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# Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers

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Kristen Boon\*

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This article distinguishes the traditional concepts of *jus ad bellum* and *jus in bello* (law of war and law in war) from the new doctrine of *jus post bellum* (law of post-war reconstruction). The author examines *jus post bellum* in light of the recent non-consensual legal reforms in Iraq, Kosovo, and East Timor to demonstrate how international bodies and coalitions are increasingly assuming legislative functions, legitimately and otherwise, in the context of their duties as interim administrators. The large degree of discretion conferred upon these administrators does not always ensure adequate levels of trusteeship, accountability, and proportionality, which are integral to the stability of post-conflict zones. The author contends that a distinct *jus post bellum* framework that incorporates these principles of justice would allow for a more systematic and comprehensive approach to legal reform in occupied territories, which would in turn facilitate the transition to legitimate self-government.

Cet article distingue les concepts traditionnels de *jus ad bellum* et de *jus in bello* (le droit à la guerre et le droit dans la guerre) de la nouvelle doctrine du *jus post bellum* (droit de la reconstruction après la guerre). L'auteur se penche sur le *jus post bellum* suite aux réformes juridiques non consensuelles en Irak, au Kosovo et au Timor oriental pour montrer comment les coalitions et organes internationaux s'attribuent de plus en plus souvent des fonctions législatives — légitimement ou non — parmi leurs tâches en tant qu'administrateurs intérimaires. Le degré élevé de discrétion dont bénéficient ces administrateurs ne garantit pas toujours des niveaux adéquats de saine gestion, de responsabilité et de proportionnalité, essentiels à la stabilité de territoires qui ont été le théâtre d'un conflit. L'auteur avance qu'un cadre de *jus post bellum* distinct incorporant ces principes de justice conduirait à une approche plus systématique et complète à la réforme juridique dans les territoires occupés, ce qui à son tour faciliterait la transition vers un gouvernement autonome légitime.

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## I. Introduction: Ethics and Law Making in Occupied Territories

Legal reform in occupied and administered territories has become a key element in post-intervention reconstruction plans. In Kosovo, East Timor, and Iraq, international organizations, occupying powers, and private “hired guns” are taking on the business of law making. The legitimacy and success of post-conflict interventions are closely linked to the ability of the intervening powers to establish functioning legal systems and to ensure law and order. As the United Nations secretary-general stated in his 2004 report on the rule of law in post-conflict zones, “Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.”<sup>1</sup> Where this exercise has failed, the legitimacy and authority of interim international administrations have faced serious challenge.<sup>2</sup>

The expanding role of international players in the reform of domestic legal systems demonstrates a shift away from what was traditionally an essential attribute of sovereignty: the exclusive right of a sovereign to make laws within its jurisdiction.<sup>3</sup> This article surveys the legal reforms that have taken place in the contemporary occupations in Kosovo, East Timor, and Iraq in order to demonstrate how international actors are increasingly operating within this area of state domain. Because legal reform in post-conflict zones is now central to the reconstruction effort, I argue that a more coherent legal and ethical framework—a *jus post bellum* based on the principles of trusteeship, accountability, and proportionality—is required to establish the rule of law in the context of interim international administrations.

### A. Two Distinctions: Identity of the Actor and Nature of the Intervention

Two categories related to legal interventionism must be distinguished at the outset. First, this article examines two different legislative actors: the belligerent occupant bound by the laws of war, such as the Coalition Provisional Authority (“CPA”) in Iraq, and the multilateral interim administration or “functional occupant”,

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<sup>1</sup> *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN SC, UN Doc. S/2004/616 (2004) 1 [*Report of the Secretary-General*].

<sup>2</sup> The problems arising from the absence of law, order, and security in post-conflict zones are well documented. See e.g. David Zucchino, “After the War / Law and Order” *Los Angeles Times* (22 April 2003) A-12; Peter Slevin, “Baghdad Anarchy Spurs Call for Help; Iraqis, U.S. Officials Want More Troops” *Washington Post* (13 May 2003) A-01; Dionisio Babo-Soares, “Law and Order: Judiciary Development in East Timor” (Council for Asia Europe Co-operation, 2001) at 11-12; Andrew Roche, “Law and Order is Kosovo’s Achilles Heel” *Reuters* (26 December 1999).

<sup>3</sup> See Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 291 (stating that while certain limits on the permissible content of laws exist by virtue of international law, the basic competence of a state to legislate within its domestic jurisdiction is inherent in the concept of sovereignty).

such as the UN Missions in Kosovo and East Timor.<sup>4</sup> The differing scopes of legislative powers accorded to each is analyzed in Section III.

Second, two types of intervention must be differentiated: consensual and non-consensual intervention. National sovereignty is not infringed where foreign legislative intervention is consensual because the consent acts as a source of privilege for the actions taken by a foreign state.<sup>5</sup> In the wake of political transformations in Eastern Europe and South Africa, for example, armies of lawyers, judges, and legislative experts were invited to assist in redrafting national laws and constitutions. Similarly, the UN Chapter VI operations in El Salvador (“ONUSAL”) and Cambodia (“UNTAC”), which reshaped aspects of the legal and judicial systems, took place at the invitation of those states.<sup>6</sup> The success of these missions has in fact been attributed to enhanced state consent in the process of reconciliation, rehabilitation, and self-determination.<sup>7</sup>

Non-consensual legal interventionism (where a state does not consent to foreign law making) does impinge upon national sovereignty.<sup>8</sup> This is because the territorial state is administered by a temporary legal representative that does not assume the state’s sovereignty.<sup>9</sup> After Saddam Hussein’s government was ousted in Iraq, for example, the United States and the United Kingdom created a temporary occupation government, the CPA, which was accorded certain powers pursuant to the Geneva Conventions and Security Council Resolutions. The sovereignty of the state of Iraq was retained (or “embodied”) by the Governing Interim Council (“GIC”).<sup>10</sup> The UN’s interventions in Kosovo and East Timor were similarly non-consensual. Acting under Chapter VII of the UN Charter, the Security Council established the United Nations Mission in Kosovo (“UNMIK”) and the United Nations Transitional Administration

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<sup>4</sup> One of the best known modern occupations is Israel’s occupation of the Palestinian Territories. This long-term occupation is outside the scope of the present article given my focus on temporary, contemporary, and internationally sanctioned administrations. For a discussion of the occupation of the West Bank, see generally Adam Roberts, “Prolonged Military Occupation: the Israeli-Occupied Territories Since 1967” (1990) 84 A.J.I.L. 44, and Emma Playfair, ed., *International Law and the Administration of Occupied Territories* (Oxford: Clarendon Press, 1992).

<sup>5</sup> See Brownlie, *supra* note 3 at 106 (on the relationship between consent and sovereignty).

<sup>6</sup> See Timothy A. Wilkins, “The El Salvador Peace Accords: Using International and Domestic Law Norms to Build Peace” in Michael W. Doyle, Ian Johnstone & Robert C. Orr, eds., *Keeping the Peace: Multidimensional UN Operations in Cambodia and El Salvador* (New York: Cambridge University Press, 1997) 255.

<sup>7</sup> See Michael Doyle *et al.*, “Strategies for Peace: Conclusions and Lessons” in Doyle *et al.*, *ibid.*, 369 at 386.

<sup>8</sup> It should be noted that the occupation or administration may be non-consensual but still legal. An occupation is legitimate if the occupant is a belligerent under the laws of war or if the administration takes place pursuant to Security Council authorization.

<sup>9</sup> See Brownlie, *supra* note 3 at 107.

<sup>10</sup> See SC Res. 1511, UN SC, 4844th Mtg, UN Doc. S/RES/1511 (2003) para. 4.

in East Timor (“UNTAET”) without the consent of the territorial sovereigns, namely the Former Yugoslavia (today Serbia-Montenegro) and Indonesia respectively.<sup>11</sup>

This article focuses on cases of non-consensual legal reform in order to explore the outer limits of international intervention in domains normally reserved to the state. These developments add fodder to the already well-established canon that traditional notions of the sanctity of state sovereignty are dissolving. More importantly, recent examples of international legal reform show how international legislators can operate with nearly untrammelled discretion, above the checks and balances that the rule of law ordinarily requires. While the focus of this article is on non-consensual legal reform, its recommendations are applicable to a range of contemporary situations, including peace treaties concluded under Chapter VI of the UN Charter which often leave open-ended issues (including legal reform) to the discretionary authority of the interim administrators.<sup>12</sup>

### B. Jus Post Bellum

To date, the literature on ethics and the rule of law in the context of post-conflict legal reconstruction has been sparse and the issue remains under-theorized. In *Just and Unjust Wars*, Michael Walzer addressed questions of post-conflict reconstruction, largely in the context of peace settlements.<sup>13</sup> He returned to reconstruction after the invasion of Iraq. In an essay entitled “Just and Unjust Occupations”, he states that “we need criteria for *jus post bellum* that are distinct from (though not wholly independent of) those that we use to judge the war and its conduct.”<sup>14</sup> Where the literature exists, it has sometimes proceeded by grafting aspects of the “just war” rules of initiating war and the “just war” law of conduct in war onto the post-war context of

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<sup>11</sup> In the case of Kosovo, the Former Yugoslavia was the territorial sovereign and its non-consent to the Security Council’s actions was explicit. Although Indonesia claimed to be the territorial sovereign of East Timor, its status was disputed by Portugal, among others, as the International Court of Justice case on that issue made clear. See *Case Concerning East Timor (Portugal v. Australia)*, [1995] I.C.J. Rep. 90. Non-consent to intervention can nonetheless be inferred from the Security Council’s decision to act under Chapter VII of the UN Charter, which is an exception to UN Charter Art. 2(7); Art. 2(7) provides that the organization is not authorized to intervene “in matters which are essentially within the domestic jurisdiction of any state.”

<sup>12</sup> The concept of “open-endedness” in the mandates of the UN Missions in Cambodia and El Salvador is noteworthy. Doyle, Johnston & Orr recommend that architects of UN operations incorporate as much scope for independent implementation as possible because of the impossibility of anticipating the nature of the contingencies that may arise (Michael Doyle, Ian Johnstone & Robert C. Orr, eds., *Keeping the Peace: Multi-Dimensional UN Operations in Cambodia and El Salvador* (Cambridge: Cambridge University Press, 1997).

<sup>13</sup> Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977) at c. 7 [Walzer, *Wars*].

<sup>14</sup> Michael Walzer, “Just and Unjust Occupations” in *Arguing About War* (New Haven, CT: Yale University Press, 2004) at 163 [Walzer, “Occupations”].

the so-called “just peace”.<sup>15</sup> *Jus post bellum*, or the justice of post-war settlements and reconstruction, is assumed to draw on similar principles as *jus ad bellum* (law of war) and *jus in bello* (law in war).<sup>16</sup> In my view, the question that requires analysis in the post-conflict reconstruction phase is whether the *exercise* of law-making authority by international administrations is legitimate, just, and ethical. This proposed separation of doctrines requires explanation.

First, as a matter of principle, there is no *necessary* link between the principle of justice as it applies to the cause of war, conduct in war, or reconstruction after war. For example, international humanitarian law clearly separates the reasons for war from the rules of conduct in war. As Adam Roberts explains, “international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory.”<sup>17</sup> Similarly, Common Article 2 of the Geneva Conventions states that the Conventions apply to all cases of declared war or other armed conflict, even if the state of war is not recognized by one of the signatories, and to all cases of partial or total occupation.<sup>18</sup> The 1977 preamble to Protocol 1 to the Geneva Conventions provides that the provisions apply in all circumstances without distinction based on the “nature or origin” of the armed conflict.<sup>19</sup> These distinctions between the reasons for war and conduct in war are based on the powerful premise that no matter what the cause of war, all wars should be fought humanely.

This rationale for separating *jus ad bellum* from *jus in bello* should similarly apply to *jus post bellum*. No matter what the cause of war, and no matter how wars are fought, a *jus post bellum* requires that international authorities and occupants who assume governing and legislative duties exercise their powers according to certain principles of justice. The contention that *jus ad bellum* or *jus in bello* cannot be dissociated from *jus post bellum* (because a just post-war order is inherently linked to the reasons for war or the method of waging war and the type of peace that is wrought) is not categorically true. It is possible to imagine that a war fought

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<sup>15</sup> See Brian Orend, “Justice After War” (2002) 16(1) *J. Ethics & Int’l Affairs* 43 at 44, where he states that “those principles ... offer a coherent set of plausible values to draw on while developing an account of just war settlement.”

<sup>16</sup> See *ibid.*; Walzer, *Wars*, *supra* note 13 at 123. See also Walzer, “Occupations”, *supra* note 14, where he writes that “we need criteria for *jus post bellum* that are distinct from (though not wholly independent of) those that we use to judge the war and its conduct”; and Robert Keohane, “Political Authority after Intervention: Gradations in Sovereignty” in J.L. Holzgrefe & Robert O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge, U.K.: Cambridge University Press, 2003) at 275-98.

<sup>17</sup> Adam Roberts, “What is Military Occupation” (1984) 55 *Brit. Y.B. Int’l L.* 249 at 294.

<sup>18</sup> See e.g. *Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, art. 2, 6 U.S.T. 3516 (entered into force 21 October 1950) [*Fourth Geneva Convention*].

<sup>19</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (with Annexes)*, 6 August 1977, 1125 U.N.T.S. 3, Can. T.S. 1991 No. 2.1 (entered into force 12 July 1978).

inhumanely can still be terminated in accordance with justice, or that a peace agreement, although imposed, is just and equitable.<sup>20</sup>

The more compelling objection to the proposed separation of doctrines is that it would be unjust to allow aggressors the range of powers accorded to legitimate belligerents. While occupants are given great powers—“abnormal powers” according to Gerhard von Glahn—which are permissive and prohibitive in equal parts, an aggressor should perhaps not be permitted to take advantage of the permissive rights of occupation.<sup>21</sup> Although attractive on its surface, this argument is problematic in two ways. First, it is not easy to concur on who is an aggressor. What may be a just war for some is thinly disguised neo-colonialism for others. It is not surprising that the interventions in Kosovo, East Timor, Afghanistan, and Iraq remain extremely controversial.<sup>22</sup> Second, even aggressors should be held to certain bedrock principles of governance. A clear baseline of legal and ethical *jus post bellum* principles should be demarcated for international actors and authorities involved in legal reform regardless of the provenance of their presence or their motivations for intervening. Under certain circumstances their responsibilities may be augmented,<sup>23</sup> but this heightened standard does not detract from the common limits which should inform the exercise of the legislative powers they assume.

The suggested separation of the doctrines of *jus ad bellum*, *jus in bello*, and *jus post bellum* is also logical in light of the different foundational principles of each. *Jus ad bellum* refers to the right to resort to force under contemporary international law.<sup>24</sup> It grew out of the teachings of Saints Augustine and Thomas Aquinas, who sought to delineate the circumstances under which war was permissible.<sup>25</sup> Because the right to wage aggressive war was abolished by the Kellogg-Briand Pact of 1928 and the UN Charter of 1949, *jus ad bellum* fell into disuse until recent discussions about humanitarian intervention revived interest in the doctrine.<sup>26</sup> The purpose of *jus ad bellum*, to delineate the right to wage war, has little bearing on the central tasks of post-conflict reconstruction: the establishment of law and order, preparation for free elections,

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<sup>20</sup> See Walzer, “Occupations”, *supra* note 14 at 163. Compare Orend, *supra* note 15.

<sup>21</sup> Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press, 1957) at 6. See also Walzer, *ibid.*; and Roberts, *supra* note 17 at 294.

<sup>22</sup> See e.g. John Tirman, “The New Humanitarianism” *Boston Review* 28 (December 2003/January 2004) 24, online: Boston Review <<http://bostonreview.net>>.

<sup>23</sup> See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) [*The Responsibility to Protect*] at para. 5.1, which links the responsibility to intervene with a concomitant responsibility to rebuild.

<sup>24</sup> See Ingrid Detter, *The Law of War*, 2nd ed. (Cambridge: Cambridge University Press, 2000) at 157.

<sup>25</sup> See Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995) at 246-47.

<sup>26</sup> See Detter, *supra* note 24 at 157; Franck, *ibid.* at 247.

establishment of the groundwork for independent institutions and the recognition of fundamental rights and liberties with the aim of eventual self-governance.

*Jus in bello* is similarly distinct. *Jus in bello* seeks to reduce the consequences of war to non-combatants, particularly to groups requiring extra protection such as the wounded, women, and children. The fundamental principles of *jus in bello* are necessity (the degree of force used and the selection of military targets), proportionality (which restricts the right to cause injury to civilians in excess of concrete military gains), and humanity (which places limits on the methods and means of warfare that are considered humane).<sup>27</sup> These principles are both narrower and different from the requirements of post-conflict reconstruction set out above.

The separation of *jus post bellum* from *jus ad bellum* and *jus in bello* does not suggest that the principles underlying these three legal concepts are wholly independent of one another, or deny that the perceived legitimacy of international interventions will influence popular support for the scope of the reconstruction mandate. The underlying purpose of international humanitarian law is irrefutably connected to other branches of law that bear on post-conflict reconstruction, namely international human rights and refugee law. All are concerned with the protection of life, health, and dignity, and with punishing torture and establishing a framework to ensure that fundamental guarantees are respected.<sup>28</sup> In addition, the *Hague Regulations*<sup>29</sup> and the *Fourth Geneva Convention*,<sup>30</sup> which codify *jus in bello*, contain certain binding parameters that limit the legislative powers of belligerent occupants. It would be wrong, however, to emphasize the similarities in these legal doctrines so as to mask their very different foundations. *Jus post bellum* has distinct end goals: to establish security, create the political and economic basis for independence, and promote a democratic process. A *jus post bellum* is derived in part from the international community's interest in establishing and maintaining peace and order under Chapter VII of the UN Charter, but more substantially from the general human rights norms and the right to self-determination that have emerged since WWII.

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<sup>27</sup> See Detter, *ibid.* at 164-65 and 241.

<sup>28</sup> See Jakob Kellenberger, "International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence" (2003) 85 Int'l Rev. Red Cross 645 at 646.

<sup>29</sup> *Regulations respecting the Laws and Customs of War on Land*, annexed to *Convention respecting the Laws and Customs of War on Land*, 18 October 1907, 36 Stat. 2277 [*Hague Regulations*].

<sup>30</sup> *Supra* note 18.



### C. The Rule of Law and Some Principles of a Jus Post Bellum

“Recent *peacekeeping* and peace-enforcement experiences have indicated ... that the most fundamental requirement, and a primary objective, of a lasting peace is the reestablishment of the rule of law.”<sup>31</sup>

In its broadest terms, the rule of law requires that political authority be subject to predetermined principles, and that the exercise of discretion take place within certain limits.<sup>32</sup> The rule of law and majority rule are generally considered to be the two core concepts of democracy. In post-conflict zones, the rule of law plays a special role: it “enables wary former adversaries all to play a vital role in keeping the new order honest and trustworthy” by establishing rules that constrain the power of all parties, protect the rights of all individuals, and provide for the settlement of disputes.<sup>33</sup> The process of legal reform is of critical import because it determines who is involved in the discussion and what fundamental values are incorporated into the new legal order.<sup>34</sup>

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<sup>31</sup> Mark Plunkett, “Reestablishing Law and Order in Peace-Maintenance” (1998) 4 *Global Governance* 61 at 63. See also Hansjorg Strohmeyer, “Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor” (2001) 95 *A.J.I.L.* 46 at 47. Paddy Ashtown makes a similar observation with regard to Bosnia: “In Bosnia, we thought that democracy was the highest priority and we measured it by the number of elections we could organize. In hindsight, we should have put the rule of law first, for everything depends on it: a functioning economy, a free and fair political system, the development of civil society, and public confidence in police and courts. We should do well to reflect on this as we formulate our plans” (Paddy Ashtown, “What I Learned in Bosnia”, online: <<http://www.usip.org/pubs/specialreports/sr/04.html>>).

<sup>32</sup> The current discussion can only set out a basic definition of this controversial concept. For a rich account of its various forms, see David Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999). It is interesting to note that the secretary-general has promulgated an “international” definition of the rule of law in his 2004 report; it is “a principle of governance in which all persons, institutions and entities, public and private including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards” (*Report of the Secretary-General*, *supra* note 1 at para. 6). In so doing, the secretary-general supposes that the rule of law has a substantive requirement: conformity with international human rights norms and standards, which is in contrast to the dominant conception that the content of the law is separate from the procedural requirements of validly enacted laws, such as generality, clarity, stability, prospective application, etc.

<sup>33</sup> Neil J. Kritz, “The Rule of Law in the Postconflict Phase: Building a Stable Peace” in Chester A. Crocker & Fen Osler Hampson, eds., *Turbulent Peace: The Challenge of Managing International Conflict* (Washington, D.C.: United States Institute of Peace Press, 2001) at 802.

<sup>34</sup> The role of constitutions in transitional societies has been addressed by Ruti Teitel, “Human Rights in Transition: Transitional Justice Genealogy” (2003) 16 *Harv. Hum. Rts. J.* 69 at 70-71 and 90, and Samuel Issacharoff, “Constitutional Courts in the Field of Power Politics: Constitutionalizing

*Jus post bellum* requires that international authorities exercise their temporary legislative powers in accordance with certain principles of justice. I propose three such principles that are already apparent (whether implicitly or explicitly) in the occupation context: trusteeship, accountability, and proportionality. These principles assist in establishing the rule of law and are consistent with general principles of human rights and self-determination. The core content of these principles are outlined here, and will be applied in greater detail in subsequent sections.

### 1. Trusteeship

It has been said that trusteeship is implicit in any occupation.<sup>35</sup> Conceptually, trusteeship exists in domestic and international contexts where persons or entities are incapable of functioning on their own.<sup>36</sup> In the occupation context, this trust relationship exists because the economic, social, and proprietary control and discretion held by the occupant leaves local populations vulnerable to the risk of misconduct.<sup>37</sup> Historically, trusteeship is manifest in the UN's trusteeship system, under which member states and the UN together undertook to promote the political, economic, social, cultural, and educational well-being of the territory's inhabitants. Trusteeship is also implied by the obligations placed on occupying powers under the Geneva Conventions. Trusteeship creates concurrent legal and ethical obligations for an occupant to act in the best interests of the population and to exercise a reasonable standard of care in undertaking its duties. It also prohibits the occupant from self-dealing, or from benefiting from the trust.<sup>38</sup>

### 2. Accountability

Accountability requires answerability of the government to the citizens of the occupied territory and to the international community.<sup>39</sup> At its core is the notion of responsibility, manifest through both procedural and substantive limits on action, and

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Democracy in Fractured Societies" (2004) *Tex. L. Rev.* 1861. On the process of legal reform, see generally Daniel Berkowitz *et. al.*, "The Transplant Effect" (2003) 51 *Am. J. Comp. L.* 163.

<sup>35</sup> See Roberts, *supra* note 17 at 295; and von Glahn, *supra* note 21 at 668, n. 18.

<sup>36</sup> See Gerald B. Helman & Steven R. Ratner, "Saving Failed States" *Foreign Policy* 89 (Winter 1992-93) at 12 (discussing how domestic notions of guardianship and bankruptcy are analogous to an international "conservatorship").

<sup>37</sup> For a Canadian account of the elements of a fiduciary duty, see *e.g.* *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at para. 80, 220 D.L.R. (4th) 1, 2002 SCC 79, Binnie J. [cited to S.C.R.].

<sup>38</sup> For a discussion of the basic requirements of a fiduciary in international law, see Christopher Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (Melbourne: Oxford University Press, 1992) at 153, 227-30.

<sup>39</sup> In the post-conflict context, the concept of accountability often arises in reference to prosecutions for past crimes, truth and reconciliation commissions, and other transitional justice mechanisms. For the purposes of the present analysis, however, accountability is used to refer to public authority rather than individual criminal responsibility.

the imposition of sanctions if those responsibilities are not met.<sup>40</sup> Accountability mechanisms are inherent to the democratic model in that they regulate the exercise of public authority. For example, accountability might require monitoring, a certain transparency of process, limits on the scope of immunities applicable to international organizations and actors, and even liability for certain wrongful acts.<sup>41</sup>

### 3. Proportionality

Proportionality is the lynchpin between the duties of a trustee and the responsibilities of accountability. Like accountability, the function of proportionality is to curb the discretion of public authorities. Proportionality differs, however, in that it acts as the measure by which aims and means are assessed and interests are balanced. It is concerned with the interests of states and individuals, or of equal entities, and it operates in particular where there is a public authority.<sup>42</sup> Proportionality, therefore, responds to the need to create a measure and process regulating the extent and nature of legal interventionism by international actors.

The potential scope of a *jus post bellum* is broad. This analysis will focus on how the three elements of trusteeship, accountability, and proportionality are inherent in the duties of international administrators and occupants, and how these principles help to fill the gaps in the legal frameworks that exist. I will explore this general aim by asking the following questions: What is the context of international legal intervention? What authority do belligerent occupants or multilateral interim administrations (“functional occupants”) have to create new laws in post-conflict zones? What are the limits on this authority? And finally, how does the concept of proportionality enable us to distinguish between the different legal and ethical responsibilities that result from a UN-sponsored administration, or a belligerent occupation?

## II. The Context of Law Making in Post-conflict Zones and Occupied Territories

Colonial practices provide the starting point to understanding the rights and duties of contemporary occupants as legislators. One of the most important legacies of European colonial practices was the export and implementation of the colonizer’s

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<sup>40</sup> Compare Ruth W. Grant & Bob Keohane, “Accountability and Abuses of Power in World Politics” (2005) 99:1 Am. Pol. Sci. Rev. 29: “Accountability ... implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of those standards, and to impose sanctions if they determine that those responsibilities have not been met” (*ibid.* at 29).

<sup>41</sup> See *e.g.* Committee on the Accountability of International Organisations, Final Report (2004) at 18, online: International Law Association <[http://www.ila-hq.org/html/layout\\_committee.htm](http://www.ila-hq.org/html/layout_committee.htm)>.

<sup>42</sup> See Riccardo Pisillo Mazzeschi, Book Review of *Il principio della proporzionalità nell’ordinamento internazionale* by Enzo Cannizzaro (2002) 13 E.J.I.L. 1031.

legal system. Most colonial powers understood that the stability and viability of their authority rested on some respect for local traditions. As a matter of practice, laws supporting commerce and trade were the first to be exported, whereas laws regulating domestic and private affairs were generally left to local customs and authorities. As social and religious conversion took place and as involvement in a particular region became more extensive, greater components of the colonizer's legal systems were transplanted.<sup>43</sup> Legal reform was thus integral to the colonial project, although justified as a means of helping the colonies to evolve toward a higher standard of civilization.<sup>44</sup> The balance between recognition of existing legal orders and the extension of the colonizer's laws was delicate, and the primary limits that existed on a colonial power's ability to change local laws were practical: the colonizer retained absolute supremacy over the colonies, but colonial laws often stood side by side with traditional laws.<sup>45</sup>

The law of belligerent occupation has similarly recognized the right of occupying powers to alter domestic laws, although in more defined circumstances.<sup>46</sup> These circumstances are narrow because of the defining features of occupations, namely: (1) although an occupying power has direct control over all or part of a territory, that control is intended to be temporary; (2) there is no formal transfer of sovereignty to the occupying power; and (3) by displacing the prior ruler or rulers, the occupant assumes certain obligations to ensure the welfare of the inhabitants of the occupied territory. In contrast to conquest, where the invading power intends to take permanent sovereign control, occupation is (at least in theory) transitional and non-transformatory.<sup>47</sup>

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<sup>43</sup> See A.N. Allott, "Native Tribunals in the Gold Coast" (1957) 1 J. African L. 163 at 164.

<sup>44</sup> See M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975) at 198 (discussing French colonial practices).

<sup>45</sup> See *ibid.* at 2.

<sup>46</sup> See discussion of Geneva Conventions in Part III, below.

<sup>47</sup> See Ardi Imseis, "On the Fourth Geneva Convention and the Occupied Palestinian Territory" (2003) 44 Harv. Int'l L.J. 65 at 87. Imseis describes the theoretical distinction between occupation and conquest. Occupation is a legal position falling "far" short of sovereignty and which comes into operation as soon as enemy territory is occupied, whereas conquest is a situation arising when a war comes to a close, and where the victor substitutes itself for the pre-existing sovereign in the conquered territory. Benvenisti defines occupation as "the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory" (Eyal Benvenisti, *The International Law of Occupation*, rev. ed. (Princeton, NJ: Princeton University Press, 1993) at 4). With reference to art. 42 of the *Hague Regulations*, the International Court of Justice has recently defined de facto occupation as follows: "territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep., online: International Court of Justice <<http://www.icj-cij.org>> at para. 78 [*Case on the Wall*]).

The presumption of neutrality during occupations has generally been disproved in practice. Most occupations have resulted in expansive legal and institutional reforms.<sup>48</sup> Legal reform is a high priority because the occupant usually wishes to export its own institutions,<sup>49</sup> or to establish a regime that will be friendly to its security interests.<sup>50</sup> The legal reconstructions in post-WWII Japan and Germany are illustrative and have been called “programmed installation[s] of democracy”.<sup>51</sup> As Adam Roberts writes, “here as elsewhere, the victors desired to exercise their power freely, and in particular to make drastic political and other changes in the defeated States.”<sup>52</sup>

The advent of UN-sponsored interim administrations has added domestic legal reform to the international post-intervention strategy, although for somewhat different reasons. In many post-conflict zones where the UN has intervened, human tragedy, not ideology, has motivated legal reform. Post-intervention legal reform has often been necessary because prior laws were discriminatory, violated international norms, or were clearly inadequate for the needs of the country.<sup>53</sup> Recognizing this void, the 2000 Brahimi Report advocated a “quick response” UN legal team that could fill the experiential and legislative void in post-conflict situations.<sup>54</sup> The United Nations Development Programme, in conjunction with the Galway Centre for Human Rights and the United States Institute for Peace, are developing model transitional draft codes for criminal law and criminal procedure that can be implemented in transitional post-conflict situations in order to avoid a legal vacuum.<sup>55</sup> A report by the International Commission on Intervention and State Sovereignty similarly states that such “justice packages” should be “considered an integral part of any post-

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<sup>48</sup> See generally Benvenisti, *ibid.*, who provides a comprehensive analysis of legal reforms during and after WWI and WWII.

<sup>49</sup> See e.g. John M. Owen IV, “The Foreign Imposition of Domestic Institutions” (2002) 56 Int’l Organization 375.

<sup>50</sup> See e.g. David M. Edelstein, “Occupational Hazards: Why Military Occupations Succeed or Fail” (2004) 29 Int’l Security 49.

<sup>51</sup> John D. Montgomery, *Forced to Be Free* (Chicago: University of Chicago Press, 1957) at 4.

<sup>52</sup> Roberts, *supra* note 17 at 268.

<sup>53</sup> Plunkett, *supra* note 31 at 65; Gordon Renouf, “Some Features of the Legal System in East Timor” (March 2002), online: NALC East Timor-Australia Legal Assistance Network <[http://www.nalc.org.au/timor\\_network](http://www.nalc.org.au/timor_network)>. Renouf writes: “[f]ollowing the departure of the Indonesian administration ... there was no legal system in East Timor: there were virtually no intact court buildings, no legal records, no copies of Indonesian or any other laws. Most importantly there were no personnel equipped to operate a legal system ...” (*ibid.* at 1; footnotes omitted).

<sup>54</sup> *Identical Letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, UNGA, 55th Sess., UN Doc. A/55/305 (2000) paras. 76-83, UNSC, UN Doc. S/2000/809 (2000) paras. 76-83 [*Brahimi Report*]. See also discussion of “justice packages” in Plunkett, *supra* note 31 at 68.

<sup>55</sup> See the website of the United States Institute of Peace at <<http://www.usip.org>> and that of the National University of Ireland, Galway, Irish Centre for Human Rights at <[http://www.nuigalway.ie/human\\_rights](http://www.nuigalway.ie/human_rights)>. See also *Brahimi Report*, *ibid.* at para. 81.

intervention peace building strategy, pending the re-establishment of local institutions.”<sup>56</sup>

This linkage of intervention with internationally promulgated legal reform, and of the rule of law with reconstruction, is illustrative of three distinct trends. First, although the involvement of the international community in interim administrations is not unprecedented, until a decade ago, traditional peacekeeping operations were generally limited to the provision of security for reasons of capacity, expertise, and authority.<sup>57</sup> The broadening of peacekeeping mandates in Namibia, Somalia, and Cambodia, and finally Kosovo and East Timor (where complete legislative and executive authority were granted to the interim administrations) illustrate how the Westphalian understanding of strict territorial sovereignty has faded away in post-intervention contexts.<sup>58</sup> From the perspective of interim governors, there has been an expansion of administrative mandates to routinely include consensual, or less routinely to include non-consensual, domestic legal reform, under Chapters VI and VII respectively of the UN Charter.

A second trend is that citizens of territories under international or occupying administrations are supportive of certain interventions into domestic laws.<sup>59</sup> This acquiescence is due in part to the pragmatic desire for law and order: legal and political vacuums in occupied territories can lead to chaos, as the post-intervention looting in Iraq demonstrated. But domestic support for international involvement in legal reform has a symbolic dimension as well. From the perspective of the interim governees, where oppressive regimes are overthrown, the legitimacy of international administrations and occupying forces is suspect if the laws of the ousted powers remain in force. In Kosovo for example, UNMIK originally designated the “prior applicable law” in force as the Serbian law which prevailed prior to the NATO intervention.<sup>60</sup> An outcry from Kosovar Albanians ensued because Serbian law was seen as the law of the oppressor.<sup>61</sup> UNMIK therefore amended this regulation and designated the applicable law as that in force when Kosovo was an autonomous

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<sup>56</sup> *The Responsibility to Protect*, *supra* note 23 at para. 5.14.

<sup>57</sup> Compare Ralph Wilde, “Representing International Territorial Administrations: A Critique of Some Approaches” (2004) 15 E.J.I.L. 71 at 75 (arguing that contemporary international administrations do not mark as stark of a departure from prior peacekeeping administrations as is often claimed).

<sup>58</sup> See Keohane, *supra* note 16 at 275-98; see also Henry Schermers, “Different Aspects of Sovereignty” in Gerard Kreijen, ed., *State, Sovereignty, and International Governance* (Oxford: Oxford University Press, 2002) at 185-86, 191.

<sup>59</sup> I do not claim that there has not been deep dissatisfaction with some legislative reforms in terms of the substance and process adopted. See Part III.F, below. Nonetheless, where ethnic tensions have run high, or where prior legal regimes were discriminatory or non-functional, local populations have supported international legal reform as a means of moving forward.

<sup>60</sup> See *On the Authority of the Interim Administration in Kosovo*, UNMIK Reg. No. 1999/1 (25 July 1999).

<sup>61</sup> See David Marshall & Shelley Inglis, “The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo” (2003) 16 Harv. Hum. Rts J. 95 at 101.

province in 1989.<sup>62</sup> As the *Brahimi Report* noted: “the law and legal systems prevailing prior to the conflicts [in Kosovo and East Timor] were questioned or rejected by key groups considered to be the victims of the conflicts.”<sup>63</sup>

Finally, the international community’s involvement in legislative reform in post-conflict zones is connected to the transformation of the international legal system since WWII. Instruments in the fields of human rights law, international criminal law, international humanitarian law, and international refugee law have created a new rights framework, of which the international community is the custodian.<sup>64</sup> The debate about the “universalism” of those rights is beyond the scope of the present analysis, but it is important to note that the promulgation and enforcement of individual and group rights through the international system has guaranteed international institutions both legitimacy and a privileged role in determining the normative content of these rights.<sup>65</sup>

International criminal law is particularly relevant to the legitimacy of international involvement in reconstruction and legal reform. International tribunals or transitional justice mechanisms such as ad hoc tribunals, truth and reconciliation commissions, vetting, and the prosecution of perpetrators in domestic or international fora have become an international priority.<sup>66</sup> Ruti Teitel has described this as a shift from transitional justice within the scheme of international law to justice-making as an element of nation-building.<sup>67</sup> These measures have often been implemented with international assistance, leading to the development of shared standards and expertise.

The convergence of these three trends has led to something akin to a predisposition toward international involvement in post-conflict legal reconstruction.<sup>68</sup> The secretary-general has recently rejected a piecemeal approach to transitional justice and the rule of law, calling instead for comprehensive plans that engage all aspects of the justice sector.<sup>69</sup> This upswing of legal interventionism prompts an inquiry into what limits, if any, apply to international actors legislating in occupied territories and post-conflict zones.

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<sup>62</sup> See *On the Law Applicable in Kosovo*, UNMIK Reg. No. 1999/24 (12 December 1999).

<sup>63</sup> *Brahimi Report*, *supra* note 54 at para. 79.

<sup>64</sup> See *Report of the Secretary-General*, *supra* note 1 at para. 9.

<sup>65</sup> See *ibid.* at para. 10.

<sup>66</sup> See generally *ibid.*

<sup>67</sup> Teitel, *supra* note 34. See also Issacharoff, *supra* note 34.

<sup>68</sup> See e.g. Orend, *supra* note 15: “[T]here should be a presumption *in favor of permitting rehabilitative measures* in the domestic political structure of a defeated aggressor” (*ibid.* at 51, emphasis added).

<sup>69</sup> See *Report of the Secretary-General*, *supra* note 1 at para. 23.

### III. The Authority of International Actors to Alter Domestic Laws and Legal Systems

What authority do occupying powers or multilateral institutions have to revise and enact domestic or municipal laws where a state has failed, does not, or cannot consent? There are two sources of applicable law. First, where a state is occupied by foreign powers, as Iraq was by the US and the UK, the *Hague Regulations* of 1907<sup>70</sup> and the *Fourth Geneva Convention* of 1949<sup>71</sup> apply and set out the limits of the occupant's legislative powers. Second, multilateral actors such as the UN Missions in Kosovo and East Timor that are not belligerent occupants as defined in international law derive their authority from the Security Council's powers under Chapter VII of the UN Charter. The limits to the law-making authority of these international administrations are those that would apply generally to Chapter VII enforcement actions by the Security Council. As will be shown, both sources of law are insufficient to meet the objectives and needs of current interim administrations. I argue that this insufficiency leaves a void that requires guidance from the doctrine of *jus post bellum*.

#### A. The Legislative Capacities of Occupying Powers

Historically, there were few limits on an occupant's powers. As von Glahn writes:

The development of the existing rules governing military occupation was preceded by centuries during which no real distinction was drawn between military occupation on the one hand and conquest and subjugation on the other. Conquest of enemy territory was generally regarded as establishing annexation to the conqueror's realm, and it was held that the successful sovereign was practically immune from any limitations on his right to do as he liked in the occupied area.<sup>72</sup>

The *Hague Regulations* and the *Fourth Geneva Convention* (which supplements the *Regulations*) therefore mark an important turning point: they establish certain limits with regard to the occupant's powers of governance and administration. Most importantly, both treaties codify the principle that prior laws are to remain in force, except in enumerated circumstances. This fundamental requirement derives from the related principles that as a matter of customary law, local laws remain valid even under military occupation, and that the laws created by a people are presumably those best suited to them.<sup>73</sup>

Article 43 of the *Hague Regulations* sets out the contours of this obligation:

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

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<sup>70</sup> *Supra* note 29.

<sup>71</sup> *Supra* note 18.

<sup>72</sup> von Glahn, *supra* note 21 at 7.

<sup>73</sup> See *ibid.* at 95.



ensure, as far as possible, public order and safety, *while respecting, unless absolutely prevented, the laws in force in the country.*<sup>74</sup>

Despite the logic of respecting the prior laws in force, this restrictive rule did not hold. The obligation to “ensure” public order and civil life or safety was used as a justification by occupants for the exercise of broad discretionary powers.<sup>75</sup> For example, during the WWI occupation of Belgium, “article 43 was invoked as justification for minor, though important, social reforms, but it also served to cover acts that were aimed at the dissolution of the Belgian nation and the impoverishment of its resources and industrial infrastructure.”<sup>76</sup>

The four Geneva Conventions were adopted in 1949 in response to the atrocities of WWII. One of their distinguishing features was that protections for individuals in times of war were increased substantially.<sup>77</sup> Rather than operating as contracts between states, the *Fourth Geneva Convention*, in particular, has been described as a “bill of rights” for the inhabitants of an occupied territory.<sup>78</sup> This characterization has been endorsed in *Prosecutor v. Tadic* where the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) underscored that article 4 of the *Fourth Geneva Convention* is directed at the protection of citizens to the maximum extent possible, and does not rely on formal bonds and purely legal relations.<sup>79</sup>

The *Fourth Geneva Convention* applies to cases of declared war (even if the state of war is not recognized by one of the countries), and to cases of partial or total occupation of a territory even if there is no armed resistance. Under the *Fourth Geneva Convention*, where only one party is a High Contracting Power, that party is still bound by the Convention under article 2. Virtually all states, 189 in total, are party to the Geneva Conventions and the *Hague Regulations*, and even exceptional abstainers are most likely bound because many provisions in the treaties are now considered to constitute customary international law.<sup>80</sup>

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<sup>74</sup> *Hague Regulations*, *supra* note 29 [emphasis added]. The original “vie publique” has been translated as both “civil life” and as “safety”, and the appropriateness of each term is the subject of some debate. See Benvenisti, *supra* note 47 at 9-10.

<sup>75</sup> See Benvenisti, *ibid.* at 12.

<sup>76</sup> *Ibid.* at 46. See also Edmund M. Schwenk, “Legislative Power of the Military Occupant under Art. 43 of the Hague Regulations” (1945) 45 Yale L.J. 393 at 405.

<sup>77</sup> See Georges Abi-Saab, “The Specificities of Humanitarian Law” in Christophe Swinarski, ed., *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva: International Committee of the Red Cross, 1984) 265 at 269 (describing the shift as one from high-state contracting to a “reach for the level of the individual”, the real beneficiaries of humanitarian law).

<sup>78</sup> See Benvenisti, *supra* note 47 at 105.

<sup>79</sup> (1999), Case No. IT-94-1-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para. 168, online: ICTY <<http://www.un.org/icty/>>.

<sup>80</sup> See Theodor Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius Publications, 1987) at 348; Franck, *supra* note 25 at 275.

Articles 64 and 65 to 70 of the *Fourth Geneva Convention* set out more lenient exceptions to the presumptions for maintaining prior applicable law. Article 64 provides:

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

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Several aspects of this provision are noteworthy. First, paragraph 1 of article 64 provides that an occupying power may repeal or suspend penal laws where they constitute a threat to its security, or when they are an obstacle to the application of the present Convention.<sup>81</sup> This first exception could justify the repeal of laws requiring conscription for the military, possession of arms, laws requiring individuals to fight against the enemy, and certain laws restricting public meetings and freedom of expression.<sup>82</sup> The second exception would enable an occupying power to change domestic laws that, for example, conflict with article 27, which guarantees that occupants respect religious rights, or rights to family, bodily dignity, and group rights for minorities.<sup>83</sup> Where guaranteed by the Convention, therefore, municipal laws affecting both group and individual rights may legitimately be amended. Jean Pictet notes, however, that these exceptions are of a limitative nature: “[t]he occupation authorities cannot abrogate or suspend penal laws for any other reason – and not, in particular, merely to make it accord with their own legal conceptions.”<sup>84</sup>

Second, while article 43 of the *Hague Regulations* applied to the continuity of laws in general, paragraph 2 of article 64 of the *Fourth Geneva Convention* does not explicitly restrict legislative powers to penal matters. On the basis of this wording, only penal laws, not civil laws, are subject to the requirements concerning prior

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<sup>81</sup> During the negotiations of this article, the US proposed language that would have given an occupant an absolute right to change the laws of the occupied territory. Protests from other delegates such as the USSR led to the rejection of this provision. See *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 3 (Berne: Federal Political Department, 1949) at 671.

<sup>82</sup> See Benvenuti, *supra* note 47 at 16; von Glahn, *supra* note 21 at 682-83.

<sup>83</sup> See Jean Pictet, *The Geneva Conventions of 12 August 1949: Commentary* (Geneva: International Committee of the Red Cross, 1952-1959) at 335.

<sup>84</sup> *Ibid.* at 336.

applicable law under paragraph 1 of article 64.<sup>85</sup> Paragraph 2 of article 64 allows the occupying power to enact new civil provisions in three circumstances. First, the occupying power may enact legal instruments that “are essential to enable it to fulfill its obligations”. The Convention imposes a variety of obligations upon occupying powers, including the responsibility to provide inhabitants with food and medical supplies (article 55), and to provide medical assistance and hospitals (article 56). If an occupying power interpreted these obligations in a fulsome manner, they could provide the basis for an expansive revision of domestic laws. The rights of individuals guaranteed by the Convention therefore trump the laws of the former sovereign.

The second and third bases upon which occupying powers can revise domestic laws relate to the maintenance of order and security by the occupying power. Under existing international law, these bases were already available to justify certain restrictions on free speech, to limit elections, and to regulate local currencies.<sup>86</sup> These legislative provisions are subject to the general prohibition in article 47, which provides that occupying powers cannot “legislate around” the protections of the Conventions. The article further states that protected persons in occupied territories should not be deprived of changes introduced into the institutions or government of a territory as a result of the occupation of that territory, or as a result of agreements concluded between the authorities of the occupied territories, or by annexation of the territory.<sup>87</sup> Consequently, an occupying power could not use the exceptions of “security” or “maintaining order” in article 64 to change domestic penal or civil laws in a manner undermining its obligations under other provisions of the Convention, for example by compelling occupants to serve in its armed or auxiliary forces;<sup>88</sup> by enacting measures to destroy private or collective property, unless as a matter of military necessity;<sup>89</sup> or by allowing the use of physical or moral coercion to obtain information.<sup>90</sup>

In addition to the Geneva Conventions, two external limits are applicable to the legislative capacities of occupying powers. First, an occupant may not apply its

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<sup>85</sup> The International Committee of the Red Cross’ commentaries on the Conventions state that the reference to penal laws only is an oversight. Jean Pictet contends that the principle of continuity applies to both the civil and penal laws of the occupied territory, and to the associated rules of procedure: “The reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts; there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution” (*ibid.* at 335). Benvenisti disagrees, and rightly, I think, shows that the intentions of the delegates were to intentionally establish a different norm for civil laws in article 64(2). See Benvenisti, *supra* note 47 at 101-02. It could, however, be argued that as a matter of interpretation, the header for article 64 in Pictet, *ibid.*—Penal Law—applies also to paragraph 2.

<sup>86</sup> See Benvenisti, *supra* note 47 at 16.

<sup>87</sup> *Fourth Geneva Convention*, *supra* note 18, art. 47.

<sup>88</sup> *Ibid.*, art. 51.

<sup>89</sup> *Ibid.*, art. 53.

<sup>90</sup> *Ibid.*, art. 31.

domestic law directly to an occupied territory. Rather, an occupant must issue regulations or laws in the occupied territory through an established process.<sup>91</sup> Second, in its 2004 decision on the Wall in the Occupied Territories, the International Court of Justice (“ICJ”) held that occupiers must apply international human rights covenants to which they are a party where they exercise their jurisdiction on foreign territory.<sup>92</sup> In so doing, the ICJ implies that occupiers cannot legislate in contravention of their national treaty obligations in any territory.

In sum, the scope of an occupier’s legislative powers is defined by two broad parameters: (1) the prior laws of a territory remain in force unless changed by an occupant through the process and under the exceptions provided by international humanitarian law; and (2) an occupant must respect and apply its international obligations in the occupied territory, including ensuring that any new legislation passed is in accordance with these obligations.

### ***B. The Ineffectiveness of the Legislative Provisions of the Laws of Occupation and the Principles of Jus Post Bellum***

The Geneva Conventions were intended to balance indigenous law with the exigencies of occupation, but this balance has rarely been struck in practice. The problems are several-fold.

First, and most significantly, the Geneva Conventions require occupying powers to assume onerous responsibilities for the welfare of the population in the occupied territory that are suggestive of a trusteeship relationship. The Geneva Conventions place heightened obligations on occupying powers to protect the vulnerable members of society (“the wounded, sick ... and expectant mothers”<sup>93</sup>) and to ensure the maintenance, education, and religion of children orphaned or separated from their families by war.<sup>94</sup> Occupying powers must also ensure that internees are kept in good health,<sup>95</sup> and they may not requisition foodstuffs except for use by the occupant’s own personnel.<sup>96</sup> This relationship is also apparent in the *Hague Regulations*. Article 43 obliges occupants to take all steps in their power to further public order and safety.<sup>97</sup> Similarly, in the management of public property, article 55 states that the occupant is

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<sup>91</sup> See von Glahn, *supra* note 21 at 94-95, (noting that the German military order of 10 May 1940 was illegal in that it provided that German military or special courts in the then occupied Netherlands and Belgium could apply German criminal law directly). Compare Schwenk, *supra* note 76 at 414 (who notes that the rule also holds in the converse situation: no extraterritorial effect is given to the acts of a military occupant).

<sup>92</sup> *Case on the Wall*, *supra* note 47.

<sup>93</sup> *Fourth Geneva Convention*, *supra* note 18, art. 16.

<sup>94</sup> *Ibid.*, art. 24.

<sup>95</sup> *Ibid.*, art. 89.

<sup>96</sup> *Ibid.*, art. 55.

<sup>97</sup> See Felice Morgenstern’s discussion in “Validity of the Acts of the Belligerent Occupant” (1951) 28 *Brit. Y.B. Int’l L.* 291 at 295.

a usufructuary (a “prudent administrator”).<sup>98</sup> While a usufructuary can use any proceeds from the capital as its own, it must safeguard the trust by acting with a certain standard of care, and it will be liable for losses resulting from its fraud, default, or neglect.

In practice, the responsibilities associated with a trustee-like relationship rarely obtain because most occupying powers do not acknowledge that they are subject to the Geneva Conventions. The application of the *Fourth Geneva Convention* has been contested or rejected by Israel in the case of the West Bank, Kuwait by Iraq, East Timor by Indonesia, Tibet by China, and Afghanistan by the Soviet Union.<sup>99</sup> Despite the applicability of the Geneva Conventions to many recent occupations (as occupation is a matter of fact),<sup>100</sup> those who have recognized their status as occupying powers have often sidestepped the prohibitions where it was in their interest.<sup>101</sup>

In addition, breach of the trusteeship relationship is generally without consequence, because the Geneva Conventions have essentially no accountability mechanisms under which the occupied territory (or the individuals within it) can challenge an occupying power’s acts. The Geneva Conventions create no reporting requirements, they provide for no judicial review of the occupying power’s acts, and they contain no requirements for a consultative process.

With regard to the enforcement of the Geneva Conventions more broadly, all contracting parties are required by article 1 to respect the Conventions, but the only external enforcement mechanism in the treaty is article 49 of the *First Convention*, which requires high contracting parties to enact penal legislation so as to prosecute grave breaches of the Conventions. “Grave breaches” are defined in article 50 of the Convention, and they include willful killing, torture or inhuman treatment, and biological experiments. Overexpansive reform of domestic laws would not qualify.<sup>102</sup> While a “protecting power” could theoretically be appointed to adjudicate as per

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<sup>98</sup> As stated in article 539 of the Louisiana Civil Code. This concept is similar across civil law traditions, with article 601 of the French *Code civil* stating: “He [the usufructuary] gives security that he will use the things as a prudent administrator would do ...” See also the German Civil Code, B.G.B. section 1036(2) and the Greek Civil Code article 1148, which impose the obligation of “orderly management”. See A.N. Yiannopoulos, *Louisiana Civil Law Treatise*, vol. 3 (St. Paul, Minn.: West Group, 2000) at 256-57. For a recent discussion of the occupant as usufruct, see R. Dobie Langenkamp & Rex. J. Zedalis, “What Happens to the Iraqi Oil? Thoughts on Some Significant, Unexamined International Legal Questions regarding Occupation of Oil Fields” (2003) 14 E.J.I.L. 417.

<sup>99</sup> See Eyal Benvenisti, “The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective” (2004) at 12, where he describes the transition of the occupier as “Watch Guard” under the *Hague Regulations* to full-fledged administrator under the Geneva Conventions.

<sup>100</sup> See *supra* note 47.

<sup>101</sup> See generally Benvenisti, *supra* note 47 at c. 6.

<sup>102</sup> See Morgenstern, *supra* note 97 at 306-07 (noting that the doctrine adopted by several national courts is that while occupying powers cannot arbitrarily invalidate the laws in force, their legislative acts cannot be reviewed as long as the acts fall within the occupier’s general sphere of powers).

article 9 of the *Fourth Convention*, this provision has never been used and would likely be ineffective in practice in challenging changes to domestic laws.<sup>103</sup> Similarly, municipal enforcement mechanisms in domestic or bilateral contexts could be invoked if the Convention is accepted as self-executing, but given the unwillingness of occupying powers to recognize the applicability of the Geneva Conventions it is unlikely they would serve as a deterrent.<sup>104</sup> As a result, occupying powers have wide discretion to change domestic laws, and unless held to account under the law of state responsibility, a “good faith” adherence is virtually the only effective limit on their powers.<sup>105</sup>

The imbalance between the occupant’s extensive trusteeship duties and the absence of accountability mechanisms has meant that despite the principle of preserving the *status quo ante* inherent to the law of occupation, there are few effective limits if the intention of occupying powers is to change domestic institutions and laws. Occupying powers have used the concepts of liberation, self-determination, and democracy to justify broad political and legal changes in the reconstruction phase. The formalism of the Geneva Conventions has broken down in practice, and invasive techniques have been used in their wake. These breaches must be recognized in order for the international community to effectively address them.

### C. The Contemporary Occupant: The CPA in Iraq

“This has been about liberation, not about occupation.”<sup>106</sup>

General Tommy Franks

The CPA’s non-consensual occupation of Iraq, which lasted from May 2003 to June 2004, richly illustrates the limited scope and the open texture of the law of occupation. The US and UK reluctantly accepted that they were “occupying powers” in Iraq under the *Hague Regulations* and Geneva Conventions, although in UN documents they limited their obligation to the respect of international humanitarian

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<sup>103</sup> *Contra* Robert O. Weiner & Fionnuala Ni Aolain, “Beyond the Laws of War: Peacekeeping in Search of a Legal Framework” (1996) 27 Colum. H.R.L. Rev. 293 at 332.

<sup>104</sup> See Imseis, *supra* note 47 at 123-24; Benvenisti, *supra* note 47 at 192, where he discusses the refusal of a Belgian court (during the German Occupation of 1914–18) to allow a private citizen to challenge occupation measures under article 43 of the *Hague Regulations*. But see Morgenstern, *supra* note 97 at 292, on the self-executing nature of the *Hague Regulations*.

<sup>105</sup> The ICJ *Case on the Wall* states that all states have an *erga omnes* obligation to enforce the laws of occupation (*supra* note 47 at para. 159). But see the separate opinion of Judge Kooijmans at paras. 40-50). Note also that where a breach of state responsibility has occurred, an occupying power may be liable to pay compensation. See *e.g. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Order of 26 January 1971, [1971] I.C.J. Rep. 9 at 54.

<sup>106</sup> As cited in Katherine Butler & Donald Macintyre, “General Franks strides into his Baghdad palace” *The Independent* (17 April 2003) online: The Independent <<http://www.independent.co.uk>>.

law in general terms.<sup>107</sup> In their 8 May 2003 letter to the President of the Security Council, for example, the UK and the US stated that they would “strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq.”<sup>108</sup> The restrictive use of the term “essential” set the basis for possible derogations from the more general humanitarian requirements of the Geneva Conventions.

Security Council Resolutions 1483 and 1511 recognized but did not authorize the CPA’s occupation of Iraq.<sup>109</sup> The CPA therefore remained bound by the Geneva Conventions, except to the extent that those same resolutions could be said to create exceptions to international humanitarian law or new obligations for the CPA. For example, the CPA was charged with establishing and administering a Development Fund for Iraq and a program linking food assistance to the production of oil.<sup>110</sup> These duties went beyond the powers envisioned by the Geneva Conventions. As David Scheffer notes, “In effect, the Council specified additional obligations not required by occupation law, but in doing so invited the Authority to act beyond some of the barriers that occupation law otherwise would impose on occupying powers.”<sup>111</sup>

The CPA’s status as occupying power in Iraq was also unique due to the tripartite, multilateral structure comprised of the UN, CPA, and the GIC set out in Resolution

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<sup>107</sup> Some public statements suggested the UK and US accepted their status as occupying powers. See e.g. “Comments made by UK Permanent Representative Sir Jeremy Greenstock after UK-US Presentation of Joint Draft of Security Council Resolution on Iraq”, online: The UK Mission to the United Nations <<http://www.ukun.org>>; Kim Holmes, Assistant Secretary of State for International Organization Affairs, “Understanding United Nations Resolution 1483” (Presented at the Foreign Press Center, Washington D.C., 23 May 2003) [unpublished], online: United States Diplomatic Mission to Italy <[http://www.usembassy.it/file2003\\_05/alia/A3052306.htm](http://www.usembassy.it/file2003_05/alia/A3052306.htm)>; L. Paul Bremer, “Address to the Iraqi People” (Prepared for broadcast on 5 September 2003) [unpublished], online Coalition Provisional Authority <[http://www.cpa-iraq.org/transcripts/20030908\\_05scp\\_broadcast\\_path\\_to\\_sovereignty/APFD.html](http://www.cpa-iraq.org/transcripts/20030908_05scp_broadcast_path_to_sovereignty/APFD.html)>. With the exception of certain regulations and memoranda issued by the CPA in which the application of the Geneva Conventions was acknowledged, official documents did not set out the obligations so clearly. The preamble to Security Council Resolution 1483 refers to the US and UK as occupying powers (“the Authority”), but paragraph 5 calls upon “all concerned” to comply fully with their obligations under international law, in particular the Geneva Conventions of 1949 and the *Hague Regulations* of 1907 (SC Res. 1483, UNSC, 4761 Mtg., UN Doc. S/RES/1483 (2003) Preamble, para. 5).

<sup>108</sup> *Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council*, UNSC, 2003, UN Doc. S/2003/538 at paras. 90-93 [UN S/2003/538].

<sup>109</sup> Upon the end of the occupation of Iraq, Security Council Resolution 1546 similarly welcomed that “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” (SC Res. 1546, UNSC, 4987 Mtg., UN Doc. S/RES/1546 (2004) at para. 2).

<sup>110</sup> SC Res. 1483, *supra* note 107 at paras. 9, 13, 16.

<sup>111</sup> David Scheffer, “Future Implications of the Iraq Conflict: Beyond Occupation Law” (2003) 97 *Am. J. Int’l L.* 842 at 845-46. See also Benvenisti, *supra* note 47, preface.

1483.<sup>112</sup> Security Council Resolution 1483 supported a joint effort to work with the Iraqi people “until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.”<sup>113</sup>

Legal reform during the occupation of Iraq was extensive. The CPA passed 12 regulations, issued 100 orders (including several amendments), and published 17 explanatory memoranda.<sup>114</sup> Under Order No. 100, all legislation enacted by the CPA was deemed to remain in force after the CPA’s dissolution on 30 June 2004 pursuant to Security Council Resolution 1546<sup>115</sup> unless and until rescinded or amended by the subsequent transitional government.<sup>116</sup>

Formally, the legal reform in Iraq took place in the context of the strictures of the *Fourth Geneva Convention* and *Hague Regulations* as discussed above. Most regulations contained a blanket preamble to the effect that instruments issued by the CPA were enacted “under the laws and usages of war.”<sup>117</sup> The Security Council resolutions addressing the occupation lifted key restrictions on the CPA’s authority by requiring the CPA, in coordination with the special representative to the secretary-general (“SRSG”), to encourage the promotion of economic reconstruction and the conditions for sustainable development, the protection of human rights, and international efforts to promote legal and judicial reform.<sup>118</sup> The preamble to Resolution 1483 also encouraged “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.”<sup>119</sup>

Some of the CPA’s regulations did conform to the legislative restrictions of the Geneva Conventions. Examples of conforming instruments include CPA Memorandum No. 3 on Criminal Procedures, which set out standards for interim detainees consistent with article 78 of the *Fourth Geneva Convention*.<sup>120</sup> Similarly, section 3 of Order No. 7 prohibits torture and cruel, degrading, or inhuman treatment

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<sup>112</sup> See generally Thomas D. Grant, “The Security Council and Iraq: An Incremental Practice” (2003) 97 A.J.I.L. 823.

<sup>113</sup> SC Res. 1483, *supra* note 107 at para. 9.

<sup>114</sup> See online: Coalition Provisional Authority, CPA Official Documents <<http://www.iraqcoalition.org>> [CPA website].

<sup>115</sup> SC Res. 1483, *supra* note 107.

<sup>116</sup> CPA, Order 100, *Transition of Laws, Regulations, Orders, and Directives Issued by the CPA*, CPA/Ord/28 June 2004/100, online: CPA website, *supra* note 114 [CPA Order 100]. For commentary on the effect of laws passed by an occupant after sovereignty is regained, see von Glahn, *supra* note 21 at 258.

<sup>117</sup> See *e.g.* CPA Order 100, *ibid.* at preambular para. 1.

<sup>118</sup> SC Res. 1483, *supra* note 107 at para. 8.

<sup>119</sup> *Ibid.* at para. 1.

<sup>120</sup> CPA Memo No. 3 on criminal procedures states in the preamble that the CPA is “acting, in particular, consistent with the Fourth Geneva Convention of 1949 Relative to the Treatment of Civilians in Times of War”: CPA, Memo No. 3, *Criminal Procedures*, CPA/Mem/27 June 2004/03, online: CPA website, *supra* note 114 [CPA Memo 3].



or punishment and is similar to that identified in article 32 of the *Fourth Geneva Convention*.<sup>121</sup> The Memorandum also amended certain provisions of the Iraqi Penal Code to make them conform to international human rights standards. For example, it implemented the right of the accused to remain silent during criminal proceedings without adverse inference being drawn from the exercise of that right; the same Memorandum removed the presumption that “a refusal to answer will be considered as evidence against the defendant.”<sup>122</sup>

Some CPA instruments, however, used the open language of the Security Council resolutions to take advantage of gaps in the Geneva Conventions. For example, the Geneva Conventions provide almost no direction with regard to reform of the private sector and economy. This lacuna exists because occupiers are reticent to agree to hard and fast rules that restrict their ability to profit from the economic resources and structures of an occupied territory.<sup>123</sup>

The US made use of this open texture to enact comprehensive economic reforms. Order No. 12 triumphantly reconfirmed “the provisions of General Franks’ Freedom Message to the Iraqi People of April 16, 2003” and suspended all tariffs and trade restrictions, although certain foodstuffs and other goods were exempted for humanitarian reasons.<sup>124</sup> Order No. 39 laid the basis for the privatization of the Iraqi economy, and allowed 100% foreign ownership, including 100% profit remittances in all but a few economic sectors and regions of Iraq.<sup>125</sup> The CPA also introduced a flat tax, which is justified under article 48 of the *Hague Regulations*, but which appears to contradict the US’ own policy of not introducing new taxes in occupied territories.<sup>126</sup>

These broad legal reforms prompt inquiry into whether the duties of trusteeship and accountability were respected in the execution of the CPA’s mandate. In some

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<sup>121</sup> CPA, Order 7, *Penal Code*, CPA/Ord/9 June 2003/07, s. 3, online: CPA website, *supra* note 114.

<sup>122</sup> CPA Memo 3, *supra* note 120, s. 3(b)(i).

<sup>123</sup> von Glahn, *supra* note 21 at 202.

<sup>124</sup> CPA, Order 12, *Trade Liberalization Policy*, CPA/Ord/26 Feb 2004, online: CPA website, *supra* note 114.

<sup>125</sup> CPA, Order 39, *Foreign Investment*, CPA/Ord/20 Dec 2003/39, online: CPA website, *supra* note 114. For a critical account of this mission, see Naomi Klein, “Iraq is not America’s to sell: International law is unequivocal—Paul Bremer’s economic reforms are illegal” *The Guardian* (7 November 2003) 27.

<sup>126</sup> See United States, Department of the Army, *The Law of Land Warfare*, 18 July 1956, (Washington, D.C.: U.S. Govt. Print. Off.) at 157, para. 426(b): “Unless required to do so by considerations of public order and safety, the occupant must not create new taxes.” For a discussion of the lack of consensus on whether an occupying power may introduce taxes, see Benvenisti, *supra* note 47 at n. 41. But see von Glahn, *supra* note 21 at 150, who argues that an occupying power has no authority to impose a new local tax, although existing taxes may be used to cover the costs of administration. But note that flat taxes have become a favored approach amongst some tax reform specialists (see “The Case For Flat Taxes—Simplifying Tax Systems” *The Economist* (16 April 2005) 59). For critical commentaries on the flat tax in Iraq, see Dana Milbank & Walter Pincus, “U.S. Administrator Imposes Flat Tax System on Iraq” *Washington Post* (2 November 2003) A09; Naomi Klein, “Privatization in Disguise” *The Nation* (28 April 2003) 40.

respects these reforms were within the parameters of the Security Council authorizations because the CPA's regulations helped to create a free market economy and a basis for foreign investment.<sup>127</sup> In other respects, however, the motivations appeared to be ideological or based on economic self-interest, suggesting a possible conflict of interest. For example, bids during the privatization of the Iraqi economy were infamously restricted to the so-called "coalition of the willing".

The Security Council deliberately expanded the typical trusteeship duties through its resolutions on Iraq, and in so doing acknowledged the extent to which inhabitants are dependent on the occupying power not only for the necessities of life, but also for the development of fundamental institutions and for the basis for self-government. To illustrate, Security Council Resolution 1483 requires the Authority to "*promote the welfare* of the Iraqi people through the effective administration of the territory, including in particular working toward 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."<sup>128</sup> The 8 May 2003 letter from the UK and the US to the Security Council confirmed this specific obligation with respect to the management of oil reserves, stating that the CPA would "act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people."<sup>129</sup> The CPA's administrative instruments also acknowledged this relationship. Order No. 2 stated that all assets of dissolved entities would be held by the administrator of the CPA "on behalf of and for the benefit of the Iraqi people."<sup>130</sup> Order No. 4<sup>131</sup> used this same language in providing that all property and assets of the Iraqi Baath Party that had been transferred or acquired were subject to seizure by the CPA "on behalf, and for the benefit of the people of Iraq." This obligation was most noticeable with regard to the administration of natural resources and public property: the preamble to Order No. 9, for example, affirmed "the CPA's obligation to responsibly manage Iraqi public property on behalf of the Iraqi people."<sup>132</sup>

Expanded trusteeship duties were, however, undercut by the limited principles of accountability that were integrated into the CPA's mandate. Accountability flowed to the international community under paragraph 6 of Security Council Resolution 1511,

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<sup>127</sup> *Report of the Secretary-General pursuant to Paragraph 24 of Security Council Resolution 1483 (2003)*, UNSC, 2003, UN Doc. S/2003/715 at para. 46 [UN S/2003/715].

<sup>128</sup> SC Res. 1483, *supra* note 107. These responsibilities were underscored by the UN in reports on Iraq: "Under international humanitarian law, the CPA bears the primary responsibility for the welfare of the Iraqi people, including the provision of public services" (see UN S/2003/715, *supra* note 127 at para. 60).

<sup>129</sup> UN S/2003/538, *supra* note 108.

<sup>130</sup> CPA, Order 2, *Dissolution of Entities*, CPA/Ord/23 Aug 2003, online: CPA website, *supra* note 114.

<sup>131</sup> CPA, Order 4, *Management of Property and Assets of the Iraqi Baath Party*, CPA/Ord/28 Jun 2004 at s. 3, online: CPA website, *supra* note 114.

<sup>132</sup> CPA, Order 9, *Management and Use of Iraqi Public Property*, CPA/Ord/27 Jun 2004, online: CPA website, *supra* note 114.

which requested the CPA to “report” on progress being made.<sup>133</sup> A monitoring process was also established—the International Advisory and Monitoring Board—to track management of the Development Fund for Iraq.<sup>134</sup> Nonetheless, neither the coalition nor the SRSB had an obligation to report to the people of Iraq directly, nor were any independent institutions such as an ombudsperson created. The Security Council resolutions also made no mention of accounting for the Iraqis killed during the invasion.<sup>135</sup> A further void in the accountability framework was brought to world attention by the abuse of prisoners at the Abu Gharib prison by US soldiers and private contractors.<sup>136</sup> These events underscored the lack of a judicial process—in Iraq, internationally, and abroad—to hold occupants to account for wrongs committed during the occupation.

#### **D. The Legislative Capacities of the UN Civil Administrations: UNMIK and UNTAET**

A critical distinction between belligerent occupations and the second category of actors, multilateral interim administrations (“functional occupants”), is the non-applicability of international humanitarian treaties to the latter. UN missions are not bound by the limits imposed by international humanitarian law on belligerent occupants as described above.<sup>137</sup> The *Hague Regulations* and the Geneva Conventions bind only signatory states. As an international organization, the UN has no status to sign the Geneva Conventions (although it has concluded related agreements in other contexts). Nor are the obligations of the Geneva Conventions automatically transferred by member states to the Security Council.<sup>138</sup> Although the UN can consent to be bound by the Conventions, it has made no explicit assumption of responsibilities in the context of its interim administrations. Unlike peacekeeping operations where the UN has agreed to respect the principles of humanitarian law,<sup>139</sup> neither UNMIK

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<sup>133</sup> See Grant, *supra* note 112 at 840.

<sup>134</sup> SC Res. 1483, *supra* note 107 at para. 12.

<sup>135</sup> José E. Alvarez, *International Organizations as Law-Makers* [forthcoming in 2005] at 39.

<sup>136</sup> Efforts to extend the immunities of US contractors after the handover on 30 June 2004 underscored this perception of unaccountability while highlighting the legal void within which these individuals operate: Sue Fleming, “US Seeks Some Immunity for Contractors in Iraq” (16 June 2004), online: Iraq Net <<http://www.iraq.net/displayarticle4260.html>>. But see Scheffer, *supra* note 111 at 857, which discusses potential actions under the *Federal Tort Claims Act* 28 U.S.C.S. § 2671.

<sup>137</sup> Some scholars have argued that the Conventions should apply to UN peacekeeping missions. See *e.g.* Benvenisti, *supra* note 47 at xvi. At present, no instruments apply directly.

<sup>138</sup> For a discussion of the international personality of the United Nations, see Philippe Sands & Pierre Klein, eds., *Bowett’s Law of International Institutions*, 5th ed. (London: Sweet & Maxwell, 2003). Note, however, that two decisions by the European Court of Human Rights suggest that member states may transfer their duties to international organizations. See *Waite and Kennedy v. Germany* (1999), I Eur. Ct. H.R. 393 at para. 67 and *Matthews v. The United Kingdom* (1999), I Eur. Ct. H.R. 251 at paras. 32 & 33.

<sup>139</sup> Since 1999, the UN has stated that forces under UN command must respect the principles of international humanitarian law. See *UN Secretary-General’s Bulletin: Observance by United Nations*

nor UNTAET committed itself to observing international humanitarian laws in their constitutive instruments.<sup>140</sup> Not only are the founding resolutions and the regulations on applicable law silent with regard to the applicability of international humanitarian law,<sup>141</sup> but both missions were given “all legislative and executive authority with respect to [the territory], including the administration of the judiciary.”<sup>142</sup> The founding documents therefore placed no limits on the legislative authority of the missions. Indeed, in defining UNTAET’s mandate, the Security Council authorized it to take “all necessary measures to fulfill its mandate.”<sup>143</sup>

The legal framework applicable to the legislative powers of the UN missions derives from the nature of their creation. The interim administrations in Kosovo and East Timor were established under the Security Council’s Chapter VII powers, through Security Council Resolutions 1244 and 1272 respectively. The mandates expressly included providing security and maintaining law and order throughout the territory of Kosovo and East Timor.<sup>144</sup> They also provided that the Special Representative, who as Transitional Administrator was responsible for all aspects of the United Nations work in Kosovo and East Timor, had the power to enact new laws and regulations and to amend, suspend, or repeal existing ones.<sup>145</sup>

This novel use of the Chapter VII powers to authorize interim legislative powers and to vest ultimate legislative authority in an agent of the secretary-general

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*Forces of International Humanitarian Law*, UNST, 1999, UN Doc. ST/SGB/1999/13; Robert C.R. Siekman, “Legal Responsibilities of Military Personnel” in Charlotte Ku & Harold K. Jacobson, eds., *Democratic Accountability for the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003) 104 at 111-12.

<sup>140</sup> Some argue that the UN should be bound by the general principles of the Geneva Conventions, even if it is not bound by the specific provisions. “[It] is uncontroversial that in an enforcement action United Nations forces could well find themselves in belligerent occupation of territory, and that most or all of the customary and conventional laws of war would then apply” (Roberts, *supra* note 17 at 290). This argument has recently been used to suggest the extension of humanitarian and human rights obligations to KFOR forces in Kosovo. See John Cerone, “Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo” (2001) 12 E.J.I.L. 469.

<sup>141</sup> Indeed, the Security Council only appears to refer to the Geneva Conventions in Security Council Resolution 1239 (1999) prior to the creation of UNMIK, where it states in the preamble that instruments of international humanitarian law (including the Geneva Conventions) should be borne in mind. See SC Res. 1239, UNSC, 4003 Mtg, UN Doc. S/RES/1239 (1999) (preamble).

<sup>142</sup> UNMIK Reg. No. 1999/1, *supra* note 58: “[A]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary General.” UNTAET Reg. No. 1999/1 (27 November 1999): “[A]ll legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is exercised by the Transitional Administrator.”

<sup>143</sup> SC Res. 1272, UNSC, 4057th Mtg., UN Doc. S/RES/1272 (1999) at para. 4.

<sup>144</sup> SC Res. 1272, *ibid.*, and SC Res. 1244, UNSC, 4011th Mtg., UN Doc. S/RES/1244 (1999) at para. 11(a).

<sup>145</sup> *Ibid.*; *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, UNSC, 1999, UN Doc. S/1999/779 at para. 39 [UN S/1999/779].

represents a considerable expansion of the UN's traditional peacekeeping mandate.<sup>146</sup> Where a threat to peace and security is found, article 41 of the UN Charter gives the Council broad power to decide "what measures not involving the use of armed force" are to be employed to give effect to its decisions. The specific measures contemplated in article 41 ("complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations") have been interpreted as nonexclusive.<sup>147</sup> Indeed, article 41 has been used not only as the nominal basis for sanctions and embargoes,<sup>148</sup> boundary demarcation disputes,<sup>149</sup> and the limited use of military force,<sup>150</sup> but also for some administrative functions,<sup>151</sup> and the creation of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>152</sup> On the basis of this authority, Michael J. Matheson has stated that "there is no reason in principle why the Council cannot authorize other measures of governance that it believes necessary to restore and maintain the peace, including the creation of administrative and judicial structures, *the promulgation of laws and regulations*, and the imposition of taxes and other financial measures."<sup>153</sup>

The UN administrations in Kosovo and East Timor have done exactly this: they have promulgated laws in large numbers, some of which touch on fundamental issues of the legal and political order. Over the course of its four-year mandate, UNTAET passed 71 regulations on issues involving security as well as judicial and financial reform.<sup>154</sup> It defined the scope of its general powers and established a National

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<sup>146</sup> Compare UNTAC's operation in Cambodia, where similar powers were granted to the SRSG, but with the consent of Cambodia. The SRSG did, however, retain residual authority in regard to the Supreme National Council of Cambodia. See Steven R. Ratner, "The Cambodia Settlement Agreements" (1993) 87 A.J.I.L. 1; Agreement of Comprehensive Political Settlement of the Cambodian Conflict (Oct. 23, 1991) (1992) 31 I.L.M. 183 (1992).

<sup>147</sup> *Prosecutor v. Tadic*, (1995), Case No. IT-94-AR72 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: United Nations <<http://www.un.org.icty>>.

<sup>148</sup> SC Res. 661, UNSC, 2934 Mtg. UN Doc S/RES/661 (1990). It was used here to impose sanctions against Iraq.

<sup>149</sup> See *e.g.* SC Res. 687, UNSC, 45th Sess., UN Doc. S/INF/47 (1991) at 11, concerning a boundary dispute between Iraq and Kuwait.

<sup>150</sup> See *e.g.* Security Council Resolutions concerning the interventions in Haiti and Kuwait: SC Res. 940, UNSC, 49th Sess., UN Doc. S/INF/50 (1994) at 51; SC Res. 678, UN SCOR, 45th Sess., UN Doc. S/INF/46 (1990) at 27.

<sup>151</sup> See *e.g.* SC Res. 827, UNSC, 3217th Mtg., UN Doc. S/RES/827 (1990) at paras. 16-19, regarding reparations for victims of Persian Gulf conflict.

<sup>152</sup> SC Res. 827, *ibid.*, and SC Res. 955, UNSC, 3453d Mtg., UN Doc. S/RES/955 (1994).

<sup>153</sup> Michael Matheson, "United Nations Governance of Postconflict Societies" (2001) 95 A.J.I.L. 76 [emphasis added].

<sup>154</sup> For a discussion of the process of legal reform in East Timor, see Hansjoerg Strohmeyer, "Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor" (2001) 29 U.N.S.W. L.J. 171.

Consultative Council to consult with the East Timorese.<sup>155</sup> It subsequently addressed banking measures and the applicable currency, and implemented measures relating to taxation.<sup>156</sup> It passed a telecommunications law and a code of military discipline, it established a legal aid service in East Timor, and it enacted a comprehensive amendment of the applicable rules of criminal procedure.<sup>157</sup> On 20 May 2002, the UN handed over authority to a democratically elected government in East Timor, and UNTAET's mission ended.

UNMIK's legislative activities have been even more extensive, with 27 regulations passed in 1999, followed by 69 in 2000, 41 in 2001, 23 in 2002, 41 in 2003 and 56 in 2004.<sup>158</sup> About half of the regulations were supplemented by administrative directions. Many of the initial regulations fit into familiar categories, such as the establishment of basic competencies,<sup>159</sup> security,<sup>160</sup> the amendment or repeal of prior discriminatory laws,<sup>161</sup> and ensuring the effective operation of the justice system.<sup>162</sup> A second series of regulations addressed economic and financial reform, and banking and foreign investment.<sup>163</sup>

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<sup>155</sup> *On the Authority of the Transitional Administration in East Timor*, UNTAET Reg. No. 1999/1 (27 November 1999); *On the Establishment of a National Consultative Council*, UNTAET Reg. No. 1999/2 (2 December 1999).

<sup>156</sup> See *On Bank Licensing and Supervision*, UNTAET Reg. No. 2000/8 (25 February 2000); *On the Use of Currencies*, UNTAET Reg. No. 2000/2 (14 January 2000); *Taxation System for East Timor*, UNTAET Reg. No. 2000/18 (30 June 2000).

<sup>157</sup> See *On the Establishment of an Authority for the Regulation of Telecommunications in East Timor*, UNTAET Reg. No. 2001/15 (21 July 2001); *On the Establishment of a Code of Military Discipline for the Defence Force of East Timor*, UNTAET Reg. 2001/12 (20 July 2001); *On the Establishment of a Legal Aid Service in East Timor*, UNTAET Reg. 2001/24 (5 September 2001); *On Transitional Rules of Criminal Procedure*, UNTAET Reg. No. 2000/30 (25 September 2000).

<sup>158</sup> See online: UNMIK Regulations & Administrative Directions, Official Gazette <<http://www.unmikonline.org/regulations/index.htm>>.

<sup>159</sup> See UNMIK Reg. No. 1999/1, *supra* note 60.

<sup>160</sup> See *On the Establishment of the Kosovo Corps*, UNMIK Reg. No. 1999/8 (20 September 1999).

<sup>161</sup> See *On the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property*, UNMIK Reg. No. 1999/10 (13 October 1999).

<sup>162</sup> See UNMIK Reg. No. 1999/24, *supra* note 62; *On the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor*, UNMIK Reg. No. 1999/5 (4 September 1999); *On Recommendations for the Structure and Registration of the Judiciary and Prosecution Service*, UNMIK Reg. No. 1999/6 (7 September 1999); *On Appointment and Removal from Office of Judges and Prosecutors*, UNMIK Reg. No. 1999/7 (7 September 1999).

<sup>163</sup> See *On Bank Licensing, Supervision and Regulation*, UNMIK Reg. No. 2001/24 (1 October 2002); *On the Banking and Payments Authority of Kosovo*, UNMIK Reg. No. 1999/20 (15 November 1999); *On the Licensing of Non-Bank Micro-Finance Institutions in Kosovo*, UNMIK Reg. No. 1999/13 (16 October 1999); *On the Currency Permitted to be Used in Kosovo*, UNMIK Reg. No. 1999/4 (2 September 1999).

UNMIK also placed great emphasis on developing an effective system of taxation<sup>164</sup> and on establishing the institutions and procedures necessary to assist in the eventual transition to self-government, such as setting up electoral rules and municipal administrations.<sup>165</sup> It has devoted extensive energy and resources to improving the criminal law system and the administration of justice.<sup>166</sup> In sum, UNMIK's regulations have gone far beyond the types of exceptions permitted to occupying powers bound by the Geneva Conventions. They touch instead on many areas of great local concern such as the definition of fundamental rights and freedoms and the establishment of building blocks for self-government.

### **E. The Scope of the Legislative Power of the UN Missions**

The breadth of subject matter addressed by UNMIK and UNTAET regulations raises the issue of what—if anything—is outside the legislative competencies of the UN missions. Because the power of UN interim administrations to legislate is based on the delegated powers of the Security Council, the answer relates to the applicable limits to the Security Council's own enforcement actions.

The Security Council was never intended to be a legislator.<sup>167</sup> Its legislative actions in post-conflict zones are therefore subject to explicit and implicit limits under the UN Charter. The explicit limits arise primarily from the authority and powers of the Security Council set out in Chapters V, VI, VII, VIII, and XII. Assuming the creation of the UN missions is *intra vires* the powers of the Security Council, the Security Council is limited principally by its obligations to maintain international peace and security. The Charter would, therefore, prohibit legislative acts authorizing

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<sup>164</sup> See *On Excise Taxes in Kosovo*, UNMIK Reg. No. 2000/26 (22 April 2000), amending UNMIK Reg. No. 2000/2; *On the Establishment of a Presumptive Tax*, UNMIK Reg. No. 2000/29 (20 May 2000), amended by UNMIK Reg. No. 2001/40; *On Tax Administration and Procedures*, UNMIK Reg. No. 2000/20 (12 April 2000); *On Personal Income Taxes in Kosovo*, UNMIK Reg. No. 2002/4 (20 February 2002).

<sup>165</sup> See *On the Establishment of the Administrative Department of Trade and Industry*, UNMIK Reg. No. 2000/63 (7 December 2000); *On Self-Government of Municipalities in Kosovo*, UNMIK Reg. No. 2000/45 (11 August 2000); *On the Registration and Operation of Political Parties in Kosovo*, UNMIK Reg. No. 2001/16 (4 July 2001), amending UNMIK Reg. No. 2000/16.

<sup>166</sup> See *On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders*, UNMIK Reg. No. 2001/18; *On the Use in Criminal Proceedings of Written Records of Interviews Conducted by Law Enforcement Authorities*, UNMIK Reg. No. 2002/7 (28 November 2002); *On Measures against Organized Crime*, UNMIK Reg. No. 2001/22 (20 September 2001); *On the Prohibition of Terrorism and Related Offences*, UNMIK Reg. No. 2001/12 (14 June 2001); *On the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law*, UNMIK Reg. No. 2001/1 (12 January 2001); *On the Prohibition of Trafficking in Persons in Kosovo*, UNMIK Reg. No. 2001/4 (12 January 2001); *On a Constitutional Framework for Provisional Self-Government in Kosovo*, UNMIK Reg. No. 2001/9 (15 May 2001). See also Gregory L. Naarden & Jeffrey B. Locke, "Peacekeeping and Prosecutorial Policy" (2004) 98 A.J.I.L. 4 at 727.

<sup>167</sup> See Oscar Schachter, "United Nations Law" (1994) A.J.I.L. 1.

acts of aggression, the annexation of neighboring territories, or belligerent changes in borders.

More relevant to the scope of legislative competencies are the implicit limits applicable to the Security Council by virtue of paragraph 2 of article 24 of the UN Charter, which states that “[i]n discharging these duties, the Security Council shall act in accordance with the Purposes and Principles of the United Nations.” The purposes and principles of the United Nations as set out in Articles 1 and 2 require, in part, the promotion and encouragement of respect for human rights and fundamental freedoms without distinction as to race, sex, language, or religion, and the equal rights and self-determination of peoples.<sup>168</sup> This provision does not directly address the circumstances under which a UN mission can change domestic laws, but it does suggest that Chapter VII enforcement actions must conform to certain international human rights and humanitarian norms.<sup>169</sup>

Which international human rights and humanitarian principles must the Security Council respect? Some argue that under paragraph 3 of article 1 of the UN Charter, the Security Council is bound to respect the broad gamut of rights contained in instruments such as the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination*, and the *United Nations Human Rights Convention*.<sup>170</sup> Because customary international law is not as a general matter binding on the Security Council, because the UN is not a party to these instruments, and because member obligations are not attributed or transferred to the UN, a narrower approach is more persuasive: the core limits on Security Council actions are those norms that have become customary through its own practice and legitimacy.<sup>171</sup> The Security Council has developed, as a matter of its own customary practice, certain limits on its otherwise broad discretion.<sup>172</sup>

The Security Council has recognized the applicability of general humanitarian principles in the context of embargoes. For example, sanctions against Rhodesia, Haiti, and Yugoslavia, as well as Iraq during the Iraq-Kuwait crisis, were designed to

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<sup>168</sup> It has been argued that article 24(2) provides a foundation for incorporating and requiring enforcement of all rights guaranteed in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* (among other international instruments), but such an expansive reading has not received wide support. See Jose Alvarez, “The Security Council’s War on Terrorism: Problems and Policy Options” in Erica De Wet & André Nollkaemper, eds., *Review of the Security Council by Member States* (Antwerp: Intersentia, 2003) 119.

<sup>169</sup> By way of analogy, note the International Committee of the Red Cross’ position on the application of international humanitarian law to the UN forces in peacekeeping operations. See Siekman, *supra* note 139 at 112.

<sup>170</sup> See Erika De Wet, “The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View” in De Wet & Nollkaemper, *supra* note 168, 7 at 13.

<sup>171</sup> See Alvarez, *supra* note 168 at 125.

<sup>172</sup> *Ibid.* at 129.



accord with humanitarian requirements.<sup>173</sup> Furthermore, Security Council Resolution 666 signaled that the sanctions regime in Iraq required the assessment and monitoring of “humanitarian circumstances.”<sup>174</sup> While not legally bound to apply these norms, the Security Council has nonetheless established parameters for its actions that are connected to its overall legitimacy.<sup>175</sup> In other words, while the Security Council need not justify its actions with regard to customary international law under the Charter, its practices have nonetheless developed to demonstrate that it does not operate above the law.<sup>176</sup>

In addition to these customary norms of practice, the Security Council may be bound by *jus cogens* norms. *Jus cogens* refer to those fundamental and inalienable rights and duties in customary international law that cannot be set aside by treaty or acquiescence, but only by the formation of a rule of contrary effect.<sup>177</sup> The content and status of *jus cogens* norms are the subject of some dispute, but examples include prohibitions on genocide, the slave trade, and the right to self-determination. Another norm that is particularly applicable in the context of legislative reform is article 4 of the *International Covenant on Civil and Political Rights* (“ICCPR”), which safeguards the right to life, the prohibition of torture or cruel and degrading treatment, the prohibition of slavery and servitude, the impermissibility of retroactive punishment, the right of recognition before the law, and freedom of thought, religion and conscience.<sup>178</sup> Fair trial standards also constitute non-derogable norms as set out in ICCPR article 14, and require bodies established pursuant to UN enforcement actions (such as the UN missions) to ensure equality before courts and tribunals, and fair and public hearings by competent, independent, and impartial tribunals.<sup>179</sup>

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<sup>173</sup> *Ibid.* at 92. See also Henry G. Schermers & Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 4th ed. (Boston: Martinus Nijhoff, 2003) s. 1577.

<sup>174</sup> SC Res. 666 (1990), UNSC, UN Doc. S/RES/666 (1990).

<sup>175</sup> See Paul Szasz, “The Security Council Starts Legislating” (2002) 96 A.J.I.L. 901.

<sup>176</sup> See T.D. Gill, “Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter” (1995) 26 *Nethl. Y.B. Int’l L.* 33 at 62.

<sup>177</sup> See Brownlie, *supra* note 3 at 488. Scheffer, *supra* note 111, notes that “it is unlikely that the Security Council would approve responsibilities contradicting overarching principles of occupation law regarded as *jus cogens* or *erga omnes* norms” (*ibid.* at 852).

<sup>178</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 4, Can. T.S. 1976 No. 47 [ICCPR]. See also Vera Gowlland-Debbas, “Security Council Enforcement Action and Issues of State Responsibility” (1994) 43 *Int’l & Comp. L. Q.* 55 at 70-71, where the author discusses the application of *jus cogens* norms to the Security Council; Erika De Wet, “Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime” (2001) 14 *Leiden J. Int’l L.* 277 at 286.

<sup>179</sup> Article 14 of the ICCPR, *ibid.*, is supplemented by Common Article 3 of the Geneva Conventions, which prohibits the “passing of sentences and the carrying out of executions without the judgment pronounced by a regularly constituted court.” Additional Protocol I (art. 7) and Additional Protocol II (art. 6) provide further relevant standards in this regard.

The final determinant of the powers and limitations of UN missions is of course the Security Council resolutions that establish them. The resolutions set out the mandates, purposes, and jurisdiction of the missions, and as such constitute “self-limits” on their legislative powers. Both UNMIK and UNTAET passed regulations decreeing prior applicable laws to be in force to the extent that they did not conflict with UN regulations, international human rights standards, or the purposes of the mandate.<sup>180</sup> The UN missions have consequently recognized and implemented a fundamental premise of the Geneva Conventions, namely the ongoing applicability of prior law.

The UN missions also acknowledged their obligations with regard to certain human rights principles. UNTAET Regulation 1999/1 set out a list of internationally recognized standards that all persons undertaking public duties or holding public office in the mission were required to respect.<sup>181</sup> In Kosovo, UNMIK Regulation 1999/24 stated that persons undertaking public duties or holding public office in Kosovo should observe internationally recognized human rights standards. Unlike the UNTAET Regulation, no specific instruments were identified. Nonetheless, the special representative to the secretary-general for UNMIK recognized that international human rights standards constituted a legal limit on UNMIK’s exercise of authority in his 12 July 1999 report, which stated that “in assuming its responsibilities, UNMIK will be guided by internationally recognized standards of human rights as the basis for the exercise of its authority in Kosovo.”<sup>182</sup>

#### **F. Jus Post Bellum Principles in the UN Missions**

The concept of trusteeship informs the duties of the UN missions, although its scope is narrower than those imposed on belligerent occupants by the *Hague Regulations* and the Geneva Conventions. Historically, the concept of trusteeship was central to the mandate system of the League of Nations, and subsequently the Trusteeship Council of the United Nations.<sup>183</sup> The obligations of the administering

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<sup>180</sup> UNTAET Reg. No. 1999/1, *supra* note 142, s. 3 (identifying the applicable law as that in force prior to 25 October 1999); UNMIK Reg. No. 1999/1, *supra* note 60, amended by UNMIK Reg. No. 1999/25. See also discussion in Marshall & Inglis, *supra* note 61 at 104-05.

<sup>181</sup> These obligations were derived from the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *International Convention on the Rights of the Child*. See UNTAET Reg. No. 1999/1, *supra* note 155.

<sup>182</sup> UN S/1999/779, *supra* note 145 at para. 42.

<sup>183</sup> *League of Nations Covenant*, art. 22. See Sir Arnold Wilson, “The Laws of War in Occupied Territory” (1932) 18 *Transactions of the Grotius Society*: “Enemy territories in the occupation of the armed forces of another country constitute (in the language of Art. 22 of the League of Nations Covenant) 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 title” (*ibid.* at 38).

authorities to promote self-government were to be based on the “freely expressed wishes of the peoples concerned” as set out in 76(b) of the Charter. In trusteeship agreements with territories, the obligation to “respect the rights and safeguard the interests” was readily acknowledged. Article 8 of the trusteeship agreement for Tanganyika, for example, stated:

In framing laws relating to the holding or transferring of land and natural resources, the administering authority shall take into consideration the native laws and customs, and shall respect the rights and safeguard the interests, both present and future, of the native population. No native land or natural resources may be transferred, except between natives, save with the previous consent of competent public authority. No real rights over native land and natural resources in favour of non-natives may be created except with the same consent.<sup>184</sup>

Occupied and UN administered territories do not fall within the UN’s trusteeship system, which is now essentially defunct.<sup>185</sup> Nonetheless, the relationships of dependency are similar, and some have argued that contemporary occupations have a status akin to an international stewardship.<sup>186</sup> The obligations on member states set out in article 73 of the Charter (which is not exclusive to the trusteeship system) reinforce this general duty:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that *the interests of the inhabitants of these territories are paramount*, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture and of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
  - b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
  - c. to further international peace and security
- ... [emphasis added]

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<sup>184</sup> As cited in C.V. Lakshminarayan, *Analysis of the Principles and System of International Trusteeship in the Charter* (N.p., 1951) at 125.

<sup>185</sup> The secretary-general has now recommended deletion of the Trusteeship Council from the UN Charter. See Secretary-general, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UNGA, UN Doc. A/59/2005 at para. 218.

<sup>186</sup> In this vein, some commentators consider UN administered territories to be modern day trusteeships. See e.g. Richard Caplan, *A New Trusteeship? The International Administration of War-torn Territories* (Oxford: Oxford University Press for the International Institute for Strategic Studies, 2002).

The legislative powers of the interim administration set out in UNMIK Reg. No. 1999/1 imply trusteeship by the use of the term “entrust”:

In the performance of the duties *entrusted* to the interim administration under United Nations Security Council resolution 1244 (1999), UNMIK will, as necessary, issue legislative acts in the form of regulations. Such regulations will remain in force until repealed by UNMIK or superseded by such rules as are subsequently issued by the institutions established under a political settlement, as provided for in United Nations security Council resolution 1244 (1999).<sup>187</sup>

The mandate and trusteeship system also provides a basis for the principle of accountability in international administrations. Although the responsibility to local inhabitants and local ownership over the process was generally a low priority, the trusteeship system did create opportunities to formulate questionnaires, make reports, consider petitions from inhabitants, and make periodic visits to the territories. In fact, Simon Chesterman suggests that these mechanisms probably represented a higher level of accountability than what was available to the populations of Kosovo, East Timor, and Bosnia during recent administrations.<sup>188</sup>

In Kosovo and East Timor, several accountability mechanisms are worthy of note. First, the SRSGs of both missions were required to report regularly to the Security Council, although there was no requirement to report to the inhabitants. Second, both missions created the institution of Ombudsperson.<sup>189</sup> Because UN missions are not subject to judicial review, the Ombudsperson was virtually the only institution that could check the authority of the international community. In Kosovo, the Ombudsperson was created under the auspices of the OSCE in 2000, and has jurisdiction to investigate complaints against the interim administrations and local institutions concerning human rights abuses and other abuses of authority.<sup>190</sup> It has exercised this function carefully, and has issued a number of reports highlighting irregularities in UNMIK’s administration.<sup>191</sup> Conspicuously absent from the Ombudsperson’s jurisdiction, however, are allegations of abuse by the Kosovo Force (“KFOR”).

The perception of accountability by the UN missions has been weakened by several developments. The 2001 Constitutional Framework, which affirms the direct application of human rights in Kosovo, does not state whether these apply to UNMIK

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<sup>187</sup> *Supra* note 60.

<sup>188</sup> Simon Chesterman, *You The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004) at 45.

<sup>189</sup> See Simon Chesterman, “The United Nations as Government: Accountability Mechanisms for Territories Under UN Administration” (2002), online: International Peace Academy <[http://www.ipacademy.org/PDF\\_Reports/un\\_as\\_govt\\_for\\_web.pdf](http://www.ipacademy.org/PDF_Reports/un_as_govt_for_web.pdf)>. An Ombudsperson office was also created in East Timor in 2001, but it had no formal mandate and was not established by regulation.

<sup>190</sup> *On the Establishment of the Ombudsperson Institution in Kosovo*, UNMIK Reg. No. 2000/38 (30 June 2000). Conspicuously absent from the ombudsperson’s jurisdiction, however, is KFOR.

<sup>191</sup> See annual reports of Ombudsperson Institution in Kosovo, online: <<http://www.ombudspersonkosovo.org>>.

or to KFOR.<sup>192</sup> The definition of “authority” in the Constitution makes no reference to the role of international organizations, and NATO personnel are granted broad immunities.<sup>193</sup> This ambiguity translates to the appearance that UNMIK and KFOR are operating outside of the law, undermining the public’s confidence that their interim government is bound by the principles it claims to espouse. This lack of confidence has been sharpened by several widely reported incidents of executive detentions, whereby individuals were detained for up to two years without judicial review.<sup>194</sup>

Accountability is also a matter of process, whereby the local populations are given ownership over institutional and legal changes. Formally, both UNMIK and UNTAET included consultative mechanisms with local representatives. Composed of political leaders from Albanian and Serb communities (although the Serb representatives rarely participated out of protest), the Kosovo Transitional Council (“KTC”) was created as one of the foundational organs of the mission. Similarly, in East Timor, a National Consultative Council was established under Regulation 1999/2.<sup>195</sup> In practice, the process was hindered by the paucity of lawyers trained in the local legal system and the absence of a legislative committee. UN legal counsel typically drafted laws, sent them to independent experts such as the Council of Europe for comments, and then forwarded them on to UN headquarters in New York for approval.<sup>196</sup> This exclusive method of drafting resulted in many legal instruments containing aspirational standards that were not grounded in practice.<sup>197</sup> In some instances, these standards were not present in the national laws of even the most liberal democracies. In Kosovo, only the most important laws—such as the draft constitution—became a matter of public debate, despite other laws that had a very concrete impact on daily life.<sup>198</sup>

#### IV. Legal Reform and Proportionality

This survey of legislative reform reveals a number of interesting convergences in the activities of both categories of occupant. The scope of these contemporary experiments in legal reconstruction is unabashedly wide: in each case, legal reform is

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<sup>192</sup> See Kosovo Constitutional Framework Chapters 2 and 3 and discussion in Marshall & Inglis, *supra* note 61 at 102-03. See also Cerone, *supra* note 140.

<sup>193</sup> Appendix B to Kosovo Constitutional Framework: Status of Multi-National Military Implementation Force, art. 18.

<sup>194</sup> See Elizabeth Abraham, “The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo” (2003) 52 Am. U. L. Rev. 1291.

<sup>195</sup> UNTAET Reg. No. 1999/2, *supra* note 155.

<sup>196</sup> This is based on my personal observations.

<sup>197</sup> The drawbacks of this approach are well explained in Katharina Pistor, “The Standardization of Law and Its Effects on Developing Economies” 50 Am. J. Comp. L. 97 at 99.

<sup>198</sup> Marshall & Inglis write that “UNMIK’s legislative power has been used without the articulation of broad policy goals or any consistent, transparent, or inclusive process” (*supra* note 61 at 96).

premised upon principles of liberalism and democracy.<sup>199</sup> Furthermore, the administrations have recognized, but departed from the fundamental premise of the law of occupation that the laws of the sovereign remain valid and in force unless security concerns or competing treaty obligations require their repeal or amendment. In Kosovo, East Timor and Iraq, the occupants have promulgated wide-reaching legal reforms with remarkable similarity in subject matters and content, particularly in the commercial and financial fields. Finally, the goals of the administrations are long term: to transform the institutions and laws of the occupied state according to the democratic model and to use legal reform to secure a market economy.<sup>200</sup>

It is certainly the case that occupants and multilateral interim administrations require some law-making capabilities. Failure to give authorities the power to pass and to enforce new laws may create legal and political vacuums in occupied territories which could lead to chaos and even harm to the inhabitants. The capacity to change laws is also integral to the democratic system. Nonetheless, the necessity of legal reform in post-conflict situations stands in an uneasy embrace with the primitive legislative frameworks applicable to contemporary occupants. The fundamental precepts of the rule of law risk being violated by the very actors who claim to establish them. Inadequate or unenforced limits on legislative powers mean that occupiers risk taking on quasi-imperial roles, blurring the distinction between occupation and conquest, self-determination and subjugation. The consequence may be to undermine the right of a people to exercise self-determination.

Post-conflict legal reform produces a fundamental dilemma: on the one hand, there is a growing consensus that in times of humanitarian crisis, there is a political imperative to rebuild core state capacities such as functioning legal systems in order to ensure peace and stability. On the other hand, overexpansive international involvement in the reconstruction of legal systems risks violating fundamental premises of international law which maintain that sovereignty cannot be alienated by the use of force, and that a people has the right to determine its own political path and legal institutions. As John D. Montgomery stated in 1957 in regard to the “artificial revolutions” of Germany and Japan, “it is not yet clear that defeat in war may legally become the means of forcing a people to become free.”<sup>201</sup>

Trusteeship and accountability provide two conceptual benchmarks that help to resolve this dilemma. These principles provide content to the occupant’s

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<sup>199</sup> Literature on transitional justice that addresses the mechanisms for dealing with perpetrators of massive human rights violations through amnesties, domestic or international criminal processes is outside the scope of the current study in that it deals with past atrocities, rather than the prospective creation of domestic legal orders. Nonetheless, there is an important parallel in that transitional justice mechanisms display a similar commitment to liberal institutions. See *e.g.* David Dyzenhaus, “Transitional Justice” (2003) 1 *Int’l J. Const. L.* 163.

<sup>200</sup> For a discussion of market reform in the context of peacemaking, see Roland Paris, *At War’s End* (Cambridge: Cambridge University Press, 2004) at 5-6 and 17.

<sup>201</sup> Montgomery, *supra* note 51 at 4-5.

responsibilities as a legislator based on the explicit and implicit legal mandates of the occupants. Trusteeship and accountability do not exist in complete harmony, however. Trusteeship requires that an occupant use its discretion to act in the best interests of the population; that is, an occupant is required to act on what the inhabitants *should* want. The occupant is held to a certain standard of conduct in light of this fiduciary goal. Accountability, in contrast, requires the occupant to act as an agent for what the inhabitants actually *do* want, and to be held to account when decisions are not transparent or do not conform to developing rules of global administrative law.<sup>202</sup> History demonstrates all too clearly how the legitimacy and effectiveness of international administrations and occupations are undermined if these principles are not properly balanced.

Proportionality is a useful intermediary between these two concepts in that it helps to determine what kind of intervention is appropriate by balancing ends and means according to contingencies. It invites an assessment of the proposed legal reforms in light of the existing legal system, the goals of the interventions, the available alternatives. Proportionality is a principle common to both domestic and international legal systems. In domestic systems, this concept is often employed to weigh state policies against infringements on individual rights, to assess the constitutionality of derogations from rights, and to determine the appropriate measures of punishment for a given crime.<sup>203</sup> In the UN system, proportionality appears in the context of counter-measures and the use of force, and as an equitable measure in resource allocation.<sup>204</sup> It is explicitly found in article 67 of the *Fourth Geneva Convention*,<sup>205</sup> and might be said to implicitly inform article 64 to the effect that an occupier must make a proportional determination concerning the applicability of exemptions to the general rule that prior law remains in force. Proportionality,

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<sup>202</sup> For a variation of this tension, see Grant & Keohane, *supra* note 40 at 10-11. See also Benedict Kingbury *et al.*, “The Emergence of Global Administrative Law” *Law & Contemp. Probs* [forthcoming in 2005].

<sup>203</sup> Proportionality is a doctrine of considerable importance in ECHR jurisprudence which has been adapted from German constitutional law. A three-part test is generally applied: (i) Are the means chosen suitable? (ii) Does the legislative act go beyond what is necessary? (iii) Is there an absence of disproportionality? See generally Francis G. Jacobs, “Recent Developments in the Principle of Proportionality in European Community Law” in Evelyn Ellis, ed., *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) at 1-22.

<sup>204</sup> See Enzo Cannizzaro, “The Role of Proportionality in The Law of International Counter Measures” (2001) 12 E.J.I.L. 889, and De Wet, *supra* note 178 at 292.

<sup>205</sup> Art. 67 of the *Fourth Geneva Convention* (*supra* note 18) provides:

The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportioned to the offence.

therefore, acts as a balancing tool to assess the effectiveness of international enforcement measures.<sup>206</sup>

As a primary matter, the identity of the occupant will decide the applicable duties of trusteeship and accountability. Where legal intervention takes place under UN auspices, post-conflict reconstruction makes its ultimate goal self-determination, restoration of stability and peace, the establishment of functioning institutions, a market economy and respect for human rights. It also sets in motion the democratic process by preparing for free elections. After a territory has gained independence, the UN and the international community must respect internal decisions as to the future direction of the country. Occupants bound by the Geneva Conventions are permitted far less transformative roles. They act as temporary guardians, and unless tasked with a broader role by the Security Council, they may not use legal reform as a means to fundamentally reorient a society.

A proportionality assessment requires an analysis of whether these goals can be met by an approach that is closer to trusteeship or to accountability on the spectrum of possibilities. To determine how to apply these duties and fill the gaps in the existing legal frameworks, the analysis of a variety of circumstances is required. Factors that weigh in favour of higher trusteeship obligations are the collapse of central institutions, the absence of a functioning legal system, few trained lawyers, and outdated and discriminatory laws. Factors that would support more accountability include a representative civil society, a modern and enforced legal system, some concurrence on fundamental values such as the division of power between political constituencies and the role of religion, and a history of democratic elections. The appropriate package will depend, in each instance, on the identity of the occupant and the scope of their legal powers, on the goals of the legal reform (to prepare for self-determination or to maintain the status quo pending the formation of a new government), and on the conditions in the country itself.

With these factors in mind, were the legal reforms canvassed in this article proportionate? For Iraq, Eyal Benvenisti interprets Resolution 1483 as “[granting] a mandate to the occupants to transform the previous legal system” to enable the Iraqi people to meet the goals of self determination.<sup>207</sup> But a foundational difference between the legislative powers of belligerent occupants and interim administrations is that occupants have no authority to override the legislative acts of prior regimes as a matter of right. Even where gaps arise in the framework set out by the Geneva Conventions, the occupant has no inherent power to legislate at will because article 64 confers no such power in the first place. Legal reforms in Iraq that advanced the duties of the CPA as occupant or addressed the specific goals set out in the UN

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<sup>206</sup> See *e.g.* W. Michael Reisman & Douglas L. Stevick, “The Applicability of International Law Standards to United Nations Economic Sanctions Programmes” (1998) 9 *E.J.I.L.* 86 (discussing proportionality in the context of economic sanctions).

<sup>207</sup> Benvenisti, *supra* note 47, preface.



resolutions were justifiable, but reforms that were not reasonably connected to these goals were not. On this reading, certain reforms in Iraq—particularly the privatization of the economy are not easily defended as proportionate. This measure has introduced a radical reorientation of the economy, which cannot meaningfully be changed by succession governments. In addition, given the democratic goals underlying the CPA's occupation, the absence of independent accountability mechanisms such as an ombudsperson's office is troublesome, as are efforts to maintain immunities under international law for private contractors working in Iraq.

The breadth of legal reforms in Kosovo and East Timor were problematic for other reasons. Because the occupants in Kosovo and East Timor were UN missions, greater accountability in the proportionality analysis is required. Due to the complete legislative authority granted to the SRSG, and to the UN's broad duty to promote self-government (a duty which would not apply to an occupant unless the Security Council provided otherwise), the UN should have ensured the application of human rights and humanitarian laws to its interim administrations. Some inroads have been made in the context of the High Representative in Bosnia, as discussed above, but in future missions clearer standards will be necessary for the long-term legitimacy of the missions. In more general terms, the legal reforms in Iraq, Kosovo and East Timor were disproportionate because occupants introduced far too many new regulations than could realistically take root. The limited ability of local institutions to enforce the regulations due in large part to poorly functioning and under resourced judicial systems, and the very different legal cultures existing in these societies, has meant that the legal reforms surpassed the local absorptive limits. Going forward, more limited legislative mandates are necessary, which will include a better sequencing of reforms based not only on short-term crises, but on the longer term ability of a society to integrate new norms into its existing legal system. In addition extensive consultation with local members of the legal community, such as judges, is necessary to ensure that the reforms make sense to the ultimate users of the legal systems, and not just to the temporary occupants.

## V. Conclusion

For foreign legal intervention to be effective, legal reform must be embraced by the local legal intermediaries (such as courts, judges, and institutions) and by local populations. Laws function in living systems, and legal reform that takes place by transplanting foreign laws or by introducing new practices into existing social contexts will be poorly enforced if the laws are not embedded in the society.<sup>208</sup> Consensual and non-consensual experiments in legal interventionism have demonstrated the importance of (i) consultation with the users and the administrators

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<sup>208</sup> Daniel Berkowitz *et al.*, "The Transplant Effect" (2003) 51 *Am. J. Comp. L.* 163, 179. See also Katharina Pistor, "The Standardization of Law and Its Effects on Developing Economies" (2002) 50 *Am. J. Comp. L.* 97 at 98.

of the legal systems, (ii) proportionality in determining the nature and extent of those reforms, and (iii) clear standards of governance (and potential liability where those standards are infringed) by interim administrations.

Self-determination rests in an uneasy balance with current peacebuilding operations. In 1859, John Stuart Mill argued that a state is self-determining even if its citizens attempt but fail to establish free institutions, but that same state is deprived of self-determination if the institutions are established by an intrusive neighbour.<sup>209</sup> That is, the members of a political community must seek and establish their own freedom. The absolutism of Mill's statement would be tempered with some caveats today. Sovereignty is not a shield for egregious violations of human rights, nor are internal conflicts outside the scope of international humanitarian law. Indeed, some recommend that peacebuilding missions delay economic reforms and elections until new institutions are in place.<sup>210</sup> Nonetheless, because transitional administrations are stopgap responses to longer term situations of instability, they must mediate between immediate needs such as the provision of food and healthcare and reestablishment of security on the ground with the longer term goals of creating a basis for eventual self-government.

The foregoing analysis has shown that legal reform has often proceeded without regard for the applicable limits on the powers of international administrations and occupants under international law. This approach can be explained in light of the occupant's interest in operating freely and acting quickly in post-conflict zones. It may also be the result of a general presumption that because legal interventionism is motivated at least in part by a desire to secure democracy and a market economy, good judgement and respect for limits are inherent in the mandate. The central contention of this analysis has been that certain functional limits must be incorporated into legal reform mandates, and that the principles of trusteeship, accountability, and proportionality are factors that can be used to articulate substantive standards in the legal frameworks applicable to occupation. In applying these factors to the contingencies of post-conflict situations on the ground, the international community can help to establish a framework that will define the ethical calculus of its relationship with post-conflict regimes and that will establish a more systematic approach to legal reform. The sweeping powers granted to the SRSGs in Kosovo and East Timor may ultimately be exceptional, but the open-ended nature of the law of occupation demonstrates the considerable latitude that must be curbed if future legal reform in the context of occupation and interim administrations is to be legitimate.

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<sup>209</sup> John Stuart Mill, "A Few Words on Intervention" in *Essays on Politics and Culture*, ed. by Gertrude Himmelfarb (New York: Doubleday, 1962) 396 at 411. See discussion in Walzer, *Wars*, *supra* note 13 at 87.

<sup>210</sup> Paris, *supra* note 200 at 6-7.