Leiden Journal of International Law (2018), 31, pp. 479–508
 doi:10.1017/S0922156518000316

INTERNATIONAL LEGAL THEORY

Occupied Iraq: Imperial Convergences?

KERRY RITTICH*

Abstract

The occupation of Iraq in 2003 involved a wide-ranging set of interventions in the domestic legal, political and economic structures of the state, interventions that provoked a debate about whether the law of occupation should recognize a category of 'transformative' occupation.

While the occupation itself has often been decried as an imperial venture, its administration involved a diffusion of power among international institutions as well as ratification by the Security Council through Resolution 1483. This article pursues the intuition that the transformation of norms and practices elsewhere in the international order underwrote the idea that it was the law of occupation that was problematic, at the same time facilitating the transmutation and preservation of practices that might be identified as imperial. Two developments are key: The first is the pervasive normalization of intervention in the domestic policy and legal orders of states; the second is the dissemination of norms about domestic regulation within the international order, those that touch on economic governance in particular. The orders of the occupying were infused in both form and substance with ideas of 'normal governance' traceable to myriad projects, policies and practices of other international institutions: development agencies, financial institutions, trade organizations. Iraq then might be a revealing case with which to consider the character and locations of contemporary imperialism, as well as the role of international law and international institutions in its unfolding.

Keywords

economic reform; governance; imperialism; international institutions; law of occupation

1. Introduction

Following the invasion in 2003, the occupying powers engaged in a wide-ranging set of interventions in the legal, political and economic institutions of Iraq. Among international lawyers, these interventions gave rise to a debate about whether the law of occupation should be reformed and expanded to expressly legitimate action performed by a benevolent occupier in the name of universally endorsed and accepted values and objectives.

Although it was conducted in the name of advancing the welfare of the Iraqi people, the occupation itself has been identified and decried as an imperial venture. But it also enjoyed significant international support, as the Security Council

* Professor of Law, Women and Gender Studies, and Public Policy and Governance, University of Toronto [kerry.rittich@utoronto.ca]. Deep thanks to the other contributors to this volume, to two anonymous reviewers, and to Yishai Blank, Karen Engle, Guenter Frankenberg, Aeyal Gross, Vasuki Nesiah, Amr Shalakany, Chantal Thomas, Robert Wai, Lucie White, Mikhael Xifaras and the law faculties at Hong Kong University and Tel Aviv University for their comments, insights and assistance.

both recognized the authority of the occupying powers and noted the need for a multilateral effort and the assistance of the International Monetary Fund and the World Bank in the reconstruction and development of Iraq.

Many of the objectives pursued by the occupying powers in Iraq were already normalized activities within international institutions. Here, I pursue the intuition that the move to expand the law of occupation and debates about the imperial character of the occupation might be illuminated by considering the congruence between occupation reforms and governance endeavours elsewhere in the international order. Tracing the links between Iraq and other international contexts, I explore how projects and practices elsewhere in the international arena, those that touch on matters of development, finance, trade, and investment in particular, help underwrite the idea that restrictions of the law of occupation were outdated and problematic. At the same time, Iraq indicates something about the routes and mechanisms by which international institutions now assist in the emergence and transmutations of practices that might be identified as imperial. Here, two features seem noteworthy, important to debates on both the law of occupation and on imperialism. The first is a pervasive normalization of intervention in the domestic policy choices and legal orders of states on the part of international institutions. The second is the global dissemination and entrenchment of good governance and regulatory norms, an effort that has been particularly powerful concerning those that touch on the economy.

To explore these issues, Section 2 situates the occupation of Iraq within contemporary post-conflict territorial administration, suggesting that a preoccupation with governance both links these contexts and joins them to other international projects in which domestic economic surveillance and reform are central. Section 3 considers the controversy that the occupation of Iraq engendered, looking both backward to imperial practices and forward to the arguments for a 'transformative' approach to the law of occupation.

A number of frames help capture both the forces behind the instability in the law of occupation and the preoccupation with governance, as discussed in Section 4, from the role of hegemonic powers and the variable fortunes of sovereignty within the international order to Foucault's theories concerning liberal governmentality and biopolitical power. Section 5 considers three sources through which economic reforms were authorized, explained and conducted in Iraq: Security Council Resolution 1483, the National Security Strategy of the US, and key orders of the Coalition Provisional Authority, noting the extent to which they reallocated risks and powers among Iraqis and outsiders and situated economic governance within the domain of security concerns.

Section 6 'reads' the economic reforms in Iraq in a broader context, suggesting that the ubiquity of economic interventions along with their technocratic cast helped make them seem uncontroversial. It then places those reforms in broader historical context, identifying other recent contexts which serve as waypoints on the path to normalizing intervention.

Section 7 sets out the arguments for the recognition of 'benevolent' occupation and, reflecting on parallel events in the contexts of transition and development, raises questions about the benefits to be expected of economic reforms like those

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

instituted in occupied Iraq. The growing convergence between development and human rights agendas indicates why human rights seem likely to fuel rather than restrain the agenda for deep economic reform, while the gaps between contemporary domestic governance practices and the law of occupation create predictable pressure to loosen its constraints.

If Iraq presents a compelling case with which to consider the character of contemporary imperialism, as well as the role of international law and international institutions in its unfolding, then Iraq also stands as a clear caution about any expansive approach to the powers of occupiers and tasks of occupation.

2. Situating the law of occupation: International territorial administration and the move to governance

Occupation raises the spectre of war and conquest, and the international law governing occupation engages, in the first instance, questions about the exercise of military power and the establishment of public order and security.[1] However, even if the maintenance of security remains a central preoccupation, it is well-recognized that the attention of occupying powers is less and less restricted to matters of security and civil order alone; instead, it now typically extends to a broad range of rules and institutions that organize economic and political life writ large. As the nature of occupation has changed and the activities of the occupier have expanded, the law that governs it has been progressively destabilized, with significant constituencies both within and beyond the discipline now arguing for an international law that would legitimate explicitly 'transformative' approaches to the task of occupation and administration.[2]

Moreover, the law of occupation must now be considered in relation to other peace-building operations on the international plane, foremost of which are the UN administered 'post-conflict' governance projects that have proliferated since the 1990s.[3] Post-conflict governance in locations as disparate as Iraq, Kosovo and East Timor now subsumes what might previously have been understood as occupation within new forms of internationally recognized and organized forms of territorial administration.[4] These administrations now encompass an extraordinarily wide range of activities which, depending on the mandate under which they operate, may both engage and displace the rules governing occupation. For this reason, the boundary between occupation and international administration has substantially

[1] 1907 Convention IV Respecting the Laws and Customs of War on Land (the 'Hague Convention'), The Hague, UKTS 9 (1910), available at ihl-databases.icrc.org/applic/ihl/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument.

[2] A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', (2006) 100 AJIL 580; S. Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', (2005) 16 EJIL 695.

[3] See R. Wilde, *International Territorial Administration* (2008); C. Stahn, *The Law and Practice of International Territorial Administration* (2008); G.H. Fox, *Humanitarian Occupation* (2008).

[4] The *locus classicus* on this is Wilde, ibid.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

collapsed.[5] Both because these contexts are all sites of intervention by international institutions and because they raise a host of inter-linked normative, ethical and institutional issues, for many purposes it is useful to think about the law of occupation and post-conflict administration together.[6]

Iraq after the invasion by the United States in 2003 represents something of a case study in how the categories of occupation and post-conflict or international territorial administration might effectively merge. Post-invasion events in Iraq not only clearly began as an occupation;[7] they arguably continued in that vein,[8] notwithstanding the engagement of UN organs and other international institutions in the governance of Iraq soon after the invasion. But it is not merely the involvement of international institutions and the Security Council ratification of the US and British presence that links Iraq with other theatres of international administration. The UN Security Council's May 2003 Resolution 1483 both formalized the role of the Coalition Provisional Authority (CPA) as the occupying power and authorized a series of activities and projects, many of which had already become normalized parts of UN-sponsored territorial administration in locales such as Kosovo and East Timor.[9]

It may no longer be adequate, however, to conceptualize contexts such as Iraq or other theatres of international territorial administration in the contemporary language of post-conflict governance. The powers now exercised by occupiers and administrators are so expansive, unfettered and intentionally 'transformative' that they put the category itself in question. Is this really *post-conflict* governance? Or does the emphasis belong somewhere else? For these administrations seem less and less comprehensible merely in terms of the conflict which was ostensibly their genesis. Examined as sites of institutional practice, they also seem less unique: as occupiers and administrators expand their zone of operation, their activities increasingly mirror and mimic forms of intervention now commonly found elsewhere in the international order, those directed at economic development and debt relief in particular. Occupied Iraq, then, might be thought of as a theatre of intervention continuous with many others, one that reflects particularly intense engagement with norms about the nature and character of the global economic order.The intuition pursued here is that at this point we may gain more purchase on what is driving both the expanding scope of international administration and the pressure to transform the law of occupation by situating post-conflict governance in relation to economic projects and interventions in the international order that emerged contemporaneously in the post-Cold War period. Whatever the ongoing force of concerns about peace and security, another important set of reference points for the laws and norms of occupation and international administration can be located in the

[5] See Ratner, *supra* note 2; See Wilde, *supra* note 3.
[6] See Wilde, ibid., Ch. 8.
[7] M.N. Schmitt, 'Iraq (2003 onwards)', in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012), 356 at 356.
[8] See Roberts, *supra* note 2.
[9] See, for example, O. Korhonen, J. Gras and K. Kreutz, *International Post-Conflict Situations: New Challenges for Cooperative Governance* (2006). See also Wilde, *supra* note 3.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

systematic efforts to promote market-centred economic development and effect the 'transition' of formerly socialist and communist states to market-centred economies and polities. These initiatives, underway for a generation, have served as a vehicle to construct and diffuse norms about 'good' economic governance, norms that are now increasingly entrenched across the international order as a whole.[10]

At first glance, development, transition and market reform projects do not seem obviously connected to regimes of occupation and international territorial administration. They do not raise military or security concerns in the first instance, and they are certainly not understood to be peace-building operations at their core. Instead, these ventures are typically figured as conjoined projects of political and economic reform designed to lead to more democratically accountable polities and economies that are better integrated into and attuned to the demands of the current global order. Yet in substance, many of these non-conflict-based state-building projects look much like their post-conflict counterparts. Despite quite different origins, they tend to display remarkably similar, and sometimes indistinguishable, aims and preoccupations. Indeed, there is now so much overlap in the regulatory objectives, institutional forms and governance mechanisms advocated in post-conflict and other contexts that it seems safe to say that they are informed by a shared vision and consciousness. Whether war, economic crisis, political upheaval or something else constitutes the precipitating event, the intervention and administration that follows is sure to include some mix of the following: respect for the rule of law; reforms to judicial processes and institutions; democratization, understood as the implementation of a liberal constitutional order and periodic, multi-party elections; recognition of human rights and an expanded voice and role for civil society; and the elimination of corruption, along with greater transparency and accountability on the part of public officials.[11] Economic liberalization and the adoption of rules and policies that foster intensified private sector activity invariably form a central part of the agenda for change, and they follow a well-defined Washington[12] and now post-Washington consensus style.[13]

The commonalities across these different political and institutional contexts do not stop at the level of form and substance. Many of the actors and institutions that are involved in post-conflict governance and administration are also involved in the design and execution of reform projects elsewhere on the transnational plane. Experience in one sphere is deemed to constitute competence and knowledge for

[10] For a discussion of the genesis of these reforms in the context of transition, see K. Rittich, *Recharacterizing Restructuring: Law, Gender and Market Reform* (2002); see also J. Gathii, 'Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States', (2000) 45 *Villanova Law Rev.* 971.

[11] See I. Shihata, *The World Bank in a Changing World: Selected Essays and Lectures* (1991). For a discussion of the role of the rule of law in organizing and legitimating these interventions see S. Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (2010).

[12] J. Williamson, 'Democracy and the Washington Consensus', (1993) 21 *World Development* 1329.

[13] J.E. Stiglitz, 'Is There a Post Washington Consensus Consensus?', in N. Serra and J.E. Stiglitz (eds.), *The Washington Consensus Reconsidered: Towards a New Global Governance* (2008), 41.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

others, and the personnel who are involved in running programs now move easily, indeed routinely, from one realm of administration to another.[14]

As these shared preoccupations and actors disclose, what fundamentally links these international projects and regimes is not conflict but deep engagement with the project of governance.[15] And as the language of 'failed' or 'rogue' states suggests, states that are the objects of concern are thought to have pathologies or deficiencies in their internal governance, defects that require international guidance and pressure and sometimes external intervention for their management and/or eradication.[16]

Among the hallmarks of these interventions is that governance is approached in fundamentally functionalist and technocratic or managerialist terms.[17] Occupation, post-conflict administration, development, and transition all take place in states with varied histories, and they possess institutions that are inseparably mixed with cultural norms, social practices and political priorities. The dilemmas that international regimes and interventions seek to address might be addressed and resolved in a range of ways; indeed, they might be perceived as radically discontinuous phenomena. Interventions nonetheless typically proceed on the 'as if' assumption that most dilemmas are simply local variants of what are, at the end of the day, fundamentally common problems.[18] As such, they invite solutions that can be constructed out of global legal and institutional forms that travel.[19]

At this point, a broad range of commentators have observed the extent to which democratic governance, emerging as an international norm only in the post-Cold War era,[20] has become fused with security concerns and humanitarian intervention, serving as both justification for and the objective of international administrations.[21] Iraq may mark a further point in the evolution of the normative agenda and institutional character of these international interventions. For Iraq illustrates clearly the centrality of economic liberalization and market-building to international governance, confirming at the same time the extent to which deep economic reform has become part of the repertoire of legitimate – indeed expected – activities in which international bodies and institutions now engage. Thus, Iraq stands as a productive example, not just of the effective merger of occupation with international territorial administration, but of the continuity of occupation and post-conflict governance

---

[14] See Korhonen, Gras and Kreutz, *supra* note 9.

[15] See also Wilde, *supra* note 3, at 203–4.

[16] For a discussion of parallel consciousness informing the field of law and development see K. Rittich, 'Theorizing International Law and Development', in A. Orford and F. Hoffman (eds.), *Oxford Handbook of the Theory of International Law* (2016), 802.

[17] See Wilde, *supra* note 3; N. Bhuta, 'Democratization, State-Building and Politics as Technology', in B. Bowden, H. Charlesworth and J. Farrall (eds.), *The Role of International Law in Rebuilding Societies After Conflict: Great Expectations* (2009), 38; K. Rittich, 'Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates', (2005) 55 *University of Toronto Law Journal* 853.

[18] A. Lang, 'Governing "As If": Global Subsidies Regulation and the Benchmark Problem', (2014) 76 *Current Legal Problems* 135.

[19] See G. Frankenberg, 'Constitutional transfer: The IKEA theory revisited', (2010) 8 *I·CON* 563–79.

[20] T.M. Franck, 'The Emerging Right to Democratic Governance', (1992) 86 AJIL 46.

[21] See Wilde, *supra* note 3; Bhuta, *supra* note 17. See also S. Marks, 'What Has Become of the Emerging Right to Democratic Governance?', (2011) 22 EJIL 507; G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004).

with other contemporary projects, those concerned with economic management in particular.

3. Occupied Iraq: A new imperial moment?

Iraq under the CPA experienced an especially intrusive form of occupation. What began as an occupation was arguably transformed into an instance of international administration as well, as Security Council Resolution 1483 recognized the authority of the occupying powers, ratified the powers that they were already exercising, and awarded key institutions a mandate to assist in their efforts. With international support, the CPA promulgated a far-reaching set of administrative decrees and acts; few, if any, rules and institutions of political or economic consequence escaped its scrutiny, and it is unclear that any sphere of Iraqi life was regarded as securely off-limits.

The invasion and occupation of Iraq generated an immense amount of controversy within the legal profession and among the public at large.[22] Recalling earlier moments in which securing access to resources and markets drove the transformation of international law,[23] they also raised the spectre of imperialism.[24] It seems clear, at least in retrospect, that both events were so overwritten with politics and decisionism that little explanatory purchase can be gained by considerations of legality alone.[25] At the same time, international law mattered deeply to the conduct of both the invasion and the occupation. It provided the normative frame for public debate about events as a whole, as well as the basis for judgments about the legitimacy – or illegitimacy – of specific actions, first and foremost being the invasion itself.[26] There is a plausible argument, for example, that despite the controversy over the legality of the invasion itself, the conduct of military activities in Iraq was not in any way extra-legal but was, by contrast, intensely and explicitly legal, informed throughout by *jus in bello*.[27]

Within the discipline, debates about the legality and legitimacy of the occupation took a familiar form.[28] The starting point of the analysis is Article 43 of the Annex to the Hague Convention of 1907, which requires an occupying power to restore order

---

[22] United Kingdom, Report of a Committee of Privy Counsellors, The Report of the Iraq Inquiry ('The Chilcot Report'), 6 July 2016, available at www.iraqinquiry.org.uk/the-report/.

[23] Classic discussions include: H. Grotius, in R. Tuck (ed.), *The Rights of War and Peace*, Book I (2005); A. Anghie, 'Francisco Vitoria and the Colonial Origins of International Law', (1996) 5 *Social and Legal Studies* 321; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

[24] See A. Anghie, 'The War on Terror and Iraq in Historical Perspective', (2005) 43 *Osgoode Hall L. J.* 45; R. Chandrasekaran, *Imperial Life in the Emerald City: Inside Iraq's Green Zone* (2006); U. Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty', (2011) 24 LJIL 799.

[25] See N. Bhuta, 'The Antinomies of Transformative Occupation', (2005) 16 EJIL 721.

[26] See C. Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law* (2013).

[27] D. Kennedy, *Of Law and War* (2004).

[28] See E. Benvenisti, *The International Law of Occupation* (1993); G.H. Fox, 'The Occupation of Iraq', (2005) 36 *Georgetown Journal of Int'l Law* 195; D.J. Sheffer, 'Beyond Occupation Law, (2003) 97 AJIL 842; M. Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', (2005) 16 EJIL 661; O. Ben-Naftali, A.M. Gross and K. Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', (2005) 24 *Berkeley Journal of Int'l Law* 101; See Stahn, *supra* note 3.

'while respecting unless absolutely prevented, the laws in force in the country'.[29] These obligations have been inflected by the Fourth Geneva Convention[30] and other normative developments in international law since the Second World War, those respecting self-determination and human rights in particular. There is now a compelling argument that sovereignty should be understood to reside not in the regime that has been defeated and displaced in the course of hostilities but in the people themselves; thus it remains operative throughout the duration of any occupation.[31] At the same time, human rights norms and obligations may override sovereignty and the provisions of domestic law, compelling the occupying power to ignore if not change any laws that appear to contravene those norms and obligations.[32] Nonetheless, the ongoing utility of Article 43 as a frame of reference for analyzing occupation lies in its connection to fundamental, organizing principles of international law, namely respect for the sovereign authority of states and the overarching concern to foreclose any legitimation of the acquisition of territory by force. More directly and pragmatically, it reflects the omnipresent possibility that occupation might slide inexorably into annexation,[33] a realization that the powers of the occupier must be limited in both time and scope if that eventuality is to be foreclosed.

Much of the inquiry around the legality of the occupation concerned the extent to which the powers assumed by the CPA either did or should depart from the limits specified in the law of occupation.[34] Some analysts applauded the expanded range of activities undertaken by the occupying power, finding them justifiable – even necessary – given the defects of the deposed regime on the one hand and the task of reconstruction and the demands of advancing the welfare of Iraqis on the other.[35] Others decried these activities or worried about their reach.[36] More typical, however, were analyses deeming some actions questionable but many others entirely defensible, either because of Security Council authority or the putative demands of respect for human rights.[37] In retrospect, what seems most salient is how much of the debate revolved around where to resituate the border around the occupier's legal powers in relation to those of the occupied state. Yet the question must be asked: why was so much of that debate focused on the limits placed by the law of occupation, rather than on the expansive actions of the occupying power? What enabled the tacit acceptance that many of these actions were self-evidently 'good'? And what (if anything) might the fluid, if contested, borders of the law of occupation indicate about the character of contemporary imperialism?

---

[29] Convention IV Respecting the Laws and Customs of War on Land, *supra* note 1, Art. 43.

[30] 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 75 UNTS (1950) 287, available at ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument.

[31] See Benvenisti, *supra* note 28.

[32] Ibid.

[33] See Ben-Naftali, Gross and Michaeli, *supra* note 28.

[34] See Sheffer, *supra* note 28; Fox, *supra* note 28.

[35] J. Yoo, 'Iraqi Reconstruction and the Law of Occupation', (2004–2005) 11 *U.C. Davis J. Int'l L. and Pol'y* 7.

[36] See Sassoli, *supra* note 28; Fox, *supra* note 28.

[37] See Ratner, *supra* note 2.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

Iraq may seem unique in the extent to which the occupying power provocatively disregarded any constraints on its capacity to reconfigure local norms, rules, practices and institutions. It is tempting to write events in occupied Iraq off as simply an aberration, or at least the acts of an occupier with uniquely imperial designs and capacities. At minimum, it might be argued that Iraq should be read in the context of significant repudiation of international law norms by an administration that was deeply resistant to recognizing any limits on the conduct of war by the executive branch.[38] Yet the transformation of Iraq can also be seen as less exceptional, a point in a progression of events that has both deep historical roots and contemporary analogues. The occupation of Iraq displays marked continuities with earlier European interventions in the periphery, from outright conquest accompanied by missions of civilization and exploitation to the administration of mandates in the interwar period to the 'modernization' and development projects of the post-war era.[39] Like other contemporary regimes of occupation and administration, it bears important resemblances to imperial and colonial governance, that is, regimes and practices that we have now formally disavowed.[40]

The occupation of Iraq looks both forward and backwards. The deep engagement with the conduct of the economy by the occupying power, along with the enmeshment of the international financial institutions (IFIs) in the administration of the occupation itself serves to forge a link between the occupation of Iraq and colonial governance practices.[41] Yet Iraq is also clearly marked by more contemporary developments too: foremost among them is a muscular role assumed by international institutions in constructing, disseminating and backstopping norms concerning the internal governance of states. Thus, Iraq may stand as a hinge case, one connecting old imperial practices with new forms of administration and governance that have yet to be adequately taxonomized and analyzed under the rubrics of either international law or colonialism.

4. The law of occupation: Framing the transformation

In the present as in the past, non-European or 'Western' states are more routinely deemed 'failed' or lacking in ways that legitimate intervention.[42] Yet intervention on the part of international institutions is no longer reserved to developing or 'outlier' states; at moments of crisis, Europe's own periphery has been subject to intrusive surveillance in recent years.[43] Thus, the interventionist turn within the law of occupation may be symptomatic of an international environment in which

[38] See H. Koh, 'Forward: On American Exceptionalism', (2003) 55 *Stanford Law Review* 1479. For a defence, see, J. Goldsmith and E. Posner, *The Limits of International Law* (2005).
[39] See Anghie, *supra* note 24; Wilde, *supra* note 3; J. Gathii, *War, Commerce and International Law* (2010).
[40] See A. Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations', (2002) 34 *NYU J. of Int'l Law and Politics* 513; Wilde, *supra* note 3, at 289–90; Bhuta, *supra* note 17.
[41] See Anghie, *supra* note 40, at 513.
[42] Ibid, at 622.
[43] See 'The Euro Plus Pact', 11 March 2011, available at ec.europa.eu/economy_finance/economic_governance/index_en.htm.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

the internal affairs of states *in general* have become more highly supervised and sovereignty's borders increasingly porous to external influences.[44] Multiple regimes and practices, many of which are traceable to the governance activities of international institutions, hegemonic states, or both,[45] now influence the normative and political priorities of states and constrain their policy and regulatory agendas. At the same time, international institutions are adopting an expansive approach to the functions they are entitled to assume to advance their official or constitutional purposes.[46] Both developments may inform and stabilize regimes of administration and occupation, helping to loosen any constraints generated by the law of occupation.

What has licensed this pattern of increasing international intervention, and why have the interventions conducted in the name of the international community or international values taken the form that they have? Is the call to recognize transformative occupation symptomatic of a shifting settlement between the spheres of domestic authority and international oversight within the international order? There are, of course, powerful arguments that challenges to the law of occupation can be attributed to the rise of human rights or even to a general displacement of the subject of international law from the state to the individual.[47] Yet these trends provide at best an incomplete account of the pressure to alter the normative constraints of the law of occupation.

No single conceptual framework seems adequate to capture all the forces now driving the evolution of governance practices on the international plane and the pressure to transform international legal norms that follows in its wake. When it comes to international territorial administration, practice may well lead theory in any event.[48] What drives legitimacy and acceptance may be the form of intervention itself.[49] The emergence of transformative occupation might, of course, simply represent the latest wave of renewal in international law, an extension of the perennial project of conflict management that lies at the core of the enterprise.[50] We might also see contemporary debates about the administrations in Iraq, Kosovo, or Timor as symptomatic of the intensified preoccupation with the legality of armed conflict[51] and a correlative displacement of practices of diplomacy within international law as a whole.[52]

If international law tends to be marked by the norms and practices of states that are hegemonic at a given moment, international territorial administration might also be part of what Grewe has described as the twentieth century rise of the

---

44 M. Koskenniemi, 'The Fate of International Law: Between Technique and Politics', (2007) 70 *Modern Law Review* 1.

45 J. Alvarez, 'Hegemonic International Law Revisited', (2003) 97 AJIL 873.

46 A. Orford, Book Review Article: 'International Territorial Administration and the Management of Decolonization', (2010) 59 *Int'l Comp. L.Q.* 227, at 232, 234; I.F.I. Shihata, 'The World Bank and "Governance" Issues in its Borrowing Members', in *The World Bank in A Changing World: Selected Essays* (1991).

47 R. Teitel, *Humanity's Law* (2011).

48 S. Chesterman, *You, the People: The United Nations, Transitional Administrations, and State Building* (2004), 49.

49 See Orford, *supra* note 46, at 232.

50 D. Kennedy, 'When Renewal Repeats: Thinking Against the Box', (2000) 32 *New York J. of Int'l L. and Politics* 335.

51 See Kennedy, *supra* note 27.

52 See Simpson, *supra* note 21.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

Anglo-American condominium.[53] Since the Second World War, the US has been the effective arbiter of the international order,[54] and for a significant period following the end of the Cold War, the undisputed hegemon as well, as its recognition, along with the UK, as the occupying power in Iraq reflects in overt, formal ways.

Article 43 expresses in particularly forceful terms the norms of non-intervention and sovereign equality of states that, at least in the mainstream disciplinary imaginary, have organized relations among states since the inception of the Westphalian era. Article 43 was also enshrined at a historical moment in which formerly peripheral states argued for the protection of sovereignty across a range of issues. However, it is well-recognized that sovereignty itself has varying fortunes within international law, and that whatever its general status, it is subject to variable application and interpretation depending on the state whose sovereignty is at issue. At least since the Concert of Vienna in 1815, the international legal order has embraced asymmetric power among sovereigns at the level of norm as well as fact; in practice 'legalized hegemony' oscillates with sovereign equality for normative ascendancy in the international sphere. [55] This asymmetry in power and status, highly visible in Iraq, is not simply a matter of the balance of geopolitical forces; it is also a matter of 'global hegemonic law'.[56] And on the other side of the equation from legalized hegemony are those states who (necessarily) suffer from diminished sovereignty: here too, Iraq stands out. Already marked as a rogue power or 'outlaw state' following the first Gulf War and its sovereignty abridged and impaired by the sanctions that followed,[57] it seems hardly surprising that Iraq provided fertile ground on which to argue for the licensing of more 'transformative' forms of occupation.

As Grewe noted, the tolerance for intervention in the twentieth century international order appears to be connected to the increased intermingling of the state and the economy, visible first in the regulation of commercial practices and subsequently in the emergence of the social and administrative state.[58] If the evolution of international law sometimes follows domestic innovations, then perhaps we are simply witnessing within the law of occupation developments long recognized within domestic law. These are the limits of imagining legal relations as primarily a question of determining the powers of entities, public and private, who operate within bounded spheres of authority,[59] along with the normalization of public welfare concerns as part of the legitimate calculus of governing.[60]

Yet explaining the character of economic reforms that now inform and structure so many international projects requires more. Here, Foucault's analysis of contemporary governance seems indispensable, both to capturing the centrality of the economy as an object of governance and to tracing the modes by which economic

---

53 See W. Grewe, *The Epochs of International Law* (2000); M. Mazower, *Governing the World* (2012).
54 See Grewe, *supra* note 53, at 576.
55 See Simpson, *supra* note 21.
56 See Alvarez, *supra* note 45, at 886.
57 UN Security Council Resolution 678 (1990), available at worldlii.org/int/other/UNSC/1990/32.pdf.
58 See Grewe, *supra* note 53, at 592; D. Kennedy, 'The Three Globalizations of Legal Thought', in D. Trubek and A. Santos (eds.), *The New Law and Economic Development* (2006).
59 For a discussion see D. Kennedy, *The Rise and Fall of Classical Legal Thought* (2006).
60 See also Benvenisti, *supra* note 28, at 209–10.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

reforms are operationalized. Three distinct yet inter-operative Foucaultian insights, set out here only in summary form, seem pertinent. The first is the identification of the economy as the endpoint of liberal governmentality, leading to what might be described as a general economization of governance.[61] In a prescient and compelling account, Foucault describes in *The Birth of Biopolitics* how this fundamental reorientation in the aims of rule is enabled by the rise of a new rationality in which 'the formal principles of the market economy … index a general art of government'.[62] The second is Foucault's identification of biopolitics – the control of populations and the simultaneous crafting of human subjectivity – as both the project and the distinguishing characteristic of modern governance.[63] In this 'conduct of conduct', the state and its institutions penetrate below the skin of the body politic, informing the practices of both individuals and groups and reshaping social and economic life, human aspirations, and the relationships between citizen, state and market in myriad ways. Foundational to both the economization of governance and the management of populations is the third element, Foucault's horizontal, dispersed and capillary as opposed to vertical, concentrated and singular model of power.[64] In its most famous iterations, power is refigured as a power/knowledge *complex*, a reminder of the fundamental role that the representation of the world and its problems plays to the constitution and exercise of power itself.

In law as in other disciplines, an immensely important set of insights challenging the modernist, liberal legal and political imaginary has been generated out of Foucault's radical reconceptualization of the complex inter-relationships among rule, subjectivity, power and representation.[65] One is that effective rule is not merely a matter of simply *imposing* norms and rules. More fundamentally, it involves creating and successfully diffusing the epistemes and knowledge frameworks in which they are received as neutral, natural or desirable dimensions of social and political life.[66] This may involve positing people with natural propensities, for example to competitive engagement with market processes, or producing normal or optimal contexts in which specific issues materialize as problems to be managed and to which preferred interventions become the solution.[67] In short, the exercise of rule involves actively (re)constructing narratives of the world and its progress. In these world-making ventures, what matters is not the 'truth' of representations but whether the relevant epistemic and political communities accept them as plausible bases on which to proceed with projects and interventions.[68]

If these heuristics do capture dimensions of international law and practice, we might account for the uncertain and contested status of the law of occupation in

[61] See also Anghie, *supra* note 40.
[62] M. Foucault, *The Birth of Biopolitics: Lectures at the College de France, 1978-79* (2008).
[63] M. Foucault, *Sovereignty, Territory, Population: Lectures at the College de France, 1977-78* (2007).
[64] M. Foucault, *The History of Sexuality: An Introduction*, Vol. I (1980), 94–5.
[65] See B. Golder and P. Fitzpatrick, *Foucault's Law* (2009); T. Aalberts and B. Golder, 'On the Uses of Foucault for International Law', (2012) 25 *Leiden Journal of International Law* 603; B. Golder, *Foucault and the Politics of Rights* (2015).
[66] See Rittich, *supra* note 10, Ch. 2.
[67] J. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (2006), at 278–9.
[68] See Lang, *supra* note 18, at 135.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

terms of forces, trends and operations, some of which can be read directly on the surface of international agreements and national policy statements and others of which operate in the realm of practice and belief.

5. Legalizing the practices of occupation: Reinventing the Iraqi economy

In Iraq, the injunction of the law of occupation to respect the laws in force was turned inside out as the legal regime governing economic relations was swept away, a product of the elision of 'effective administration' of the state in the name of the welfare of the Iraqi people with the perceived requirement of deep economic reform.[69] The process can be viewed and analyzed through Security Council Resolution 1483 of May 2003;[70] the National Security Strategy of the United States of 2002;[71] as well as some of the key economic orders promulgated by the CPA.[72] Together, they illustrate the mechanisms, legal and discursive, through which reforms were both instituted and normalized in Iraq.

5.1. Security Council Resolution 1483: Authorizing economic reform?

Resolution 1483 begins with the expected references to the sovereignty and territorial integrity of Iraq and 'the right of the Iraqi people to determine their own political future and control their own natural resources'.[73] Iraq's sovereignty affirmed, Resolution 1483 then moves on to list the imperatives that bear on the CPA and identify the institutions and actors that can be expected to assist the process of reconstruction. While these imperatives range from co-ordinating humanitarian assistance and protecting refugees to facilitating the creation of a representative government, chief among the tasks of the CPA is the promotion of the welfare of the Iraqi people through the 'effective administration' of the territory of Iraq.[74] Authorizing the appointment of a Special Representative whose duties include co-ordinating activities among the CPA and international agencies, Resolution 1483 enjoins the Representative to 'facilitat[e] the reconstruction of Iraq's key infrastructure' and 'promot[e] economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions'.[75] It also establishes a Development Fund for Iraq, overseen by an International Monitoring and Advisory Board populated by representatives of the UN, the IFIs, and the Arab Fund for Social and Economic Development. Suspending Iraq's pre-existing 'Oil-for-Food'

---

[69] See also Fox, *supra* note 3, at 260.
[70] UN Security Council Resolution 1483, 22 May 2003, UN Doc. S/RES/1483 (2003), available at http://unscr.com/en/resolutions/1483.
[71] *The National Security Strategy of the United States of America*, September 2002, available at www.state.gov/documents/organization/63562.pdf.
[72] S. Talmon, *The Occupation of Iraq*, vol. II, *The official Documents of the Coalition Provisional Authority and the Iraqi Governing Council* (2013).
[73] UN Security Council Resolution 1483, *supra* note 70, Preamble.
[74] Ibid., Art. 4.
[75] Ibid., Art. 8 (d) and (e).

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

Programme, it authorizes the export of petroleum, petroleum products, and natural gas, consistent with prevailing market 'best practices'[76] and protects the resulting revenues from garnishment in repayment of Iraq's outstanding debt obligations.[77]

It is worth underscoring the effects of Resolution 1483 on the economic front. All at once, it establishes a framework for the economic reconstruction of Iraq; releases and protects heretofore blocked funds from the key industrial sector, oil, to finance that reconstruction; identifies the actors who will play the lead roles; and allocates both decisional and financial authority to those same parties. While internal economic reforms are not expressly identified, Resolution 1483 does authorize the means by which they might be accomplished, as among the activities to be co-ordinated is 'encouraging international efforts to promote legal and judicial reform'.[78]

As described below, extraordinarily far-reaching legal reform in the service of deep economic reform is precisely what occurred. Despite, moreover, the pleas for the return of sovereignty to the Iraqi people as soon as possible and parallel efforts to draft a new Iraqi constitution, these reforms appear to have raised no red flags within the UN; if anything, the reverse is true. The Secretary General not only endorsed the process of market-centred transition upon which the CPA immediately embarked but the involvement of the IMF, World Bank, and the United Nations Development Program in the process too, noting in his report pursuant to Resolution 1483 that their expertise and experience in transition would be 'particularly valuable' to laying the foundations of market-oriented reforms in Iraq.[79] Thus, rather than at odds with the exercise of sovereignty, sovereignty and market-oriented reforms appear to coexist in the international imaginary; insofar as they are designed to advance the welfare of the Iraqi people in self-evident ways, perhaps they are even sovereignty's presumed expression.

5.2. The National Security Strategy of the United States: Linking economic reform to security

The clearest artefact of the authority claimed by the occupying power itself in respect of economic reforms is the *National Security Strategy of the United States* of September, 2002 (NSS). [80] The NSS is most famous for making the case for the option of 'pre-emptive' war.[81] Less well-known is that, for the first time, the NSS expressly includes the liberalization of markets in the definition of US national security interests. The argument linking security to market-centred economic reforms abroad is simple – '[A] strong world economy enhances our national security by advancing freedom and prosperity in the rest of the world'[82] – and the prescription for advancing it

[76] Ibid., Art. 20.
[77] Ibid., Art. 22.
[78] Ibid., Art. 8 (i).
[79] UN Security Council, Report of the Secretary General pursuant to paragraph 24 of Security Council Resolution 1483 (2003), UN Doc. S/2003/715, 17 July 2003, available at documents-dds-ny.un.org/doc/UNDOC/GEN/N03/430/63/PDF/N0343063.pdf?OpenElement, paras. 88–91.
[80] See *The National Security Strategy of the United States of America*, *supra* note 71.
[81] For a discussion see A. Anghie, 'On Critique and the Other', in A. Orford (ed.), *International Law and its Others* (2006), 389; and Anghie, *supra* note 24.
[82] *National Security Strategy*, *supra* note 71, Ch. 6.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

deeply familiar: pro-growth legal and regulatory policies, 'sound' fiscal policies to support investment, tax policies to provide incentives to work, and investment, all underpinned by the rule of law and intolerance of corruption 'so that people are confident that they will be able to enjoy the fruits of the economic endeavors'.[83] In this vision, reforms become a win-win endeavour in which US interest in reforms abroad and the interests of other nations strongly converge, as the economic prosperity flowing from reforms in foreign states renders threats to peace less likely. Here, the NSS and Resolution 1483 might be seen as on all fours: the promotion of freedom and prosperity through pro-growth regulatory policies meet 'effective administration' to advance the welfare of the Iraqi people in an apparently seamless match.

The Iraq war provided an occasion to put the NSS into action. Yet the timing of its release suggests that NSS may be as much the expression of the military and economic planning concerning Iraq that was already underway as it was its source. By September 2002, energy policy and national security policy had already been merged within the administration.[84] This policy planning exercise was a mixed public/private venture, moreover one with a very uncertain border between its public and private elements.[85] Different branches of the administration such as the Pentagon were already drafting plans, with private sector assistance, detailing the shape of post-war reforms in Iraq; indeed, the definition of US national security interests was already a project of the Vice President while he was still a private citizen employed as the CEO of Halliburton.[86] Among the central objectives of these plans were those ultimately reflected in the CPA Orders, privatizing state-owned industries and opening the economy up to foreign investment, as well as those that remained elusive: privatizing the oil fields of Iraq.[87]

5.3. The orders of the Coalition Provisional Authority: Implementing economic liberalization

Iraq under the CPA exemplified in stark relief a number of features of contemporary post-conflict administration. It was a world in which public and private actors exchanged roles and personnel at dizzying speed; security, economic, and political motivations and projects were intermingled and visibly in play; while securing market access was a central concern of the occupying power.

It was widely reported that the US failed to adequately plan for the aftermath of the invasion in Iraq. As true as that may have been in some respects, it does not appear to be the case concerning Iraq's economy. There could be little doubt about either the objective of economic 'regime change' or its relative priority after the invasion. Military victory and subsequent occupation were quickly seized upon as an occasion

[83] Ibid.
[84] M. Klare, *Blood and Oil: The Dangers and* Consequences *of America's Growing Dependency on Imported Petroleum* (2004); S. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (2004); J. Risen, *Pay Any Price: Greed, Power and Endless War* (2014).
[85] See J. Mayer, 'Contract Sport: Letter from Washington', *New Yorker* 16 & 23 February 2004, at 80.
[86] L. McQuaig, *It's the Crude, Dude: War, Big Oil, and the Fight for the Planet* (2005).
[87] See Hersh, *supra* note 84; see Klare, *supra* note 84.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

to introduce wide-ranging regulatory changes covering everything from labour law and public employment to public procurement and contracting, intellectual property, debt resolution, companies, tax policy, banking, public ownership, trade liberalization and foreign investment. Reforms compelled almost total and immediate exposure of a relatively closed economy to the vagaries of the global market, giving visceral expression to the image of open markets as the engine of material progress and the glue of a peaceful world order.[88] Although not all reforms initially envisaged were successfully implemented, the US remained deeply interested in their execution well after legislative authority had been formally transferred to the Iraqis.[89]

Iraq under occupation continued to be mired in conflict, with the unstable security situation precluding much of the reconstruction, investment and economic activity that, in theory, might otherwise have occurred. Yet the CPA orders immediately affected the social and economic circumstances of large swathes of the Iraqi population in a range of negative ways, producing widespread unemployment and unprecedented levels of poverty in relatively short order.[90] Both because of these immediate effects and because of longer term consequences, the orders can be taken as key moments and mechanisms in the allocation of the costs and benefits of the war and its aftermath; for the same reasons, they arguably evidence the imperial character of the occupation itself. They profoundly altered the allocation of risk and costs as between Iraqis, and they altered the position of Iraqis vis-à-vis foreign actors and interests. At the same time, they shifted the roles and functions of public and private actors and institutions, putting public policy and administration in the service of an imagined community of private economic rights holders, albeit all in the name of advancing the welfare of Iraqis themselves.

Order no. 1, on the 'De-Ba'athification of Iraqi Society',[91] while explicitly political in motivation, had immediate economic consequences, removing all full members of the Ba'ath party from their positions within government ministries and affiliated corporations and institutions such as universities and hospitals and precluding them from future employment in the public sector. This severely undercut the economic security of the Iraqi managerial class, fuelling their exodus from Iraq and ensuring that outsiders would be required to occupy many significant positions in the new economy.

Order 1 was in itself cataclysmic. However, its effects were exacerbated by Order no. 2, 'Dissolution of Entities', which dissolved the Iraqi armed services, creating a large number of Iraqis in desperate economic circumstances who were, in addition, both armed and militarily trained. In addition to dismantling the institutions needed to respond to the worsening internal security situation, the decision to disband the Iraqi military directly fuelled the rise of sectarian militias which, within a few years,

[88] See A. Hirschman, *Rival Views of Market Societies and Other Recent Essays* (1986); A. Hirschman, *The Passions and the Interests* (1977).

[89] The White House, 'Initial Benchmark Assessment Report', 12 July 2007, available at georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070712.html.

[90] OXFAM, 'Rising to the Humanitarian Challenge in Iraq', Briefing Paper, July 2007, available at www.oxfam.org/sites/www.oxfam.org/files/Rising%20to%20the%20humanitarian%20challenge%20in%20Iraq.pdf.

[91] Order 1 and all subsequent CPA orders referenced can be found in Talmon, *supra* note 72.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

led to civil war and *de facto* segmentation of the Iraqi population along sectarian lines.[92]

Order no. 12, 'Trade Liberalization Policy', suspended customs duties on virtually all goods, immediately exposing Iraqi services and industries to outside competition without the acquisition of any countervailing benefits. By contrast, the negotiated removal of tariffs under the multilateral trading system is typically a gradual process that involves temporal and substantive protections to cushion domestic markets from the destabilizing effects of liberalization. As routinely occurs in cases of liberalization by 'shock therapy', the unilateral and immediate removal of tariff barriers could be expected to result in the demise of many national industries, including those that might otherwise have weathered the competition given time to adjust.

Order no. 39, 'Foreign Investment', opened the Iraqi economy up to foreign investment, including investment associated with reconstruction projects. This represented a profound change to the existing structure of ownership, as large parts of the Iraqi economy were publicly held in the Saddam regime. Although outright ownership of energy resources was excluded, foreign investment and management contracts in oil- related industries were permitted; in conjunction with other orders, this virtually ensured extensive foreign involvement in key industries notwithstanding that nominal ownership of the underlying resources remained in Iraqi hands. The relative disadvantage of the domestic Iraqi commercial class was then exacerbated by Order no. 17, 'Status of the Coalition, Foreign Liaison Missions, their Personnel and Contractors', which insulated both Coalition forces and personnel and non-Iraqi business entities or individuals 'supplying goods and/or services to or on behalf of the Coalition Forces or the CPA' from the application of Iraqi laws and regulations as they pertain to their contracts.

Tax policy was also crucial to the allocation of the costs and benefits of reconstruction. Order no. 37, 'Tax Strategy', set individual and corporate tax rates at 15 per cent, creating a flat tax that precluded any progressivity in the rate structure. In tandem with foreign investment policy, it also limited the tax base and, hence, the resources available for public purposes, notwithstanding the devastation caused by the war and infrastructure deterioration resulting from more than a decade of UN sanctions. Order no 38, 'Reconstruction Levy', then effectively imposed the costs of reconstruction on locals and consumers through a 5 per cent tax on many imported goods, thus permitting foreign investors to escape many of the costs of reconstruction that made their new opportunities possible.

Order no 87, 'Public Contracts' established open competition as the preferred method of awarding contracts yet authorized negotiated contracts on alternative bases such as technical solution, risk, experience and past performance. The inability to prefer local contractors in public procurement – a common requirement in many countries – disadvantaged Iraqi nationals and assisted foreign players, particularly in the oil sector; providing a means by which an administration already sympathetic to foreign investment could give substantial weight to accrued

[92] N. Rosen, 'Anatomy of a Civil War: Iraq's Descent into Chaos', *Boston Review*, November/December 2006, available at bostonreview.net/archives/BR31.6/rosen.php.

experience. Despite the general norm of competitive bidding, Order 87 effectively ratified the method by which much post-invasion contract work was in fact awarded. For example, Kellogg Brown and Root, then a subsidiary of Halliburton, was granted a no-bid contract to reconstruct the Iraqi oil industry several months before the Iraq war even started.[93] The secrecy surrounding post-war reconstruction plans make it impossible to know exactly how the process unfolded.[94] However, there is no evidence that the administration even considered the possibility that Iraqi nationals might perform this work, even though as Order 24 recognizes, Iraq 'possesses a large, well-trained engineering and technical work force fully capable of advancing scientific research and development initiatives to support the reconstruction and economic development of Iraq'.

Finally, Order 100, 'Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority', continued all the laws in force until rescinded or amended by the transitional government or its successors. Apart from the political difficulties that attend efforts at law reform, changes to economic rules may prove particularly challenging. For example, if a subsequent Iraqi government were to decide to renationalize services or firms, it might be compelled to pay compensation under foreign investment rules. Similarly, if it were to re-institute tariffs, even to levels that were lower than those formerly in place, it may be exposed to countervailing actions under international trade rules. Any contracts signed would, in principle, bind future governments as well; this includes long term contracts for the exploitation of oil resources of the kind envisioned in the Iraq Hydrocarbon Law. Rather than a mere principle of administrative continuity and convenience, then, Order 100 entrenched substantive changes and generated constraints on future government policy-making, the costs and effects of which are difficult, if not impossible, to foresee.

6. Situating economic reform

6.1. Reading economic reforms in Iraq

The CPA orders sharply altered the existing allocation of authority and control in respect of economic decision-making and profoundly reordered legal powers and entitlements over property, resources and contracting. In so doing, they altered the balance of power as between public and private, as well as the access to economic assets and opportunities among Iraqis themselves and among Iraqis and outsiders.

Two inter-related things about the economic reforms in Iraq seem noteworthy viewed retrospectively. First, despite the extent to which they disrupted the status quo *ante bellum*, and did so in ways that aggravated the economic security of Iraqis in predictable ways, they barely figured in international debates about the legitimacy of the occupying power and the legality of its activities;[95] compare for example the

[93] J. Gerth and D. Van Natta, Jr., 'Halliburton Contracts in Iraq: The Struggle to Manage Costs', *The New York Times*, 29 December 2003.
[94] See Mayer, *supra* note 85.
[95] See N. Klein, 'Baghdad Year Zero', *Harper's*, September 2004, 43.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

concerns about human rights violations, voiced in conjunction with the actions of the U.S. military at Abu Ghraib,[96] or the public controversy surrounding the creation of the new Iraq constitution.[97] Second, whether there was a reasonable prospect that the proposed reforms would actually deliver on the promise of economic progress was, for the most part, simply assumed; the *relative* capacity of reforms to do so, and the extent to which they were the best or optimal means of advancing the economic security and welfare of Iraqis in particular, never surfaced as a serious topic of conversation at all. With the exception of the draft Iraq Hydrocarbon Law,[98] questions of economic policy and regulation were so receded that the average outside observer might well have concluded that the legal concerns of Iraqis were restricted to the drafting of the new constitution and the election of representatives to the Iraqi parliament.[99]

Yet the excesses, failures, perversities and sheer surprises that surrounded parallel efforts in the context of 'transition' from plan to market should have undermined any easy claim that such reforms would reliably generate good economic outcomes.[100] The most problematic dimensions of these exercises had already been identified: the imposition of model reforms, crafted by external technocrats with little knowledge of local institutions and context or input from those familiar with them; the speed with which reforms were implemented; the abandonment or destruction of firms and industries deemed 'uncompetitive'; the failure to attend to the position of the losers; and blindness to the likelihood of profound resistance on the ground. Nonetheless, all were replicated in Iraq.

It is worth asking, then, what prepared the ground for the acceptance of reforms that were so significant in their transformative reach and so fraught with evident risk for Iraqis, even as they provided unprecedented opportunities for outsiders.

First is simply the widespread and repeated dissemination of the necessity of deep reform, particularly in any state like Iraq with a large public-sector presence in the economy. The calls by CPA Administrator Paul Bremer for Iraq to transition from a closed, static, planned economy to a transparent market economy through the establishment of a dynamic private sector must have seemed uncontroversial simply because parallel reforms, couched in similar terms, had long been promoted in the region and beyond. The IMF, for example, played a leading role in setting the terms of Saddam-era debt relief, and it continued to use its economic clout to ensure that its preferred reforms, chief among them the Iraq Hydrocarbon Law, were passed.[101] Both the World Bank and the IMF had routinely advised developing and transition states to implement deep economic reforms;[102] by this time, they were

[96] See Hersh, *supra* note 84.
[97] R. Wright, 'Constitution Sparks Debate on Viability', *Washington Post*, 25 August 2005.
[98] See L.W. Gerard, 'United Steelworkers letter to Congress opposing privatization of the Iraqi oil industry, July 31, 2007', in J. Ehrenberg et al. (eds.), *The Iraq Papers* (2010), 392.
[99] See N. Feldman, 'Imposed Constitutionalism', (2004–2005) 37 *Conn. Law Rev.* 857.
[100] See J. Stiglitz, *Globalization and Its Discontents* (2002); Stiglitz, *supra* note 13.
[101] J. Steele, 'Good News from Baghdad at Last: the oil law has stalled', *The Guardian*, 3 August 2007.
[102] I. Shihata, 'Law, Development and the Role of the World Bank', *Complementary Reform: Essays on Legal, Judicial and Other Institutional Reforms Supported by the World Bank* (1997); See also Stiglitz, *supra* note 100; Rittich, *supra* note 10.

promoting closely related policy and regulatory reforms in industrialized states as well.[103]

Second was the technocratic language and frame within which reforms were cast.[104] Thoroughgoing economic transformation was repeatedly presented as foundational to the effective administration of the state and action for the benefit of the Iraqi people. By 2003, however, there was enough international experience to establish that far from 'merely technical', reforms could adversely affect the fortunes of different groups;[105] it was also clear that arguments *for* reforms rested on shaky theoretical foundations.[106] Nonetheless, by the time of the occupation, a standard package of reforms, including expanded property and intellectual property rights, contract and debt enforcement, and labour and product market 'deregulation', had become inextricably linked to objectives such as support for private sector growth and enhancing the efficiency of market operations, while support for the private sector had, in turn, been accepted as the *sine qua non* for social and economic progress.[107]

Third, and relatedly, was the pervasiveness of international intervention and constraint on domestic policies and regulations, especially when it came to economic and financial matters. By the time of the invasion of Iraq, a large number of developing and transitional states were under economic surveillance by the IFIs for reasons of debt relief, financial stabilization, and/or development assistance. Regulatory and policy constraints emanating from trade and investment agreements had become a familiar part of the international landscape, as negotiations in the WTO era engaged domestic regulatory 'non-tariff' barriers to trade. Finally, intervention on humanitarian considerations was increasingly normalized, visible in the establishment of the International Criminal Court and doctrines such as the Responsibility to Protect. Put simply, the imagined sphere of sovereign control over domestic policy and practice was under pressure from a range of normative developments and institutional projects in the international order.

Above all, the debate that didn't happen suggests that in important quarters, economic reforms were imagined not as matters of sovereignty but as matters of 'good governance', a category so shorn of legal, moral, and political controversy that it could be taken as the frame within which sovereign projects might proceed. Thus, although the occupying power found itself under intense international scrutiny about the legality of a range of practices, from the initial invasion to the treatment of prisoners in its aftermath, aside from some voices on the left,[108] the radical reconstruction of Iraqi economic institutions passed with surprisingly little comment.

---

[103] IMF, *World Economic Outlook: Advancing Structural Reforms* (2004), Chapter III, 'Fostering Structural Reforms in Industrial Countries', available at www.imf.org/external/pubs/ft/weo/2004/01/pdf/chapter3.pdf.

[104] See D. Kennedy, *A World of Struggle* (2016); A. Lang, *World Trade Law After Neoliberalism* (2011).

[105] Stiglitz, *supra* note 100; Rittich, *supra* note 10.

[106] See Stiglitz, *supra* note 13.

[107] K. Rittich, 'Rights, Risk and Reward: Governance Norms in the International Order and the Problem of Precarious Work', in J. Fudge and R. Owens (eds.), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (2006), 31.

[108] D. Whyte, 'The Crimes of Neo-Liberal Rule in Occupied Iraq', (2007) 47 *British J. of Criminology* 1.

6.2. Historicizing economic reform

Whether Resolution 1483 clearly authorized the reforms instituted by the CPA and what its relation is to the law of occupation remain contested matters.[109] Yet post-conflict administrations have become virtual laboratories for institutional and regulatory transformation, and sharp divergences from the norms of sovereignty and self-determination are increasingly normal, particularly when it comes to the economy.

Seen within a longer historical trajectory, it is unclear that norms concerning domestic law were ever intended to apply on a universal basis.[110] Laws proscribing interference with property and contract rights upon conquest, for example, have never been applied in a uniform manner. Non-European forms of property holding were frequently not recognized as constraining imperial powers and ambitions at all, either because they were mere 'custom', because they lacked the cognizable elements of Western property law and land tenure systems required to oust competing claims, or both.[111] In short, recognition of domestic law has always been qualified within the international order. Nonetheless, it is possible to identify a number of recent waypoints in the international engagement with domestic economic laws, events that help conjoin occupation and post-conflict administration with other theatres of governance.

An important first step was the move to policy-based lending by the IFIs which, by the 1990s, had surpassed in scope, prominence and cost their traditional project-based and balance of payments lending. Despite robust critique of such endeavours and the subsequent disappearance of express conditionality tying loans to macroeconomic policy and regulatory reform, issues of governance remain central concerns.[112]

Although 'good governance' as a term of art first made its appearance in the World Bank's analysis of the failures of development in Africa during the 1980s,[113] it was the states in 'transition' to market economies in Central and Eastern Europe and the Commonwealth of Independent States (CIS) that provided the context for the institutional elaboration of market-centred governance.[114] At the forefront of this project were international bodies also active in Iraq, the IFIs, who advocated broadly similar economic reforms in both locales; they were assisted by the new European Bank for Reconstruction and Development which was expressly directed to 'foster the transition to market-oriented economies and promote private and entrepreneurial initiative' in states 'applying the principles of multiparty democracy, pluralism and market economics'.[115] Although during transition the ideals about

---

[109] See Fox, *supra* note 3, Ch. 8.
[110] See Anghie, *supra* note 24.
[111] See J. Gathii, 'Foreign and Other Economic Rights upon Conquest and Under Occupation: Iraq in Comparative and Historical Context', (2004) 25 *U. Penn. J. of Int'l Econ. Law* 491; Gathii, *supra* note 39.
[112] K. Rittich, 'Second Generation Reforms and the Incorporation of the Social', in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (2006), 203.
[113] World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (1989).
[114] Wold Bank, *World Development Report: From Plan to Market* (2006).
[115] Agreement to Establish the European Bank of Reconstruction and Development, Art. 1, available at www.ebrd.com/news/publications/institutional-documents/basic-documents-of-the-ebrd.html.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

best regulatory and institutional practice were just coalescing while by 2003 they were largely consolidated, foundational to reforms in both cases was a distinction between issues that were subject to democratic deliberation and those that were matters of expert judgment; into the latter category fell legal and regulatory matters concerning the management of the economy.[116]

In most transition states, path-breaking economic reforms that immediately exposed the economies to global economic forces were implemented in the form of 'shock therapy'.[117] As in Iraq, the relative impotence of domestic actors and the disarray of existing institutions enabled outsiders to chart a reform trajectory with few of the usual political constraints, even if their objectives were rarely realized in the form they imagined and some had to be delayed or abandoned entirely.

The administration of Kosovo stands as both a precursor to Iraq under occupation and a point of connection between transitional governance and occupation and post-conflict administration. There, too, deep economic transformation was both a priority and pillar of the administration as a whole;[118] classic international law norms, moreover, provided no constraint. For example, Article 55 of the Hague Convention specifies that the occupier is 'only an administrator and usufructuary' of state property, and compels the occupier to 'safeguard the capital of these properties, and administer them in accordance with the rules of usufruct'.[119] Nonetheless, an economic liberalization and privatization scheme that included fundamental changes to the financial sector was launched in Kosovo long before the establishment of representative local government.[120] There, too, administrators sought to institute a liberal market order to remedy a series of perceived pathologies of the pre-existing regime, from state control of enterprises to regulations and entitlements thought to be incompatible with the proper functioning of the market economy.[121]

Perhaps most significant, the preoccupation with good economic governance is no longer restricted to the IFIs. References to good governance now turn up in documents from the International Labour Organization[122] or the UN Human Rights Council[123] as well; indeed, good governance as a concept has arguably been the IFIs most successful institutional export. The surveillance exercised by the IMF and other economic institutions over the industrialized countries during the same period, while arguably less disciplinary has been no less reformist in aspirations. For example, in both its general economic reports and analyses and Article IV consultations with individual countries, the IMF has pressed the imperative of policy and regulatory reform in many of the areas under scrutiny in Iraq, from

[116] See Shihata, *supra* note 46; see also Rittich, *supra* note 10, Ch. 2.
[117] For a classic discussion, see J. Sachs, *Poland's Jump to the Market Economy* (1993).
[118] See Wilde, *supra* note 3, Ch. 6.
[119] Convention IV Respecting the Laws and Customs of War on Land, *supra* note 1.
[120] O. Korhonen and J. Gras, *International Governance in Post-Conflict Situations* (2001), 29.
[121] See H. Perritt, Jr., 'Economic Sustainability and Final Status for Kosovo', (2004) 25 *U. Penn. J. Int'l Ec. L* 259.
[122] ILO, *Promoting good governance in the labour market by strengthening tripartism and social dialogue*, 31 January 2004, available at www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/—ilo-jakarta/documents/publication/wcms_125297.pdf.
[123] UN Human Rights Council, 'Good Governance and Human Rights: Overview', available at www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

trade and financial liberalization to taxation and fiscal policy to labour law.[124] The OECD is now spearheading the promotion of 'regulatory coherence', under which regulations across a wide number of areas are subject to cost-benefit analysis and subject to justification on efficiency grounds, while trade agreements such as the Transpacific Partnership now enshrine coherence as a shared obligation.[125]

At the same time as technocrats, institutional institutions and civil society groups alike have become preoccupied with matters of governance, they have developed new techniques to measure, and thereby advance 'progress' in, domestic law and policy. Prime among them is the establishment of benchmarks and indicators on a wide range of issues, from human rights, democratic governance, development and gender equality to business regulation and economic growth.[126] Indicators now surface in report after report, providing points of connection and modes of engagement among widely dispersed international actors and institutions; they are now so routinely deployed that their development alone now sometimes counts as progress. While indicators can be attached to hard sanctions, they more commonly stand as powerful examples of Foucaultian rule, in which institutional power operates through knowledge claims while reforms are catalyzed by directing practice and diffusing norms across public and private domains.[127] The most powerful example here is the World Bank's flagship project, *Doing Business*, which is designed to rank and track progress on economic reforms.[128]

Viewed from this vantage point, it would be surprising if the law of occupation remained *unmarked* by such powerful and pervasive developments in the international order as a whole. If wide-ranging interventions on the part of the occupying force were not only tolerated but, as Resolution 1483 makes clear, expected and even welcomed, then perhaps the key lies in the normalization of such actions in other international spheres and endeavours. And if the sovereignty of occupied states like Iraq is 'in receivership',[129] so be it; similar things are happening to states that have not been militarily defeated.

7. Reforming the law of occupation

Although occupying powers have been reconstituting the legal rules and institutions of subject nations at least since the end of the Second World War, Germany and Japan standing as the clearest examples, they did so under explicit claims that the law of occupation did not apply.[130] Since the end of the Cold War, this process has been

[124] See IMF, *supra* note 103.
[125] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, available at www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng, Art. 25.
[126] K. Davis et al., *Governance by Indicators: Global Power through Quantification and Rankings* (2012); K. Rittich, 'Governing by Measuring: The Millenium Development Goals in Global Governance', in H. Ruiz-Fabri, R. Wolfrum and J. Gogolin (eds.), *Select Proceedings of the European Society of International Law*, Vol. 2, 2008 (2010), at 463; World Bank, *Doing Business*, various years, available at www.doingbusiness.org/.
[127] For a discussion in the context of law and development, see Rittich, *supra* note 16, at 820.
[128] World Bank, *supra* note 126.
[129] See Alvarez, *supra* note 45, at 885.
[130] See Benvenisti, *supra* note 28, at 91–2.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

regularized in the international administration of 'failed' states: the greater the extent to which the laws, institutions and practices of the state diverge from those now recognized as normative in the international order, the more likely they are to attract scrutiny. As a result, the *de facto* limits on a well-intended occupier or administrator, especially one replacing a ruler deemed authoritarian or 'criminal', are vanishing.[131]

7.1. The transformative occupation, the benevolent occupier

To many, Iraq represents a textbook case for normative reconsideration, suggesting nothing so much as the need to reinvent the law of occupation. Rather than preserve the sovereign authority of the occupied state to the extent possible, the more pressing task is to establish a zone in which reforms that are self-evidently desirable – even imperative – are legitimated through international law.[132]

The uncomfortable gap between legal norm and state practice so evident in Iraq produced powerful arguments for the recognition of a distinction between 'belligerent' occupation and an emergent category of 'transformative' occupation.[133] Where occupation is multilateral in operation and humanitarian in character, it is proposed, the appropriate response is an updating of the law of occupation and a loosening of its constraints; as classically conceived, the law is manifestly unsuited both to the circumstances that now typically give rise to occupations and to the capacious demands of post-conflict administration.[134] As Roberts put it, the paradigmatic situation now can be 'crudely summarized as good occupants occupying a bad country (or at least one with a bad system of government and laws)'.[135]

Making reference to 'principles' and 'practices' of international law, some propose that those states that advance democracy and human rights and protect civilians from atrocities should have different powers than those conventionally permitted under the law of occupation.[136] Others propose those who have international mandates should have expanded authority to legislate: for example, where the Security Council has acted under Chapter VII (as in Iraq), that authority should override any inconsistent provisions in international humanitarian law; moreover, the more that the status quo is incompatible with international human rights norms, the greater should be the latitude for change.[137] Indeed, some are of the view that deviations from the law of occupation are permitted outright to the extent that they further purposes set out in Security Council resolutions.[138]

Arguments for transformative occupation rest, at base, on a number of interlinked premises. First, they are premised on the likelihood of a 'benevolent' administrator,

[131] See Ratner, *supra* note 2.
[132] See Benvenisti, *supra* note 28.
[133] See Roberts, *supra* note 2.
[134] Ratner, *supra* note 2; Sheffer, *supra* note 28.
[135] Roberts, *supra* note 2, at 601.
[136] See Sheffer, *supra* note 28, at 851.
[137] See Ratner, *supra* note 2.
[138] See Schmitt, *supra* note 7, at 384, 385.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

one who has the interests of the locals at heart.[139] Second, they assume that there is a relatively broad consensus about the tasks that must be undertaken in governing *any* society, one that goes well beyond civil order and extends to aims such as fostering democratization, the rule of law, and the establishment of market-based economies. Third, such arguments assume a consensus about what it means in institutional detail to further such aims and, finally, that the occupier will be well-positioned to actually do so. In short, arguments for transformative occupation assume a highly convergentist set of propositions: that far-reaching rather than limited international intervention is typically warranted; that good motivation on the part of the occupying power or international administrator is the rule rather than the exception; that well-motivated action corresponds with serving the interests of the population of the occupied territory; that those interests can now be reliably advanced through the expertise of international administrators and institutions; and that all of these propositions either should or already do find expression and legitimacy in established principles and practices of international law.

But is there, in fact, such convergence and congruence? And is there a clear and tractable distinction between belligerent and benevolent occupation? Many of the CPA orders were justified precisely in terms of the values of democracy and political and economic freedom that proponents suggest *would* characterize a benevolent occupation. However, the variety of competing rationales – deposing a despotic ruler, eliminating weapons of mass destruction, stabilizing a politically volatile region, eliminating the threat to the world peace posed by terrorists such as Al Qaeda, and furthering the human rights of the Iraqi people – proffered over time for the invasion suggests, at minimum, that its basis was a moving target. Critics of the invasion and occupation, including Iraqis themselves, advanced still other rationales, namely the desire on the part of the US to secure control over a crucial part of the oil resources of the Middle East.[140] As a result, nothing remains more deeply contested than the motivation for the hostilities in Iraq in the first place.

Rather than confirm their utility, then, Iraq suggests something about the instability of norms and principles such as freedom and democracy as metrics of benevolent occupation. Even if humanitarian concerns might sometimes legitimately ground international intervention, in Iraq such concerns operate as much to discredit as to support the occupation. Despite repeated claims that democracy was advancing and a peaceful society in Iraq was ever closer, it seemed just as plausible that occupation reforms did the opposite – fuel atrocities against civilians, provoke the fragmentation of Iraq, enable the rise of sectarian militias, and undermine democracy, as the sheer scope of the reforms ensured a process of disenfranchisement through administration. [141]

[139] On the assumption of benevolent intervention, see also A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2009).
[140] See R. Fisk, *The Great War for Civilization* (2004).
[141] See P. Cockburn, *The Occupation: War and Resistance in Iraq* (2007).

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

7.2. Human rights, in both directions

Human rights considerations are now routinely invoked as sources of normative authority in post-conflict administration, and the advancement of human rights forms a core element of the case for a transformative approach to the law of occupation.[142] Yet while the idea that human rights 'apply' to the context of occupation now seems uncontentious,[143] what their recognition might involve is much less clear. It is tempting to conclude that human rights might provide a source of protection for the sovereignty of those living under regimes of occupation. Yet human rights may also authorize rights violations in the context of occupation.[144] Whatever their general effects, the incorporation of human rights seems likely to license more rather than less action on the part of the occupier, particularly where existing state institutions and practices seems anachronistic or out of step with global norms.

This is not merely because, like other international law norms, human rights historically have been applied differently to Western and non-Western states. Nor is it because the US routinely takes the position, as it did in Iraq, that as a defender of human rights, its actions are necessarily consistent with human rights. Nor is it simply that well-positioned individuals occupying key institutional chokepoints might press exceptionalist claims leading to contraventions of human rights norms.[145] The problem is that human rights both constrain and enable the occupier, providing a basis on which to condemn institutional reforms but also one on which to legitimate or even require them. So if one view is that an occupying power can only do what is absolutely necessary to respect its human rights obligations and must stay as close as possible to local economic and social traditions, all changes being commensurate with the temporary nature of the occupation,[146] the competing view is that the obligation to progressively realize social and economic rights compels an occupying power to take extensive action.[147] Human rights might be invoked to impugn economic reforms, especially where they impose fiscal constraints that undermine the realization of social and economic rights.[148] But countervailing human rights claims, grounded in the view that economic reforms are needed to advance human welfare, are equally available.

Given the divergent positions that rights claims support, the question becomes what sorts of action they seem likely to underwrite in the context of occupation. Here, it seems useful to notice that in other international governance ventures, human rights and market-centred reform and reconstruction are already powerfully allied in theory and practice. This alliance suggests both the likely repetition of economic reforms in future instances of occupation and international administration and an enabling role for human rights in the process: rather than provide a brake on the

[142] See Roberts, *supra* note 2.
[143] See Ratner, *supra* note 2.
[144] A. Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?', (2007) 18 EJIL 1.
[145] See Koh, *supra* note 38.
[146] See Sassoli, *supra* note 28; Roberts, *supra* note 2, at 622.
[147] See Benvenisti, *supra* note 28.
[148] See Sassoli, *supra* note 28.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

actions of the occupier intent on deep economic change, human rights seem as likely to drive them forward, especially where reforms enjoy multilateral support.[149]

Since 1999, human rights have been identified across the international order as central to an integrated strategy to advance both human dignity and welfare and economic development. As Amartya Sen first proposed, human rights are properly understood both as constitutive *of* development and as instrumental *to* development.[150] By 1999, it had also become axiomatic that development must be led by the private sector rather than the state, and that development itself was foundational to the achievement of human rights.[151] Thus, the now-mainstream proposition that human rights and development are mutually constitutive – even conterminous – objectives that involve the adoption of a common set of reinforcing legal and institutional reforms has served to entrench as well as supplement market-centred development;[152] see for example, the rights identified with the 'legal empowerment of the poor': access to justice and the rule of law, property rights, labour rights and 'business' rights. [153]

Human rights and market-centred development had, along with democracy, already become closely entwined enterprises in the international order at the time of the occupation of Iraq.[154] Yet Iraq cements these enterprises more clearly to security. For visible in Iraq were both prongs of a double movement in which security concerns were extended to control over market institutions, while maintaining security itself became central to the operation of markets. With this move, the circle is complete: not only do human rights and development go seamlessly together; security is required for the defence of markets and human rights, while market reforms become integral to the security agenda, broadly conceived.

The effort to authorize military intervention in the name of rights such as the right to trade has a venerable history in international law.[155] And if Iraq exemplifies a pervasive tendency to represent human rights, development and security as coterminous objectives and to interpret their requirements in harmonious ways, a degree of convergence was already present in the minds of colonial administrators as they attempted to work out the competing demands of ensuring market access and resources for the imperial centre while simultaneously advancing the welfare of the natives.[156] Iraq under occupation, then, might be seen as merely the modern instantiation of old imperial objectives and conundrums. However, it perhaps represents a new configuration, one linking values and objectives – development, human rights and security – that are also distinct and severable. Whether they should all be conjoined and if so, in what form, must, in the wake of Iraq, surely be a question.

---

[149] See, for example, Fox, *supra* note 3, at 268–70.
[150] A. Sen, *Development as Freedom* (1999).
[151] See P. Alston and M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (2005).
[152] See Rittich, *supra* note 112.
[153] See UNDP, *Commission on Legal Empowerment of the Poor* (2008).
[154] U. Baxi, *The Future of Human Rights* (2002).
[155] M. Koskenniemi, 'International Law and the Emergence of Mercantile Capitalism: Grotius to Smith', in P.-M. Dupuy and V. Chetail (eds.), *The Roots of International Law* (2013), at 1.
[156] F. Lugard, *The Dual Mandate in British Tropical Africa* (1922).

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

7.3. The law of occupation and the rise of governance

The posture of restraint on the part of the occupying powers mandated by the Hague Regulations is rooted in a number of assumptions about the nature and exercise of sovereign authority, assumptions that are at increasing distance from contemporary governance practices. This distance, in turn, puts immense pressure on the categories and distinctions that the law of occupation classically seeks to maintain.

Here, three points of tension might be marked. The law of occupation is not only predicated upon the sovereign authority of states with respect to the conduct of their internal affairs. It reflects a world in which significant differences in the domestic governance of states is a normal and expected state of affairs. It does not contemplate a world in which particular forms and styles of governance, still further specific legal rules and institutions, have normative status *in general* at the international level. The law of occupation is, unsurprisingly, not well-equipped to settle contending authority claims *about* such rules and institutions.

Second, in mandating respect for private property and the private sphere of the family and religion,[157] the law of occupation posits relatively clear and tractable distinctions between public and private domains. It doesn't envision a state of affairs in which *whether* an asset, resources or service should be public or private is a live question. Still less does it imagine that *how* public and private are intermingled might be seen as central to administration and public welfare, despite the fact that as Grewe, Foucault and Kennedy all note, preoccupation with such matters is a defining characteristic of the modern state. The law of occupation doesn't contemplate at all a world in which international institutions might themselves have stakes in these very issues. Instead, it imagines the central task as simply delimiting the sphere of action of the occupied power.

Third, the law of occupation proceeds on the basis that identifying the occupying power is a straight forward affair. It does not contemplate actors and institutions beyond the state, private and public, domestic and international, playing any significant role in its administration. Nor does it provide a template for analyzing the modes of action through which such actors operate or evaluating how they relate to the exercise of sovereign power. Thus, it provides little guidance in managing situations, like Iraq, where they are imbricated in governance at every turn.

None of these observations, on their own, provide normative support for a 'transformative' law of occupation. Rather, the magnitude and complexity of the tasks at hand, along with the immense stakes to be settled, may well counsel the opposite: continuing to repose authority in the people who must live with the decisions made. But the expanding tasks that governance now routinely encompasses *does* provide a vantage point from which to appreciate the pressure to loosen the constraints of the law of occupation.

---

[157] Hague Convention, *supra* note 1, Art. 46.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

8. After the occupation: Towards a conclusion

The explicit desire to access Iraq's resources almost certainly played a central role in the design and implementation of occupation reforms,[158] while the widespread corruption documented during the tenure of the CPA strengthens the intuition that the welfare of Iraqis barely ranked in the order of concerns.[159] Yet the fact that analogous reforms can be found in so many other theatres of governance, post-conflict administration and beyond, suggests that the interests of external powers cannot be a complete explanation for what unfolded in Iraq. Rather, the occupation of Iraq indicates an increasingly porous, permeable boundary around sovereign policy and regulatory authority, particularly in the sphere of economic governance.

Despite the converging arguments from democracy, market-centred development, human rights and security in support of transformative approaches to occupation, the occupation of Iraq suggests how their simultaneous pursuit might produce upheaval and declining fortunes for the affected populations. As events during the occupation and its aftermath illustrate, the linkage between peace and security and economic justice came dangerously apart, suggesting how reforms that directly aggravate economic insecurity and/or undermine any realistic possibility of managing distributive conflict among different segments of society can also be expected to undermine political security. Herein lies the paradox.[160] The less deference accorded to local norms and decision-making, the more 'transformative' the occupation. But precisely because of the depth of their reformist ambitions and their detachment from local input and control, such regimes risk being profoundly destabilizing, thus undermining the possibility of successfully governing in *any* mode.

In the wake of Iraq, it is tempting to conclude that hegemonic states have simply taken exceptionalist positions concerning their legal powers, or even become 'post-legal'. But there are compelling reasons to explore how international law and international institutions underwrite, and even expand, the exercise of imperial power as well.[161] It seems beyond dispute that the engagement of international organizations assisted in the legitimation of the occupation in Iraq;[162] for some, that engagement provides a complete answer to any deviations from the law of occupation.[163] Even if its basis remains in dispute, by any broader measure the occupation of Iraq seems enabled by the international legal order as a whole. If Iraq under occupation was indeed an imperial venture, then Iraq also makes clear that such ventures are now continuous with other international projects, imbricated in myriad 'normal' governance practices and supported by the ordinary operation of international law, from the activities of the IFIs to the resolutions of the Security Council.

---

158 A. Greenspan, *The Age of Turbulence: Adventures in a New World* (2007).
159 See D.L. Barlett and J.B. Steele, 'Billions Over Baghdad', 2007 (October) *Vanity Fair*.
160 On the paradoxes of transformative occupation, see also Bhuta, *supra* note 25.
161 See M. Koskenniemi, 'The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law', (2002) 65 *Modern Law Review* 159; B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004) 15 EJIL 1.
162 See Roberts, *supra* note 2.
163 See Schmitt, *supra* note 7.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press

As Gross has observed, occupation now occurs through agents, third parties and institutions.[164] We might draw the same observation about imperialism itself. Rather than concentrated within a single hegemonic state, imperial power is now diffused across multiple sites and mobilized through the actions of diverse institutions. Yet precisely because practices that might be imperial are also normalized dimensions of so many international projects, it has become more difficult to conclusively identify any particular instance *as* imperial. Indeed, Iraq suggests that this may no longer be the pertinent question, as the border between territories under sovereign versus imperial rule is increasingly blurred.

Viewed from the outside in, even the very purposes and aims of imperialism may be less stable than we imagine. Rather than imagine imperialism as a discrete political and economic phenomenon that simply replicates itself at different moments, we should perhaps instead be alert to the processes and mechanisms by which imperial ambitions and tendencies travel, take root, and change form. Following Foucault, we could attend to how imperial practices work through the diffusion and entrenchment of general or 'universal' norms and forms of knowledge. In so doing, we might, as Wilde, Alvarez and others have suggested, investigate international administration and interventions for the extent to which they continue aims and practices historically associated with imperialism, recalling that colonial spaces tend to function as sites of experimentation, the fruits of which often come home.[165] Such a refocused lens on imperialism may ultimately take in many more contexts than we first imagine, including locations usually identified with imperial centres themselves.

Yet if imperial ventures always involve a conjoined moral and material agenda,[166] then this dual character is clearly apparent in Iraq, as is the 'omnipresent drive to make colonial practices more human, to justify them in other rhetorics'.[167] Neither the invasion nor the occupation could have succeeded to the extent that they did without the flags of democracy, freedom, development and human rights under which the foreign and international powers travelled. And if imperialism classically involves a project to supply the metropole with resources for its needs, Iraq is no exception here either, especially if we permit some transnational commercial class to stand in for a singular metropole.[168] The CPA orders may be just colonial governance practices in modern dress, enabling market access and asset acquisition through the techniques of rule of law, best practices, and good governance, all the while allocating the costs and burdens as well as the benefits and advantages of war and its aftermath among insiders and outsiders. If imperialism retains its purchase in the contemporary world and if the role of international law is important to its analysis, locales such as Iraq are surely of central interest.

---

[164] A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (2017).
[165] U. Mehta, *Liberalism and Empire: A Study in 19th Century British Liberal Thought* (1999).
[166] See Lugard, *supra* note 156; M. Craven, 'Between Law and History: The Berlin Conference of 1884–85 and the Logic of Free Trade', (2015) 3 *London Rev. Int'l Law* 31.
[167] See Wilde, *supra* note 3, at 320.
[168] See Chimni, *supra* note 161.

https://doi.org/10.1017/S0922156518000316 Published online by Cambridge University Press