

# TRANSFORMATIVE OCCUPATION OF IRAQ AND INTERNATIONAL LAW: A LEGAL ANALYSIS

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## I. INTRODUCTION

It has been more than two decades that one of the most extensive reforms in West Asia was undertaken in Iraq. These far-reaching reforms were done when Iraq was under foreign occupation. Many Iraqi laws were changed and the Iraqi economy became the most open economy. The occupying powers issued almost a hundred orders, seventeen memorandums, and twelve regulations in Iraq.<sup>1</sup> The occupying powers gave many reasons for introducing such long-lasting changes in Iraq. These reasons went beyond the permissible grounds for changing the laws of occupied territory under the law of occupation. The legality of these changes has been in much debate under international law and this article will highlight this in next few pages.

In the current scenario, the world is also witnessing many armed conflicts and the situations of intervention and occupation. The occupation of enemy territory is the common by-product of conflicts. Thus, it is the right time to critically engage with the arguments given in support of the transformative occupation of Iraq. This is pertinent because it will highlight whether imposed reform by the occupant would bring a sustainable peace and prosperity. This will also help in locating the legal contours of administration in occupied territory.

To this end, the article is divided into six parts, including introduction given in part one. Part two discusses the commencement of the occupation in Iraq and some important legal and political developments. Part three discusses the transformative occupation of Iraq in little detail. The purpose is to highlight the wide arguments taken by the occupying powers to introduce changes in Iraq. Part four discusses the legality of the arguments that are made by the occupying powers in support of their transformative ambitions. Part five discusses the other dangers of transformative occupation, Part six concludes the paper with suggestions. The author adopts the doctrinal research method to examine and analyze the legalities of transformative occupation of Iraq.

## II. COMMENCEMENT OF OCCUPATION IN IRAQ

The occupation of Iraq occurred after a long political battle and in almost one-sided war. UN Security Council (UNSC) Resolution 687 of 1991 prescribed for regular inspection and destruction of Iraq's nuclear, chemical, and biological weapons under the international supervision.<sup>2</sup> This was followed by many claims and counter claims between Iraqi authorities and UN inspectors as to the role of inspectors in Iraq. Subsequently, UNSC Resolution 1441 of

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Coalition Provisional Authority (CPA) Official Documents, *available at*: <https://govinfo.library.unt.edu/cpa-iraq/regulations/index.html#Regulations> (last visited on May 25, 2024).

2002 found Iraq in material breach of its obligations and offered Iraq a final opportunity to comply with its obligations.<sup>3</sup>

The United States of America (USA) claimed that Iraq failed to comply with its obligations and sought authorization from the UNSC to intervene in Iraq. The consensus at UNSC failed, and the USA along with United Kingdom (UK), unilaterally launched hostilities against Iraq on March 18, 2003. The US forces entered Baghdad on April 09, 2003, and the US President declared the end of military operations in Iraq on May 01, 2003. Iraq was placed under the occupation of the joint forces of the US and the UK. Coalition Provisional Authority (CPA) was created, and the same was communicated to the President of the Security Council by the permanent representatives of the USA and the UK on May 08, 2003.<sup>4</sup> The administrator of CPA, Mr. L. Paul Bremer, was receiving salary from the US army, and the CPA was reporting to the US Defence forces and the US President.<sup>5</sup> The UNSC Resolution 1483 of May 22, 2003, declared these forces under the unified command as the occupying power.<sup>6</sup>

CPA, through its regulation no. 6, created the Iraqi Governing Council on July 13, 2003.<sup>7</sup> It consisted of twenty-five members appointed by the CPA. Neither the people of Iraq nor the Special Representative of the UN Secretary General in Iraq had any say on this. The constitution of the Iraqi Governing Council was welcomed by the UNSC as a step towards the formation of a democratic government in Iraq, but its role was mostly consultative.<sup>8</sup> The Iraqi Governing Council lacked any democratic input. Most of the orders and resolutions of the CPA used the consent of the Iraqi Governing Council as one of the arguments to bring far-reaching changes in Iraq.

### III. TRANSFORMATIVE OCCUPATION OF IRAQ

The occupation of Iraq is a classic case of a transformative occupation. Transformative occupation means an occupation with transformative purposes. Range of these transformative purposes is not clear. The law of occupation does not allow the transformation of the occupied territory and it provides only for trusteeship administration by the occupier. Occupier is authorized only to change those laws of occupied territory that affect its security and that put hindrances in fulfilment of its obligation under the law of occupation.<sup>9</sup> The transformative occupation is such occupation that involves ‘transformation away from repressive closed

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<sup>2</sup> UN Security Council, SC Res 687, SCOR, UN Doc S/Res/687 (Apr. 03, 1991), *available at*: [https://docs.un.org/en/S/RES/687\(1991\)](https://docs.un.org/en/S/RES/687(1991)) (last visited on May 25, 2024).

<sup>3</sup> UN Security Council, SC Res 1441, SCOR, UN Doc S/Res/1441 (Nov. 08, 2002), *available at*: [https://docs.un.org/en/S/RES/1441\(2002\)](https://docs.un.org/en/S/RES/1441(2002)) (last visited on May 25, 2024).

<sup>4</sup> Letter from the Permanent Representative of the UK and the US addressed to the President of the Security Council, UN doc S/2003/538 of May 08, 2003, quoted in Adom Roberts “The End of Occupation: Iraq 2004” 54 (1) *International Comparative Law Quarterly* 31 (2005).

<sup>5</sup> L. Elaine Halchin “The Coalition Provisional Authority (CPA): Origin, Characteristics and Institutional Authorities” *Congressional Research Service Report* (2005), p.no. 14, *available at*: <http://www.au.af.mil/au/awc/awcgate/crs/#iraq> (last visited on May 27, 2024).

<sup>6</sup> UN Security Council, SC Res 1483, SCOR, UN Doc S/Res/1483 (May 22, 2003), *available at*: [https://docs.un.org/en/S/RES/1483\(2003\)](https://docs.un.org/en/S/RES/1483(2003)) (last visited on May 27, 2024).

<sup>7</sup> CPA Official Documents, *supra* note 1, CPA Reg. No. 6.

<sup>8</sup> UN Security Council, SC Res 1500, SCOR, UN Doc S/Res/1500 (Aug. 14, 2003), *available at*: [https://docs.un.org/en/S/RES/1500\(2003\)](https://docs.un.org/en/S/RES/1500(2003)) (last visited on May 27, 2024).

political systems and towards democratic systems that more closely adhere to international standards of governance and individual rights'.<sup>10</sup> The changes introduced in Iraq went too long and attempted to change political and economic spectrum of Iraq forever.

The changes affected almost all sphere of Iraqi nation including its political, legal, and economic structures. Since laws relating to belligerent occupation do not permit transformation of occupied territory, the supporters of this concept take the help of other sources. In the case of Iraq, mandate from the Security Council and developments in other fields of international law were largely argued for such negation of the strict application of law of occupation.

The following table highlights the broad arguments given by the occupying powers to bring long-lasting changes in Iraq.

**Grounds given by CPA for the changes made in Iraq<sup>11</sup>**

<b>CPA Order No.</b>	<b>Area of Change/ Enactment</b>	<b>Grounds/Reasons provided for the change</b>
Order No. 1	De ba'athification of Iraq	<ul style="list-style-type: none"> <li>• Human Rights violations by Ba'ath party.</li> <li>• Continuation of Ba'ath party was a threat to Iraq</li> </ul>
Order No. 2	Dissolution of entities	<ul style="list-style-type: none"> <li>• These entities were used by previous regime to oppress Iraq's people</li> </ul>
Order No. 7	Penal Code	<ul style="list-style-type: none"> <li>• In violation of International Human Rights norms</li> </ul>
Order No. 12	Trade Liberalization Policy	<ul style="list-style-type: none"> <li>• To develop a free market economy in Iraq</li> </ul>

<sup>9</sup> I. Maxine Marcus, "Humanitarian Intervention without Borders: Belligerent Occupation or Colonization" 25(1) *Houston Journal of International Law* 137 (2002).

<sup>10</sup> Gregory H. Fox, "Transformative Occupation and the Unilateralist Impulse" 94(885) *International Review of the Red Cross* 241 (2012).

<sup>11</sup> Reasons/Grounds given in the table have been taken from the preambles of the respective orders of CPA. Various grounds have been mentioned in the respective orders, here only some of them have been mentioned according to their importance for the present discussion. This table discusses only those orders of CPA which were in patent discord with the law of occupation. This table was originally part of the M. Phil. Dissertation submitted by author to CILS/SIS/JNU.

Order No. 13	The Central Criminal Court of Iraq	<ul style="list-style-type: none"> <li>• To develop judicial system</li> <li>• To ensure due process</li> </ul>
Order No. 15	Establishment of the Judicial Review Committee	<ul style="list-style-type: none"> <li>• For order and security</li> <li>• Due process and rule of law</li> </ul>
Order No. 17	Status of CPA, MNF-Iraq	<ul style="list-style-type: none"> <li>• To clarify their status</li> </ul>
Order No. 20	Trade Bank of Iraq	<ul style="list-style-type: none"> <li>• To uplift Iraqi economy</li> </ul>
Order No. 22	Creation of New Iraqi Army	<ul style="list-style-type: none"> <li>• For stability and security</li> <li>• To build the national self defence of Iraq</li> </ul>
Order No. 23	Code of Military Discipline	<ul style="list-style-type: none"> <li>• For stability and security in Iraq</li> <li>• To discipline and maintain Iraqi army</li> </ul>
Order No. 27	Establishment of the Facilities Protection Services	<ul style="list-style-type: none"> <li>• For improving security and stability in Iraq</li> </ul>
Order No. 28	Establishment of the Iraqi Civil Defence Corps	<ul style="list-style-type: none"> <li>• To contribute to the conditions of security and stability in Iraq.</li> </ul>
Order No. 31	Modification of Penal Laws and Criminal Proceedings Law	<ul style="list-style-type: none"> <li>• For security and stability</li> </ul>

Order no. 37	Tax Strategy for 2003	<ul style="list-style-type: none"> <li>• Review of taxes</li> </ul>
Order No. 39	Foreign Investment	<ul style="list-style-type: none"> <li>• Effective administration of Iraq</li> <li>• To solve the problems of the then existing laws regulating commercial activity</li> <li>• For market economy</li> </ul>
Order No. 42	Creation of the Defence Support Agency	<ul style="list-style-type: none"> <li>• For security and stability</li> <li>• Welfare of the Iraqi people</li> </ul>
Order No. 48	Delegation in respect of Iraqi Special Tribunal	<ul style="list-style-type: none"> <li>• To fix accountability for the crimes during Ba'ath Party era</li> <li>• For public order</li> <li>• Rule of law according to international law.</li> </ul>
Order No. 64	Amendment to the Iraq's Company Law	<ul style="list-style-type: none"> <li>• Some provisions of old laws hinder Iraqi economic growth.</li> </ul>
Order No. 67	Ministry of Defence	<ul style="list-style-type: none"> <li>• For welfare of the Iraqi people</li> <li>• To further the Iraqi people's right to have national self defence capabilities.</li> </ul>

Order No. 69	Delegation of Authority for Iraqi National Intelligence Services	<ul style="list-style-type: none"> <li>• For welfare of Iraqi people</li> </ul>
Order No. 74	Interim Law on Securities Market	<ul style="list-style-type: none"> <li>• To make these laws modern, efficient, transparent</li> </ul>
Order No. 80	Amendment to Trademark Laws	<ul style="list-style-type: none"> <li>• To meet international standards.</li> </ul>
Order No. 81	Patent Laws	<ul style="list-style-type: none"> <li>• To meet international standards.</li> </ul>
Order No. 83	Amendment to Copyright Laws	<ul style="list-style-type: none"> <li>• To meet international standards.</li> </ul>
Order No. 94	Banking Laws of 2004	<ul style="list-style-type: none"> <li>• To promote the economic reconstruction and sustainable development.</li> </ul>

Thus, it is clear from the above given table that most of the grounds provided by CPA to bring the changes in Iraq do not comply with exceptional limits under which the occupant is permitted to legislate. These reasons vary from permissible limits to non-permissible limits under international law. On close scrutiny, it seems that occupying powers had argued unscrupulously whatever they pleased. The occupying powers have argued the various grounds in a manner which is in complete disregard with the principle of sovereign equality among nations and hence, discussion on their legality becomes pertinent.

#### IV. TRANSFORMATIVE ARGUMENTS AND INTERNATIONAL LAW

It seems that the reasons for the changes vary from the permissible exceptions under international humanitarian law to the transformative purposes of the occupiers. It is beyond doubt that the nature of most of the changes goes beyond the temporary authority of the occupiers. These were motivated to transform the social, political, and economic structure of Iraq. Though sovereign government of Iraq which was to come after occupation, was authorised to rescind these changes; but taking note of the nature and effect of such changes and further vulnerability of new incoming government along with various other legal and non-legal strangles imposed on it, it could be proved in unambiguous terms that occupiers were working to transform the Iraqi society and had no respect for the law of occupation.

Most of the economic changes had turned Iraq from one of the centrally state-controlled economy to the most open free market economy of the world.<sup>12</sup> These changes did not relate either to the military necessity or daily administration on a temporary basis. Most of these changes referred to various grounds in support of the transformative purposes. Some of these grounds were used as common. These were consent of the Iraqi Governing Council, mandate of the Security Council, and developments in other fields of international law. The author now proceeds to evaluate them separately.

### ***A. Consent of Iraqi Governing Council***

The consent of the Iraqi Governing Council was largely quoted as one of the reasons for changes introduced in Iraq. But this meant nothing. The Governing Council was a nominated body by occupant and nothing more than a council created by the occupying powers themselves. It lacked a democratic voice and could not be considered an independent council free from the effects of the occupying powers. Experiences of two world wars proved that such bodies had always been prone to be used by the occupants according to their own whims.<sup>13</sup> Some authors also argued to curb such practices of the occupant.<sup>14</sup> Furthermore, articles 8<sup>15</sup> and 47<sup>16</sup> of the Fourth Geneva Convention of 1949 (GC IV) specifically mention that protected persons in occupied territory could not be deprived of their rights in any circumstances. Obligations and restrictions imposed under this law could not be waived even by ousted sovereign.

### ***B. Mandate from the Security Council***

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

It is pertinent to analyse the UNSC Resolution 1483 in respect of the law of occupation. Following points are worthy to be mention in this regard. Firstly, this resolution specifically recognised the USA and the UK as occupying powers. Secondly, it further called upon the CPA that it should promote the welfare of Iraqi people through the UN Charter and international law<sup>17</sup>. Thirdly, a special representative for Iraq (was to be appointed by the Secretary General of the United Nations) was called to assist the people of Iraq in coordination with the CPA in performing some tasks and bringing some changes of humanitarian nature.<sup>18</sup> Fourth, it supported

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<sup>12</sup> Robert Kolb “Occupation in Iraq since 2003 and the Power of the UN Security Council” 90 (869) *International Review of the Red Cross* 39 (2008).

<sup>13</sup> Jean S. Pictet, *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 243 (The International Committee of the Red Cross, Geneva, 1958).

<sup>14</sup> G. Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* 74 (The University of Minnesota Press, Minneapolis, 1957).

<sup>15</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), 75 *UNTS* 287 (hereinafter mentioned as ‘Geneva Convention IV’), art. 8.

<sup>16</sup> *Id.*, art. 47.

<sup>17</sup> *Supra* note 6.

<sup>18</sup> *Id.*, operative para. 8.

the constitution of an interim Iraqi administration by the people of Iraq with the help of the CPA.<sup>19</sup>

These references of effective administration, setting of performance agenda and establishment of an interim Iraqi administration have been the central points of debate among scholars and some of them interpreted it, though criticising this resolution, as mandate to pursue transformative ambition of occupiers and state building.<sup>20</sup> But this does not seem to be the final truth. In the words of Robert Kolb, the adoption of this position “is to presuppose something that needs to be proved”.<sup>21</sup> There are alternative approaches also which do not consider UNSC resolution 1483 as a blank mandate for occupying powers to carry on transformative purposes.<sup>22</sup>

This resolution neither mandates the occupiers to take a reformist agenda nor endorses any such effort by them in clear terms. Though it mentions some reformist agenda, but they are not to be carried solely by the occupants and respect for the law of occupation was always demanded.<sup>23</sup> It does not expressly or impliedly deny the applicability of these laws even during carrying out such tasks. UNSC Resolution 1483 in its operative paragraph 5, demands the occupying powers to fulfil their obligations under international law. The occupation-related obligations are derived from customary international humanitarian law as well as from the GC IV and the Hague Regulations 1907 (HR IV). This is a clear indication towards applicability of law of occupation and it should be interpreted as an effort to restrain the occupant’s authority to unilaterally undertake transformative purposes.<sup>24</sup>

Some of the problems of interpretation are caused by the ambiguous and broad language of operative paragraph 4 of the UNSC Resolution 1483. This paragraph called the CPA to promote the welfare of the Iraqi people through the “effective administration” of the territory. It further called it to restore and create the conditions of security and stability in Iraq so that political future of Iraq could be freely determined by the Iraqi people. These mandates were supposed to be carried out according to the UN Charter and other rules and principles of relevant international law. CPA had used this reference of effective administration in most of its orders.

The subjective nature of phraseology like “welfare of the Iraqi people” and “other relevant international law” is argued by David J Scheffer in favour of transformative purposes<sup>25</sup>.

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<sup>19</sup> *Id.*, operative para. 9.

<sup>20</sup> Carsten Stahn, “ “Jus ad Bellum”, “Jus in Bello”, “Jus Post Bellum”? - Rethinking the Conception of the Law of Armed Forces” 17(5) *European Journal of International Law* 929 (2006).

<sup>21</sup> *Supra* note 12 at 38.

<sup>22</sup> Nehal Bhuta, “The Antinomies of Transformative Occupation” 16(4) *European Journal of International Law* 735 (2005). Also see, Marco Sassoli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers” 16(4) *European Journal of International Law* 681-682 (2005); and Gregory H. Fox, “The Occupation of Iraq” 36(2) *Georgetown Journal of International Law* 295 (2005).

<sup>23</sup> *Supra* note 6, operative para. 8.

<sup>24</sup> Nehal Bhuta, *supra* note 22 at 735.

<sup>25</sup> David J. Scheffer, “Beyond Occupation Law” 97 (4) *American Journal of International Law* 844 (2003). Author observes: “to pull Iraq out of its repressive past and return it to the community of civilized nations, the Authority will aggressively employ international human rights law, principles of democratization, economic initiatives, and perhaps controversial use of force principles in the name of domestic security. Many of the principles advanced by the authority will not have occupation laws as their source; some may have their own *jus cogens* identity or deeply rooted in the normative principles of the United Nations Charter.”



Supporter of the transformative occupation argues that though this reference to other international law includes the law of occupation; but it also includes the developments in other fields of international law<sup>26</sup>. Thus, they argue for the conflation of various fields of international law, and hence make the situation a blurred one.

But this problem could easily be solved by considering the *lex specialis* nature of international humanitarian law. International humanitarian law has its own history and purposes. They are made to be applied in most subtle and vulnerable situation. They have their own harsh realities and experiences, and thus, the protection granted under them should not be taken away merely on the grounds of development in other fields of international law.<sup>27</sup>

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

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

### ***C. International Humanitarian Law and the Security Council***

Apart from this as the International Humanitarian Law obligations fall under *jus cogens*, an expert argues that even UNSC Resolutions should not derogate from it.<sup>28</sup> Nevertheless, there are opposite views also and it is argued that the UNSC may give mandate to derogate from *jus cogens*.<sup>29</sup> However, the question that who will decide whether the Security Council Resolutions has violated *jus cogens* seems problematic.

But without going in to this debate, it seems reasonable to draw a line of concurrence that there is always be a presumption that the UN Security Council has not derogated from the international humanitarian law norms and any such claimed derogation must be explicit in unambiguous terms.<sup>30</sup> Any ambiguity in its resolutions must be resolved in favour of

<sup>26</sup> *Ibid.*

<sup>27</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, (1996) *ICJ Reports*. Dissenting opinion of Judge C. Weeramantry, pp. 443-445.

<sup>28</sup> Marco Sassoli, *supra* note 22 at 681.

<sup>29</sup> Bernd Martenczuk, "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?", 10(3) *European Journal of International Law* 545-546 (1999).

<sup>30</sup> *Legal consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion*, (1971) *ICJ Reports*, p.no. 53, para. 114. Also see, Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions" 16 (1) *European Journal of International Law* 68, 78-79 (2005); and Marten Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation"

international humanitarian law norms. Any measures authorised by the UN Security Council in generic terms, as in the case of Iraq, should be implemented in a manner that respects international humanitarian law. This argument is also supported by the fact that Security Council has also called upon the occupying power to take actions to end the violations of IHL.<sup>31</sup>

Thus, it seems that UN Security Council resolutions should be interpreted in harmonious manner to avoid any conflict with principles of international humanitarian law and more particularly with the principles of law of occupation. They could not deny the existence of a situation of occupation. Any such attempt would amount to change the basic framework of preservationist approach of law of occupation. In essence the belligerent occupation is conflict of interest between occupiers and occupied.

It is a situation which is very prone to be used according to the whims and caprices of the occupying powers for their own benefit. This makes the conditions of inhabitants vulnerable. Thus, the law of occupation is an attempt to provide some help to the occupied. Lord McNair observed that “the law of belligerent occupation is an attempt to substitute for chaos some kind of order, however harsh it may be”.<sup>32</sup> Thus, any such mandate given by the UN Security Council in most generic words should be interpreted in favour of preservationist approach of occupation laws.<sup>33</sup>

#### ***D. Developments in Other Fields of International Law***

There is another approach which supports the transformative purposes in Iraq. It is argued that occupation laws have become old and does not meet the challenges of contemporary international law.<sup>34</sup> Advocates of this approach mention about the development in other branches of international law, and thus, feel uncomfortable in balancing the occupation laws with respect to those developments. Mainly, they discuss the developments in human rights jurisprudence. Some authors also argue that occupation laws should not be applied in specific situations which demand transformation.<sup>35</sup>

The advisory opinion of the International Court of Justice in the Wall Case confirms the applicability of the International Covenant on Civil and Political Rights 1966, International Covenant on Economic, Social and Cultural Rights 1966, and United Nations Convention on the Rights of Child 1989 in occupied territory.<sup>36</sup> Hence, occupant is obliged to implement provisions of such conventions and to abolish the regulations and institutions of the occupied territory which contravene the standards of human rights laws. This also gives right to the individuals of the occupied territory, either in side in occupied territory or outside, to demand

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86(856) *International Review of the Red Cross* 762 (2004).

<sup>31</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (2004), *ICJ Reports*, p.no. 200, paras. 159-160.

<sup>32</sup> Lord McNair and A.D. Watts, *The Legal Effects of War* 371 (Cambridge University Press, Cambridge, 1966).

<sup>33</sup> Jose E. Alvarez, “Hegemonic International Law Revisited” 97(4) *American Journal of International Law* 873-888 (2003).

<sup>34</sup> Davis P. Goodman, “The Need for Fundamental Change in the Laws of Belligerent Occupation” 37(6) *Stanford Law Review* 607 (1985).

<sup>35</sup> David J. Scheffer, *supra* note 25 at 848-849.

<sup>36</sup> *Supra* note 31 at 191-192, para. 134.

redress for their human rights violations from the occupying power.<sup>37</sup> However, criticism of this approach is also available.<sup>38</sup>

As regards abolition of institutions of the occupied territory which are in contravention of the standards of human rights norms, it should always be taken into mind that such contravention should be of substantive nature and not be only in nature of procedure of implementation. Procedure of implementation should conform to local cultural and legal patterns. According to ICRC commentary on GC IV, occupying authority must not touch the local legislation ‘merely to make it accord with their own legal conceptions’.<sup>39</sup> Existence of a similar law in occupying power’s own country is not the proper test.<sup>40</sup> While implementing such changes the occupant should always keep in mind that it is not the sovereign of the territory and only such changes may be introduced that are absolutely necessary to comply with its obligations.<sup>41</sup>

However, there are other practical problems in merging of human rights and humanitarian laws. Mostly human rights laws are individual centric justifies the limiting of rights for the sake of multiple reasons. As compared to the international humanitarian law which considers people under occupation as protected person, the human rights discourse places everyone on equal plane without any distinction between occupied and occupier. This equalisation of occupied and occupier may lead to a distorted picture that finds the situation as conflict of rights.

Further, human rights discourse treats individual localized violations as exceptions. However, in occupation where norm is the denial of rights, the human rights based study of the situation may depict the instances of denial of right as exception but in reality, it is the normal factual assentation. Thus, individual win of human rights may create the myth of a “benign occupation” that protects human rights even though they are mostly denied.<sup>42</sup> About such merger of human rights laws with laws of occupation, Aeyal M. Gross observes that “transplanting human rights to a situation of occupation may thus blur its inherently undemocratic rights denying nature, and confer upon it the perceived legitimacy of an accountable regime.”<sup>43</sup>

Apart from this, there are some other differences between humanitarian law and human rights law. These are as follows: First, humanitarian laws treaties are all universal and there is no regional variation. Second, there is no classification under the humanitarian law like the different generations of rights. International humanitarian law is a compact whole to protect the individuals in the grimmest situations of armed conflicts and their aftermaths. Third, there is no

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<sup>37</sup> Steven R. Ratner, “Foreign Occupation and International Territorial Administration: The Challenges of Convergence” 16(4) *European Journal of International Law* 704 (2005).

<sup>38</sup> Michael J. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation” 99(1) *American Journal of International Law* 141 (2005). Also see, Michael J. Kelly, “Critical Analysis of the International Court of Justice Ruling on a Israel’s Security Barrier” 29(1) *Fordham International Law Journal* 228 (2005).

<sup>39</sup> *Supra*, note 13 at 336.

<sup>40</sup> Marco Sassoli, *supra* note 22 at 677.

<sup>41</sup> *Ibid.*

<sup>42</sup> Aeyal M. Gross, “Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?” 18(1) *European Journal of International Law*, 8 (2007).

<sup>43</sup> *Id.*, p. 33.

such political rights or right as to the form of governments under international humanitarian law.<sup>44</sup> These specialties of humanitarian laws make this body a coherent system of law free from any political biases and more susceptible to enjoy universal application without any controversy.

The above-mentioned differences between these two bodies of laws should not be considered as arguments against the application of the well-established norms of human rights laws in occupied territories, but this article only argues that these specialties and differences must always be kept in mind and the occupant must not use this capacity for altering the political system of the occupied territory under the pretext of human rights reforms.

## V. OTHER DANGERS OF TRANSFORMATIVE OCCUPATION

There are other reasons also to discard arguments made in favor of transformative purposes. Any such acceptance of the logic of transformative purposes would certainly mean the enhanced capacity of the occupant without any clear and unambiguous mandate. Enhanced authority without any clear mandate and effective reporting system are always prone to be used according to the whims of the occupying powers. Indicating the potential danger, Marco Sassoli observes that “simple encouragement of international efforts to promote legal and judicial reform by an occupying power is certainly too vague to justify an occupying power to legislate beyond what IHL permits.”<sup>45</sup>

Further, such permissive interpretation of laws of occupation may lead to consequential problems in other areas of international law. These may be as follows:<sup>46</sup> First, it may blur the line between occupation and annexation. Limited powers of the occupiers and its temporary character might be harmed by such wide interpretation and it may lead to the situation that would amount to annexation in disguise of occupation for the time being. Second, it may dilute the principle that the applicability of international humanitarian law is free from the justness of use of force. This may be utilized by an intervener to realize those war aims under the garb of occupation laws which are prohibited according to the rules of use of force. This would amount to an additional catastrophe for international law in the form of humanitarian occupation, a step forward from humanitarian intervention.

Third, it has the potential to negate the principle of autonomy of states. The principle that “every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state” would cease to apply in case of occupied territory. Fourth, the unconstrained occupier would face no barrier to enact legislation that could result in the incurred international liability of the occupied territory by the temporary occupant.

Thus, transformative occupation would always be of the unilateralist impulse and deny the multilateral nature of international law. It would challenge and compromise many edifices of international law. The legal status of the territories of weak states would always remain

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<sup>44</sup> Louise Doswald Beck and Sylvain Vite, “International Humanitarian Law and Human Rights Law”, in M. K. Balachandran and Rose Varghese (eds.), *Introduction to International Humanitarian Law*, 139 (New Delhi: International Committee of the Red Cross, 1999).

<sup>45</sup> Marco Sassoli, *supra* note 22 at 681.

<sup>46</sup> Gregory H. Fox, *supra* note 22 at 264-269.

precarious on the good will of the powerful states; and thus, would compromise the basic right of self-determination to the inhabitants of the occupied territory.

## **VI. CONCLUSION AND SUGGESTIONS**

Thus, it is clear from the above points and arguments that most of the changes made in Iraq have transgressed the law of occupation. There are also some arguments in favour of such transgression, but it seems that those arguments are in themselves flawed and baseless. Though Iraq has lived up with these changes for more than two decades, but they always remain precarious on the direct or indirect support of the erstwhile occupying powers. This would significantly compromise the sovereign space of the state. The occupying powers should desist from introducing long-lasting changes in the occupied territory and such changes should come from the organic native voices. The contemporary scenario in the Occupied Palestinian Territory must also be informed that long lasting changes in the occupied territories must not be brought by the occupant. It is neither legal nor legitimate.