the issue that the distribution of such consignments is to be made under the supervision of Protecting Power.
[116] *ibid.*, Article 61.

prohibited.[117] This protection is available to the protected persons from the moment they fall in to the hands of the occupying power.[118] However, the civilian population may be evacuated from territory afflicted by the hostilities to the interior of the occupied territory for the sake of their own security or for imperative military necessity.[119] But they must be transferred back as soon as the hostilities ceases.[120] Any such transfers and evacuations shall be notified to the protecting power without delay.[121] The occupying power is also forbidden to transfer its own civilian population into occupied territory.[122] Unlawful deportation or transfer from occupied territory has also been declared as grave breaches of the fourth Geneva Convention.[123]

C. Work Conditions

It is forbidden to compel persons living in the occupied territory to do services in the armed or auxiliary forces of the occupying power.[124] Any pressure or propaganda made in this regard to invite voluntary enlistment is prohibited.[125] The occupying power can not force the inhabitants of occupied territory to furnish information about other belligerents or their means of defence.[126]

Only adults above eighteen years of age may be required to work but only for some restricted purposes.[127] These purposes may be the supplying needs of the army of occupation or the public utility services like; work for the feeding, sheltering, clothing, transportation or health of the population of the occupied territory.[128] Such work shall be done within occupied territory, as for as possible, to the regular place of residence of the

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[117] *ibid.*, Article 49.
[118] ICTY, *Prosecutor v.Mlladen Naletilic* (Case No. IT-98-34-T), Trial Chamber Judgment of 31 March 2003, p. 75, para 222.
[119] Geneva Convention IV, n.19, Article 49.
[120] *ibid.*
[121] *ibid.*
[122] *ibid.*
[123] *ibid.*, Article 147.
[124] *ibid.*, Article 51.
[125] *ibid.*
[126] Hague Regulation IV, n. 1, Article 44.
[127] Geneva Convention IV, n.19, Article 51.
[128] *ibid.*

persons concerned.[129] Such work shall be proportionate to the worker's physical and intellectual capacity.[130] These works should be carried out against the appropriate payment and in accordance with the labour legislation in force.[131] Any action aimed at creating unemployment is prohibited.[132]

D. Protection of the Children

Article 50 of the Geneva Convention IV[133] provides for the protection of children under occupied territory.[134] The occupying power shall facilitate the proper working of all institutions devoted to the care and education of children.[135] This should be done with the co-operation of the national and local authorities.[136] The occupying powers are bound not only to avoid interference with the activities of these institutions but also to support and encourage them actively.[137] This article ensures the continuity in the educational and charitable work of these institutions.[138]

The occupying power shall take all necessary steps to facilitate the identification of children and the registration of their patronage.[139] It is prohibited to change the family or personal status of children.[140] Particulars of parents and other near relatives should always be recorded if available.[141] A special section of Bureau set up in accordance with Article 136[142] shall be responsible to take all necessary steps to

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[129] *ibid.*
[130] *ibid.*
[131] *ibid.*
[132] *ibid.*, Article 52.
[133] Geneva Convention IV, n. 19, Article 50.
[134] No general definition of children is given under the Convention. However the Convention has fixed various age limits in the provisions prescribing preferential treatment for children, for example: fifteen years of age in Article 14, 23, 24 and 38(para5); twelve years of age in Articles 24(para3) and eighteen years of age in Articles 51(para2)and 689(para4). Only last paragraph of Article 50 provides age limit of fifteen years to a children to enjoy preferential treatment under war time legislation. Thus, this age limit of fifteen years might serve criterion for other paragraph of this Article.
[135] Geneva Convention IV, n. 19, Article50.
[136] *ibid.*
[137] Jean S. Pictet (1958), n.2, p. 286.
[138] Jean S. Pictet (1958), n.2, p. 287.
[139] Geneva Convention IV, n.19, Article 50.
[140] *ibid.*
[141] *ibid.*
[142] *ibid.*, Article 136. This article obliges the conflicting parties to establish an official information Bureau for receiving and transmitting information in respect of the protected persons who are in its power. Also see, Jean S. Pictet (1958), n.2, p. 289. About its importance author observes "The official Bureau which the

identify children.[143] It is also prohibited to enlist the children in formations or organisations subordinate to the occupying power.[144]

Taxes, contributions and debts under occupied territory

A. Taxes

A belligerent occupant has the right to collect taxes, dues and tolls by and for the benefit of the occupied territory. It should be done in accordance with Article 48 of the Hague Regulations IV.[145] Same rule of assessment and incidence as it was before the occupation should be applied.[146] However occupant is prevented to collect taxes before they fall due.[147] Occupant is bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate government was so bound.[148] He can not enrich himself through taxes.[149]Generally, occupant is not permitted to create new and additional taxes because that power is vested exclusively in the absent sovereign and not in the temporary belligerent occupant.[150] But he can levy other money contributions in the occupied territory.[151]

B. Contributions

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occupying power is thus bound to open in occupied territory is a valuable source of information of all kinds. It is in a position to render useful service, particularly in the case of children whose identity has not been established by the local services concerned."

[143] Geneva Convention IV, n.19, Article 50.

[144] *ibid.*

[145] Hague Regulation IV, n.1, Article 48. It states that: "If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

[146] *ibid.*

[147] G. Von Glahn (1957), n.14, p. 152.

[148] Hague Regulation IV, n. 1, Article 48.

[149] G. Von Glahn (1957), n.14, p. 152.

[150] *ibid.*, p. 150. Also see, Julious Stone (1959), n.9, p. 712-713. Author has contrary opinion and states: "Article 48 does not, despite contrary opinion, forbid increases in taxation". He further observes: "even new taxes and duties may be warranted, where (due to changes in yield) the sovereign would have had to resort to them".

[151] Hague Regulation IV, n. 1, Article 49.

The contribution is a legal method to collect funds in an occupied territory, with definite limitations surrounding its utilization by belligerents.[152] H. Lauterpacht defines contribution as "payment in ready money demanded either from municipalities or from inhabitants, whether enemy subjects or foreign nationals."[153] According to Julious Stone it is as "money impositions on the inhabitants over and above . . . taxes."[154] M Greenspan defines contribution as "the demand for money on the inhabitants, over and above the taxes, dues, and tolls already payable to the state in the occupied territory".[155]Contribution has been defined in Encyclopedia of Public International Law as "extraordinary payments imposed by an occupying power on the population of an occupied territory in war time. Demands for such payments are usually addressed to the local administrative units (towns, provinces)".[156]

Contribution is levied in addition to the taxes.[157] These levies must conform the following requirements. Firstly, they must be made under a written order and on the responsibility of the commander - in- chief.[158] Secondly, a receipt must be given to each contributor.[159] Thirdly, the levy must be collected as for as possible, in accordance with the rules in existence and the assessment in force for taxes.[160] Fourthly, the contribution must be only for the needs of the army or local administration.[161] Fifthly, contribution must not be enforced in the case of genuine impossibility of payment.[162]

It is important to note that the Hague Regulation IV do not specify the upper limit to the amount of contribution that may be exacted by an occupant. The requirements discussed above are very general and elastic in nature. It seems from the writings of the scholars that Hague Regulation IV does not permit the occupant to support his war effort through

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[152] G. Von Glahn (1957), n.14, p. 161.
[153] H. Lauterpacht (ed.) (1952), n. 26, p. 414.
[154] Julious Stone (1959), n.9, p. 713.
[155] Morris Greenspan (1959), n.26, p. 304.
[156] Ignaz Seidl – hoohenveldern (1992), "Contributions", in R. Bernhardt (ed.) *Encyclopedia of Public International Law* Vol. I, Amsterdam: Elsevier Science Publishers, p. 819.
[157] Hague Regulation IV, n. 1, Article 49.
[158] Hague Regulation IV, n. 1, Article 51.
[159] *ibid.*
[160] *ibid.*
[161] *ibid.*, Article 49.
[162] Ignaz Seidl – hoohenveldern (1992), n.156, p. 822.

contributions.[163] G. Von Glahn discussed some other conditions which should be taken into consideration while imposing any contribution.[164] These are as follows: Firstly, the invader is not allowed to recoup its cost of waging war by contribution. Secondly, contributions designed for the profit of the occupying state or its individual citizen is not allowed. Thirdly, contributions levied as advance payments on post war reparation or against any other future claim against legitimate government of the occupied territory are also not allowed. Fourthly, contribution could also not be levied as a weapon of war, such as to terrorise the local population or the enemy state to end the war quickly.

C. Debts

The occupant is not allowed to collect pre-occupation debts owed to legitimate sovereign of the territory.[165] Such debts constitute agreements, contracts or obligation between the debtor and legitimate sovereign and the occupant does not come into the picture.[166] He can not step into the role of creditor and also can not act as an agent of the ousted sovereign in the financial matters. He may prevent all payments from the area under his control to the hostile legitimate sovereign.[167]

Generally, occupant should abstain itself from contracting new debts on behalf of the occupied territory in normal circumstances.[168] Despite this if new debts are contracted to fulfil occupant' obligation towards welfare of the native population, the transaction must be fair, reasonable and clearly demonstrable.[169]

Public and Private Property in Occupied Territory

Initially the belligerents could appropriate all property, whether public or private which they found on occupied territory. But this rule has become obsolete by the time and a new set of rules has taken its place. This development is more or less concentrated around the

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[163] G. Von Glahn (1957), n.14, p. 163.
[164] *ibid.*
[165] *ibid.*, p. 157. Author observes that "the occupant can not undertake the replacement of sovereign by collecting debts owed to the sovereign."
[166] *ibid.*, p. 157.
[167] *ibid.*, p. 156.
[168] *ibid.*, p. 159. Also see, Julious Stone (1959), n.9, p. 718.
[169] G. Von Glahn (1957), n.14, p. 159.

emerging distinction between public and private property. Thus the occupant's power to deal with properties under occupied territory, generally, varies in accordance with the nature of such properties whether they are public or private. However the rule propounded by Article 53 of the Geneva Convention IV runs common to both types of property. It prohibits the occupying power from any destruction of property, public or private, real or personal, which is not rendered absolutely necessary by military operations.

Similar provisions could also be traced in Article 23(g) of the Hague Regulation IV.[170] Some argues that Article 53 of the Geneva Convention IV is the restatement (with reference to occupied territory with some modifications) of the general principle mentioned in Article 23(g) of the Hague Regulation IV.[171] However, there are some differences also. For example, Article 23(g) of the Hague Regulation forbids the unnecessary destruction of the enemy property during warfare and the qualification to this article refers to "necessities of war" whereas Article 53 of the Geneva Convention IV refers to all properties in occupied territory whether enemy or not and the qualification to this article refers only to "military operations", a term with a more restricted meaning.[172] Thus in occupied territory more restrictive exception is applicable in respect of necessity of military operations.

A. Public Property in Occupied Territory

Treatment with public property depends upon its nature whether it is immovable or movable property. The principle behind it that the sanctity of public property should be preserved up to the maximum extent and its nature should not be degraded or changed. Public properties must not be treated in a way that makes them unbeneficial for the use of legitimate sovereign after occupation.

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[170] Hague Regulation IV, n.1, Article 23 (g). It states that "it is specially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".

[171] Jean S. Pictet (1958), n.2, p. 301. Commenting upon relationship of these two articles author observes: " its (Article 23(g) of the Hague Regulation 1907) scope is . . . much wider than that of the provision under discussion (Article 53 of the Geneva Convention 1949),which is only concerned with property situated in occupied territory."

[172] Morris Greenspan (1959), n.26, p. 279.

Public Immovable Property

As for as public immovable property of enemy is concerned Article 55 of the Hague Regulation IV states that:

> The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estates, forests and agricultural estates belonging to the hostile State and situated in the occupied territory. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct.[173]

Thus, an occupant is denied the right to appropriate immovable public property by virtue of mere occupation.[174] An occupant is obliged to respect the substance or capital of enemy public immovable property and he is entitled only to use it in accordance with the rules of usufruct.[175] Thus the occupant is entitled to sell the crops of the land or to cut and sell the timber in the public forests and the like.[176] But he is prohibited from exercising his right in a wasteful or negligent way so as to decrease the value of stock and the plant.[177] He is not permitted to exploit such properties beyond normal use (the use that was done in pre occupation days).[178] The occupant is not supposed to support its war aim from the resources of the occupied territory.[179]Being only the usufructuary, the occupant is forbidden to sell or otherwise dispose of the immovable public property of the enemy state.[180] Occupant may lease state property but such lease and contracts in relation to public property should not extend beyond the period of occupation.[181]

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[173] Hague Regulation IV, n. 1, Article 55.
[174] H. Lauterpacht (ed.) (1952), n. 26, p. 397.
[175] *ibid.*, Also see, Morris Greenspan (1959), n.26, p. 288; Jean-Marrie Henckaerts and Louise Doswald-Beck (2005), *Customary International Humanitarian Law,* Cambridge: Cambridge University Press, p. 179.
[176] H. Lauterpacht (ed.) (1952), n. 26, p. 397.
[177] *ibid.*
[178] G. Von Glahn (1957), n.14, p. 177.
[179] N. V. De Bataafsche Petroleum Maatschappij V. The War Damage Commission (1956) 22 *Malayan Law Journal*, p. 155, in L C. Green (1959), *International Law through the Cases*, London: Stevens and Sons Limited, p. 662, it was observed that: "to exploit the resources of occupied territory in pursuance of a deliberate design to further the general war of the belligerent without consideration of the local economy, is plunder and therefore a violation of the laws and customs of war".
[180] Morris G. Shanker (1952), "The law of the Belligerent Occupation in the American Courts", *Michigan Law Review,* 50(7): 1066-1083, p. 1073. Author observes: "the belligerent occupant was limited to the rights to its use during the occupation, but could not gain an absolute title to such property so as to authorise its alienation".
[181] Morris Greenspan (1959), n.26, p. 288. Also see, H. Lauterpacht (ed.) (1952), n. 26, p. 397.

Public Movable Property

The rights of an occupant with respect to movable public property of the enemy state are limited to a far smaller extent than in the case of immovable public property.[182] The Hague Regulation IV, which govern the rules affecting such property, states that:

> An army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.[183]

Thus a belligerent does not acquire title to enemy public movable property though he can use his possessory rights over such property. His rights to appropriate public movable properties depend upon the susceptibility of those properties to be used for military operations. Thus movable public property of enemy state can be seized or utilised for the time period of occupation provided it can directly be useful for military operations.[184]

However, there are other kinds of public movable properties that are not directly susceptible of military use. These consist of state archives, public records, works of art and science and other like things. These properties have held immune from seizure and destruction by an occupant.[185] Every possible effort should be made to preserve these and to avoid their loss or destruction.[186]Every property of municipalities dedicated to religion, charity, education, art and sciences should be treated as private property though such property may belong to state.[187] The duty to protect institutions dedicated to religion also arises from Article 58 of the Geneva Convention IV.[188]

The property to which the legitimate sovereign of the occupied territory has legal title but which is actually administered on behalf of private persons should be exempted from

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[182] G. Von Glahn (1957), n.14, p. 180.
[183] Hague Regulation IV, n. 1, Article 53.
[184] H. Lauterpacht (ed.) (1952), n. 26, p. 399.
[185] G. Von Glahn (1957), n.14, p. 183.
[186] *ibid.*, p. 184.
[187] Hague Regulation IV, n. 1, Article 56.
[188] It states that "the occupying power shall permit ministers of religion to give spiritual assistance to the members of their religious communities. The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory".

seizure as public property and the occupant should apply the rules governing private property in such cases.[189]

B. Private Property in Occupied Territory

Conquest does not vitiate pre – existing private property and contract rights.[190] Private property must be respected and can not be confiscated.[191] Pillage is prohibited.[192] Thus the real estate of private persons must not be expropriated or alienated. Occupant is not entitled to exploit it or lease it for public or private benefit.[193] Any private property wrongfully sold confers no title on a buyer.[194] In this context, H Lauterpacht observes:

> Immovable private enemy property may under no circumstances or conditions be appropriated by an invading belligerent. Should he confiscate and sell private land or buildings, the buyer would acquire no right whatever to the property.[195]

Private property in the occupied territory falls under two categories. Firstly, those which are specifically apt for direct military use such as cables, telephones, telegraphs and all kinds of transport by land, air and sea. Secondly, all other things. The former may be seized or utilised but subject to restoration at the end of the war and payment of compensation.[196] As regards the question who is to pay the compensation, it seems that the treaty of peace must settle upon whom the burden of making compensation is ultimately fall.[197] The other things are forbidden to be taken unless actually required for the use of occupying army.[198] Even then they must be duly requisitioned by commanding authority.

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[189] G. Von Glahn (1957), n.14, p183.
[190] James Thuo Gathi (2004), "Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical context", *University of Pennsylvania journal of International Economic Law*, 25(2): 491-556, p. 492.
[191] Hague Regulation IV, n. 1, Article 46.
[192] Hague Regulation IV n. 1, Article 47.
[193] Morris Greenspan (1959), n.26, p. 294.
[194] *ibid.*
[195] H. Lauterpacht (ed.) (1952), n. 26, p. 403.
[196] *ibid.*, p. 404. Also see, Julious Stone (1959), n.9, p. 706; Hague Regulation IV, n. 1, Article 53.
[197] H. Lauterpacht (ed.) (1952), n. 26, p. 404.
[198] *ibid.*, p. 405. Also see, Julious Stone (1959), n.9, p. 707.

In a land marking case named, *Singapore Oil Stocks case*[199], it was held that crude oil in the ground had not sufficiently close connection with the direct military use. Suitableness of the things for direct military use should be determined at the time of their seizure and not on the future probability of such use after some mechanical exercises.[200] The right of the belligerent occupant to use those properties which are directly suitable for the military purposes ceases with the cessation of the hostilities.[201] After this the occupant has right only to posses such properties on behalf of the owner.[202] All other rights related to such properties remain with the original owner.[203]

Thus it is clear that occupant can seize some kinds of properties for military purposes and enjoy those properties for the period of occupation according to his rights and duties in international law. Any deprivation of the property in disregard to the laws of belligerent occupation is incapable of transferring or creating any title.[204] However, any seizure and enjoyment of public and private property in violation of Hague Regulations and Geneva Conventions is now punishable as a war crime.[205] Nuremberg tribunal convicted the major German criminals of war crimes on the charges which included "wanton destruction of cities, towns or villages, or devastation not justified by military necessity".[206] The Nuremberg tribunal while interpreting the provisions of the Hague Regulations IV relating to public and private property, observed that "the economy of an occupied territory can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear".[207]

Further, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly has been declared as war crime by

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[199] *N. V. De Bataafsche Petroleum Maatschappij V. The War Damage Commission* (1956), n.179, p. 662.
[200] *ibid.*
[201] *ibid.*, p. 663.
[202] *ibid.*
[203] *ibid.*
[204] H. Lauterpacht (ed.) (1952), n. 26, p. 411.
[205] G. Von Glahn (1957), n.14, p. 183.
[206] Loukis G. Loucaides (2004), "The Protection of the Right to Property in Occupied Territories", *International Comparative Law Quarterly,* 53(3) : 677-690, p. 680.
[207] L. C. Green (1959), n. 179, p. 688. Also see, H. Lauterpacht (ed.) (1952), n. 26, p. 401.

various statues.[208] Thus all useless and wanton destruction of enemy property whether it is public or private is prohibited.[209] However, military necessity can not justify all and every kind of action, and is subject to the rules of international law and the restrictions it imposes.[210]

C. Cultural Property in Occupied Territory

International law considers cultural property relevant for the international community at large and thus protects it during armed hostilities as well as during occupation period. International law forbids the seizure, destruction or damage to any historical monuments and any institutions devoted to the art and sciences.[211]

The belligerent occupant is bound to ensure and provide good order and security protection for cultural properties. The occupying power is bound to 'support the competent national authorities of the occupied territories in safeguarding and preserving its cultural property' and obliged not to prevent them in doing so.[212] However, when the national authorities are unable to act, it becomes the duty of the occupant to establish special measure for their protection. The responsibility of the occupant also becomes greater in the case when damage is done during the period of occupation. He is obliged to protect the very existence of such cultural properties and to protect it from deterioration.

It is not permitted to take monuments of art from the occupied territory or to remove them from their normal location, unless such removal is required for their preservation.[213] If such properties are transferred from the occupied territory to another state, the latter is under an obligation to protect them. Property illegally exported from a territory under occupation has to be returned at the close of the hostilities to the competent authority of

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[208] Article 6 (b), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (1945), 82 *UNTS* 279. Also see, Article 3, Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), UN Doc. S/25704 (1993), Annex.; Article 8 (2) (a) (iv), Rome Statute of the International Criminal Court (1998), UN Doc. A/Conf.183/9 (1998).

[209] H. Lauterpacht (ed.) (1952), n. 26, p. 415.

[210] Morris Greenspan (1959), n.26, p. 279.

[211] Hague Regulation IV, n. 1, Article 56.

[212] Article 5, Convention for the Protection of Cultural Property in the Armed Conflict, The Hague, 14 May 1954, 249 *UNTS 240*.

[213] G. Von Glahn (1957), n.14, p. 184.

the country previously occupied. The former occupying power has to pay indemnity to those who hold such property in good faith. Cultural property deposited by one state in to the territory of another state party must be returned by the latter at the close of hostilities. Removal of art objects from the occupied territory has also been treated as a war crime.[214]

Requisitions

H. Lauterpacht defines requisition as "the demand for the supply of all kinds of articles necessary for an army, such as provisions for men and horses, clothing, or means of transport."[215] Encyclopedia of Public International Law defines it as "the right of an occupant state to use the resources of the occupied territory and the services of the persons subject to the occupation regime for the maintenance of its military forces, in return for cash compensation or against the issuance of the receipt."[216] Glahn states that "requisition is the term used for the demand for a supply of all kinds of articles needed by an army, such as food stuffs, clothing, horses, transportation and means of transportation, and buildings. . . . It is a formal process governed by both international law and by the laws and regulations of the state to which the armed forces in question belong."[217]

The belligerent occupant's power to requisition is broadly a corollary to its obligation to preserve public order and safety in the occupied territory and to ensure the food and medical supply of the population and it should not be misused for war aims.[218]Requisition is of two kinds, firstly, requisition in kind and secondly, requisition in services. Requisition in kind relates to the requisition of property for the needs of armed forces whereas requisition in services means demand of services form the local population for the same.

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[214] G. Von Glahn (1957), n.14, p. 185.
[215] H. Lauterpacht (ed.) (1952), n. 26, p. 409.
[216] Rudolf Dolzer (2000), "Requisitions", in R.Bernhardt (ed.) *Encyclopedia of Public International Law,* Vol. IV, Amsterdam: Elsevier Science Publishers, p. 205.
[217] G. Von Glahn (1957), n.14, p. 165.
[218] Rudolf Dolzer (2000), n. 216, p. 205. Also see, H. Lauterpacht (ed.) (1952), n. 26, p. 408. Author argues in opposite way and observes: "requisitions and contributions in war are the outcome of the eternal principle that war must support war".

Article 52 of the Hague Regulation IV provides following rules for lawful requisitions. Firstly, it may be made from municipalities as well as from inhabitants. Secondly, it covers supplies only for the needs of the army of occupation. Thirdly, requisitions in kind must as for as possible be paid in cash and if this is not possible a receipt should be given and payment should be made as soon as possible. Fourthly, the requisition in kind must be in proportion to the resources of the country. Fifthly, it can not be made by individual soldiers or officers, but only by commander in the locality.

However, in all respects the compensation for requisitioned properties must be given by the occupant and it can not be imposed on the occupied territory.[219] A German decree issued during Second World War was held invalid on the ground that it had imposed the compensation for the property requisitioned by German army on the Belgian State (occupied during such period).[220]

Further, Article 55 of the Geneva Convention IV while restating some of above mentioned requirements states that the occupying power may not requisition foodstuffs, articles or medical supplies available in the occupied territory without taking note of the requirements of the civilian population in the occupied territory. The belligerent occupant's power of requisition and seizure in respect of food and medical supplies has been more restricted.[221] It obliges the occupying power to ensure the fullest extent of the means available to it - the food and medical supplies of the population of the occupied territory.

The material and the stores of the civilian hospitals can not be requisitioned so long as they are necessary for the interest of the civilian population.[222]This protection of the civilian population has been further extended by Article 14 of the Additional Protocol I of 1977, according to which civilian medical units, there '*materie'l*, or the services of their personnel are to a large extent exempted from the power of requisition of the occupant.[223]

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[219] Edgar Bodenheimer (1952), "United States and Belgium: Validity of the Belligerent Occupant's Decrees", *American Journal of Comparative Law*,1(1/2): 119-122, pp. 120-121.
[220] *ibid.*
[221] Geneva Convention IV, n.19, Article 55,
[222] *ibid.*, Article 57.
[223] Additional Protocol I, n. 111, Article 14.

Same type of protection is also available to the civil defense organizations of the occupied territory against requisitions.[224]

The rules of requisition are not applicable in regard to transactions made in the form of contracts (such as sales, lease, service agreements).[225] However the use of power of requisition on the part of occupant is assumed when he leaves the person affected no choice about transaction though he negotiates over some of its element.[226]

Though no fixed procedure for requisition is laid down in Hague Regulations IV and Geneva Convention IV, direct contact between troops and inhabitants must be avoided. Requisition should be made through local civil authorities in the occupied territory. However, in their absence the principal inhabitants may be contacted by the representative of the army for the requisition. Direct contact between belligerent troops and the inhabitants must be avoided in all circumstances.[227]

Thus it appears that the occupant's power to demand requisition is curtailed by the needs of the local civilian population and the resource capacity of the occupied territory to bear such demands. However it is important to note that beyond these specific limitations occupant state must observe other restraints inherent in the general concept.[228] All other limitations relating to use of property and treatment with individuals is applied on the occupant. The general exploitation of the occupied territory for the purposes of the domestic economy of the occupying power can not be justified by the rules on requisitions.[229]

Means of Communication

Means of communication and transportation come under the authority of the occupant. He can siege, utilize or regulate their operation regardless of their nature as private or

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[224] *ibid.* ,Article 63.
[225] Rudolf Dolzer (2000), n. 211, p. 206.
[226] *ibid.*
[227] Morris Greenspan (1959), n.23, p. 303.
[228] Rudolf Dolzer (2000), n. 211, p. 207.
[229] *ibid.*

public property. Demolition of such property is prohibited.[230]Submarine cables have been protected by Article 54 of the Hague Regulations IV. Occupant must not destroy or seize the cable except in the case of absolute necessity. Even if such seizure or destruction takes place, the affected properties must be restored and compensated.[231] The occupant is bound to notify the affected neutral state immediately about such seizure or destruction.[232] Same rules are also applied to any destruction of lightships or light houses along the coast of the occupied territory.[233]

The postal services of the occupied territory may be taken over by the occupant. He can supervise and direct its functioning. He can require the available employees of preoccupation days to continue to serve in their regular post, so long as their duties do not fall within the forbidden sphere of participation in military activity against their own sovereign.[234]

The obligation to maintain some form of postal services in the occupied territory is imposed on the occupant by Article 25 of the Geneva Convention IV. It requires that all persons in occupied territory must be enabled to give news of a strictly personal nature to members of their family wherever they may be, and to receive news from them.[235] If circumstances render it difficult or impossible to exchange family correspondence by the ordinary post, the belligerent must decide in consultation with a neutral intermediary how to ensure the fulfilment of their obligation, particularly with the cooperation of the National Red Cross society. [236]If it is deemed necessary to limit family correspondences, the restrictions shall be confined to the compulsory use of standard forms containing twenty five freely chosen words, and to a limitation of one such form sent per month.[237]

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[230] Hague Regulation IV, n. 1, Article 53.
[231] G. Von Glahn (1957), n.14, p. 216. Author argues that Hague Regulation does not provide any clue as to whom compensation should be demanded. However, it seems that affected neutral state would turn first to the belligerent who was responsible for the actual destruction.
[232] *ibid.*
[233] *ibid.*
[234] *ibid.*
[235] Geneva Convention IV, n.19, Article 25.
[236] *ibid.*
[237] *ibid.*

It appears that occupant can regulate the fee charged in civilian postal services. He is not bound by rates prevailing before the occupation. However he should remember that postal rates are not taxes but the charges for services. Civilian population may use the services as it pleases or may abstain from it.

As for as postal services to other countries are concerned, the occupant is free to impose regulation subject to the rules of Universal Postal Union. However the Geneva Convention IV (particularly Articles 23, 25-26, 38, 61-62, 98,106-112, and 128) requires the maintenance of certain types of postal communication between the enemy territory under occupation and outside nations.

Conclusion

The law of belligerent occupation is an attempt to protect the inhabitants of the occupied territory as well as to foster respect for the autonomy of such territory in the eyes of occupant. Rights granted to the inhabitants of the occupied territory are absolute and can not be limited or altered under any circumstances. The occupant is mere trustee for the time being of occupation. In fact, political, legal and economical structures of the occupied territory should remain intact unless they are in derogation with the Geneva Convention IV.

The concerned officials in the occupied territory may continue their services. Apart from this, allegiance must not be demanded however obedience could be sought. Property rights also must be respected. Mass forcible transfer or deportation of the population from the occupied territory is prohibited. Humanitarian needs of the population of the occupied territory must be addressed. Historical monuments and cultural properties in the occupied territory must be protected and must not be transferred to the other states. Means of communication should be protected. The occupant could utilize them subject to restoration and compensation given for such use. Postal services should be maintained.

CHAPTER III

NOTION OF TRANSFORMATIVE OCCUPATION: IRAQ SITUATION

Chapter III

Notion of Transformative Occupation: Iraq Situation

Introduction

The occupation of Iraq was unique. It was a multilateral occupation under unified command of the Coalition Provisional Authority (hereafter mentioned as CPA). Status of CPA under the United States of America's laws was not clear. Some institutional bodies were also created by CPA for interim Iraqi administration but they were little more than the CPA's puppet. Declaration of termination of occupation in Iraq was not followed by resumption of sovereignty of Iraq and hence created unique transitional situation.

The uniqueness of this occupation also lay in the nature of changes made during occupation. Almost all legal, political and economical structures of Iraq were altered in a manner best suited to the occupiers. Least care had been given to the laws of belligerent occupation. These changes were to transform Iraq in one of the most open economic system of the world. This chapter discusses these issues in little detail.

Commencement of Occupation in Iraq

The occupation of Iraq was taken place after a long political confrontation and a short war. At the end of the first gulf war the United Nations imposed a number of obligations on Iraq through the Security Council resolution 687 of 1991, which obliged it to permit regular inspections for the destruction of its capabilities of chemical, biological and nuclear weapons.[1] There were series of confrontations between Iraq and the inspectors of the United Nations over these disarmament obligations. In 2002, after a four year

[1] Security Council Resolution 687 (1991) [Online: Web], Accessed 25 July 2009, URL: http://www.un.org/documents/Scres.htm.

absence, the inspectors returned to Iraq following the Security Council Resolution 1441.[2] It said that Iraq was in "material breach" of its obligations under Resolution 687 and subsequent resolutions on the subject. It termed the return of inspectors to Iraq as a 'final opportunity' for Iraq to make full disclosure of its weapons stockpiles and capabilities. Consensus at the United Nations failed at this point. The United States of America claimed that Iraq had failed to meet the demands of Resolution 1441and sought the council authorisation of armed intervention. Necessary votes failed to materialise and the USA and the UK unilaterally started the hostilities against Iraq on March 18, 2003. It is important to note that the legality and illegality of the use of force against the Iraq was also a controversial issue.[3]

Iraqi resistance proved minimal. The USA forces entered Baghdad on April 9, 2003 and the pentagon declared the end of major hostilities on April 14, 2003. However, the end of major military operations in Iraq was declared by American President George W. Bush on May 1, 2003.

The USA and the UK announced the creation of CPA in letter to the Security Council on May 8, 2008. Though the word occupation was not used in the letter, its reality was evident. It stated that "the states participating in the coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq".[4] It further stated that a new authority would "exercise power of government temporarily" in Iraq. Further, the Security Council Resolution 1483 of 22 May, 2003 acknowledged this letter and described these states as "occupying powers under unified command". It referred this command as "the Authority". However it is important to note that this was the declaration of the existing fact and was not of

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[2] Security Council Resolution 1441(2002) [Online: Web], Accessed 25 July 2009, URL: http://www.un.org/documents/Scres.htm.

[3] The present study does not intend to cover these issues as the scope of this study is limited. However, to know more about the use of force against Iraq, see generally, Sia Spiliopoulou Akermark (2005), "Storms, Foxes and Nebulous Legal Arguments: Twelve Years of force Against Iraq, 1991-2003", *International Comparative Law Quarterly* 54(1): 221-235. Also see, Vaughan Lowe (2003), "The Iraq Crisis: What Now?", *International Comparative Law Quarterly,* 52(4) : 859-871.

[4] Letter from the Permanent Representative of the UK and the US addressed to the President of the Security Council, UN doc S/2003/538 of 8 May 2003, quoted in Adom Roberts (2005), "The End of Occupation: Iraq 2004", *International Comparative Law Quarterly*, 54(1): 27-48, p 31. Also see, Eyal Benvenisti (2003), "Water Conflicts during the Occupation of Iraq", *American Journal of International Law*, 97(4): 860-872, p. 861.

constitutive nature. Thus there was occupation in Iraq and the Security Council only declared its existence and did not create it.[5]

Occupying Powers in Iraq

Occupation of Iraq was the case of multilateral occupation. Multilateral occupation is an occupation where two or more states involved in control over occupied territory. This control may vary from region to region and time to time. This presents a unique problem about the identification of occupying powers and fixing their liability under international law. Both the Hague Regulations IV and the Geneva Convention IV do not define "occupying powers" rather they only incorporate the factual test of existence of occupation.

The occupation of Iraq raised this issue. The position of the USA and the UK were clear. The preamble of Security Council Resolution 1483 of May 22, 2003 expressly recognised them as "occupying powers under unified command (the Authority)". It further noted in next paragraph, that "other states that are not occupying powers are working now are in future may work under the Authority". This paragraph referred to those states which provided support to the CPA but did not engage in exercising authority over any part of the territory of Iraq. However the operative paragraph 5 of the resolution called 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". This reference to all concerned is wider and related to all those states which had placed their military force on occupied territory.[6] Thus if non occupying states turned out to be involved in activities amounting to occupation they would have be treated as occupying powers.[7]

Further it is important to note that occupation is a factual situation on ground and thus the status of occupying powers should also depend upon facts of each case. It does not

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[5] Eyal Benvenisti (2003), n.4, p. 861.

[6] David J. Scheffer, (2003), "Beyond Occupation Law", *American Journal of International Law*, 97(4): 842-860, p. 844. Author observes: "this strongly suggests that the observance of occupation law for any state deploying military forces on Iraqi territory can be independent of whether that state is designated as an occupying power."

[7] Robert Kolb (2008), "Occupation in Iraq since 2003 and the power of the UN Security Council", *International Review of the Red Cross*, 90(869): 29-50, p. 42.

depend upon any such declaration and indication about status of occupying powers. In the case of Iraq also, the Security Council Resolution 1483 was only an indicator and it was neither the conclusive nor the only source to determine the occupying powers in Iraq. It was only a declaration of existence of such situation.

The fact that certain states had only been assigned very small sections of territory and had very few troops on the ground did not make a difference. Within this small territory troops might be carrying out functions for which respect for the law of occupation is relevant. Thus if and whenever the armed forces of any state became involved in hostilities, they had to respect obligations relating to occupation regardless of whether they had been considered as occupying powers or not.[8]

Coalition Provisional Authority (CPA)

It was established approximately one month after United States and coalition forces took control of Baghdad on April 9, 2003.[9] Letter of the permanent representative of the USA and UK to the president of the Security Council on May 8, 2003 confirmed the formation of such authority.[10] Status of CPA was unclear under US laws.[11] However it is important to note that the CPA shared close connection with the US Department of Defence.[12] CPA administrator answered to both the President of the USA as well as to its Secretary of Defence.[13] In administrative terms, the CPA fell under the Department of the Army and the salary of its administrator L. Paul Bremer was paid by the US army.[14]

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[8] Knut Dorman and Laurent Colassis, "International Humanitarian Law in the Iraq Conflict", Accessed 25 July 2008. [Online: Web], Accessed 25 July 2009, URL: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/Section_ihl_occupird_territory

[9] L. Elaine Halchin (2005), "The Coalition provisional Authority (CPA): Origin, Characteristics and Institutional Authorities" *Congressional Research Service Report*. [Online: Web], Accessed 25 July 2009, URL: http://www.au.af.mil/au/awc/awcgate/crs/#iraq.

[10] Adom Roberts (2005), n 4, p. 31.

[11] L. Elaine Halchin (2005), n.9, p. 41-42. Author observes: "available information about the authority found in materials produced by the Administration alternatively (1) denies that it was a federal agency; (2) states that it was the US government entity or instrumentality; (3) suggests that it was enacted under United Nations security Council Resolution 1483; (4) refers to it . . . as civilian group reporting the secretary of defense;(5) states that it was created by the United States and the United kingdom; and (6) asserts that it was established by the then commander of the CENTCOM."

[12] *ibid.*, p. 14.

[13] *ibid.*

[14] *ibid.*, p. 14

Governing Council of Iraq

Iraqi Governing Council was established on July 13, 2003 by CPA.[15] It was consisted of 25 appointed members and was established to further the responsibility of occupying power mentioned under operative paragraph 9 of Security Council Resolution 1483.[16] The appointment of members of the Governing Council was wholly concentrated in the hands of the administrator of the CPA and neither the people of Iraq nor the UN special Representative of the Secretary General was able to influence the procedure of selecting the members of the Governing Council. However, this was meant to be done with the help of these two.[17]

Thus in its true sense the Governing Council of Iraq is the sole result of the discretion of the Administrator of the CPA and lacks the democratic inputs (i.e. the need to form such interim administration by the people of Iraq with the help of the Authority and working with the special representative) mentioned in Paragraph 9 of the Security Council Resolution 1483. Thus, though the Governing council was meant to represent the political spectrum of the Iraqi Society the latter was not involved in the process of its establishment.

The Security Council further welcomed the establishment of the Governing Council as an important step towards the formation by the people of Iraq of an internationally recognised, representative government that will exercise the sovereignty of Iraq.[18]

The Governing Council was acknowledged as a representative of the Iraqi people and it was supposed to ensure "that the Iraqi people's interests are represented in both the interim administration and in determining the means of establishing an internationally

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[15] CPA Regulation no. 6, [Online: Web], Accessed 25 July 2009, URL: http:// www.cpa-iraq.org. It notes "that on July 13, 2003 the Governing Council met and announced its formation as the principle body of the Iraqi Interim Administration."

[16] Security Council Resolution 1483 of May 22, 2003, S/Res/1483 (2003), Para 9, [Online: Web], Accessed 25 July 2009, URL: http:// www.un.org/documents/Scres.htm. (Herein after mentioned as SC Res. 1483). It supports the formation, by the people of Iraq with the help of the Authority and working with the special representative, of an Iraqi Interim Administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.

[17] Resolution 1483, n.16, para 9.

[18] Security Council Resolution 1500 of August 14, 2003, S/Res/1500 (2003), [Online: Web], Accessed 25 July 2009, URL: http:// www.un.org/documents/Scres.htm.

recognised, representative government".[19] However this reference to "means" is further put in more tangible form by restricting the governing council's role as only consultative with respect to the CPA.[20]

It is important to note that most of the structural changes made in Iraq which will be discussed latter in this chapter were made by CPA, referring the acknowledgement of the Governing Council's desire to bring about such significant changes and close working of CPA with it to ensure that such changes occurs in a manner acceptable to the people of Iraq.[21]

Thus the CPA used the Governing Council as a voice of Iraqi people which was not a situation. Taking in to account the structure and role of the Governing Council, it does not seem sufficient to establish a linkage between the population of Iraq and the CPA. However, the acknowledgment of the will and desire of the Governing Council did not make any difference about the nature of various long lasting changes and their patent discord with temporary nature of belligerent occupation.

Changes Made in Iraq

Through regulation no 1 the CPA granted itself the authority to supersede any law in force in Iraq. It has issued hundred orders, twelve regulations and seventeen memoranda in exercise of its legislative power.[22] Most of these orders and regulations definitely go beyond the strictures of laws of belligerent occupation. Long lasting changes have been introduced in Iraq by these orders and regulations. These changes have been supported and opposed on many grounds by scholars. But, before going further, it is pertinent to know about some of the changes which have attracted much debate due to their vulnerability towards laws of belligerent occupation. These changes can be classified in to two heads. These are as follows.

A. Changes made in political and legal field, and

[19] CPA, n. 15, Regulation no. 6.
[20] *ibid.*
[21] CPA, n.15, Order nos. 39, 81,83,80,94.
[22] CPA, n. 15.

B. Changes made in economic field

A. Changes Made in Political and Legal Field

Almost all the changes made in Iraq's political and legal structures were mainly aimed towards two points. Firstly, to disband the Ba'athists elements from Iraqi society and its political and administrative system and secondly, to transform Iraq towards a democratic state in a manner suited to the occupying powers. Both these goals were in contravention with law of belligerent occupation. Large scale changes made in Iraq's security system and a new Iraqi army was created. Iraq's penal laws and their procedures were also changed. Local and indigenous cult was ignored in such process and an attempt was made to impose the USA centric democratic norms without any inclusive Iraqi voices. Following changes are important to be discussed in this regard due to their hostile nature towards law of belligerent occupation.

De- Ba'athification

CPA issued Order No 1, on De-Bathification of Iraqi society. It stated that by this means, the occupiers would ensure that representative government in Iraq is not threatened by Bathist element. Both junior and senior members of the party were removed from governmental positions and barred from future employment in public sector. In November 2003, the CPA delegated its authority to conduct de-Ba'athification to the governing council.[23] However on June 28, the last date of its existences, the CPA conferred this authority to the incoming governments of Iraq.[24]

Further, the CPA ordered the dissolution of governmental entities.[25] The dissolved entities comprised seven ministries or governmental divisions, two cadres of Saddam Hussein's body guards, eight military organisations, four paramilitaries and seven other organisations.[26] All the assets of these entities turned over to the CPA.[27] All their

[23] CPA, n.15, memorandum no. 7.
[24] CPA, n.15, order no. 100.
[25] CPA n. 15, order no. 2.
[26] *ibid.*
[27] *ibid.*

financial obligations were suspended, all their personnel were dismissed and all titles and ranks conferred by these entities were cancelled.[28]

Changes in Security and Military Institutions

The CPA announced the creation of new Iraqi army three months after disbanding the whole Iraqi military establishment.[29] It promulgated the detailed order setting new ranks, command structures and its relationship to the civilian authorities.[30] A new code of military discipline was promulgated.[31] Five existing military codes were abolished, three of which predated the Ba'ath party's assumption of power in Iraq in 1968.[32] A defence support agency was created to provide support services for the new force in areas of finance, personnel recruitment and procurement.[33] This agency was supposed to work under the direction and control of the CPA.[34]

Two additional services, the Facilities Protection Service[35] and the Civil Defence Corps[36] were also created. CPA administrator enjoyed the command of the new Iraqi army and the civil defence corps. A ministry of defence was established to centralize the administration of these new entities.[37] Authority to create new Iraqi intelligence services was delegated to the Governing Council of Iraq.[38]

Changes in Penal Laws

Several provisions of Iraqi penal code of 1969 and Iraqi law of criminal procedure of 1971 were amended.[39] A new central criminal court was created both to serve as a model for further judicial reforms and to try those serious crimes which directly threaten public order and safety.[40] Judges of this court were appointed by the CPA administrator and the

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[28] *ibid.*
[29] CPA, n. 15, order no. 22.
[30] *ibid.*
[31] CPA, n. 15, order no. 23.
[32] CPA, n. 15, order no. 22.
[33] CPA, n. 15 order no. 42.
[34] *ibid.*
[35] CPA, n. 15, order no. 27.
[36] CPA, n.15, order no. 28.
[37] CPA, n.15, order no. 67.
[38] CPA, n.15, order no. 69.
[39] CPA, n. 15,order no. 31.
[40] CPA, n.15,order no. 13.

cases heard by this court were also chosen by him.[41] Others Iraqi courts were required to cooperate with this central court on procedural matters.[42]

The CPA created a judicial review Committee to determine the suitability of current judges and prosecutors and removing them if they were found unsuitable.[43] The committee was to operate at the discretion of the administrator of the CPA.[44] CPA also delegated its authority to Governing council of Iraq to establish an Iraqi special tribunal.[45] It was established to try Iraqi nationals or residents of Iraq accused of genocide, crime against humanity, war crimes or violation of certain Iraqi laws.[46] However, the administrator of CPA retained the authority to alter the statue or any elements of crime or rules of procedure developed for the tribunal.[47] It was also provided that any conflict between judgment of the tribunal and any promulgation of CPA should be resolved in favour CPA.[48]

B. Changes Made in Economic Field

The most far reaching changes made in Iraq were economic changes. These were able to transform Iraq as one of the most open economic system of the world. These changes could be classified in five broad areas. These are banking, foreign trade and investment, commercial laws, intellectual property laws and securities regulation. These changes were in open discord with the laws of belligerent occupation.

Changes in Banking Laws

The commercial banking system in Iraq was wholly transformed by new banking laws.[49] A comprehensive set of regulations and standards were adopted in areas like capitalisation, lending limits, on site examination of banks and their affiliates, mechanisms for conservatorship, receivership and liquidation of banks and receipt of

[41] *ibid.*
[42] *ibid.*
[43] CPA, n. 15, order no. 15.
[44] *ibid.*
[45] CPA, n.15, order no. 48.
[46] *ibid.*, section 1.
[47] *ibid.*, section 1(6).
[48] *ibid.*, section 2(3).
[49] CPA, n.15, order no. 40. However this order of CPA was further revised by the CPA order no. 94 of 6 June 2004.

deposits.[50] All existing laws inconsistent with the bank laws were suspended.[51]All banks were to be licensed by the Central Bank of Iraq.[52]Iraqi banking sector was opened to foreign investors. Previously only Arab banks were permitted to operate in Iraq. Any foreign bank might apply to Central Bank of Iraq for a permit to establish a branch in Iraq subject to some restrictions.[53] Once a foreign bank was properly established, it was treated same as an Iraqi bank.[54]

Changes in Foreign Investment Laws

All tariffs, customs, duties, import taxes and licensing fees for goods leaving or entering Iraq and all other restrictions relating to those goods were suspended until the end of the occupation.[55] A trade bank of Iraq was established to facilitate the imports and exports activities.[56] It was established with the initial capitalization of $100,000,000.[57]

The CPA order no. 39 provided ample power to foreign investors in Iraq. This order replaced all other existing laws pertaining to foreign investment in Iraq.[58] Foreign investors were entitled to make investment in Iraq on terms no less favourable than those applicable to Iraqi investors.[59] There was no requirement of partnership or joint venturing with Iraqi investors.

This order allowed foreign investors to own 100% of any Iraqi enterprise except natural resources involving primary extraction and initial processing, without any requirement to reinvest the profits into the country.[60] Initially this privilege had been only restricted to citizens of Arab countries.[61]

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[50] CPA, n. 15, order no. 94.
[51] *ibid.*, Article 107(2) of Banking law of Iraq annexed to CPA order no. 94.
[52] *ibid.*, Article 4(1) of Banking law of Iraq annexed to CPA order no. 94.
[53] *ibid.*
[54] *ibid.*,Article 4(5) of Banking law of Iraq annexed to CPA order no. 94.
[55] CPA order no. 12.
[56] CPA order no. 20.
[57] *ibid.*
[58] CPA, n.15, order no. 39, Section 3.
[59] *ibid.*, Section 4.
[60] *ibid.*, Section 7.
[61] Marten Zwanenburg (2004), "Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation", P. 757, [Online: Web], Accessed 25 July 2009, URL:

All funds associated with the foreign owned business could be transferred abroad without restriction.[62] There was no requirement for foreign investor to use local products or services. This order formally prohibited the purchase of real property or its usufruct by foreign investors but it permitted the foreign investors to obtain license to use such properties for up to forty years.[63] This term of forty years may be renewed for further such periods.[64] Thus it undermines the formal prohibition on purchase. Ministry of trade in direct consultation with the CPA was authorised to issue regulations to implement this order.[65] Apart from this, all kind tax exemption was also granted to multinational forces, sending states and contractors in Iraq on all local purchases for the official use or for the performance of contracts in Iraq.[66] Contractors were exempted to pay any tax in Iraq on their earnings from contracts.[67]

Changes in Commercial Laws

Iraqi corporate laws were extensively changed. Foreign juridical or natural persons became eligible to acquire membership in the Iraqi corporate sector as founders, share holders and partners.[68] Regarding need of such changes CPA observed that "some of the rules regarding company formation and investment under the prior regime no longer serve a relevant social or economic purpose, and ... such rules hinder economic growth."[69] Iraqi bankruptcy law was also substantially amended.[70] CPA order no.37 set out a tax strategy for Iraq for year 2003. Its preamble said that CPA was determined to complete broad review of taxes in Iraq.

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http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/Section_ihl_occupird_territory. Also see, Robert Kolb (2008), n.7, p. 39.

[62] CPA, n.15, order no. 39, section 7(2) (d). These might include (i) shares or profits or dividends, (ii) proceeds from the sale or other disposition of such foreign investment or a portion thereof, (iii) interest, royalty payments, management fees, other fees and payments made under a contract, and (iv) any other transfer approved by the ministry of trade.

[63] *ibid.*, section 8 (1)and(2).

[64] *ibid.*, section 8(2).

[65] CPA, n.15, order no. 46.

[66] CPA, n.15, order no. 17, Section 10(1).

[67] *ibid.*, Section 10(2).

[68] CPA, n.15, Order no. 64, section 1 (14).

[69] CPA, n.15, Order no. 64, preambular paragraph.

[70] CPA, n.15, Order no. 78.

Changes in Intellectual Property Laws

There was an overall change in Iraqi Intellectual Property Laws. All these changes were made to facilitate the entry of Iraq in to the World Trade Organisation.[71] Iraqi Trademark and Description Law of 1957 was amended and renamed as 'Trademark and Geographical Indications Laws'.[72] The scope of the existing patent and industrial designs law and regulations was expanded and it was renamed as 'Patent, Industrial Design, and Undisclosed Information, Integrated Circuits and Plant Variety law'.[73] The copyright law of 1971 was also amended.[74]

Changes in Securities Regulation and Trading

An interim law on security market was promulgated.[75] The logic was same that prior securities laws were not suited to a modern, efficient, transparent and independently regulated securities market and there was a need to update the existing laws up to the international standards. It ceased the existing Baghdad Stock Exchange and created a new Iraqi Stock Exchange.[76] Detailed standards were promulgated for its working. An interim Iraqi securities commission was created to supervise this exchange.[77] Its members were appointed by the administrator of the CPA with the consultation with Iraqi Governing Council.[78]

The Transition of Iraq towards Sovereignty

The Security Council Resolution 1511 of 16 October, 2003 requested the Governing Council and the occupying power to provide a time table for the drafting of a new constitution and holding democratic elections latest by 15 December 2003.[79] Accordingly, on November 15, 2003 the Interim Governing Council and the CPA

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[71] CPA, n.15, order nos. 80, 81 and 83 (preamble paragraphs).
[72] CPA, n.15, order no. 80.
[73] CPA, n.15 order no. 81.
[74] CPA, n.15 order no. 83.
[75] CPA, n.15, order no 74.
[76] CPA, n.15, order no 74; section 2(1).
[77] CPA, n.15, order no 74, section 12(1).
[78] *ibid.*
[79] Security Council Resolution 1511 of 16 October, 2003, S/RES/1511 (2003), Para 7. (hereafter mentioned as SC Res. 1511), [Online: Web], Accessed 25 July 2009, URL: http://www.un.org/Docs/sc/unsc_resolution03.html.

concluded an agreement on the timetable and program for the drafting of new constitution and holding elections under that new constitution.[80] This agreement identified five key dates in such time table. These were as follows:

Firstly, by February 28, 2004, the Governing Council was to approve a Transitional Administrative Law, to serve as an interim constitution, guaranteeing basic rights, defining the structure of a transitional government and setting out procedure to select delegates to the constitutional convention.

Secondly, by May 31, 2004, local caucuses were to be convened in each of the eighteen governorates of Iraq to elect delegates for the Iraqi Transitional National Assembly.[81]

Thirdly, by June 30, 2004, the Iraqi Transitional National Assembly was to assume full sovereignty. By then Governing Council and the CPA were to be dissolved.

Fourthly, by March 15, 2005, direct elections were to be held for a constitutional convention. This convention was to write a permanent constitution to be approved by the Iraqi people in a referendum.

Fifthly, December 31, 2005, national elections were to be held for a new Iraqi Government under the new constitution. The Transitional National Assembly was to be dissolved after the formation of the new government.

However these time limits were further altered. An election for the Transitional National Assembly of Iraq was further postponed by end of 2004 and in any case no later than January 31, 2005, and a new mechanism based on direct one man –one vote principle was evolved to hold it. A new mechanism was also adopted for the transfer of the governing power in Iraq and it was made to the new interim government of Iraq which was never stipulated in the November 15, 2003 Agreement.[82] Date of such transfer was pre-poned and it took place on 28th June 2004.

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[80] "The November 15 Agreement: Time line to a sovereign, Democratic and Secure Iraq", [Online: Web], Accessed 25 July 2009, URL: http://www.david-morrison.org.uk/iraq/iraq-trans-law.htm.

[81] Further this arrangement was changed and direct elections based on one man – one vote was planned for the constitution of the Iraqi Transitional Assembly by 31st December 2004, if possible and in any case not later than 31st January 2005.

[82] "The November 15 Agreement: Time line to a sovereign, Democratic and Secure Iraq", n. 80.

Apart from these time limits, this agreement also approved the presence of the coalition forces side by side with the Iraqi police and security agencies. All these things in accordance with their pertinence with the topic will be discussed later in this chapter.

A. Transitional Administrative Law (TAL)

The TAL was passed on March 8, 2004 by the Governing Council. It provided for the basic laws which were to be applied in Iraq after June 30, 2004.[83] It was consisted of 62 Articles. Any legislation that conflicted with this law was null and void.[84] This law included a bill of rights guaranteeing freedom of speech and equal rights for all Iraqis regardless of ethnicity, sect or gender; minority rights and linguistic rights as well as due process and independent judiciary.[85] It repudiated the Ba'athists[86] and put Iraqi armed forces under civilian control.[87] It also targeted 25 percent female participation in the federal agency.[88]

It was to remain enforce for a transition period until the new Iraqi Government was elected under the adopted permanent constitution.[89] It envisaged two phases of such transitional period. These were like one, which began with the transfer of governing authority in Iraq to the Iraqi interim government and second, which began with the formation of Transitional Government of Iraq which was to take place after the elections of the national assembly latest by January 31, 2005.[90]

It also stipulated that the laws in force in Iraq on June 30, 2004 would remain in force unless and until rescinded or amended by the Iraqi Transitional Government in accordance with this Law.[91] This reference to the Iraqi Transitional Government can be clarified with the help of Article 2(b) of the TAL whish distinguished between Interim Government and Transitional Government of Iraq. Thus it is clear that under this law

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[83] "Law of Administration for the State of Iraq for the Transitional Period" (hereinafter mentioned as TAL) [Online: Web], Accessed 25 July 2009, URL:http://www.cpa-iraq.org/government/TAL.html.
[84] *ibid.*, Article 3(b)
[85] *ibid.*, Articles 10 to 23 and 43 to 47.
[86] *ibid.*, Article 31(b),(3).
[87] *ibid.* , Article 27(c) & (d)
[88] *ibid.*, Article 30 (c)
[89] *ibid.*, Article 3(c)
[90] *ibid.*, Article 2(b)
[91] *ibid.*, Article 26

Interim Government of Iraq had no power to amend or rescind the orders, regulations or memorandums of the CPA.

This law also stated that Transitional National Assembly would write a draft permanent constitution of Iraq latest by August 15, 2005.[92] This draft constitution was to be presented for referendum not later than 15 October 2005.[93] If this was accepted elections for a permanent government was proposed to held latest by 15 December 2005 and a new government was to assume office by 31 December 2005.[94]

B. Interim Government of Iraq

As it has been stated that November 15, 2003 agreement called for a transitional national assembly to be selected by May 31, 2004 through CPA supervised process of caucuses to be held in the 18 governorates of Iraq.[95] Further this plan was dropped and the proposal for the direct elections for the assembly was adopted. However this proposal was also postponed until the end of the 2004. Meanwhile, an interim provisional government was selected on 1 June 2004. Two members of the Iraqi Governing Council got key posts in this government. These were Dr. Ayad Allawi to be the prime minister of the Interim Government and Sheikh Ghazi al – yawar to be the president of the Iraq. Governing Council dissolved itself on the same date.[96] In the words of Robert Kolb, "it may not be a puppet government, it is not far from it".[97]

This constitution of interim government was not mentioned in the November 15, 2003 agreement and it said only about transitional government. This new arrangement was the result of the massive opposition of the caucuses plan for the election of the delegates of the Iraqi Transitional National Assembly. However TAL which was passed on 8th March 2004 envisaged this arrangement and differentiated between Interim and Transitional Government.

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[92] *ibid.*, Article 61 (a)
[93] *ibid.*, Article 61 (b)
[94] *ibid.* Article 61 (d)
[95] "The November 15 Agreement: Time line to a sovereign, Democratic and Secure Iraq", n. 80.
[96] CPA, n.15, Regulation no.9. Also see, Security Council Resolution 1546 of 8 June 2004, S/RES/1546(2004), preamble, (hereinafter mentioned as SC Res. 1546), [Online: Web], Accessed 25 July 2009, URL: http://www.un.org/Docs/sc/unsc_resolution04.html.
[97] Robert Kolb (2008), n.7, p. 45.

Security Council's view about Interim Government was not clear and seemed to be guided by the motives of the occupying powers. On the one hand, it welcomed the formation of Interim Government of Iraq as the beginning of the new phase in Iraq's transition to a democratically elected government[98] and endorsed this formation as a sovereign Interim Government of Iraq, which would assume full responsibility and authority by June 30, 2004 in respect of government of Iraq.[99] However, on the other hand, it refrained the interim government from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected transitional government of Iraq assumed office.[100]

Resolution 1546 also stipulated that the CPA would cease to exist and that the occupation would end when the interim government would assume power. However it is important to note that Security Council welcomes the interim government but it did not say anything about TAL. This Resolution further endorsed the time table for the political transition of Iraq.[101]

End of Occupation in Iraq

On June 28, 2004, two days in advance of the planned and much advertised dead line of 30 June, the CPA formally handed over the authority to the Iraqi Interim Government and occupation was declared to be at an end. Internationally, the CPA was to end on same date. But as occupation is a factual situation it is natural to analyse the situation on a factual basis. The normal result of the end of occupation is the resumption of sovereignty in the occupied territory. This resumption may be in the form of old or ousted sovereign or a new sovereign. The real test is whether the incoming government is sovereign and whether it posses the basic characteristics of sovereignty subject to its liability under international law.

Thus the mere declaration of termination of occupation does not suffice the requirement for such termination and it should always be judged on the basis of power and capacity of

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[98] SC Res. 1546, n. 96, preambular paragraph.
[99] *ibid.*, operative para. 1.
[100] *ibid.*
[101] *ibid.* para. 4 (c).

the incoming government to exert its sovereign rights. Any lack of authority either in respect of changes made by occupant or future course of action pertaining to welfare of occupied territory would render the incoming government authority less than sovereign. The real issue is to the applicability of related provisions of international law in such situations. Thus it seems that any situation which amounts to occupation despite the so called transfer of authority calls the continued application of the laws of occupation. The transfer of authority must not become an excuse for an abandonment of responsibility.

Legal Nature of the Interim Government

Whether the interim government was sovereign? This is a very important question helpful to determine whether the formal hand over of the authority in Iraq would amount to end of the occupation. This would depend upon the capacity of the Interim Government to take decisions on its own subject to its international liability. This could be analysed, for the sake of convenience, considering two points: firstly, power of Interim government with respect to the presence of multinational forces and secondly, the freedom of this government to take decisions with respect to the acts of the occupant and to decide the future course of action for the welfare of Iraq.

A. Presence of Multinational Forces

As to the presence of the multinational forces in Iraq, two issues were important: firstly, the basis of its continuous presence and secondly, the decision about its engagement in Iraq. Security Council Resolution 1546 of 8 June 2004 assumed that the presence of the multinational forces in Iraq was based upon the request of the incoming Interim Government of Iraq and thus it reaffirmed the authorization of the multinational forces as was made under Security Council Resolution 1511 of October 16, 2003.[102]

However, Security Council Resolution 1511 of October 16, 2003 had authorised multinational forces under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.[103] This authorization of the presence of such forces under Security Council Resolution 1511 was solely based upon the

[102] *ibid.*, operative para 9.
[103] *ibid.*, operative para 13.

competencies of the Security Council under chapter VII of the UN Charter and thus the multinational forces had to be considered as a force falling under Article 48 of the UN Charter.

This made the authorization for the presence of multinational forces after 28 June 2004 at the request of Interim Government of Iraq doubtful. The use of term "reaffirm" in Security Council Resolution 1546 created the problem as to the nature of authorization.[104] However, this question could also be handled in another way. The authority and sovereignty of Interim Government in relation to multinational forces could also be determined by answering the question whether the mandate of the multinational forces would automatically be terminated upon the request of the Interim Government and further Security Council resolution in this respect would only be of declaratory nature.

In this respect operative paragraph 12 of Security Council resolution 1546 stated that:

> [T]he mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of political process . . . and declares that it will terminate this mandate earlier if requested by the Government of Iraq.[105]

Thus a request to withdraw the multinational force could be launched by the Government of Iraq and not by the interim government. Taking note of the Interim Government's Prime Minister's letter to the President of the Security Council on 5 June 2004 requesting the review of the mandate of the multinational forces at the request of the Transitional Government of Iraq,[106] it would be harmonious to draw the inference that this reference of "Government of Iraq" might include the Transitional Government but not in any case the Interim Government of Iraq.

Thus it could be said that only Transitional Government of Iraq could make a request for the withdrawal of the multinational forces. Moreover neither the Interim Government nor the Transitional Government was capable enough to rescind or suspend the mandate of the multinational forces. However, Transitional Government enjoyed an upper hand as it

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[104] *ibid.*, operative para 9.
[105] *ibid.*, operative para 12.
[106] *ibid.* Para 2 of the letter attached to the SC Res. 1546.

could even request for such withdrawal which Interim Government was not authorised to do.

Further the capacity of Interim Government and after this the Transitional Government with respect to military activities of the multinational force was also very limited. The influence of the Interim Government on the military activities of the multinational forces was an indirect one based upon procedures and the formulation of guidelines and policies and the Interim Government was not in a position to influence directly the concrete militarily decisions of the multinational forces.[107]

B. Other Constraints Imposed on the Interim Government

The interim Government of Iraq was not free to take actions on its own and thus lacked the sovereignty. It was always maintained that 'the Sovereignty of the Iraq resided in the state of Iraq and thus the Iraqi people were free to determine their own political future and control their own natural resources'.[108] The emphasis was always on elections and drafting of constitution acceptable to all sections of Iraqi society and thus the power of any functionary enjoying superior authority in Iraq for the time being after 28 June, 2004 did not include the power to take any actions which go beyond such interim period.

This was evident from the Security Council Resolution 1546 which also prohibited the Interim Government of Iraq from taking any decisions which affected Iraq's destiny beyond the limited interim period until an elected Transitional Government assumed office. Restraints on the Interim Government was also very much clear from the TAL which confirmed that the orders, regulations and memorandums of the CPA would remain in force unless and until rescinded by the Iraqi Transitional Government in accordance with TAL.[109] There was no reference of the Interim Government in this respect.

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[107] *ibid.*, operative paragraph 11
[108] *ibid.*, preambular paragraph 2
[109] TAL, n. 83, Article 26 (a) and (c)

Thus the Interim Government was prohibited to change any orders or regulations of the CPA. Apart from this it was also debarred from taking any action which might affect Iraq's destiny beyond the limited interim period.

Conclusion

Occupation of Iraq commenced as soon as the coalition forces became able to exercise their authority in respect of protection granted under the Geneva Convention and Hague regulations. This date might vary from subject to subject according to their nature and the respective needed authority for their protection. The USA and the UK were occupying powers in unambiguous terms. Since occupation is a factual matter any other state which was in a position to derogate and thus had ability to deny the protection under the convention should also be considered as occupying power. The changes made in Iraq were in complete derogation of *status quo ante belum.* Further, the declared date of the termination of occupation in Iraq and resumption of Iraqi sovereignty in the interim government did not corroborate the factual situation on the land. Thus it demanded the continued application of the laws of belligerent occupation.

It seems cautious approach is required in declaring and treating transitional governments as fully sovereign. Transitional situations call the continued application of the provisions of the international humanitarian law including the provisions related to occupation. Thus it can be said that at most June 28, 2004 marked the beginning of a move towards complete Iraqi sovereignty rather than a sudden realization of it.[110]

[110] Adom Roberts (2005), n. 4, p 44.

CHAPTER IV

LAW OF BELLIGERENT OCCUPATION AND TRANSFORMATIVE OCCUPATION

Chapter IV

Law of Belligerent Occupation and Transformative Occupation

Introduction

The occupation of Iraq was a classical case of transformative occupation. Transformative occupation means the occupation with transformative purposes. Range of these transformative purposes is not clear. In the case of Iraq, it affected all most all sphere of Iraqi nation including its political, legal and economical structures. Since laws relating to belligerent occupation do not permit transformation of occupied territory, the supporters of this concept take the help of other sorces. In the case of Iraq, mandate from Security Council resolutions and developments in other fields of international law were largely argued for such negation of laws of belligerent occupation. This presented the question of legitimacy of such arguments and changes made pursuant to them. This chapter studies the same.

Grounds for Changes Made in Iraq

As it has been discussed under previous chapter the CPA has made most fundamental changes in Iraq. Some old entities were abolished and new were created. New guidelines were promulgated altering the old ones in glaring manner. These changes went directly beyond the parameters of the Hague and the Geneva laws. Some grounds provided by the CPA for such changes also went beyond the accepted exceptions under this body of laws.

Grounds given by CPA for the changes made in Iraq[1]

CPA Order No.	Area of Change/ Enactment	Grounds/Reasons provided for the change
Order no. 1	De ba'athification of Iraqi society	Iraqi people have suffered Human Rights abuses by the Ba'ath party. Continuation of Ba'ath party was a threat to Iraqi society and coalition forces.
Order no. 2	Dissolution of entities	These entities were used by previous regime to oppress the people and were instruments of torture, repression and corruption.
Order no. 7	Penal Code	Former regime used some part of penal laws as a tool of repression in violation of International Human Rights norms.
Order no. 12	Trade Liberalization Policy	To develop a free market economy in Iraq.
Order no. 13	The Central Criminal Court of Iraq	To promote development of judicial system. To ensure fundamental standard of due process.
Order no. 15	Establishment of the Judicial Review Committee	To restore and maintain order and security. To promote and ensure due process and rule of law.

[1] Reasons/Grounds given in the table have been taken from the preambles of the respective orders of CPA. Various grounds have been mentioned in the respective orders, here only some of them have been mentioned according to their importance for the present discussion. However, This table discusses only those orders of CPA which has been mentioned in the previous chapter and which are in patent discord with the law of belligerent occupation.

Order no. 17	Status of CPA, MNF-Iraq, certain missions and personnel in Iraq	To clarify the status of CPA, MNF and other diplomatic and consular missions, International consultants and certain contractors in respect of the government and local courts.
Order no. 20	Trade Bank of Iraq	To revitalise Iraqi economy.
Order no. 22	Creation of new Iraqi Army	To contribute to the conditions of stability and security in Iraq. To build the national self defence of Iraq.
Order no. 23	Creation of a Code of Military Discipline for the new Iraqi Army	To contribute to conditions of stability and security in Iraq. To discipline and maintain Iraqi army.
Order no. 27	Establishment of the Facilities Protection Services	To contribute to the conditions of security and stability in Iraq.
Order no. 28	Establishment of the Iraqi Civil Defence Corps	To contribute to the conditions of security and stability in Iraq.
Order no. 31	Modification of Penal Laws and Criminal Proceedings Law	To promote security and stability of the Iraqi people.
Order no. 37	Tax Strategy for 2003	To complete a broad review of taxes in Iraq and until such review is completed an interim tax strategy is needed.
Order no. 39	Foreign Investment	To provide effective administration of Iraq. To solve the problems of the then existing laws regulating commercial activity.

		To transfer Iraq from a non-transparent centrally planned economy to a market economy.
Order no. 42	Creation of the Defence Support Agency	To restore the conditions of security and stability in Iraq. To promote the welfare of the Iraqi people.
Order no. 48	Delegation of authority regarding an Iraqi special Tribunal	To fix accountability for the crimes committed by the previous regime. To prevent threat to public order. To promote rule of law in accordance with international law.
Order no. 64	Amendment to the Iraqi company law of 1997	Some provisions of old laws hinder Iraqi economic growth.
Order no. 67	Ministry of defence	To promote the welfare of the Iraqi people and contribute towards stability and security in Iraq. To further the Iraqi people's right to have national self defence capabilities.
Order no. 69	Delegation of authority to establish the Iraqi National Intelligence Services	To promote the welfare of Iraqi people through the effective administration of the territory. To neutralize the threats to the security of Iraq.
Order no. 74	Interim Law on Securities Market	Previous regulations concerning securities market are not well suited to modern, efficient, transparent and independently

		regulated securities market
Order no. 80	Amendment to Trademark laws	To meet international standards.
Order no. 81	Patent laws	To meet international standards.
Order no. 83	Amendment to copyright laws	To meet international standards.
Order no. 94	Banking laws of 2004	To promote the economic reconstruction and sustainable development.

Thus, it is clear from the above table that most of the grounds provided by CPA to bring the changes in Iraq do not comply with the exceptional limits under which the belligerent occupant is permitted to legislate. These reasons vary from the permissible limits to the non-permissible limits under international law. On close scrutiny, it seems that occupying powers had argued unscrupulously whatever they pleased. They have argued the various grounds in a manner which is in complete disregard with the principle of sovereign equality among nations. It seems that most of the reasons are deliberately phrases in ambiguous terminology by the occupying powers to take advantage in legal discussions.

Apart from this, these grounds have the flavour of hegemonic tendencies in international law. These were the attempts to legalise the illegal wishes of contemporary superpowers with the help of legal arguments. Thus, in this context, it becomes important to discuss the legality of these arguments under international law.

Arguments for Transformative Purposes

Thus it seems that the reasons for the changes vary from the permissible exceptions under international humanitarian law to the transformative purposes of the occupiers. It seems a mixture of permissible and non permissible grounds and thus makes the situation blurred. However it is beyond doubt that the nature of most of the changes goes beyond the temporary authority of the occupiers. These were long lasting and motivated to transform

the social, political and economic structure of Iraq. Though sovereign government of Iraq which was to come after occupation was authorised to rescind these changes but taking note of the nature and effect of any such changes and further vulnerability of new incoming government and various other legal and non-legal strangles imposed on it (as has been discussed in the previous chapter), it could be proved in unambiguous terms that occupiers were working to transform the Iraqi society and had no respect for the of law of belligerent occupation.

Most of the economic changes would turn Iraq from one of the centrally state controlled economy to a most open free market state of the world.[2] These changes did not either relate to the military necessity or daily administration on the temporary basis. Most of these changes referred various grounds in support of the transformative purposes. Some of these grounds were used as common. These were consent of Iraqi Governing Council, mandate of Security Council and developments in other fields of international law.

A. Consent of Iraqi Governing Council

The consent of Iraqi governing Council was largely quoted as one of the reasons for changes introduced in Iraq. But this meant nothing. Governing Council was a nominated body by occupant and nothing more than a council created by the occupying powers themselves. It lacked democratic voice and could not be considered as an independent council free from the effects of the occupying powers. Experiences of two world wars proved that such bodies had always been prone to be used by the occupants according to its own whims.[3]Some authors also argued to curb such practices of occupant.[4]

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[2] Robert Kolb (2008), "Occupation in Iraq since 2003 and the power of the UN Security Council", *International Review of the Red Cross,* 90(869): 29-50, p. 39.

[3] Jean S. Pictet (1958), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in time of War*, Geneva: The International Committee of the Red Cross, p. 243. Author observes: "occupying power usually tried to give some colour of legality and independence of the new organizations, which were formed in the majority of case with the cooperation of certain elements among the population of the occupied country, but it was obvious that they were in fact always subservient to the will of the Occupying Power."

[4] G. Von Glahn (1957*), The Occupation of Enemy Territory _ _ _ A Commentary on the Law and Practice of Belligerent Occupation,* Minneapolis: The University of Minnesota Press, p. 74. Author observes: "the experiences of both world wars clearly indicated the need of circumventing the variety of ingenious devices by which occupants avoided the observance of the rules of international law."

Furthermore, Articles 8[5] and 47[6] of the Geneva Convention IV specifically mention that protected persons in occupied territory could not be deprived of their rights in any circumstances. Obligations and restrictions imposed under this law could not be waived even by ousted sovereign.

B. Mandate from the Security Council

Some of the CPA orders also noted the mandate of respective Security Council Resolutions specially S.C. Res. 1483 of May 22, 2003 to bring such long lasting and transformative changes. This invites one important point to elaborate whether Security Council Resolution 1483 had actually granted such mandate to transgress the well defined body of international humanitarian law.

It is pertinent to analyse the Security Council Resolution 1483 in respect of occupation laws. Following points are worthy to be mentioned in this regard. Firstly, this resolution specifically recognised the authorities, responsibilities and obligations under applicable international law of the USA and the UK as occupying powers under unified command. Secondly, it further called upon the Authority to promote the welfare of the Iraqi people through the effective administration of the territory, consistent with the Charter of the United Nations and other relevant international law.[7] Thirdly, special representative for Iraq (was to be appointed by the Secretary General of the United Nations) was called to assist the people of Iraq in coordination with the CPA in performing some tasks and

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[5] Article 8, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), 75 *UNTS* 287 (hereinafter mentioned as Geneva Convention IV). This Article states that the protected persons can not renounce the rights secured by them in any circumstances or by any special agreement between the High Contracting Parties. Thus the rights of the protected persons are absolute and can not even be waived of by themselves.

[6] *ibid.*, Article 47. This Article is structured under the title "inviolability of rights". It states that the protected persons in occupied territory can not be deprived of any of the benefits available to them under the present convention by the any change introduced in that territory as a result of occupation. This Article affirms the continuity of protection available to the protected persons, and further, states that neither any agreement between the occupying power and authorities of the occupied territory nor any annexation by the occupying power can take away the benefit available to the protected persons.

[7] Security Council Resolution 1483 of 22 May 2003,S/RES/1483(2003) Operative para 4, (hereinafter mentioned as SC Res. 1483), [Online: Web], Accessed 25 July 2009, URL: http://www.un.org/Docs/sc/unsc_resolution03.html.

bringing some changes of humanitarian nature.[8] Fourthly, it supported the formation of an interim Iraqi administration by the people of Iraq with the help of the CPA.[9]

These references of effective administration, setting of performance agenda and formation of an interim Iraqi administration have been the central point of debate among scholars and some of them interpreted it, though criticising this resolution, as mandate to pursue transformative ambition of occupiers and state building.[10] But this does not seem to be the final truth and in the words of Robert Kolb the adoption of this position "is to presuppose something that needs to be proved".[11] There are alternative approaches also which do not consider resolution 1483 as blank mandate for occupying powers to carry on transformative purposes.[12]

This resolution neither mandates the occupiers to take reformist agenda nor endorses any such effort by them in clear terms. Though it mentions some reformist agenda but they are not to be carried solely by the occupants and respects for law of occupation was

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[8] *ibid,* Operative para 8. The list of task for which assistance has been demanded were these: (1) coordination in humanitarian and reconstruction assistance, (2) promotion of safe and orderly and voluntary return of refugee, (3) restoration and establishment of national and local institutions for representatives governance and to facilitate a process leading to a internationally recognized representative government of Iraq, (4) reconstruction of key infrastructure, (5) promotion of economic reconstruction and conditions for sustainable development, (6) encouragement of international efforts to contribute to basic civilian administrative functions, (7) promotion of the protection of human rights, (8) rebuilding the capacity of Iraqi civilian police force, (9) promotion of legal and judicial reforms.

[9] *ibid,* Operative para 9.

[10] Carsten Stahn (2006), " "Jus ad Bellum", "Jus in Bello", _ _ _ "Jus Post Bellum"? - Rethinking the Conception of the Law of Armed Forces", *European Journal of International Law*, 17(5): 921-943, p. 929. Author observes: "which (resolution 1483) merged the structures of belligerent occupation with elements of peace keeping under chapter VII, in order to facilitate the reconstruction under the umbrella of the collective security. . . . the reference of the Council to two parallel legal regimes, namely the continued application of the laws of occupation on one hand , and principles of state building on the other, left the limits of reconstruction in legal limbo". Also see, David J. Scheffer (2003), "Beyond Occupation Law", *American Journal of International Law*, 97(4): 842-860, pp. 845-846. Author observes: "this mandate . . . rested uncomfortably within occupation law and left the Authority with a daunting task of transforming the political landscape of Iraq. . . Such synthesis of Security Council authority and the obligations that flow from occupation law is both unique and exceptionally risky."

[11] Robert Kolb (2008), n. 2, p. 38.

[12] Nehal Bhuta (2005), "The Antinomies of Transformative Occupation", *European Journal of International Law*, 16(4): 721-740, p. 735. Author observes: "the resolutions exhorted, without specifically mandating, the occupying powers to set in motion (with the advice and assistance of the United Nations's Special Representative) a process for the formation of a new political and economic order. . . ". Also see, Marco Sassoli (2005), "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *European Journal of International Law*, 16(4): 661-694, pp. 681-682. Also see, Gregory H. Fox (2005), "The Occupation of Iraq", *Georgetown Journal of International Law*, 36(2):195-297, p. 295.

always demanded.[13] It does not expressly or impliedly deny the applicability of these laws even during carrying out such tasks. Resolution 1483 in its operative paragraph 5, called upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions 1949 and the Hague Regulations 1907. This is a clear indication towards applicability of laws of occupation and should be interpreted as an effort to restrain the occupant's authority to unilaterally undertake transformative purposes.[14]

Some of the problems of interpretation are caused by the ambiguous and broad language of operative paragraph 4 of the resolution 1483. This paragraph called the CPA to promote the welfare of the Iraqi people through the "effective administration" of the territory. It further called it to restore and create the conditions of security and stability in Iraq so that Iraqi people can freely determine their own political future. These mandates were supposed to be carried out in a manner consistent with the Charter of the United Nations and other relevant international law. CPA had used this reference of effective administration in most of its orders.

The subjective nature of phraseology like "welfare of the Iraqi people" and "other relevant international law" is argued by some writers in favour of transformative purposes. Supports of the transformative occupation argue that though this reference to other international law includes the law of occupation but it also includes the developments in other fields of international law.[15] Thus they argue for the conflation of various fields of international law and hence making the situation blurred one.

But this problem could easily be solved by considering the *lex specialis* nature of international humanitarian law. International humanitarian law has its own history and purposes. They are made to be applied in most subtle and vulnerable situation. They have

[13] SC Res. 1483, n. 7, operative para 8. This only mentions some of the agenda of reformist nature which were directed to the Special Representative to the Secretary General and not to the CPA.
[14] Nehal Bhuta (2005), n. 12, p. 735.
[15] David J. Scheffer (2003), n. 10, p. 844. Author observes: "to pull Iraq out of its repressive past and return it to the community of civilized nations, the Authority will aggressively employ international human rights law, principles of democratization, economic initiatives, and perhaps controversial use of force principles in the name of domestic security. Many of the principles advanced by the authority will not have occupation laws as their source; some may have their own *jus cogens* identity or deeply rooted in the normative principles of the United Nations Charter."

their own harsh realities and experiences and thus the protection granted under them should not be taken away merely on the ground of development in other field of international law.[16]

There is another problem of such juxtaposition or conflation. It negates the rule of self determination and further denies the indigenous cultural voices in such imported changes. It seems the long lasting effects of such conflation on occupied territory is also contrary to the basic understanding of the international law that the occupation is a temporary measure and occupier is prohibited to decide the destiny or future course of action of the occupied territory beyond the period of occupation.

Further, if it is argued that the Security Council has mandated such transformative changes in Iraq by the CPA then its parallel corollary should also be checked. It means whether the Security Council has authority to disapprove the CPA actions in Iraq. The answer is simple negative. Apart from this there is no obligation on the CPA to report to the Security Council. CPA reported to the USA department of defence and the USA president. Security Council has no direct or indirect control over the CPA. Thus to argue that Security Council has mandated such changes is an attempt to legalise what is illegal *per se.*

C. International Humanitarian Law and the Security Council

Apart from this as the International humanitarian law obligations fall under *jus cogens,* some argues that even Security Council Resolutions should not derogate from it.[17] Nevertheless, there are opposite views also and it is argued that Security Council may

[16] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* (1996) *ICJ Reports.* Dissenting opinion of judge C. Weeramantry, p. 444. He observes that "problems in humanitarian law are not abstract. . . they can not be logically or intellectually disentangled from their terrible context. Distasteful though it be to contemplate the brutalities surrounding these legal questions, the legal questions can only be squarally addressed when those brutalities are brought in to vivid focus."

[17] Marco Sassoli (2005), n.12, p. 681.

give mandate to derogate from *jus cogens*.[18] However, the question that who will decide whether the Security Council Resolutions has violated *jus cogens* seems problematic.

But without going in to this debate, it seems reasonable to draw a line of concurrence that there is always be a presumption that Security Council has not derogated from the international humanitarian law norms and any such claimed derogation must be explicit in unambiguous terms.[19] Any ambiguity in its resolutions must be resolved in favour of international humanitarian law norms. Any measures authorised by the Security Council in generic terms, as in the case of Iraq, should be implemented in a manner that respects international humanitarian law. This argument is also supported by the fact that Security Council has also called upon to take actions to bring violations of international humanitarian law at an end.[20]

Thus it seems that Security Council resolutions should be interpreted in harmonious manner to avoid any conflict with principles of international humanitarian law and more particularly with the principles of occupation laws. They could not be used to defy or negate the nature of existence of any factual situation as of occupation. Any such attempt would amount to change the basic framework of preservationist approach of laws of occupation.

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[18] Bernd Martenczuk (1999), "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?", *European Journal of International Law*, 10(3): 517-547, p. 545-546.

[19] *Legal consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion,* (1971) *ICJ Reports*, p. 53, Para 114. The court observes: "the language of the Security council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Concil". Also see, Alexander Orakhelashvili (2005), "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions", *European Journal of International Law*, 16(1): 59-88, pp. 68 &78-79. Also see, Robert Kolb (2008), n.2, p. 41; Marten Zwanenburg (2004), "Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation", p. 762 [Online: Web], Accessed 25 July 2009, URL: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/Section_ihl_occupird_territory

[20] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, (2004), *ICJ Reports*, p. 200, para 159,160. In Para 159 Court observes: "all states are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the occupied Palestine Territory". Further in Para 160, court is of the view that "the United Nations, and especially the General Assembly and Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion".

In essence the belligerent occupation is conflict of interest between occupiers and occupied. It is a situation which is very prone to be used according to the whim and caprices of the occupying powers for their own benefit. This makes the conditions of inhabitants vulnerable. Thus the law of occupation is an attempt to provide some help to the occupied. Lord Mc Nair observed that "the law of belligerent occupation is an attempt to substitute for chaos some kind of order, however harsh it may be".[21] Thus any such mandate given by the Security Council in most generic words should be interpreted in favour of preservationist approach of occupation laws.[22]

D. Developments in Other Fields of International Law

There is another approach which supports the transformative purposes in Iraq. This argues that occupation laws have become old and does not meet the challenges of contemporary international law.[23] Advocates of this approach mention the development in other branches of international law and thus feel uncomfortable in balancing the occupation laws with respect to those developments. Mainly they discuss the developments in human rights jurisprudence. Some authors also argue that occupation laws should not be applied in specific situations which demand transformation.[24]

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[21] Lord McNair and A.D. Watts (1966), *The Legal Effects of War*, Cambridge: Cambridge University Press, p. 371.

[22] It is also important to mention that most of the international institutions are not free from their own political biases. This position can best be put in the words of Hans J. Morgenthau that "there is no such thing as the policy of an organization, international or domestic, apart from the policy of its most influential members...". United Nations Security Council is not an exception. Most of the deliberations take place in highly politicized atmosphere. This issue became more important in the case of Iraq as the occupying powers of Iraq were the permanent members of the Security Council. Thus it demands more cautious approach, and hence any ambiguity in Security Council Resolution must be interpreted in favour of application of occupation laws in its full essence. Also see, Jose E. Alvarez (2003), "Hegemonic International Law Revisited", *American journal of International Law,* 97(4):873-888, p. 2003. Author observes: "resolution 1483, is a study in deliberate ambiguity".

[23] Davis P. Goodman (1985), "The Need for Fundamental Change in the Laws of Belligerent Occupation", *Stanford Law Review*, 37(6): 1573-1608, p1607. Author observes: "the current law of belligerent occupation is so for removed from reality that even those nations inclined to obey the law will find it difficult to do so. . . Belligerent occupiers may desire a greater role in the affairs of the occupied territory and the occupied territory may require greater governmental involvement in its local affairs.

[24] David J. Scheffer (2003), n.10, p. 848-849. Author observes: ". . . the dominant premise of occupation law has been that regulation is required for the military occupation of foreign territory, but not necessarily from its transformation . . . the occupational clauses of the Fourth Geneva Convention are for more relevant to a belligerent occupation than to an occupation designed to liberate a society from its repressive governance and transform it as a nation guided by international norms. . ."

The advisory opinion of the International Court of justice in the Wall Case confirms the applicability of the International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966, and United Nations Convention on the Rights of Child 1989 in occupied territory.[25] Thus occupant is obliged to implement provisions of such conventions and to abolish the regulations and institutions of the occupied territory which contravene the standards of human rights laws. This also gives right to the individuals of the occupied territory, either in side in occupied territory or outside, to demand redress for their human rights violations from the occupying power.[26] However criticism of this approach is also available.[27]

As regards abolition of institutions of the occupied territory which are in contravention of the standards of human rights norms, it should always be taken into mind that such contravention should be of substantive nature and not be only in nature of procedure of implementation. Procedure of implementation should conform to local cultural, legal and economic traditions. According to ICRC commentary on Geneva Convention IV, occupying authority must not change local legislation 'merely to make it accord with their own legal conceptions'.[28] Existence of a similar law in occupier's own country can not be the proper test in this regard.[29]Thus while implementing such changes the occupant should always keep in mind that it is not the sovereign of the territory and it should introduce only those which are absolutely necessary under its human rights obligations.[30]

However, there are other practical problems in merging of human rights and humanitarian laws. It demands the study of the realist consequences of such merging. Mostly human rights laws are individual centric justifies the limiting of rights for the sake

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[25] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, (2004), *ICJ Reports*, pp. 191-192, para 134.
[26] Steven R. Ratner (2005), "Foreign Occupation and International Territorial Administration: The Challenges of Convergence", *European Journal of International Law* 16(4): 695-719, p. 704.
[27] Michael J. Dennis (2005), "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *American Journal of International Law,* 99(1): 119-141, pp. 141. ; Also see, Michael J. Kelly (2005), "Critical Analysis of the International Court of Justice Ruling on a Israel's Security Barrier", *Fordham International Law Journal,* 29(1): 181-228, p. 228.
[28] Jean S. Pictet (1958), n.3, p. 336.
[29] Marco Sassoli (2005), n.12, p. 677.
[30] *ibid*

of multiple reasons. As compared to the international humanitarian law which singles out people living under occupation as protected persons, the human rights discourse places everyone on equal plane without any distinction between occupied and occupier. This equalisation of occupied and occupier may lead to a distorted discourse that looks at the situation as conflict of rights.

Further, human rights discourse treats individual localised violations which are deemed to be the exception in a regime where democracy and human rights are the norm. However, in occupation where norm is the denial of rights and lack of democracy, human rights analysis may distort the picture by pointing that the right denial as the exception rather than the rule. Thus, individual win human rights victory may create the myth of a "benign occupation" that protects human rights even though they are mostly denied.[31] About such merger of human rights laws with laws of occupation Aeyal M Grass observes:

> [T]ransplanting human rights to a situation of occupation may thus blur its inherently undemocratic rights denying nature, and confer upon it the perceived legitimacy of an accountable regime.[32]

Apart from this, there are some other differences between humanitarian law and human rights law. These are as follows. Firstly, humanitarian laws treaties are all universal and there is no regional variation from one continent to another. Secondly, there is no classification under the humanitarian law like first, second and third generation human rights. Thirdly, the most politically sensitive human rights like political rights and form of governments are absent from the humanitarian laws.[33] These specialities of humanitarian laws make this body a coherent system of law free from any political biases and more susceptible to enjoy universal application without any controversy.

However it is important to note that the above mentioned differences between these two bodies of laws should not be considered as arguments against the application of the well established norms of human rights laws in occupied territories but this work only argue

[31] Aeyal M. Gross (2007), "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?", *European Journal of International Law*, 18(1) : 1-35, p. 8.
[32] *ibid*, p. 33.
[33] Louise Doswald Beck and Sylvain Vite (1999), "International Humanitarian Law and Human Rights Law", in M. K. Balachandran and Rose Varghese (eds.), *Introduction to International Humanitarian Law,* New Delhi: International Committee of the Red Cross, p. 139.

that these specialities and differences must be kept in mind always and the occupant must not use this capacity to alter the political system of the occupied territory in the garb of human rights reforms.[34]

Other Dangers of Transformative Occupation

There are other reasons also to discard arguments made in favor of transformative purposes. Any such acceptance of the logic for transformative purposes would certainly mean the enhanced capacity of the occupant without any clear and unambiguous mandate. Enhanced authority without any clear mandate and effective reporting system is always prone to be used according to the whims of the occupying powers. The potential danger can be demarcated in the words of Marco Sassoli:

> [S]imple encouragement of international efforts to promote legal and judicial reform by an occupying power is certainly too vague to justify an occupying power to legislate beyond what IHL permits.[35]

Further, such permissive interpretation of laws of occupation may lead to consequential problems in other areas of international law. These may be as follows:[36] (1) it may blur the line between occupation and annexation. Limited powers of the occupiers and its temporary character might be harmed by such wide interpretation and it may lead to the situation that would amount to annexation in disguise of occupation for the time being, (2) it may dilute the principle that the applicability of international humanitarian law is free from the justness of use of force. This may be utilized by an intervener to realize those war aims under the garb of occupation laws which are prohibited according to the rules of use of force. This would amount to an additional catastrophe for international law in the form of humanitarian occupation, a step forward from humanitarian intervention, (3) it has the potential to negate the principle of autonomy of states. The principle that "every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state" would cease to apply in case of occupied territory and (4) the unconstrained occupier would face no barrier to enact

[34] However it is also important to note that this judgment was given with respect to prolonged military occupation by Israel of Palestinian territory, and this should be considered in that regard only.
[35] Marco Sassoli (2005), n.12, p. 681.
[36] Gregory H. Fox (2005), n.12, p. 264-269.

legislation that could result in the incurred international liability of the occupied territory by the temporary occupant.

Conclusion

Thus it is clear from the above discussion that most of the changes made in Iraq have transgressed the law of belligerent occupation. There are also some arguments in favour of such transgression but it seems that those arguments are in themselves flawed and baseless. This renders most of the changes made in Iraq out of the capacity of the occupant and hence makes them devoid of any legal effect. Apart from this the general implications of such transgression are also unlimited and opens Pandora box for occupying powers. This threatens the pluralist world order and makes third world countries most vulnerable. Thus there is a need to preserve conservationist principle of laws of occupation.

CHAPTER V

CONCLUSION AND SUGGESTIONS

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Conclusion and Suggestions

The question of belligerent occupation can be considered a question of fact. Its commencement and termination both are factual and their determination should always take in to consideration the ground reality on the territory. Any acceptance or negation in this respect is only of declaratory nature and does not alter the situation in legal discussions. Even disputed status of the territory does not alter the applicability of law of belligerent occupation. It is sufficient that the territory in question does not belong to the occupying power. Doctrine of subjugation or *debellatio* has become obscured and thus, even complete demise of enemy does not alter the status of its territory from one of the occupied territory, and hence demands the applicability of laws relating to belligerent occupation.

The modern laws relating to belligerent occupation have been developed as a part of law of war to protect the 19th century European territorial order. The basic premise behind this development lies in the theory that conquest does not change the sovereignty. It now seems to be established legal norms that the occupation does not transfer sovereignty, and hence, the occupant can not demand allegiance from the inhabitants of the occupied territory though he may seek obedience for his legitimate orders. The law of belligerent occupation apply from the beginning of the occupation itself. It means, a formal declaration of the occupation is not a necessary criterion. The rights granted under this body of law are inviolable and can not be withdrawn in any circumstances. Even the consent of the ousted sovereign or of any institutional body created by the belligerent occupant during occupation does not alter the applicability of these laws.

The situation of belligerent occupation enables the occupant to make his will felt due to its status of superior military authority in the concerned territory for the time being. It is a *defacto* control of territory and the occupier is its temporary *defacto* power. Occupant's primary duty is to maintain law and order. To this end, he must respect the laws in force in the country unless absolutely prevented by it. The occupying power is prohibited from changing the whole legal and political structure of the occupied territory. Imposition of occupant's own systems in the occupied territory is also prohibited. The occupying power is seen as *trustee* protecting the *status quo ante bellum.* Thus these laws create the presumption of normative continuity in legal, political and economic structure of the occupied territory subject to some minimal exceptions.

In general, these exceptions have been made in favour of the following measures: firstly, security and absolute military necessity of the occupant; secondly, preservation of the public order in the occupied territory and thirdly, implementation of any obligation under the Geneva Convention IV. Apart from these exceptions the occupant is obliged to leave the political, legal and economic structures of the occupied territory intact. The occupying power assumes only such authority as is necessary to administer the territory and the general legislative competence remains with the displaced sovereignty.

Normally, the occupation is terminated with the withdrawal of the foreign forces. This may take place either by the native uprising or by the subsequent triumph by regular forces of displaced sovereign or by the armistice agreement. The test is the overall termination of the occupant's authority over occupied territory. Small scale and scattered belligerency inspired from the patriotic feelings does not alter the situation. Even mass uprisings do not alter the situation unless the occupant is completely driven out of the territory or its control is reduced to so minimal for the comparative longer period of time, to be considered as the occupying power. However, one should avoid arguing area wise piecemeal reduction of occupant's authority for the small time period due to various reasons as termination of occupation. Thus the protection granted under this law will continue to apply in such situations also.

Further, termination of occupation should always be followed by the resumption of sovereignty. There should not be any intermediate period between these two. Any such transitional period towards complete sovereignty should be considered as continuance of occupation. The incoming government after termination of occupation should have the right to rescind all or any of the changes made by the occupying power. It should be sovereign in all respects subjects to its liability under international law. These parameters could also be used to determine the resumption of sovereignty in the incoming government. However it seems from the writings that the occupying power may demand the recognition of its lawful acts which are within its limit and in accordance with the Hague Regulation IV of 1907 and the Geneva Convention IV of 1949. The same may be true for third states also. However, the question that who will determine the legality of the changes seems problematic.

In the light of above discussion, the occupation of Iraq presented a unique situation. Large scale changes have been made in clear transgression of laws of occupation. Iraq was changed almost completely in its political and economic outlook. Old Iraqi political elements were disbanded and kept aloof from taking part in further political process. New institutions were created. Commercial laws specially pertaining to foreign investment, banking and intellectually property were altered in a manner to make Iraq one of the most open market economies of the world. In short Iraq's path towards future was decided by the occupying powers whose legal capacity did not permit them to do that.

The occupying powers' arguments to bring such changes were based on following points: Firstly, Security Council mandate to promote the welfare of the Iraqi people through the "effective administration" of the territory; Secondly, the consent of the Governing Council of Iraq to bring such changes and Thirdly, developments in other fields of international law and the incompatibility of the law of belligerent occupation towards those developments.

As regards the Security Council mandate it can not be proved beyond doubt that the Security Council has permitted such transgression. The Security Council had not derogated from the laws of belligerent occupation in case of Iraq. One could only say that its language is somewhat ambiguous in some paragraphs of Resolution 1483. But on

close scrutiny it was clear that the Security Council had always said for the application of the laws of occupation in Iraq.

Moreover, Resolution 1483 was a compromise document. It could be very much seen from its ambiguous and generic phraseology. It mentions both the commitment to reform and the adherence to the law of occupation in consecutive paragraphs.[1] Thus it would be wrong to argue that the Security Council had mandated the occupying powers in Iraq to commit such blatant transgression against the law of occupation. The fact that the Coalition Provisional Authority was not reporting to the Security Council and the Security Council was not exercising any direct or indirect control over the CPA, further negate the probability of any such endorsement or mandate from the Security Council for such transgression.

The principles of IHL have acquired the status of *jus cogens* in international law. They are the declaration of the customary principles of international law and the obligations under these laws are now considered as obligations *erga omnes*. There is a general presumption against any derogation from such body of law. Security Council is not supposed to derogate from the customary principles of international law.

Even if it is argued that Security Council has permitted the derogation from the law of occupation it should be clearly established. Mere exhortations, recommendations, or guidelines are not sufficient to corroborate such argument. Ambiguous interpretations could not be argued for such claimed derogation. Political bargaining can not be engaged in at the expense of humanitarian law. And thus any ambiguity in the Security Council mandate should be interpreted in favour of applicability of IHL.

The consent of the Governing Council of Iraq does not seem to be a good reasoning for changes introduced in Iraq. This was a body nominated by the CPA and lacked any democratic voice. Consent of any such bodies does not matter and has no force to alter the legally applicable set of laws to a particular situation. Such consents are also not tenable for the reason of nature of law of belligerent occupation that considers obligation under these laws as obligation *erga omnes*. Any such attempt should be demoralised to

[1] Paragraphs 4 and 5 of SC Res. 1483 of 22 May 2003. S/Res/1483(2003), [Online: Web], Accessed 25 July 2009, URL: http//: www.un.org/Docs/sc/unsc_resolution03.html.

make the applicability of the laws of belligerent occupation free from any political wrangles and motives.

Arguments of development in other fields of international law and insufficiency of law of belligerent occupation to comply with those developments, also do not seem to be conclusive. Any such argument is against the structural plurality of political and economic systems of the world in favour of contemporary superpowers. Apart from this most of the modern trends in international law, particularly in international economics and trade, have their own history of critics and crisis. They are not free from their own political biases and do not enjoy the status of universal recognition and compelled enforcement.

International human rights law may be argued to be implemented in the occupied territories. But any such implementation should be of content and not of form. Implementation of human rights norms in the occupied territories does not give the occupying power a blanket authority to change all the political, legal and economic systems of the occupied territory. Regard should always be paid to the temporary nature of the belligerent occupation.

There are other practical dangers for holding the view that the applicability of this set of laws could be altered or restricted. This would lead to the negation of the fundamental guarantees available to the inhabitants of the occupied territory. Robert Kolb observes about such danger in following words:

> [M]anipulations in the scope of application would allow the entire occupation regime to be swept aside from the outset by a stroke of the pen. The substantive guarantees would then be robbed of any *effet utile* in a way that is contrary to the most intimate spirit of the modern occupation laws.[2]

However, at last it is important to note that the IHL is not a mere intellectual interrogation of black letters laws. They can not be separated from the harsh ground level reality. Any argument about these laws should not ignore the potential dangers which might be caused by such interpretation. Justice Holmes has argued that the life of law is

[2] Robert Kolb (2008), "Occupation in Iraq since 2003 and the power of the UN Security Council", *International Review of the Red Cross*, 90(869): 29-50, p 46.

not logic but experience, and the experience of Iraq has shown the inherent fragility of the notion of "transformative occupation". Aggravating humanitarian crisis and continuous shrinkage of availability of public utility services were the part of such experience during the occupation.

Transformative occupation is a concept of inherent dichotomy and paradox. The notion of transformative occupation has various legal and political flaws in it and always prone to be applied against the pluralist world order. It is an easy instrument in the hands of the contemporary superpowers to mould the basic guarantees of normative continuity of institutions of the occupied territory.

Thus this study suggests that:

- Commencement and termination of occupation is a factual matter and any declaration in this regard only has declaratory value.
- Termination of occupation should always be followed by resumption of complete sovereignty in the occupied territory.
- Incoming government after the termination of occupation should have the right to rescind all or any of the changes made during the occupation.
- Occupying powers, while using its legislative capacity, should always keep in mind the temporary nature of occupation and should avoid implementing long lasting changes.
- The law of belligerent occupation is still pertinent to answer the challenges of the contemporary world and hence there should not be any attempt to juxtapose this law with any other ambiguous mandate of any international body.
- Notion of transformative occupation is too vague to clearly demarcate the rights and duties of the occupying powers and thus should be discarded.

Apart from this, the sordid example of Iraqi occupation has thrown up many legal questions that will need to be resolved. The IHL, it seems, will need to tighten up the protective umbrella. It presents an opportunity and a challenge to the sovereign states and the humanitarian agency- the ICRC.

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ANNEXURES

Annexure I
Security Council Resolution 1483 of 22 May 2003[1]

The Security Council,

Recalling all its previous relevant resolutions,

Reaffirming the sovereignty and territorial integrity of Iraq,

Reaffirming also the importance of the disarmament of Iraqi weapons of mass destruction and of eventual confirmation of the disarmament of Iraq,

Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, *welcoming* the commitment of all parties concerned to support the creation of an environment in which they may do soon as soon as possible, and *expressing* resolve that the day when Iraqis govern themselves must come quickly,

Encouraging efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender, and, in this connection, *recalls* resolution 1325 (2000) of 31 October 2000,

Welcoming the first steps of the Iraqi people in this regard, and noting in this connection the 15 April 2003 Nasiriyah statement and the 28 April 2003 Baghdad statement,

Resolved that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance,

Noting the statement of 12 April 2003 by the Ministers of Finance and Central Bank Governors of the Group of Seven Industrialized Nations in which the members recognized the need for a multilateral effort to help rebuild and develop Iraq and for the need for assistance from the International Monetary Fund and the World Bank in these efforts,

Welcoming also the resumption of humanitarian assistance and the continuing efforts of the Secretary-General and the specialized agencies to provide food and medicine to the people of Iraq,

Welcoming the appointment by the Secretary-General of his Special Adviser on Iraq,

Affirming the need for accountability for crimes and atrocities committed *by* the previous Iraqi regime,

Stressing the need for respect for the archaeological, historical, cultural, and religious heritage of Iraq, and for the continued protection of archaeological, historical, cultural, and religious sites, museums, libraries, and monuments,

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority"),

Noting further that other States that are not occupying powers are working now or in the future may work

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[1] Source: United Nations Security Council Resolution 1483 of 22 May 2003, Doc. S/RES/1483(2003), also available [Online: Web], URL: http://www.un.org/Docs/sc/unsc_resolution03.html.

under the Authority,

Welcoming further the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority,

Concerned that many Kuwaitis and Third-State Nationals still are not accounted for since 2 August 1990,

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Appeals* to Member States and concerned organizations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution;

2. *Calls upon* all Member States in a position to do so to respond immediately to the humanitarian appeals of the United Nations and other international organizations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure;

3. *Appeals* to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice;

4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;

5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

6. *Calls upon* the Authority and relevant organizations and individuals to continue efforts to locate, identify, and repatriate all Kuwaiti and Third-State Nationals or the remains of those present in Iraq on or after 2 August 1990, as well as the Kuwaiti archives, that the previous Iraqi regime failed to undertake, and, in this regard, *directs* the High-Level Coordinator, in consultation with the International Committee of the Red Cross and the Tripartite Commission and with the appropriate support of the people of Iraq and in coordination with the Authority, to take steps to fulfil his mandate with respect to the fate of Kuwaiti and Third-State National missing persons and property;

7. *Decides* that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and *calls upon* the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph;

8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in

Iraq, and, in coordination with the Authority, assisting the people of Iraq through:

(a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;

(b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;

(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;

(d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;

(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;

(f) encouraging international efforts to contribute to basic civilian administration functions;

(g) promoting the protection of human rights;

(h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and

(i) encouraging international efforts to promote legal and judicial reform;

9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority;

10. *Decides* that, with the exception of prohibitions related to the sale or supply to Iraq of arms and related materiel other than those arms and related materiel required by the Authority to serve the purposes of this and other related resolutions, all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq established by resolution 661 (1990) and subsequent relevant resolutions, including resolution 778 (1992) of 2 October 1992, shall no longer apply;

11. *Reaffirms* that Iraq must meet its disarmament obligations, encourages the United Kingdom of Great Britain and Northern Ireland and the United States of America to keep the Council informed of their activities in this regard, and *underlines* the intention of the Council to revisit the mandates of the United Nations Monitoring, Verification, and Inspection Commission and the International Atomic Energy Agency as set forth in resolutions 687 (1991) of 3 April 1991, 1284 (1999) of 17 December 1999, and 1441 (2002) of 8 November 2002;

12. *Notes* the establishment of a Development Fund for Iraq to be held by the Central Bank of Iraq and to be audited by independent public accountants approved by the International Advisory and Monitoring Board of the Development Fund for Iraq and looks forward to the early meeting of that International Advisory and Monitoring Board, whose members shall include duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and of the President of the World Bank;

13. *Notes further* that the funds in the Development Fund for Iraq shall be disbursed at the direction of the Authority, in consultation with the Iraqi interim administration, for the purposes set out in paragraph 14 below;

14. *Underlines* that the Development Fund for Iraq shall be used in a transparent manner to meet the

humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq;

15. *Calls upon* the international financial institutions to assist the people of Iraq in the reconstruction and development of their economy and to facilitate assistance by the broader donor community, and welcomes the readiness of creditors, including those of the Paris Club, to seek a solution to Iraq's sovereign debt problems;

16. *Requests* also that the Secretary-General, in coordination with the Authority, continue the exercise of his responsibilities under Security Council resolution 1472 (2003) of 28 March 2003 and 1476 (2003) of 24 April 2003, for a period of six months following the adoption of this resolution, and terminate within this time period, in the most cost effective manner, the ongoing operations of the "Oil-for-Food" Programme (the "Programme"), both at headquarters level and in the field, transferring responsibility for the administration of any remaining activity under the Programme to the Authority, including by taking the following necessary measures:

(a) to facilitate as soon as possible the shipment and authenticated delivery of priority civilian goods as identified by the Secretary-General and representatives designated by him, in coordination with the Authority and the Iraqi interim administration, under approved and funded contracts previously concluded by the previous Government of Iraq, for the humanitarian relief of the people of Iraq, including, as necessary, negotiating adjustments in the terms or conditions of these contracts and respective letters of credit as set forth in paragraph 4 (d) of resolution 1472 (2003);

(b) to review, in light of changed circumstances, in coordination with the Authority and the Iraqi interim administration, the relative utility of each approved and funded contract with a view to determining whether such contracts contain items required to meet the needs of the people of Iraq both now and during reconstruction, and to postpone action on those contracts determined to be of questionable utility and the respective letters of credit until an internationally recognized, representative government of Iraq is in a position to make its own determination as to whether such contracts shall be fulfilled;

(c) to provide the Security Council within 21 days following the adoption of this resolution, for the Security Council's review and consideration, an estimated operating budget based on funds already set aside in the account established pursuant to paragraph 8 (d) of resolution 986 (1995) of 14 April 1995, identifying:

(i) all known and projected costs to the United Nations required to ensure the continued functioning of the activities associated with implementation of the present resolution, including operating and administrative expenses associated with the relevant United Nations agencies and programmes responsible for the implementation of the Programme both at Headquarters and in the field;

(ii) all known and projected costs associated with termination of the Programme;

(iii) all known and projected costs associated with restoring Government of Iraq funds that were provided by Member States to the Secretary-General as requested in paragraph 1 of resolution 778 (1992); and

(iv) all known and projected costs associated with the Special Representative and the qualified representative of the Secretary-General identified to serve on the International Advisory and Monitoring Board, for the six month time period defined above, following which these costs shall be borne by the United Nations;

(d) to consolidate into a single fund the accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995);

(e) to fulfil all remaining obligations related to the termination of the Programme, including negotiating, in the most cost effective manner, any necessary settlement payments, which shall be made from the escrow accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995), with those parties that previously have entered into contractual obligations with the Secretary-General under the Programme, and to determine, in coordination with the Authority and the Iraqi interim administration, the future status of contracts undertaken by the United Nations and related United Nations agencies under the accounts established pursuant to paragraphs 8 (b) and 8 (d) of resolution 986 (1995);

(f) to provide the Security Council, 30 days prior to the termination of the Programme, with a comprehensive strategy developed in close coordination with the Authority and the Iraqi interim administration that would lead to the delivery of all relevant documentation and the transfer of all operational responsibility of the Programme to the Authority;

17. *Requests further* that the Secretary-General transfer as soon as possible to the Development Fund for Iraq 1 billion United States dollars from unencumbered funds in the accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995), restore Government of Iraq funds that were provided by Member States to the Secretary-General as requested in paragraph 1 of resolution 778 (1992), and *decides* that, after deducting all relevant United Nations expenses associated with the shipment of authorized contracts and costs to the Programme outlined in paragraph 16 (c) above, including residual obligations, all surplus funds in the escrow accounts established pursuant to paragraphs 8 (a), 8 (b), 8 (d), and 8 (f) of resolution 986 (1995) shall be transferred at the earliest possible time to the Development Fund for Iraq;

18. *Decides* to terminate effective on the adoption of this resolution the functions related to the observation and monitoring activities undertaken by the Secretary-General under the Programme, including the monitoring of the export of petroleum and petroleum products from Iraq;

19. *Decides* to terminate the Committee established pursuant to paragraph 6 of resolution 661 (1990) at the conclusion of the six month period called for in paragraph 16 above and further decides that the Committee shall identify individuals and entities referred to in paragraph 23 below;

20. *Decides* that all export sales of petroleum, petroleum products, and natural gas from Iraq following the date of the adoption of this resolution shall be made consistent with prevailing international market best practices, to be audited by independent public accountants reporting to the International Advisory and Monitoring Board referred to in paragraph 12 above in order to ensure transparency, and decides further that, except as provided in paragraph 21 below, all proceeds from such sales shall be deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted;

21. *Decides further* that 5 per cent of the proceeds referred to in paragraph 20 above shall be deposited into the Compensation Fund established in accordance with resolution 687 (1991) and subsequent relevant resolutions and that, unless an internationally recognized, representative government of Iraq and the Governing Council of the United Nations Compensation Commission, in the exercise of its authority over methods of ensuring that payments are made into the Compensation Fund, decide otherwise, this requirement shall be binding on a properly constituted, internationally recognized, representative

government of Iraq and any successor thereto;

22. *Noting* the relevance of the establishment of an internationally recognized, representative government of Iraq and the desirability of prompt completion of the restructuring of Iraq's debt as referred to in paragraph 15 above, further decides that, until December 31, 2007, unless the Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution, and that all States shall take any steps that may be necessary under their respective domestic legal systems to assure this protection, and that proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations except that the above- mentioned privileges and immunities will not apply with respect to any legal proceeding in which recourse to such proceeds or obligations is necessary to satisfy liability for damages assessed in connection with an ecological accident, including an oil spill, that occurs after the date of adoption of this resolution;

23. *Decides* that all Member States in which there are:

(a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or

(b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, shall freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement, immediately shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognized, representative government of Iraq; and *decides further* that all such funds or other financial assets or economic resources shall enjoy the same privileges, immunities, and protections as provided under paragraph 22;

24. *Requests* the Secretary-General to report to the Council at regular intervals on the work of the Special Representative with respect to the implementation of this resolution and on the work of the International Advisory and Monitoring Board and *encourages* the United Kingdom of Great Britain and Northern Ireland and the United States of America to inform the Council at regular intervals of their efforts under this resolution;

25. *Decides* to review the implementation of this resolution within twelve months of adoption and to consider further steps that might be necessary;

26. *Calls upon* Member States and international and regional organizations to contribute to the implementation of this resolution;

27. *Decides* to remain seized of this matter.

Annexure II
Security Council Resolution 1511 of 16 October 2003[2]

The Security Council,

Reaffirming its previous resolutions on Iraq, including resolution 1483 (2003) of 22 May 2003 and 1500 (2003) of 14 August 2003, and on threats to peace and security caused by terrorist acts, including resolution 1373 (2001) of 28 September 2001, and other relevant resolutions,

Underscoring that the sovereignty of Iraq resides in the State of Iraq, *reaffirming* the right of the Iraqi people freely to determine their own political future and control their own natural resources, *reiterating* its resolve that the day when Iraqis govern themselves must come quickly, and recognizing the importance of international support, particularly that of countries in the region, Iraq's neighbours, and regional organizations, in taking forward this process expeditiously,

Recognizing that international support for restoration of conditions of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and *welcoming Member State contributions in this regard under resolution 1483 (2003),*

Welcoming the decision of the Governing Council of Iraq to form a preparatory constitutional committee to prepare for a constitutional conference that will draft a constitution to embody the aspirations of the Iraqi people, and *urging* it to complete this process quickly,

Affirming that the terrorist bombings of the Embassy of Jordan on 7 August 2003, of the United Nations headquarters in Baghdad on 19 August 2003, of the Imam Ali Mosque in Najaf on 29 August 2003, and of the Embassy of Turkey on 14 October 2003, and the murder of a Spanish diplomat on 9 October 2003 are attacks on the people of Iraq, the United Nations, and the international community, and *deploring* the assassination of Dr. Akila al-Hashimi, who died on 25 September 2003, as an attack directed against the future of Iraq,

In that context, *recalling* and *reaffirming* the statement of its President of 20 August 2003 (S/PRST/2003/13) and resolution 1502 (2003) of 26 August 2003,

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reaffirms* the sovereignty and territorial integrity of Iraq, and *underscores,* in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and

obligations under applicable international law recognized and set forth in resolution 1483 (2003), which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority, inter alia through steps envisaged in

[2] Source: United Nations Security Council Resolution 1511 of 16 October 2003, Doc. S/RES/1511(2003), also available [Online: Web], URL: http://www.un.org/Docs/sc/unsc_resolution03.html.

paragraphs 4 through 7 and 10 below;

2. *Welcomes* the positive response of the international community, in for a such as the Arab League, the Organization of the Islamic Conference, the United Nations General Assembly, and the United Nations Educational, Scientific and Cultural Organization, to the establishment of the broadly representative Governing Council as an important step towards an internationally recognized, representative government;

3. *Supports* the Governing Council's efforts to mobilize the people of Iraq, including by the appointment of a cabinet of ministers and a preparatory constitutional committee to lead a process in which the Iraqi people will progressively take control of their own affairs;

4. *Determines* that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established

and assumes the responsibilities of the Authority;

5. *Affirms* that the administration of Iraq will be progressively undertaken by the evolving structures of the Iraqi interim administration;

6. *Calls upon* the Authority, in this context, to return governing responsibilities and authorities to the people of Iraq as soon as practicable and *requests* the Authority, in cooperation as appropriate with the Governing Council and the Secretary-General, to report to the Council on the progress being made;

7. *Invites* the Governing Council to provide to the Security Council, for its review, no later than 15 December 2003, in cooperation with the Authority and, as circumstances permit, the Special Representative of the Secretary-General, a timetable and a programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution;

8. *Resolves* that the United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government;

9. *Requests* that, as circumstances permit, the Secretary-General pursue the course of action outlined in paragraphs 98 and 99 of the report of the Secretary- General of 17 July 2003 (S/2003/715);

10. *Takes note* of the intention of the Governing Council to hold a constitutional conference and, recognizing that the convening of the conference will be a milestone in the movement to the full exercise of sovereignty, *calls for* its preparation through national dialogue and consensus-building as soon as practicable and *requests* the Special Representative of the Secretary-General, at the time of the convening of the conference or, as circumstances permit, to lend the unique expertise of the United Nations to the Iraqi people in this process of political transition, including the establishment of electoral processes;

11. *Requests* the Secretary-General to ensure that the resources of the United Nations and associated organizations are available, if requested by the Iraqi Governing Council and, as circumstances permit, to assist in furtherance of the programme provided by the Governing Council in paragraph 7 above, and encourages other organizations with expertise in this area to support the Iraqi Governing Council, if requested;

12. *Requests* the Secretary-General to report to the Security Council on his responsibilities under this resolution and the development and implementation of a timetable and programme under paragraph 7 above;

13. *Determines* that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and *authorizes* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well
as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;

14. *Urges* Member States to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13 above;

15. *Decides* that the Council shall review the requirements and mission of the multinational force referred to in paragraph 13 above not later than one year from the date of this resolution, and that in any case the mandate of the force shall expire upon the completion of the political process as described in paragraphs 4 through 7 and 10 above, and expresses readiness to consider on that occasion any future need for the continuation of the multinational force, taking into account the views of an internationally recognized, representative government of Iraq;

16. *Emphasizes* the importance of establishing effective Iraqi police and security forces in maintaining law, order, and security and combating terrorism consistent with paragraph 4 of resolution 1483 (2003), and *calls upon* Member States and international and regional organizations to contribute to the training and equipping of Iraqi police and security forces;

17. *Expresses* deep sympathy and condolences for the personal losses suffered by the Iraqi people and by the United Nations and the families of those United Nations personnel and other innocent victims who were killed or injured in
these tragic attacks;

18. *Unequivocally condemns* the terrorist bombings of the Embassy of Jordan on 7 August 2003, of the United Nations headquarters in Baghdad on 19 August 2003, and of the Imam Ali Mosque in Najaf on 29 August 2003, and of the Embassy of Turkey on 14 October 2003, the murder of a Spanish diplomat on 9 October 2003, and the assassination of Dr. Akila al-Hashimi, who died on 25 September 2003, and *emphasizes* that those responsible must be brought to justice;

19. *Calls upon* Member States to prevent the transit of terrorists to Iraq, arms for terrorists, and financing that would support terrorists, and *emphasizes* the importance of strengthening the cooperation of the countries of the region, particularly neighbours of Iraq, in this regard;

20. *Appeals* to Member States and the international financial institutions to strengthen their efforts to assist the people of Iraq in the reconstruction and development of their economy, and *urges* those institutions to take immediate steps to provide their full range of loans and other financial assistance to Iraq, working with the Governing Council and appropriate Iraqi ministries;

21. *Urges* Member States and international and regional organizations to support the Iraq reconstruction

effort initiated at the 24 June 2003 United Nations Technical Consultations, including through substantial pledges at the 23-24 October 2003 International Donors Conference in Madrid;

22. *Calls upon* Member States and concerned organizations to help meet the needs of the Iraqi people by providing resources necessary for the rehabilitation and reconstruction of Iraq's economic infrastructure;

23. *Emphasizes* that the International Advisory and Monitoring Board (IAMB) referred to in paragraph 12 of resolution 1483 (2003) should be established as a priority, and reiterates that the Development Fund for Iraq shall be used in a transparent manner as set out in paragraph 14 of resolution 1483 (2003);

24. *Reminds* all Member States of their obligations under paragraphs 19 and 23 of resolution 1483 (2003) in particular the obligation to immediately cause the transfer of funds, other financial assets and economic resources to the Development Fund for Iraq for the benefit of the Iraqi people;

25. *Requests* that the United States, on behalf of the multinational force as outlined in paragraph 13 above, report to the Security Council on the efforts and progress of this force as appropriate and not less than every six months;

26. *Decides* to remain seized of the matter.

Annexure III
Security Council Resolution 1546 of 8 June 2004[3]

The Security Council,

Welcoming the beginning of a new phase in Iraq's transition to a democratically elected government, and *looking 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,

Recalling all of its previous relevant resolutions on Iraq,

Reaffirming the independence, sovereignty, unity, and territorial integrity of Iraq,

Reaffirming also the right of the Iraqi people freely to determine their own political future and control their own natural resources,

Recognizing the importance of international support, particularly that of countries in the region, Iraq's neighbours, and regional organizations, for the people of Iraq in their efforts to achieve security and prosperity, and *noting* that the successful implementation of this resolution will contribute to regional stability,

Welcoming the efforts of the Special Adviser to the Secretary-General to assist the people of Iraq in achieving the formation of the Interim Government of Iraq, as set out in the letter of the Secretary-General of 7 June 2004 (S/2004/461),

Taking note of the dissolution of the Governing Council of Iraq, and welcoming the progress made in implementing the arrangements for Iraq's political transition referred to in resolution 1511 (2003) of 16 October 2003,

Welcoming the commitment of the Interim Government of Iraq to work towards a federal, democratic, pluralist, and unified Iraq, in which there is full respect for political and human rights,

Stressing the need for all parties to respect and protect Iraq's archaeological, historical, cultural, and religious heritage,

Affirming the importance of the rule of law, national reconciliation, respect for human rights including the rights of women, fundamental freedoms, and democracy including free and fair elections,

Recalling the establishment of the United Nations Assistance Mission for Iraq (UNAMI) on 14 August 2003, and affirming that the United Nations should play a leading role in assisting the Iraqi people and government in the formation of institutions for representative government,

Recognizing that international support for restoration of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and welcoming Member State contributions in this regard under resolution 1483 (2003) of 22 May 2003 and resolution 1511 (2003),

Recalling the report provided by the United States to the Security Council on 16 April 2004 on the efforts and progress made by the multinational force,

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[3] Source: United Nations Security Council Resolution 1546 of 8 June 2004, Doc. S/RES/1546(2004), also available [Online: Web], URL: http://www.un.org/Docs/sc/unsc_resolution04.html.

Recognizing the request conveyed in the letter of 5 June 2004 from the Prime Minister of the Interim Government of Iraq to the President of the Council, which is annexed to this resolution, to retain the presence of the multinational force,

Recognizing also the importance of the consent of the sovereign Government of Iraq for the presence of the multinational force and of close coordination between the multinational force and that government,

Welcoming the willingness of the multinational force to continue efforts to contribute to the maintenance of security and stability in Iraq in support of the political transition, especially for upcoming elections, and to provide security for the United Nations presence in Iraq, as described in the letter of 5 June 2004 from the United States Secretary of State to the President of the Council, which is annexed to this resolution,

Noting 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, and to cooperate with relevant international organizations,

Affirming the importance of international assistance in reconstruction and development of the Iraqi economy,

Recognizing the benefits to Iraq of the immunities and privileges enjoyed by Iraqi oil revenues and by the Development Fund for Iraq, and *noting* the importance of providing for continued disbursements of this fund by the Interim Government of Iraq and its successors upon dissolution of the Coalition Provisional Authority,

Determining that the situation in Iraq continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below;

2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty;

3. *Reaffirms* the right of the Iraqi people freely to determine their own political future and to exercise full authority and control over their financial and natural resources;

4. *Endorses* the proposed timetable for Iraq's political transition to democratic government including:

(a) formation of the sovereign Interim Government of Iraq that will assume governing responsibility and authority by 30 June 2004;

(b) convening of a national conference reflecting the diversity of Iraqi society; and

(c) holding of direct democratic elections by 31 December 2004 if possible, and in no case later than 31 January 2005, to a Transitional National Assembly, which will, inter alia, have responsibility for forming a Transitional Government of Iraq and drafting a permanent constitution for Iraq leading to a constitutionally elected government by 31 December 2005;

5. *Invites* the Government of Iraq to consider how the convening of an international meeting could support the above process, and notes that it would welcome such a meeting to support the Iraqi political transition and Iraqi recovery, to the benefit of the Iraqi people and in the interest of stability in the region;

6. *Calls on* all Iraqis to implement these arrangements peaceably and in full, and on all States and relevant organizations to support such implementation;

7. Decides that in implementing, as circumstances permit, their mandate to assist the Iraqi people and government, the Special Representative of the Secretary- General and the United Nations Assistance Mission for Iraq (UNAMI), as requested by the Government of Iraq, shall:

(a) play a leading role to:

(i) assist in the convening, during the month of July 2004, of a national conference to select a Consultative Council;

(ii) advise and support the Independent Electoral Commission of Iraq, as well as the Interim Government of Iraq and the Transitional National Assembly, on the process for holding elections;

(iii) promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq;

(b) and also:

(i) advise the Government of Iraq in the development of effective civil and social services;

(ii) contribute to the coordination and delivery of reconstruction, development, and humanitarian assistance;

(iii) promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq; and

(iv) advise and assist the Government of Iraq on initial planning for the eventual conduct of a comprehensive census;

8. *Welcomes* ongoing efforts by the incoming Interim Government of Iraq to develop Iraqi security forces including the Iraqi armed forces (hereinafter referred to as "Iraqi security forces"), operating under the authority of the Interim Government of Iraq and its successors, which will progressively play a greater role and ultimately assume full responsibility for the maintenance of security and stability in Iraq;

9. *Notes* that the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq and therefore reaffirms the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution;

10. *Decides* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities;

11. *Welcomes*, in this regard, the letters annexed to this resolution stating, inter alia, that arrangements are being put in place to establish a security partnership between the sovereign Government of Iraq and the multinational force and to ensure coordination between the two, and notes also in this regard that Iraqi security forces are responsible to appropriate Iraqi ministers, that the Government of Iraq has authority to commit Iraqi security forces to the multinational force to engage in operations with it, and that the security structures described in the letters will serve as the fora for the Government of Iraq and the multinational force to reach agreement on the full range of fundamental security and policy issues, including policy on sensitive offensive operations, and will ensure full partnership between Iraqi security forces and the multinational force, through close coordination and consultation;

12. *Decides* further that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four above, and declares that it will terminate this mandate earlier if requested by the Government of Iraq;

13. *Notes* the intention, set out in the annexed letter from the United States Secretary of State, to create a distinct entity under unified command of the multinational force with a dedicated mission to provide security for the United Nations presence in Iraq, recognizes that the implementation of measures to provide security for staff members of the United Nations system working in Iraq would require significant resources, and calls upon Member States and relevant organizations to provide such resources, including contributions to that entity;

14. *Recognizes* that the multinational force will also assist in building the capability of the Iraqi security forces and institutions, through a programme of recruitment, training, equipping, mentoring, and monitoring;

15. *Requests* Member States and international and regional organizations to contribute assistance to the multinational force, including military forces, as agreed with the Government of Iraq, to help meet the needs of the Iraqi people for security and stability, humanitarian and reconstruction assistance, and to support the efforts of UNAMI;

16. *Emphasizes* the importance of developing effective Iraqi police, border enforcement, and the Facilities Protection Service, under the control of the Interior Ministry of Iraq, and, in the case of the Facilities Protection Service, other Iraqi ministries, for the maintenance of law, order, and security, including combating terrorism, and *requests* Member States and international organizations to assist the Government of Iraq in building the capability of these Iraqi institutions;

17. *Condemns* all acts of terrorism in Iraq, *reaffirms* the obligations of Member States under resolutions 1373 (2001) of 28 September 2001, 1267 (1999) of 15 October 1999, 1333 (2000) of 19 December 2000, 1390 (2002) of 16 January 2002, 1455 (2003) of 17 January 2003, and 1526 (2004) of 30 January 2004, and other relevant international obligations with respect, inter alia, to terrorist activities in and from Iraq or against its citizens, and specifically reiterates its call upon Member States to prevent the transit of terrorists to and from Iraq, arms for terrorists, and financing that would support terrorists, and *re-emphasizes* the importance of strengthening the cooperation of the countries of the region, particularly neighbours of Iraq, in this regard;

18. *Recognizes* that the Interim Government of Iraq will assume the primary role in coordinating international assistance to Iraq;

19. *Welcomes* efforts by Member States and international organizations to respond in support of requests by the Interim Government of Iraq to provide technical and expert assistance while Iraq is rebuilding administrative capacity;

20. *Reiterates* its request that Member States, international financial institutions and other organizations strengthen their efforts to assist the people of Iraq in the reconstruction and development of the Iraqi economy, including by providing international experts and necessary resources through a coordinated programme of donor assistance;

21. *Decides* that the prohibitions related to the sale or supply to Iraq of arms and related materiel under previous resolutions shall not apply to arms or related materiel required by the Government of Iraq or the

multinational force to serve the purposes of this resolution, stresses the importance for all States to abide strictly by them, and notes the significance of Iraq's neighbours in this regard, and *calls upon* the Government of Iraq and the multinational force each to ensure that appropriate implementation procedures are in place;

22. Notes that nothing in the preceding paragraph affects the prohibitions on or obligations of States related to items specified in paragraphs 8 and 12 of resolution 687 (1991) of 3 April 1991 or activities described in paragraph 3 (f) of resolution 707 (1991) of 15 August 1991, and *reaffirms* its intention to revisit the mandates of the United Nations Monitoring, Verification, and Inspection Commission and the International Atomic Energy Agency;

23. *Calls on* Member States and international organizations to respond to Iraqi requests to assist Iraqi efforts to integrate Iraqi veterans and former militia members into Iraqi society;

24. *Notes* that, upon dissolution of the Coalition Provisional Authority, the funds in the Development Fund for Iraq shall be disbursed solely at the direction of the Government of Iraq, and *decides* that the Development Fund for Iraq shall be utilized in a transparent and equitable manner and through the Iraqi budget including to satisfy outstanding obligations against the Development Fund for Iraq, that the arrangements for the depositing of proceeds from export sales of petroleum, petroleum products, and natural gas established in paragraph 20 of resolution 1483 (2003) shall continue to apply, that the International Advisory and Monitoring Board shall continue its activities in monitoring the Development Fund for Iraq and shall include as an additional full voting member a duly qualified individual designated by the Government of Iraq and that appropriate arrangements shall be made for the continuation of deposits of the proceeds referred to in paragraph 21 of resolution 1483 (2003);

25. *Decides further* that the provisions in the above paragraph for the deposit of proceeds into the Development Fund for Iraq and for the role of the IAMB shall be reviewed at the request of the Transitional Government of Iraq or twelve months from the date of this resolution, and shall expire upon the completion of the political process set out in paragraph four above;

26. *Decides* that, in connection with the dissolution of the Coalition Provisional Authority, the Interim Government of Iraq and its successors shall assume the rights, responsibilities and obligations relating to the Oil-for-Food Programme that were transferred to the Authority, including all operational responsibility for the Programme and any obligations undertaken by the Authority in connection with such responsibility, and responsibility for ensuring independently authenticated confirmation that goods have been delivered, and *further decides* that, following a 120-day transition period from the date of adoption of this resolution, the Interim Government of Iraq and its successors shall assume responsibility for certifying delivery of goods under previously prioritized contracts, and that such certification shall be deemed to constitute the independent authentication required for the release of funds associated with such contracts, consulting as appropriate to ensure the smooth implementation of these arrangements;

27. *Further decides* that the provisions of paragraph 22 of resolution 1483 (2003) shall continue to apply, except that the privileges and immunities provided in that paragraph shall not apply with respect to any final judgement arising out of a contractual obligation entered into by Iraq after 30 June 2004;

28. *Welcomes* the commitments of many creditors, including those of the Paris Club, to identify ways to reduce substantially Iraq's sovereign debt, *calls on* Member States, as well as international and regional organizations, to support the Iraq reconstruction effort, *urges* the international financial institutions and

bilateral donors to take the immediate steps necessary to provide their full range of loans and other financial assistance and arrangements to Iraq, *recognizes* that the Interim Government of Iraq will have the authority to conclude and implement such agreements and other arrangements as may be necessary in this regard, and *requests* creditors, institutions and donors to work as a priority on these matters with the Interim Government of Iraq and its successors;

29. Recalls the continuing obligations of Member States to freeze and transfer certain funds, assets, and economic resources to the Development Fund for Iraq in accordance with paragraphs 19 and 23 of resolution 1483 (2003) and with resolution 1518 (2003) of 24 November 2003;

30. *Requests* the Secretary-General to report to the Council within three months from the date of this resolution on UNAMI operations in Iraq, and on a quarterly basis thereafter on the progress made towards national elections and fulfilment of all UNAMI's responsibilities;

31. *Requests* that the United States, on behalf of the multinational force, report to the Council within three months rom the date of this resolution on the efforts and progress of this force, and on a quarterly basis thereafter;

32. *Decides* to remain actively seized of the matter.

Annex.

Text of letters from the Prime Minister of the Interim Government of Iraq Dr. Ayad Allawi to the President of the Security Council

5 June 2004

Republic of Iraq

Prime Minister Office

Excellency:

On my appointment as Prime Minister of the Interim Government of Iraq, I am writing to express the commitment of the people of Iraq to complete the political transition process to establish a free, and democratic Iraq and to be a partner in preventing and combating terrorism. As we enter a critical new stage, regain full sovereignty and move towards elections, we will need the assistance of the international community.

The Interim Government of Iraq will make every effort to ensure that these elections are fully democratic, free and fair. Security and stability continue to be essential to our political transition. There continue, however, to be forces in Iraq, including foreign elements that are opposed to our transition to peace, democracy, and security. The Government is determined to overcome these forces, and to develop security forces capable of providing adequate security for the Iraqi people. Until we are able to provide security for ourselves, including the defence of Iraq's land, sea and air space, we ask for the support of the Security Council and the international community in this endeavour. We seek a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the United Nations Security Council. The Government requests that the Security Council review the mandate of the MNF at the request of the Transitional Government of Iraq, or twelve months from the date on which such a resolution is adopted.

In order to discharge the Iraqi Government's responsibility for security, I intend to establish appropriate security structures that will allow my Government and Iraqi security forces to progressively take on that responsibility. One such structure is the Ministerial Committee for National Security, consisting of myself as the Chair, the Deputy Prime Minister, and the Minister of Defense, Interior, Foreign Affairs, Justice, and Finance. The National Security Advisor, and Director of the Iraqi National Intelligence Service will serve as permanent advisory members of the committee. This forum will set the broad framework for Iraqi security policy. I intend to invite, as appropriate, the MNF commander, his Deputy, or the MNF Commander's designative representative, and other appropriate individuals, to attend and participate as well, and will stand ready to discuss mechanisms of coordination and cooperation with the MNF. Iraqi armed forces will be responsible to the Chief of Staff and Minister of Defense. Other security forces (the Iraqi police, border guards and Facilities Protection Service) will be responsible to the Minister of the Interior or other government ministers.

In addition, the relevant ministers and I will develop further mechanisms for coordination with the MNF. Intend to create with the MNF coordination bodies at national, regional, and local levels, that will include Iraqi security forces commanders and civilian leadership, to ensure that Iraqi security forces will coordinate with the MNF on all security policy and operations issues in order to achieve unity of command of military operations in which Iraqi forces are engaged with MNF. In addition, the MNF and Iraqi government leaders will keep each other informed of their activities, consult regularly to ensure effective allocation and use of personnel, resources and facilities, will share intelligence, and will refer issues up the respective chains of command where necessary, Iraqi security forces will take on progressively greater responsibility as Iraqi capabilities improve.

The structures I have described in this letter will serve as the fora for the MNF and the Iraqi government to reach agreement on the full range of fundamental security and policy issues, including policy on sensitive offensive operations, and will ensure full partnership between Iraqi forces and the MNF, through close coordination and consultation. Since these are sensitive issues for a number of sovereign governments, including Iraq and the United States, they need to be resolved in the framework of a mutual understanding on our strategic partnership. We will be working closely with the MNF leadership in the coming weeks to ensure that we have such an agreed strategic framework.

We are ready to take sovereign responsibility for governing Iraq by June 30. We are well aware of the difficulties facing us, and of our responsibilities to the Iraqi people. The stakes are great, and we need the support of the international community to succeed. We ask the Security Council to help us by acting now to adopt a Security Council resolution giving us necessary support.

I understand that the Co-sponsors intend to annex this letter to the resolution on Iraq under consideration. In the meantime, I request that you provide copies of this letter to members of the Council as quickly as possible.

(Signed) Dr. Ayad Allawi

Text of letter from the United States Secretary of State Colin L. Powell to the President of the Security Council

The Secretary of State
Washington

Excellency:

Recognizing the request of the government of Iraq for the continued presence of the Multi-National Force (MNF) in Iraq, and following consultations with Prime Minister Ayad Allawi of the Iraqi Interim Government, I am writing to confirm that the MNF under unified command is prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the territory of Iraq. The goal of the MNF will be to help the Iraqi people to complete the political transition and will permit the United Nations and the international community to work to facilitate Iraq's reconstruction.

The ability of the Iraqi people to achieve their goals will be heavily influenced by the security situation in Iraq. As recent events have demonstrated, continuing attacks by insurgents, including former regime elements, foreign fighters, and illegal militias challenge all those who are working for a better Iraq.

Development of an effective and cooperative security partnership between the MNF and the sovereign Government of Iraq is critical to the stability of Iraq. The commander of the MNF will work in partnership with the sovereign Government of Iraq in helping to provide security while recognizing and respecting its sovereignty. To that end, the MNF stands ready to participate in discussions of the Ministerial Committee for National Security on the broad framework of security policy, as referred to in the letter from Prime Minister of the Interim Government of Iraq Allawi dated June 5, 2004. On the implementation of this policy, recognizing that Iraqi security forces are responsible to the appropriate Iraqi ministers, the MNF will coordinate with Iraqi security forces at all levels — national, regional, and local —in order to achieve unity of command of military operations in which Iraqi forces are engaged with the MNF. In addition, the MNF and the Iraqi government leaders will keep each other informed of their activities, consult regularly to ensure effective allocation and use of personnel, resources, and facilities, will share intelligence, and will refer issues up the respective chains of command where necessary. We will work in the fora described by Prime Minister Allawi in his June 5 letter to reach agreement on the full range of fundamental security and policy issues, including policy on sensitive offensive operations, and will ensure full partnership between MNF and Iraqi forces, through close coordination and consultation.

Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. A further objective will be to train and equip Iraqi security forces that will increasingly take responsibility for maintaining Iraq's security. The MNF also stands ready as needed to

participate in the provision of humanitarian assistance, civil affairs support, and relief and reconstruction assistance requested by the Iraqi Interim Government and in line with previous Security Council Resolutions.

In addition, the MNF is prepared to establish or support a force within the MNF to provide for the security of personnel and facilities of the United Nations. We have consulted closely with UN officials regarding the United Nations' security requirements and believe that a brigade-size force will be needed to support the United Nations' security effort. This force will be under the command and control of the MNF commander, and its missions will include static and perimeter security at UN facilities, and convoy escort duties for the UN mission's travel requirements.

In order to continue to contribute to security, the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes. In addition, the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.

The MNF is prepared to continue to pursue its current efforts to assist in providing a secure environment in which the broader international community is able to fulfil its important role in facilitating Iraq's reconstruction. In meeting these responsibilities in the period ahead, we will act in full recognition of and respect for Iraqi sovereignty. We look to other member states and international and regional organizations to assist the people of Iraq and the sovereign Iraqi government in overcoming the challenges that lie ahead to build a democratic, secure and prosperous country.

The co-sponsors intend to annex this letter to the resolution on Iraq under consideration. In the meantime, I request that you provide copies of this letter to members of the Council as quickly as possible.

Sincerely,

(*Signed*) Colin L. Powell