A Lawyer in Baghdad

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In January of this year, I left a comfortable practice in Washington for Baghdad, to work for the General Counsel to the Coalition Provisional Authority (CPA). I left my own office, with a view of the White House's South Lawn, where I could watch the President's helicopter launch and land. I left my own apartment, with more than enough space, and a big bed, near restaurants and people teeming about. And I left my friends and loved ones, whom I would miss dearly.

Baghdad was very different. I worked in a small office, in a former palace of Saddam Hussein, with a small window, shared by eight lawyers and three translators. I slept in a small trailer, in a small bed, with spotty electricity and running water. I had a roommate, who was also my boss. There were no restaurants to speak of. People teemed about, but most were armed, or in uniform, and their daily commute was by armored column, not subway car. I made close friends, but still missed home. And I could not leave a four-square mile area without body armor, helmet, and at least two heavily armed guards.

Nonetheless, for a lawyer, being in Baghdad was strangely familiar. We worked long hours; drafted legal instruments; reviewed documents for legal compliance; and counseled clients with problems often hard to believe. What made the job particularly interesting, however, were the legal authorities that shaped and defined our work. In this essay, I will discuss these authorities briefly, highlighting their contours and inconsistencies. I hope to offer a window into the legal issues that routinely confronted the CPA, and show that authorities deemed beyond reproach by those who never work with them are in fact stale and need some upkeep.

Practicing the Law of Occupation

Four principal authorities defined the legal environment during the occupation of Iraq: the Hague Regulations of 1907; the Fourth

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Geneva Convention of 1949; United Nations Security Council Resolution 1483 (2003); and United Nations Security Council Resolution 1511 (2003). Lawyers in Baghdad became intimately familiar with these authorities – and with their internal inconsistencies, which were often hard to reconcile. The tension stemmed from the decision early on by the United States, Australia, and the United Kingdom to voluntarily confirm the application of traditional occupation law in Iraq. This decision was unprecedented at the time, and has continuing repercussions today, even after the occupation has ended and full governing authority has passed to the Interim Iraqi Government.[1]

A. *Occupation Law Authorities*

The Hague Regulations ("Regulations") and the Fourth Geneva Convention ("Convention") seek to exclusively define and limit the powers of an occupying authority. Both measures, however, rest on a model of warfare and post-conflict governance ill-suited to our times, and to Iraq in particular. Article 43 of the Regulations states:

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

This concise statement is the gist of the law of occupation. It means that an occupying power may temporarily administer an occupied territory to ensure public order and safety, but is generally prohibited from imposing transformative change with respect to existing legal and institutional structures. The rule rests on a quaint model of warfare, by which wars were declared contests between professional armies with minimal effects on civilians and formal conclusion through truce or treaty. The sovereign deserved to have its laws and institutions left intact because war rarely involved the wholesale, much less permanent, removal of a sovereign government from power.

So what happens when the very purpose of war and occupation is to permanently remove a tyrannical government and institute long-term institutional change? Occupation law provides no clear answers. The Convention, drafted after two bloody world wars, clarified little, saying in relevant part at Article 64:

> [The] laws of the occupied power *shall remain in force*, with the exception that they may be repealed or suspended by the Occupying Power in cases where

1 Indeed, the occupation of Iraq was the first time in the sixty-year history of the Fourth Geneva Convention that its provisions have applied generally and without contest, let alone *voluntarily* by an occupying authority. Recent military interventions have been governed not by occupation law (which is defined by the Hague Regulations and the Fourth Geneva Convention), but by post-conflict United Nations Security Council Resolutions ("UNSCRs") – including Kosovo, where military intervention clearly lacked UN approval. As this essay discusses, two post-conflict UNSCRs applied to the occupation of Iraq, but they merely buttressed and enhanced, rather than superceded, traditional occupation law authorities. Even the Allied occupations of Japan and Germany after World War II, perhaps the closest historical parallels to the occupation of Iraq, were not administered under occupation law. To the contrary, the Allies in both cases escaped the strictures of occupation law by resorting to the customary international law concept of *debellatio*, whereby the defeated power is deemed totally defeated (or subjugated) and, as a legal matter, no longer exists. This view permitted the Allies to make fundamental changes to German and Japanese society – politically, socially, and economically – outside a traditional occupation law framework. The unconditional surrender of Germany and Japan supported the application of *debellatio*, a concept that is discredited in the international legal community and would not easily transfer to Iraq. No Coalition member, in any event, argued that *debellatio* applied in Iraq.

> they constitute a threat to its security or an obstacle to the application of the present Convention.

This formulation provides some greater authority to an occupying force than the Regulations, where the provision for modifying existing law is strongly negative ("unless absolutely prevented"). The Convention formula is gently positive ("may be repealed") but arguably does little to authorize long-term legal or institutional change. Indeed, while the Convention permits legal change for purposes of security *and* to assist in implementing the Convention, the former is no innovation and the latter is limited by the Convention itself – the prescriptions of which focus on humanitarian necessity, not structural failures of an occupied territory's ousted government. As one leading commentator notes: "The provisions of the Fourth Geneva Convention regarding occupation have not been regarded as innovative. Rather, it has been generally held that the Geneva rules were in essence *little more than a repetition of the Hague Regulations*."[2]

Consequently, the international law of occupation is far more relevant to a classic "belligerent occupation," which is intended to serve as a temporary placeholder until a conflict formally concludes and thus remains largely unconcerned with the long-term future of an occupied territory, than to an occupation designed to fundamentally renew and transform governing structures after decades of tyranny and arbitrary rule. The legal authority for implementing such transformative change – in Iraq, for example, establishing transparent institutions bounded by the rule of law and preparing to conduct nationwide elections by early 2005 – must be found outside the strictures of traditional occupation law.

B. *Resolutions 1483 and 1511*

In Iraq, two UN Security Council Resolutions provided this outside legal authority, albeit without precision or clarity. Unlike the authorities discussed above, Resolutions 1483 and 1511 explicitly instructed the CPA to play an active and vigorous role in the administration and reconstruction of Iraqi society, including the establishment of representative governing institutions. Resolution 1483 (enacted in May 2003) called upon the CPA 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.[3]

This provision alone provided the CPA with greater authority than under occupation law, because it called upon the occupying administration to *affirmatively* promote the welfare of the Iraqi people and establish conditions for self determination. Such a *positive* mandate was far different than the largely *nega-*

2 Eyal Benvenisti, The International Law of Occupation, (Princeton 1993) at 106 (emphasis added); *see also* Jean Pictet, ed., Commentary: The Fourth Geneva Convention 335 (1958) ("Article 64 expresses, in a more precise and detailed form, the terms of Article 43 of the Hague Regulations, which lays down that the occupying power is to respect the laws in force in the country 'unless absolutely prevented.'"). Benvenisti suggests that the Convention greatly expands Article 43 of the Hague Regulations, though he admits that this view is not shared by most commentators. *See* Benvenisti at 101–06. There is also a strong though unexplored argument that emerging norms of consensual self-government and a rule of law that protects basic rights have overtaken the rigid and acontextual presumption embedded in Article 43. Such an argument lies beyond the scope of this essay, however, in light of the CPA's expanded authority under subsequent UN Security Council Resolutions.

3 UNSC Res. 1483 at ¶ 4 (May 22, 2003).

tive obligations under the Convention and the Regulations.

Resolution 1483 went even further, however, charging the CPA in coordination with the United Nations and an interim Iraqi administration 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."*[4] The Resolution also granted broad authority over economic policy, authorizing the CPA in coordination with interested parties to:

> *promot[e] 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.[5]

Such provisions allowed the CPA to institute large-scale economic reforms, including a new banking law,[6] securities law,[7] company law,[8] and foreign investment law.[9] They also allowed the CPA to institute long-term institutional reforms, including the establishment of new institutions – such as the Commission on Public Integrity,[10] the Iraqi Property Claims Commission,[11] and the Central Criminal Court of Iraq[12] – and the reformation of existing institutions – such as the Iraqi Supreme Board of Audit,[13] and the Council of Judges,[14] the body responsible for overseeing the Iraqi judiciary.

Resolution 1511 (enacted in October 2003) complemented and enhanced the CPA's 1483 authority by recognizing the Iraqi Governing Council as "the principal bod[y] of the Iraqi interim administration, which, without prejudice to its further evolution, *embodies the sovereignty of the State of Iraq*."[15] This sentence provided the Iraqi mechanism through which the CPA lawfully implemented 1483-based reforms with UN imprimatur. In total, the CPA enacted 100 Orders with the full force and effect of law, including orders vital to Iraq's permanent future, such as Order 92, which established the Independent Electoral Commission to administer nationwide elections beginning early next year with the United Nations serving as active advisors.[16]

It is arguable that traditional occupation law, with its built-in status quo presumptions, would permit none of these measures.

4 Id. at ¶ 8(c) (emphasis added).

5 Id. at ¶ 8(e) (emphasis added).

6 CPA Order №. 40 (CPA/ORD/19 September 2003/40). All CPA Orders and Regulations are accessible at http://www.iraqcoalition.org/regulations/index.html#Orders.

7 CPA Order №. 74 (CPA/ORD/19 April 2004/74).

8 CPA Order №. 64 (CPA/ORD/5 March 2004/64).

9 CPA Order №. 39 (CPA/ORD/19 September 2003/39).

10 CPA Order №. 55 (CPA/ORD/28 January 2004/55).

11 CPA Regulation №. 8 (CPA/REG/14 January 2004/8).

12 CPA Order №. 13 (CPA/ORD/13 April 2003/13).

13 CPA Order №. 77 (CPA/ORD/25 April 2004/77).

14 CPA Order №. 35 (CPA/ORD/13 September 2003/35).

15 UNSC Res. 1511 at ¶ 4 (October 16, 2003) (emphasis added).

16 CPA Order №. 92 (CPA/ORD/30 May 2004/92). This Order and other election-related measures were drafted and enacted in close consultation with the United Nations, particularly its Baghdad-based elections team led by Ms. Carina Perelli. The author was involved in the CPA side of the drafting and coordination process, though it was the United Nations team that largely drove the policy decisions on election matters, including the system of representation for the National Assembly scheduled to be elected in January 2005. See CPA Order №. 96 (CPA/ORD/15 June 2004/96).

Yet Resolutions 1483 and 1511 did not explicitly preempt traditional occupation law nor suspend its clearly overlapping and limiting provisions. To the contrary, Resolution 1483 paradoxically "call[ed] upon all concerned to comply fully with their obligations under international law, *including the Geneva Convention of 1949 and the Hague Regulations of 1907*."[17] It was of course impossible to comply fully with those authorities (which generally prohibit institutional change) while also complying fully with an instruction in the same Resolution to "establish national and local institutions for representative governance."[18] The CPA, ultimately, had to resolve this inconsistency in light of a fluid situation on the ground, with a growing insurgency, and institutions that had either been destroyed, or had authority under existing Iraqi law to act in secret, accountable only to a deposed dictator.

Such reconciliation was no easy feat. Even as a pure legal matter, it was hopelessly unclear whether Resolution 1483's lone reference to traditional occupation law was meant to scale back the affirmative grants of transformative authority vested elsewhere in the same Resolution. The CPA eventually reached a consensus, however, in consultation with government attorneys in Baghdad, London, Canberra, and Washington, resolving the tension as follows: UN Security Council Resolutions authorized the CPA to reform existing Iraqi laws and institutions, thereby operating outside the strictures of occupation law, *only* if a proposed initiative carefully tracked the coordination process set forth in Resolution 1483, which required consultation and *approval* by the Iraqi Governing Council and other interested parties.[19] Initiatives that could not satisfy this coordination process had to find express authority in traditional occupation law, and were thus generally limited to security-based reforms, such as weapons control,[20] or human rights-based reforms, such as suspending arbitrary provisions of the Iraqi Penal Code.[21]

In sum, attorneys in Baghdad learned early and often that international law imposed serious limitations upon the CPA's ability to facilitate Iraq's successful transition to democracy and self-governance. Despite colorable authority under Resolution 1483, many initiatives could not be completed at all, or had to be dramatically overhauled at the last minute in light of objections from Coalition partners, the Iraqi Governing Council, or other interested parties such as the World Bank or the International Monetary Fund. These challenges, from my perspective, made the legal work of the CPA substantially more difficult, frustrating, and rewarding. They also provided a hard positive law context to successful CPA initiatives, which many who observe Iraq from the outside fail to recognize.

c. A Practical Example

One recent example – the CPA decision to prohibit assignment of state-owned prop-

17 UNSC Res. 1483 at ¶ 5.

18 Id. at ¶ 8(c).

19 The CPA's standard coordination process for economic reform measures, for example, included at the very least coordination with Iraqis likely to be affected by the proposed legislation, the World Bank, the International Monetary Fund, Coalition Governments, the Iraqi Governing Council, and relevant Iraqi ministries. If an interested party objected to the proposed measure, the measure had to be amended or abandoned. This coordination process stemmed entirely from Resolution 1483 and was not a part of traditional occupation law.

20 CPA Order №. 3 (Revised) (Amended) (CPA/ORD/31 December 2003/3).

21 CPA Order №. 7 (CPA/ORD/10 June 2003/7).

erty beyond the formal end of the occupation – illustrates the point. For three decades, Saddam Hussein's Ba'ath Party seized the most valuable property in Iraq and granted occupancy rights in exchange for regime loyalty. This policy is readily apparent in the Green Zone, a small peninsula-shaped swath of downtown Baghdad, bordered by the Tigris River, with hundreds of luxury villas owned by the Ba'ath Party for use by its most senior officials. These properties were abandoned as Coalition Forces approached Baghdad and are now among the most coveted properties in Iraq – sought after by wealthy Iraqis, foreign governments, Coalition military assets, and private contractors. During the occupation, the properties came to be occupied by individuals or groups working with the Coalition, including Iraqi ministers, members of the Iraqi Governing Council, Coalition officials and employees, foreign government representatives, non-governmental organizations, and private security teams.

There is a strong international law argument that property seized through brute force by a tyrannical regime can be reassigned or returned to its rightful owner once that regime is ousted from power. The CPA established a mechanism for doing just this, through the Iraqi Property Claims Commission, which has broad equitable authority to return displaced persons and families to their rightful homes. But in the meantime, the question arose as to what authority the CPA possessed over the land it formally occupied, and especially what authority it possessed to control access to such land after the end of the occupation, when a new Iraqi government would retain full governing authority.

The answer – reached after much debate between my office and attorneys in London, Washington, and Canberra – was very little. While an occupying authority can possess and occupy property to the extent necessary to ensure effective administration and security of an occupied territory, the Hague Regulations clearly provide that control of such property must end when the occupation ends. In light of Resolution 1483's explicit incorporation of the Hague Regulations, and its lack of explicit discussion regarding transfer or temporary assignment of state-owned property, the CPA ultimately determined that the Regulations controlled, and that all state-owned property had to revert to Iraqi government control immediately upon dissolution of the CPA. At the end of the occupation, therefore, all occupants of state-owned property in Iraq were obligated to negotiate a new deal with Iraqi authorities. They did not have to leave straightaway, but the CPA was foreclosed from supplying any comfort or certainty about future rights, no matter how instrumental the present resident may have been to the transition of governing authority or to the establishment of embassy functions in Iraq.

This decision caused much upheaval and was not welcomed by some policy-makers. It was problematic for a smooth transition from occupation to bilateral state relations and it greatly impeded the CPA's ability to provide long-term security for the brave Iraqis and foreign volunteers who worked with us every day and planned to work for the new Iraqi government or foreign embassies after the occupation. But occupation law required it and the Security Council had not adequately expanded the CPA's authority in the area. The CPA, thus, spent the final weeks of the occupation deciding what to do with displaced entities necessary to the transition, hoping to negotiate new land deals with incoming Iraqi ministers, many of whom had been named only days before. This is but one small example where traditional occupation law prohibited a favored policy outcome,

and exemplifies the seriousness with which the CPA took its legal obligations, even when those obligations were sharply incongruent with in-country necessities.

In sum, to those who say international law does not exist, or who say the occupation of Iraq was somehow extra-legal, I invite them to scrutinize the legal work of my former office, where international law was lived, breathed, and debated, with real-world consequences, twenty-four hours a day. Attorneys in Baghdad worked within a complicated web of international authorities, and were among the first to gain practical experience operating within the framework of traditional occupation law – a framework that had existed largely as a debating point, never voluntarily implemented by an occupying authority. The limitations and defects of that framework became readily apparent to many of us. For where the purpose of an occupation is enabling and transformative, a legal framework that effectively locks-in the laws and institutions of a repressive, ousted regime does not make sense, nor does much good, for anyone. The international community, therefore, should consider updating the Hague Regulations and the Geneva Convention, to reflect the realities of modern military interventions, and to permit fundamental change where transformation (from dictatorship to elections, for example) is a desirable international objective.