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## Liberalization or Economic Colonization: The Legality of the Coalition Provisional Authority's Structural Investment Law Reforms in Post-Conflict Iraq

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**LIBERALIZATION OR ECONOMIC  
COLONIZATION: THE LEGALITY OF THE  
COALITION PROVISIONAL AUTHORITY'S  
STRUCTURAL INVESTMENT LAW REFORMS  
IN POST-CONFLICT IRAQ**

*Nicole Marie Crum*<sup>\*</sup>

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## INTRODUCTION

On March 20, 2003, U.S.-led coalition forces invaded Iraq,<sup>1</sup> leading to the collapse of the Ba'athist Iraqi government. On May 1, 2003, the Bush Administration declared a U.S. victory and expressed the intent to remain in Iraq, despite the end of "major combat operations," in order to secure and reconstruct the country.<sup>2</sup>

On April 6, 2003, U.S. Deputy Defense Secretary Paul Wolfowitz announced that the U.S.-run regime would last at least six months after the war although "probably . . . longer."<sup>3</sup> According to Wolfowitz, the U.S. would remain in Iraq to provide food and medicine and to repair and install infrastructure.<sup>4</sup> However, the U.S. demonstrated that its plan for post-war Iraq has, since its inception, involved more than "traditional reconstruction," which is temporary administration of a territory to restore public order and safety.<sup>5</sup>

Under the cloak of reconstruction and assistance, the U.S.-led Coalition Provisional Authority (CPA) formally instituted extreme investment laws that altered the very fabric of Iraqi society and denied the Iraqi people a

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<sup>1</sup> Glenn Kessler, *The U.S. Puts a Spin on Coalition Numbers*, WASHINGTON POST, Mar. 21, 2003, at A29.

<sup>2</sup> George W. Bush, U.S. President, Address to the Nation on Iraq From the U.S.S. Abraham Lincoln, in PUB. PAPERS, May 1, 2003.

<sup>3</sup> Naomi Klein, *Privatization in Disguise*, THE NATION, Apr. 28, 2003, available at <http://www.thenation.com/doc.mhtml?i=20030428&s=klein>.

<sup>4</sup> *Id.*

<sup>5</sup> Convention Respecting the Laws and Customs of War on Land, art. 43, Oct. 18, 1907 U.S.T. LEXIS 29, 1 Bevans 631 [hereinafter HAGUE REGULATIONS].

meaningful opportunity to exercise democracy.<sup>6</sup> Though they have received little press attention in the West, the CPA's economic reforms have sparked widespread controversy in Iraq.<sup>7</sup> Even some of the CPA's select Iraqi Council members and members of the Iraqi business community advised that the US-led privatization measures in Iraq may cause deeper unrest, danger, and turbulence in the country and expose Iraq too rapidly to stiff outside competition, even before implementation of Order 39.<sup>8</sup>

This article focuses on the substantive investment law reforms instituted under CPA Order 39 (Order 39) on Foreign Direct Investment (FDI).<sup>9</sup> Order 39 creates a liberal investment regime and moves Iraq from a centrally-planned economy to a free market system.<sup>10</sup> Order 39 allows investors unfettered access to Iraq without the establishment of protective measures required to ensure sustainable FDI that will protect Iraq's fragile institutions and aid development through job creation, capital flow retention, technology transfer, and workforce training.<sup>11</sup> Order 39 permits complete foreign ownership of Iraqi companies without limitations on remittances, local ownership requirements, protected sectors, technology transfer requirements, local employment requirements, or limits on privatization.<sup>12</sup> Order 39 installs a free market

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<sup>6</sup> See generally Antonia Juhasz, *Ambitions of an Empire: The Bush Administration Economic Plan for Iraq and Beyond*, LEFT TURN MAGAZINE, Jan. 20 2004, available at <http://www.globalpolicy.org/security/issues/iraq/after/2004/0120ambitions.htm>

<sup>7</sup> Neil King, Jr., *Bush Officials Draft Broad Plan for Free-Market Economy in Iraq*, WALL ST. J., Oct. 28, 2003, at A4.

<sup>8</sup> Juhasz, *supra* note 6.

<sup>9</sup> See Coalition Provisional Authority, Ord. 39, Sept. 19, 2003.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

system in Iraq, in a form dreamed of by Chicago School economists, through the complete abolition of current investment law and a disregard of Iraqi legal and cultural traditions.<sup>13</sup> By allowing FDI in all economic sectors of Iraq, including previously state-owned industries and entities, Order 39 essentially permits the sale of sovereign property to foreign interests.<sup>14</sup>

Order 39 has sparked a large influx of FDI into Iraq inevitably causing serious environmental, sociopolitical, and economic impacts, which affect the long-term well-being of the nation.<sup>15</sup> While FDI can produce beneficial impacts on host state development, the U.N. High Commissioner for Human Rights has found that trade liberalization, without adequate safeguards and supervision, often results in uneven development, exacerbated economic disparity, and human rights violations.<sup>16</sup>

This article sets out to prove that the CPA, as a temporary occupying force, does not possess adequate authority to institute the reforms in Order 39. In Security Council Resolution 1483 (Resolution 1483), the Security Council established the legal framework and mandate for the actions of the CPA in Iraq.<sup>17</sup> Under Resolution 1483,

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* § 6. Section 6 of Order 39 states, “[F]oreign investment may take place with respect to all economic sectors in Iraq, except that foreign direct and indirect ownership of the natural resources sector involving primary extraction and initial processing remains prohibited. In addition, this Order does not apply to banks and insurance companies.” There is no exemption for state owned entities or industries.

<sup>15</sup> See generally Part I of this paper.

<sup>16</sup> Report of the High Commissioner for Human Rights on Human Rights, Trade, and Investment, E/CN.4/Sub.2/2002/9, at 9-10 and 22.

<sup>17</sup> See S.C. Res. 1483, U.N. Doc. S/RES/1493 (May 22, 2003).

the U.S. and U.K. must act in accordance with the Geneva Convention IV 1949, the Hague Regulations IV, the U.N. Charter, and customary international law.<sup>18</sup> It is the opinion of this article that these bodies of law prohibit the reforms effectuated by Order 39, as they appear to violate humanitarian law, U.S. and U.K. obligations under the U.N. Charter, and the Iraqis' right to self-determination and permanent sovereignty over natural resources (PSNR).<sup>19</sup> The reforms do not promote or advance the human rights of the Iraqis as required by the U.N. Charter and undermine the ability of the Iraqis to exercise autonomy over their economic and political future, natural resources, and development.<sup>20</sup> The reforms violate Iraqi law, dispose of sovereign assets, property, and resources, and bind the Iraqis to contracts previously prohibited to foreign investors.<sup>21</sup>

This article examines the legitimacy and legality of the reforms contained in Order 39. Part One discusses the origin and status of the CPA and generally documents the U.S. and U.K. argument concerning the legitimacy of the CPA. It further details the reforms under Order 39 and the manner in which the reforms alter existing Iraqi law.

Part Two specifies the law governing CPA activities in post-war Iraq and demonstrates that the coalition is an occupying force according to the Geneva Conventions and the Hague Regulations, as well as the obligations incumbent upon the CPA under the legal framework applicable to the CPA under Resolution 1483. This section defines the CPA's obligation to act as "usufruct"—in the

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<sup>18</sup> *Id.*

<sup>19</sup> See generally Part II of this article.

<sup>20</sup> *Id.*; see also Part II.D of this article.

<sup>21</sup> See generally Part III of this article.

best interest of the Iraqis—by utilizing Iraqi assets only for military necessity and not beyond the term of occupation.

Part Three argues that the CPA lacks the authority to make the investment law reforms in Order 39. This part analyzes Resolution 1483, which is asserted by the U.S.-led coalition as granting them authority to institute Order 39, and argues that the CPA lacks the authority to institute investment reforms in Iraq under Resolution 1483. The second part of this section then argues that even if the CPA possessed the authority to institute the economic reforms generally, the specific reforms contained in Order 39 violate the Iraqis' right to self-determination and their right to PSNR, as well as the U.S. and U.K. obligations under the Hague Regulations, Geneva Conventions, and U.N. Charter.

## I. THE COALITION PROVISIONAL AUTHORITY

Part One of this section documents the inception and formal establishment of the CPA. Part Two details the CPA's leadership, mandate, organizational structure, and method of governance. This part further details the manner in which the CPA implements policy. Finally, Part Three begins by describing the Iraqi law abolished by Order 39 and then explains the content of Order 39 in detail.

### *A. Origin of the Coalition Provisional Authority*

In January 2003, before the war in Iraq, the U.S. established a domestic Office of Reconstruction and Humanitarian Assistance (ORHA), which was led by retired U.S. General Jay Garner and designed to plan and implement post-conflict reconstruction in Iraq.<sup>22</sup> The

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<sup>22</sup> PAUL BOWERS, HOUSE OF COMMONS RESEARCH PAPER 03/51: IRAQ: LAW OF OCCUPATION, 9-10.

ORHA “was expected to take over *de facto* administration of Iraq” while coalition forces dealt with security and disarmament.<sup>23</sup> The ORHA intended to provide a “rolling transfer” of U.S. control to an Iraqi Interim Authority.<sup>24</sup>

On April 8, 2003, Baghdad fell, and President Bush and Prime Minister Tony Blair issued a joint statement concerning the post-war control of Iraq expressing their intent to remain in Iraq for an undetermined period.<sup>25</sup> The U.S. and U.K. declared that the Coalition would work with the U.N. in post-war Iraq and that the U.N. had a “vital role to play in the reconstruction.”<sup>26</sup> However, this statement appears to contradict the April 6, 2003, statement of U.S. Deputy Defense Secretary Paul Wolfowitz that “there will be no role for the United Nations in setting up an interim government in Iraq.”<sup>27</sup>

On May 8, 2003, without the “vital” U.N. involvement the U.S. and U.K. promised one month earlier, the U.S. and U.K. informed the Security Council that they had unilaterally created a Coalition Provisional Authority, which included the ORHA, to govern Iraq temporarily under the command and control of the U.S.<sup>28</sup> Thus, the CPA was created without the approval or involvement of the U.N., which appears to directly contravene the U.S. and U.K. promise to the Security Council of U.N. involvement.

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<sup>23</sup> *Id.*

<sup>24</sup> R. Margesson and C. Tarnoff, *Iraq: Recent Developments in Humanitarian and Reconstruction Assistance*, CRS Report RL31833, Apr. 1, 2003, available at <http://www.fas.org/man/crs/RL31833.pdf>.

<sup>25</sup> Joint Statement by U.S. President Bush and U.K. Prime Minister Blair (April 8, 2003), available at <http://www.usembassy.org.uk/potus03/potus03c.html/>.

<sup>26</sup> *Id.*

<sup>27</sup> Klein, *supra* note 3.

<sup>28</sup> U.S. and U.K. Letter to the Security Council. S/2003/538, May 8, 2003.



### *B. Nature and Authority of the CPA*

After the U.S. and U.K. declared the formation of the CPA to the Security Council in early May 2003, President Bush appointed Paul Bremer as head of the CPA. In May of 2003, shortly after the passage of Resolution 1483, Paul Bremer formally established the CPA by executing Regulation One under his authority as head of the CPA, "relevant U.N. Security Council Resolutions," and the "laws and usages of war."<sup>29</sup> CPA Regulation One sets out the nature, powers, process, and scope of the CPA.<sup>30</sup>

Regulation One states that the object and purpose of the CPA is to exercise powers of government temporarily, restore conditions of security and stability, and create conditions where the Iraqi people can freely determine their own political future through the restoration and establishment of national and local institutions.<sup>31</sup> Additional goals of the CPA included the facilitation of "economic recovery" and "sustainable reconstruction and development" of Iraq.<sup>32</sup> Thus, the CPA's mission was framed in terms of assisting the Iraqis by facilitating and advancing their efforts in the reconstruction of Iraq.

Under Regulation One, the CPA was vested with "all executive, legislative and judicial authority necessary to achieve its objectives," which gave the CPA the power to override the executive, legislative, and judicial authority of Iraqi institutions if national bodies opposed or hindered

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<sup>29</sup> COALITION PROVISIONAL AUTHORITY REG. 1, May 16, 2003 [hereinafter CPA].

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at ¶ 1.

<sup>32</sup> *Id.*

the CPA's "objectives."<sup>33</sup> Furthermore, the U.S. alone would be directly involved in the implementation of CPA policies.<sup>34</sup> Thus, while the Coalition is often presented as being multinational in nature, under Regulation One, it would be led by a U.S. General who was subject to the direction of the U.S.

The U.S.-led CPA was established as a self-governing institution with self-proclaimed, complete, and unfettered authority to govern Iraq. More importantly, the CPA and its agents would be immune from the Iraqi judicial and legal process, including prosecution for unlawful acts of Coalition troops and other agents.<sup>35</sup> Thus, Iraqis aggrieved by CPA activities would have no effective remedy against the CPA or its agents. The perpetrators, including those involved in the prisoner abuse scandal, would not be subject to Iraqi law and may only face charges in their home countries.<sup>36</sup>

### *C. Economic Reforms in Iraq and CPA Order 39*

Since the commencement of the U.S.-led war against Iraq, the Bush administration has maintained its intent to bring democracy and freedom to the Iraqi people. Inherent in these concepts of democracy and freedom is a free market economy responsive to the needs of global business and foreign investment by Western multinational enterprises (MNEs). The U.S. refers to the process of

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<sup>33</sup> CPA, *supra* note 29.

<sup>34</sup> *Id.*

<sup>35</sup> CPA Public Notice Regarding the Status of Coalition, Foreign Liaison and Contractor Personnel, 26 June 2003, *available at* [http://www.cpa-iraq.org/regulations/20030626\\_20030626\\_CPANOTICE\\_Foreign\\_Mission\\_Cir.html.pdf](http://www.cpa-iraq.org/regulations/20030626_20030626_CPANOTICE_Foreign_Mission_Cir.html.pdf)

<sup>36</sup> Ariana Eunjung Cha and Ellen McCarthy, *Prison Scandal Indicates Gap in Command*, WASHINGTON POST, May 5, 2004, at A20.

making the Iraqi economy responsive to such needs as the “economic reconstruction of Iraq.”<sup>37</sup>

The Bush Administration’s philosophy can be well-summarized in a statement issued by BearingPoint, Inc., a company awarded contracts worth almost \$250 million by the U.S. to facilitate the economic reconstruction of Iraq. BearingPoint’s goal in Iraq is to “[e]stablish the basic legal framework for a functioning market economy; taking appropriate advantage of the unique opportunity...presented by the current configuration of political circumstances.”<sup>38</sup> The “configuration of political circumstances” is the U.S.’s control of Iraq.<sup>39</sup> The contents of the BearingPoint plan are important because, unlike other Western companies engaged in discrete Iraqi reconstruction projects, BearingPoint was paid to “develop and implement international economic practices aimed at improving economic governance in Iraq and developing a policy-enabling environment for private sector-led growth in the country.”<sup>40</sup> Thus, BearingPoint’s statements may be understood to reflect a wider U.S. policy agenda in Iraq.

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<sup>37</sup> President Outlines Steps to Help Iraq Achieve Democracy and Freedom, Remarks by the President on Iraq and the War on Terror United States Army War College Carlisle, Pennsylvania, May 24, 2004, available at

<http://www.whitehouse.gov/news/releases/2004/05/20040524-10.html>.

<sup>38</sup> Juhasz, *supra* note 6 (citing BearingPoint, Inc., *Moving the Iraqi Economy from Recovery to Sustainable Growth*, Statement of Work, Feb. 21, 2003, available at

<http://www.publicintegrity.org/wow/docs/BearingPoint.pdf>)

<sup>39</sup> *Id.*

<sup>40</sup> Press Release, USAID, *USAID Awards Economics Contract for Iraq* (Sept. 20, 2004), available at

<http://www.usaid.gov/press/releases/2004/pr040920.html>.

## 1. Iraqi Investment Law Existing Pre-Order 39

Prior to the U.S. invasion and implementation of Order 39, Iraqi law<sup>41</sup> consisted of a mix of Islamic and European legal concepts similar to other Middle Eastern countries.<sup>42</sup> Iraqi investment law was based on a socialist system of governance that prohibited both the private ownership of real property and the investment in Iraq by foreigners who were not resident citizens of Arab countries.<sup>43</sup> However, Iraqi investment law did contain provisions more liberal than other nations in the Arab world, reflecting an important compromise and dialogue between the Islamic, geographical, cultural, and historical context of Iraq and the needs of modern society.<sup>44</sup>

## 2. Content of Order 39

Upon its inception, Order 39 completely abolished Iraqi investment law concerning the entry, establishment, and regulation of foreign investors.<sup>45</sup> According to its Preamble, Order 39 aims to change Iraq from a “centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector.”<sup>46</sup> Order 39 also aims to attract investment into Iraq through the liberalization of Iraqi investment laws.<sup>47</sup> The U.S. maintains that such liberalizations would increase capital flows into Iraq and aid Iraqi development through economic growth, and a

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<sup>41</sup> *Id.*

<sup>42</sup> Office of the Chief Counsel for International Commerce, U.S. Department of Commerce, *Overview of Overview of Commercial Law in Iraq*, September 12, 2003, at 2-3.

<sup>43</sup> *Id.* at 2.

<sup>44</sup> *Id.*

<sup>45</sup> See Ord. 39, *supra* note 9.

<sup>46</sup> Ord. 39, *supra* note 9, at Preamble.

<sup>47</sup> *Id.*

corresponding rise in Gross Domestic Product (GDP) would improve quality of life.<sup>48</sup> The Preamble of Order 39 notes, “facilitating foreign investment will help to develop infrastructure, foster the growth of Iraqi business, create jobs, raise capital, result in the introduction of new technology into Iraq, and promote the transfer of knowledge and skills to Iraqis.”<sup>49</sup> Finally, the Preamble recognizes the CPA’s obligation to “ensure the well-being of the Iraqi people and enable the social functions and transactions of everyday life.”<sup>50</sup>

Order 39 consists of five key elements: (1) privatization of state-owned enterprises; (2) 100% foreign ownership of businesses in all sectors except oil, mineral extraction, banks, and insurance companies; (3) “national treatment” of foreign firms; (4) unrestricted, tax-free remittance of all funds associated with the investment, including profits; (5) 40-year renewable ownership licenses.<sup>51</sup>

#### *a. Privatization*

Privatization entails the sale or transfer of previously state-owned enterprises, assets, or service entities to the private sector. The production of goods and the provision of services are shifted from state control to private control. Order 39 permits total foreign ownership of state-owned entities in a country which, up until September 19, 2003, permitted no private ownership of these entities.<sup>52</sup> Under Section Six of Order 39, foreign

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<sup>48</sup> *Id.* See also National Strategy for Victory in Iraq, National Security Council, Nov. 2005, available at [www.whitehouse.gov/infocus/iraq/iraq\\_strategy\\_nov2005.html](http://www.whitehouse.gov/infocus/iraq/iraq_strategy_nov2005.html).

<sup>49</sup> Ord. 39, *supra* note 9.

<sup>50</sup> *Id.*

<sup>51</sup> Juhasz, *supra* note 6.

<sup>52</sup> *Id.*

investment may take place in all sectors and geographic locations in Iraq except “foreign direct and indirect ownership of the natural resources sector involving primary extraction and initial processing remains prohibited.”<sup>53</sup> Accordingly, Order 39 affects over 200 previously state-owned enterprises, including water services, electric utilities, schools, hospitals, news media, and prisons.<sup>54</sup>

### *b. One Hundred Percent Foreign Ownership*

Unlike investment laws in many countries that prohibit foreign ownership in certain industries or sectors,<sup>55</sup> Order 39 allows non-Iraqis to completely own businesses such as factories, farms, telecommunications, and transport systems.<sup>56</sup> Order 39 also allows a foreign investor to establish a wholly-owned business entity in Iraq, including a subsidiary of a foreign investor.<sup>57</sup> Thus, foreign investors would not be required to partner or associate with Iraqi nationals in order to establish businesses in Iraq.

### *c. National Treatment*

Under Order 39, “[a] foreign investor shall be entitled to make foreign investments in Iraq on terms no less favorable than those applicable to an Iraqi investor.”<sup>58</sup> This national treatment provision protects investors from discriminatory treatment in Iraq.<sup>59</sup> “National treatment provisions require the state to treat foreign investors and

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<sup>53</sup> Ord. 39, *supra* note 9, at § 6.

<sup>54</sup> Juhasz, *supra* note 6.

<sup>55</sup> United Nations Conference on Trade and Development, *Foreign Direct Investment and Development*, UNCTAD/ITE/IIT/10 (vol. 1) (1999).

<sup>56</sup> *Id.* at 4.

<sup>57</sup> Ord. 39, *supra* note 9, at §§ 6 and 7.

<sup>58</sup> *Id.* at § 4.

<sup>59</sup> *Id.*

investments no less favorably than 'like' domestic investors and investments once they have crossed the border and are part of domestic commerce."<sup>60</sup> Thus, the Iraqi government would be unable to distinguish between the businesses of foreign investors and Iraqi nationals. For example, under this provision, Iraq would be unable to require U.S. companies to hire local Iraqi workers in construction projects.<sup>61</sup>

#### *d. Unrestricted, Tax Free Remittances*

Regulations on the flow of investment related capital have emerged as an important FDI issue. The more capital, such as profits from the operations of MNEs, that is reinvested into the host state, the better the impact on the host economy.<sup>62</sup> On the other hand, when foreign capital flows and business profits are not reinvested in local businesses and the local economy, the positive effects of FDI cannot take root.<sup>63</sup> Under Order 39, foreign investors are authorized to "transfer abroad without delay all funds associated with investment, including . . . shares or profits and dividends."<sup>64</sup> This rule should be compared to common investment regulations requiring investors to reinvest a certain percentage of profits or dividends in the local business entity, infrastructure, or creation of local community services because such rules are an essential

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<sup>60</sup> *Id.* at § 14.

<sup>61</sup> Juhasz, *supra* note 6.

<sup>62</sup> Steve Onyiewu and Hermanta Shrestha, Tax Incentives and Foreign Direct Investment in the MENA Region, Economic Research Forum 12<sup>th</sup> Annual Conference 11, (Dec. 19-21, 2005), Cairo, Egypt, *available at* <http://www.erf.org.eg/12thAnnualConference/TRADE/presented/Onyiewu&Shrestha.pdf>.

<sup>63</sup> *Id.*

<sup>64</sup> Ord. 39, *supra* note 9, at § 11(2).

component of FDI programs that advance the development of host countries.<sup>65</sup>

Many FDI regimes designed to advance the development of the host state also include provisions that restrict the amount of capital that a business can take out of the economy in a certain period of time.<sup>66</sup> The provision in Order 39 providing for unrestricted tax-free remittances is inconsistent with the CPA's stated objectives of designing a system that "improves the conditions of life" and "opportunities for all" in Iraq.<sup>67</sup> The policy does not maximize the benefits of FDI by requiring foreign business to better the living conditions of Iraqis by building infrastructure or creating services.

*e. 40-Year Renewable Ownership Licenses*

Finally, Order 39 permits the allocation of licenses for real property for up to 40 years, which are renewable for further periods.<sup>68</sup> This provision states that an internationally recognized representative government of Iraq may review the licenses after it assumes the responsibilities of the CPA.<sup>69</sup> Importantly, this provision extends the CPA's use of Iraqi land beyond the duration of the occupation.<sup>70</sup>

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<sup>65</sup> M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* Ch. 2 (1994).

<sup>66</sup> See United Nations Conference, *supra* note 55.

<sup>67</sup> Ord. 39, *supra* note 9, at Preamble.

<sup>68</sup> *Id.* at § 8(2).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*



## II. LAW GOVERNING CPA ACTIVITIES IN POST CONFLICT IRAQ

Part One of this section provides a background summary of international law on occupation. In it, "occupation" under international law is defined which leads to the determination that the CPA is a belligerent occupying force. Part Two generally describes the law governing the CPA's obligations as a belligerent occupant and focuses on Resolution 1483 in particular. Furthermore, this part applies Section III of the Hague Regulations, Articles 42-56 and Section III of the Geneva Convention IV, Articles 47-78. Finally, Part Three describes the applicability of other laws to the CPA's actions in Iraq, specifically the law referenced or implicated by Resolution 1483, which includes the customary international human right to self-determination and right to sovereignty over natural resources.

### *A. Background*

Because different designations and legal rules apply to different circumstances, international law distinguishes between various types of political governance based on the origin and nature of the governing authority.<sup>71</sup> Changes in the political sphere or "rulership," such as domestic revolutions not involving the assumption of control by another state, are designated as "changes in government."<sup>72</sup> Whereas, changes in "rulership" involving "assumption of control by another state" are considered "territorial changes" or "post war" changes.<sup>73</sup> Thus, a change in the political nature of a state resulting from a war is not the

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<sup>71</sup> ERNST H. FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 4 (1942).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

same as a change in political makeup resulting from a revolution where a new sovereign entity emerges. “A territorial change obtained by a belligerent during and in the course of war is not treated as a state succession but as an occupation.”<sup>74</sup> That is, sovereignty does not pass to the occupier.

Thus, the nature of the relationship between the occupier and the occupied is not the same as that between a new successor and its populace. According to international law, an occupied territory will retain its sovereignty although it is not in a position to conduct its own affairs.<sup>75</sup> Therefore, the laws governing occupation will affect virtually every aspect of the occupied territory, including its economic policies, institutions, laws, politics, social sphere, and populace of the occupied territory.

Resolution 1483 specifically calls upon the U.S. and U.K. to “comply fully with their obligations under international law, including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”<sup>76</sup> The Hague Convention IV (1907), its annexed regulations (Hague Regulations), and the Geneva Convention IV (1949) (Geneva Convention) are the main sources of treaty law on occupation.<sup>77</sup> Article 2 of the Geneva Convention expressly states that the convention applies to all cases of partial or total occupation of the territory even if the said occupation meets with no armed

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<sup>74</sup> *Id.* at 5, § 11. See also EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION*, Princeton, 1993 (discussing the legal status of other occupations).

<sup>75</sup> *Id.* at 4.

<sup>76</sup> S.C. Res. 1483, *supra* note 17, at Item 5.

<sup>77</sup> BOWERS, *supra* note 22, at 19. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GENEVA CONVENTION]; See also HAGUE REGULATIONS, *supra* note 5.

resistance.<sup>78</sup> Similarly, Section III of the Hague Regulations sets forth the provisions relating to occupation.<sup>79</sup> However, under Resolution 1483, the U.N. Charter and “other relevant international law” also govern the CPA.<sup>80</sup>

The U.N. Charter requires the U.S. and U.K., *inter alia*, to endeavor “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained” and promote higher standards of living and human rights.<sup>81</sup> Although Resolution 1483 does not designate what constitutes other relevant international law, other applicable rules of law include obligations incumbent upon states

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<sup>78</sup> GENEVA CONVENTION, *supra* note 77, at art. 2.

<sup>79</sup> HAGUE REGULATIONS, *supra* note 5, at § 3.

<sup>80</sup> S.C. Res. 1483, *supra* note 17, at ¶ 4. This provision “calls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.” *Id.* According to the *Restatement of the Law 3d: Foreign Relations Law of the United States*, Article 102, “(1) a rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world. (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted. (4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, art. 102.

<sup>81</sup> U.N. CHARTER, art. 55, at Preamble.

under treaties to which they are a party and obligations under customary international law.<sup>82</sup> This topic is addressed more fully in Section D below. However, this article focuses on the customary international law rights to permanent sovereignty over natural resources and the international right to self-determination in the context of the occupation of Iraq.

The Hague Regulations thoroughly address the economic law of occupation.<sup>83</sup> Eleven of the fifteen articles of the Hague Regulations on occupation specifically address economic questions.<sup>84</sup> For example, Article 55 of the Hague Regulations requires an occupying power to safeguard the capital of state properties, public buildings, and estates, while Articles 48-49 govern the collection of taxes by an occupying power, and Article 53 limits the type of state assets an occupying power may take and use for military purposes.<sup>85</sup> Purely economic provisions are contained in Articles 46-56 of the Hague Regulations, and Articles 42 and 43 address economic and non-economic interests.<sup>86</sup>

Furthermore, the Geneva Convention provisions on occupied territories also incorporate economic concerns into general provisions on occupation, such as Article 52, which prohibits contracts, agreements, or regulations that impair the rights of workers and preserves work

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<sup>82</sup> For discussions interpreting other relevant international law applicable to the occupation context see Karima Bennouna, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. POL'Y 171 (2004); John Yoo, *Iraqi Reconstruction and the Law of Occupation*, 11 U.C. DAVIS J. INT'L L. POL'Y 7 (2004).

<sup>83</sup> *Id.* at 9. See generally HAGUE REGULATIONS, *supra* note 5, at arts. 42-56; GENEVA CONVENTION, *supra* note 77, at arts. 47-76.

<sup>84</sup> HAGUE REGULATIONS, *supra* note 5, at arts. 42-56.

<sup>85</sup> *Id.* at arts. 48-49, 53, 55.

<sup>86</sup> *Id.*

opportunities for persons residing in the occupied territory.<sup>87</sup> However, the Hague Regulations address economic issues in a more targeted and isolated manner.<sup>88</sup>

### *B. Occupation Defined*

An occupier who controls a territory by force is deemed a "belligerent occupant."<sup>89</sup> A "territory is considered occupied when it is actually placed under the authority of the hostile army."<sup>90</sup> This occurs when the government of the territory is no longer capable of exerting authority.<sup>91</sup> However, the occupation extends only to the territory over which authority is exercised, even if the occupation meets with no armed resistance.<sup>92</sup>

Four general characteristics describe a belligerent occupation: (1) imposition by a belligerent state; (2) upon the territory of a belligerent state; (3) during armed conflict; (4) commencing before the conclusion of an armistice.<sup>93</sup> Furthermore, the Hague Regulations will apply where one belligerent overruns a part of a territory belonging to an enemy state, where both armies are still

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<sup>87</sup> GENEVA CONVENTION, *supra* note 77, at art. 52.

<sup>88</sup> *Id.* See also ERIC CARLTON, OCCUPATION: THE POLICIES AND PRACTICES OF MILITARY CONQUERORS (1992).

<sup>89</sup> Mary Ellen O'Connell, *The Occupation of Iraq: What International Law Requires Now*, (Apr. 17, 2003), available at <http://jurist.law.pitt.edu/forum/forumnew107.php>; see generally Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 2004 I.C.J. (July 9).

<sup>90</sup> HAGUE REGULATIONS, *supra* note 5, at art. 42. Please note that the term "hostile army" is not defined in the Hague Regulations.

<sup>91</sup> *Id.*

<sup>92</sup> ADAM ROBERTS, WHAT IS MILITARY OCCUPATION 55 (British Year Book of International Law 260) (1984).

<sup>93</sup> *Id.*

fighting in the field, and where no armistice or other agreement has been concluded.<sup>94</sup>

The U.S.-led Coalition meets the elements of a belligerent occupant described above for the following reasons. First, the Coalition imposed its military presence upon the territory of Iraq in the form of an armed conflict. Second, although President Bush had declared an end to formal warfare, the U.S. continued to maintain its control of Iraqi territory through the use of force and arguably against the will of many of the Iraqi people. Third, no armistice or other agreement has been concluded between the Coalition and the Iraqis. Finally, the Coalition controls a significant if not complete portion of Iraqi territory in such a manner so as to deprive the Iraqis of the ability to administer their territory independently. Consequently, strong evidence exists for the argument that the Coalition is an occupying force. In fact, “shortly after replacing Jay Garner in Iraq as head of the CPA, Ambassador Paul Bremer did acknowledge the applicability of occupation law.”<sup>95</sup>

The rights and duties of an occupying force under the Geneva and Hague Conventions are not affected by the aim or legality of the initial use of force or whether the presence of the hostile army is called an “invasion,” “liberation,” “administration,” or “occupation.”<sup>96</sup> “As the law of occupation is primarily motivated by humanitarian considerations, it is solely the facts on the ground that

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<sup>94</sup> *Id.*

<sup>95</sup> Conor McCarthy, *The Paradox of the International Law on Military Occupation*, 10 J. CONFLICT & SECURITY L. 43, 45 n.9 (2005).

<sup>96</sup> International Committee of the Red Cross, *Occupation and International Humanitarian Law: Questions and Answers*, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/634KFC>;

determine its application.”<sup>97</sup> Thus, the fact that the U.S. claims to be a liberating force in Iraq does not affect the applicability of these obligations to the Coalition under international law.<sup>98</sup>

The duties of an occupying power exist regardless of the legality of the initial use of force that gave rise to the occupation.<sup>99</sup> An occupying power, “by virtue of its de facto military control, gains ‘authority of legitimate power.’ In exchange, the occupying power must ‘take all the measures in his power to restore, and ensure, as far as possible, public order and safety.’”<sup>100</sup> Also, an occupying power must respect the laws in force in the country,<sup>101</sup> which, in this case, includes Iraq’s right to territorial integrity and political independence.<sup>102</sup>

Commentary to the Geneva Convention clarifies this duty under Article 43 of the Hague Regulations and states that Article 43 of the Hague Regulations “is not applicable only to the inhabitants of the occupied territory; it also protects the separate existence of the State, its institutions and its laws. This provision does not become in any way less valid because of the existence of the new [Geneva] Convention which merely amplifies [Art. 43 of the Hague Regulations] in so far as the question of the

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<sup>97</sup> *Id.*

<sup>98</sup> Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573 (1985).

<sup>99</sup> Frederic L. Kirgis, *Security Council Resolution 1483, Rebuilding of Iraq*, ASIL INSIGHTS, May 2003.

<sup>100</sup> Batram S. Brown, *Intervention, Self-determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT’L L. POL’Y 23 (2004).

<sup>101</sup> HAGUE REGULATION, *supra* note 5, at art. 43; GENEVA CONVENTION, *supra* note 77, at art. 47.

<sup>102</sup> Brown, *supra* note 100.

protection of civilians is concerned.”<sup>103</sup> Thus, there is no question about the scope and importance of Article 43, pursuant to which the US may not undermine the political independence of Iraq by destroying and replacing all of Iraq’s institutions.

The Preamble of Resolution 1483 recognizes the U.S. and U.K. as “occupying powers” and calls on them to comply fully with their obligations under international law, including the Geneva Conventions and the Hague Regulations.<sup>104</sup> Furthermore, in the letter of May 8, 2003, from the U.S. and U.K. to the Security Council, the two states pledged to abide by their obligations under international law.<sup>105</sup> Thus, the U.S. is fully aware that it is obliged to meet the obligations described above under the Geneva Convention and Hague Regulations and international law.

### *C. Applicable Law When Occupation Exists*

Four basic principles of international law underlie the existence of an occupation: (1) the occupying power does not gain sovereignty over the occupied territory through occupation; (2) occupation is a transitory phase wherein the rights of the population must be respected by the occupying power until formal authority is restored; (3) when exercising authority, the occupying power must observe the interests of the inhabitants; (4) the occupying power must not use its authority to exploit the population or local resources for the benefit of its own population and

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<sup>103</sup> Commentary to the Geneva Conventions of 12 August 1949 273-4 (Jean S. Pictet ed., 1958).

<sup>104</sup> S.C. Res. 1483, *supra* note 17, at Preamble.

<sup>105</sup> U.N. Doc. S/2003/538 May 8, 2003. Letter from the Permanent Representatives of the United Kingdom and the United States of America Addressed to the President of the Security Council.



territory.<sup>106</sup> Furthermore, provisions allowing an occupying power to utilize resources or assets of an occupied territory must be narrowly construed.<sup>107</sup> These rules demonstrate that occupying powers may not use their status as occupier to advance their own hegemonic interests by, for example, installing an economic regime that furthers its own political-economic agenda on the international level.

Under international law, despite the current occupation, the Iraqi people still possess sovereignty over their territory.<sup>108</sup> This concept is reinforced by Resolution 1483 and the U.S. and U.K. letter to the Security Council, both of which acknowledge the continued territorial sovereignty of Iraq.<sup>109</sup> Under the Hague Regulations, occupiers must take all measures “to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>110</sup> The Geneva Convention expresses the same principle.<sup>111</sup> Occupying forces are “absolutely prevented” from making such changes, unless the changes are essential for the occupier to maintain public order, safety, orderly government, and security.<sup>112</sup> Thus, the CPA should be

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<sup>106</sup> Human Rights Watch, *The War in Iraq and International Humanitarian Law*, available at <http://www.hrw.org/campaigns/iraq/ihlfaqoccupation.htm>. HAGUE REGULATIONS, *supra* note 5, at art. 42-55, GENEVA CONVENTION, *supra* note 77, at art. 47-81.

<sup>107</sup> THOMAS ERSKINE HOLLAND, *THE LAWS OF WAR ON LAND* 53 (Oxford: Clarendon Press 1907).

<sup>108</sup> Eyal Benvenisti, *Water Conflicts During the Occupation of Iraq*, 97 AM. J. INT’L L. 860, 862 (2003).

<sup>109</sup> See U.N. Doc. S/2003/538, *supra* note 105; Letter, *supra* note 105.

<sup>110</sup> HAGUE REGULATIONS, *supra* note 5, at art. 43.

<sup>111</sup> GENEVA CONVENTION, *supra* note 77, at art. 63.

<sup>112</sup> *Id.*

forbidden from altering Iraqi laws or institutions in a manner contrary to existing Iraqi law.

With respect to property and the economy, occupying powers may take possession of cash, funds, realizable securities belonging to the state, and real property to be used for military operations.<sup>113</sup> However, “private property must be respected,” including proprietary rights granted in state contracts.<sup>114</sup> Thus, contracts concluded between the occupied territory and foreign private parties should still be binding and enforceable. “Absent specific authorization in the existing laws of Iraq or military necessity, the Occupying Powers are prohibited from nullifying—and, arguably, suspending—any legitimate state contracts with foreign parties by amending Iraq’s laws or by issuing a legislative declaration to that effect.”<sup>115</sup> Therefore, while occupiers may confiscate private property of the enemy in certain circumstances, the private property of foreign non-belligerents should not be confiscated under any circumstances.<sup>116</sup>

If an occupying force “directly appropriates property rights lawfully acquired by foreign parties under Iraqi law” or “renders the economic benefit of such right meaningless,” aggrieved parties have a right to compensation under established principles of international

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<sup>113</sup> HAGUE REGULATIONS, *supra* note 5, at art. 53.

<sup>114</sup> Pieter H.F. Bekker, *The Legal Status of Foreign Economic Interests in Occupied Iraq*, ASIL INSIGHTS, Jul. 2003, available at <http://www.asil.org/insights/insigh14.htm> (quoting HAGUE REGULATIONS art. 46); See also Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities under the Laws of War*, ASIL INSIGHTS, Apr. 2003, available at <http://www.asil.org/insights/insigh102.htm>.

<sup>115</sup> Bekker, *supra* note 114.

<sup>116</sup> *Id.*

law regarding the expropriation of foreign property.<sup>117</sup> Occupying forces violating this rule are liable to pay compensation to injured parties.<sup>118</sup> For example, the Security Council specifically required Iraq to pay damages for any direct harm done to the property and territory of Kuwait during Iraq's "unlawful invasion and occupation."<sup>119</sup> Thus, harm caused to Iraqi assets by the CPA may require compensation by Coalition members.

Regarding public buildings, real estate, and natural resources owned by and situated in the occupied country, occupiers "shall be regarded only as administrator and usufructuary" of such properties.<sup>120</sup> Therefore, occupiers may make use of them but may not take title. According to the Army Field Manual, Chapter 6, Section 5, occupiers cannot damage or destroy property in the occupied territory unless the destruction is absolutely necessary and may not exercise these rights in a wasteful or negligent manner that seriously decreases their value.<sup>121</sup> The occupant may let or utilize public land and buildings but cannot contract or lease beyond the conclusion of the war.<sup>122</sup> Furthermore, the U.S. State Department has opined, "[i]nternational law does not support the assertion of a right in the occupant to grant an oil development concession."<sup>123</sup> Thus, the US may not contract with foreign multinational enterprises for the sale or use of Iraqi assets or resources unless it is absolutely required to do so and such activity is designed

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> U.N. SCOR RES. 687 ¶ 16 (Apr. 3, 1991).

<sup>120</sup> HAGUE REGULATIONS, *supra* note 5, at art. 55

<sup>121</sup> United States Army Field Manual 27-10, The Law of Land Warfare, Chapter 6, section 5, *available at* <http://faculty.ed.umuc.edu/~nstanton/FM27-10.htm>.

<sup>122</sup> *Id.*

<sup>123</sup> U.S. Dept. of State, Memorandum of Law (Oct. 1 1976), 16 ILM 733, 752 (1977).

to, and actually does, aid the Iraqi people. However, in any event, the U.S. may not enter contracts that extend beyond the duration of the conflict.

While humanitarian law protects the economic law of occupied territories, there are gaps in the protection afforded to the populations of socialist states, like the Iraqis, from economic colonization and exploitation by occupiers. For example, under the Hague Regulations, private property is afforded greater protection than public property during occupation.<sup>124</sup> In a state where most property is state-owned, this poses a problem. However, as demonstrated below, Resolution 1483, in its reference to other applicable law, filled in the gaps in the protections afforded to private property under the Hague Regulations and Geneva Convention. That is, principles of customary international law regarding the right to self-determination and the right of a state to permanent sovereignty over natural resources require occupying powers to respect the property rights of inhabitants.<sup>125</sup> Rules on the preservation of sovereignty and the prohibition of sale, lease, or disposal of land by an occupying force to exceed the duration of the occupation should make the contracts facilitated by Order 39 unenforceable after the termination of the occupation. Thus, even if some gaps exist, Resolution 1483's reference to "other relevant international law," which includes applicable customary international law, fills the gaps, and the CPA would still lack the authority to facilitate or execute contracts in Iraq under Order 39.

#### *D. Other Applicable Law Referenced by Resolution 1483*

The notion that human rights law is only applicable in times of peace and that, in times of war and occupation,

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<sup>124</sup> HAGUE REGULATIONS, *supra* note 5, at arts. 46, 53, 56.

<sup>125</sup> See *generally infra*, Part II.D.2 of this article.

the law of human rights yields to the “*lex specialis* of the laws of war” is no longer accurate.<sup>126</sup> Many times the worst violations of human rights occur during war and occupation, and it is during those times that the observance of international human rights standards is most important.<sup>127</sup> It is now a generally accepted norm of customary international law that international human rights are applicable in times of war and occupation, as reflected in statements by the U.N., scholars, and international human rights instruments.<sup>128</sup>

In Resolution 1483, the Security Council, for the first time under Chapter VII of the U.N. Charter, addressed the presence of the U.S. and U.K. in post-conflict Iraq. While Resolution 1483 does not address the legality of the original use of force in Iraq, which many believe to have been unlawful,<sup>129</sup> it recognizes the U.S. and U.K. as occupying powers and establishes the legal framework and mandate for those participating in the administration and reconstruction of Iraq in order to “promote the welfare of the Iraqi people through the effective administration of the territory.”<sup>130</sup> Notably, Resolution 1483 calls upon not just the CPA, but “all concerned,” to “comply fully with their obligations under international law, including in particular the Geneva Conventions and the Hague Regulations.”<sup>131</sup>

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<sup>126</sup> Christopher Greenwood, *Rights at the Frontier: Protecting the Individual in Time of War*, in LAW AT THE CENTRE: THE INSTITUTE OF ADVANCED LEGAL STUDIES AT FIFTY 278 (B.A.K. Rider ed., 1999).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Mary Ellen O’Connell, *Addendum to Armed Force in Iraq: Issues of Legality*, ASIL INSIGHTS, Apr. 2003, available at <http://www.asil.org/insights/insigh99a1.htm>

<sup>130</sup> S.C. Res. 1483, *supra* note 17, at ¶ 4.

<sup>131</sup> *Id.* at ¶ 5.

Furthermore, Resolution 1483 conceives of the international community's significant involvement in the reconstruction process.<sup>132</sup> For example, Paragraph One of Resolution 1483 appeals to U.N. member states and concerned organizations to "assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with [Resolution 1483]."<sup>133</sup> Also, Paragraph Four of the Preamble "[r]esolves that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance."<sup>134</sup> Thus, it appears that the Security Council envisioned that the international community would be involved in the reconstruction process, which should inform the spirit in which the provisions defining the scope of the CPA's authorized activities in Iraq should be read.

Paragraph Four of Resolution 1483 sets forth the primary purposes of the CPA. Furthermore, Resolution 1483 calls upon all U.N. members to assist in the reconstruction of Iraq "in accordance" with Resolution 1483.<sup>135</sup> As U.N. members, the U.S. and U.K. must obey the legal framework and mandate established by the Security Council both individually and through organizations of which they are a part.<sup>136</sup> Resolution 1483 specifically stresses that the U.S. and U.K. "promote the welfare of the Iraqi people through the effective administration of the territory, including the creation of conditions in which the Iraqi people can freely determine

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<sup>132</sup> S.C. Res. 1483, *supra* note 17.

<sup>133</sup> *Id.* at ¶1.

<sup>134</sup> *Id.* ¶ 4.

<sup>135</sup> *Id.* ¶ 1.

<sup>136</sup> U.N. CHARTER Ch. VII, art. 48.

their own political future” as soon as possible.<sup>137</sup> Resolution 1483 stresses the need for the respect and observance of Iraq’s religious, cultural, and historical heritage, and obliges the occupying powers to “promote the welfare of the Iraqi people,” and to disperse the funds obtained for reconstruction for purposes “benefiting the people of Iraq.”<sup>138</sup> Additionally, the CPA is called upon to assist in the promotion of human rights<sup>139</sup> and to recognize the right of Iraqis to determine their own political future,<sup>140</sup> as all U.N. member states are required to do under Article 55 of the U.N. Charter.<sup>141</sup>

In fulfilling these duties, Resolution 1483 expressly binds the U.S. and U.K. to the U.N. Charter and “other relevant rules of international law,” the Geneva Convention and Hague Regulations. Resolution 1483 recognizes the right of Iraqis to sovereignty over their natural resources and political, social, and economic future. Thus, under the specific terms of the Resolution, the CPA is bound by both the law of occupation, which has already been discussed, and the obligations under international law generally, as Resolution 1483 specifically applies the U.N. Charter,

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<sup>137</sup> S.C. Res. 1483, *supra* note 17, at Preamble ¶ 4.

<sup>138</sup> *Id.* at ¶ 14.

<sup>139</sup> *Id.* at ¶ 8(g).

<sup>140</sup> S.C. Res. 1483, *supra* note 17, at Preamble ¶ 14.

<sup>141</sup> U.N. CHARTER art. 55 states, “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

“other relevant international law,” and “international law” to the actions of the CPA in Iraq.

### 1. Application of Human Rights Law to Occupied Territories Generally

The first part of this section demonstrates the applicability of customary international human rights law to the context of occupation generally. It then seeks to identify the two customary international law rights implicated by Resolution 1483 and Order 39—the right to self-determination and the right to permanent sovereignty over natural resources. Finally, it concludes by describing the scope and nature of these rights and their significance with respect to occupation.

Customary international law norms of human rights law can now be said to apply universally to all circumstances.<sup>142</sup> Customary international law consists of rules applicable to states that developed over time and are evidenced by state practice supported by evidence that states observe the rule due to a perceived obligation to do so.<sup>143</sup> While the international law on occupation and

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<sup>142</sup> John Quigley, *The Relation Between Human Rights Law and The Law of Belligerent Occupation: Does an Occupied Population Have A Right to Freedom of Assembly and Expression?*, 12 B.C. INT'L & COMP L. REV. 1, 3 (1989).

<sup>143</sup> *The Paquete Habana*, 175 U.S. 677, 700. According to the Restatement of Foreign Relations Law of the United States, (1) Whether a rule has become international law is determined by evidence appropriate to the particular source from which that rule is alleged to derive. (2) In determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE



international human rights law developed as separate bodies of law, the two have come together.<sup>144</sup> Thus, it is now widely accepted as a customary international law norm that human rights law continues to operate in occupied territories.<sup>145</sup>

This notion is a direct result of developments in international law over the past century and has been expressed by, *inter alia*, the U.N. General Assembly,<sup>146</sup> U.N. Secretary General, U.N. Human Rights Committee,<sup>147</sup> countless legal scholars, and the European Court of Human Rights.<sup>148</sup> For example, in a report on human rights and armed conflict, the Secretary General of the U.N. stated, “[t]he human rights provisions of the Charter make no distinction in regard to their application as between times of peace . . . and times of war” and that the provisions cover persons living in territories under belligerent occupation.<sup>149</sup> The U.N. Secretary General construed the Universal Declaration of Human Rights (UDHR) to apply during wartime, stating that the UDHR does not distinguish between times of peace and times of armed conflict, as it sets forth rights and freedoms belonging to everyone, including those living under occupation.<sup>150</sup> The U.S. Department of State has reinforced this assertion, stating “a central goal of U.S. foreign policy has been the promotion

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UNITED STATES, art. 103 (Sources of International Law)

<sup>144</sup> Greenwood, *supra* note 126, at 281.

<sup>145</sup> Benevisti, *supra* note 108, 863.

<sup>146</sup> Basic Principles for the Protection of Civilian Population in Armed Conflicts. G.A. Res. 2675 25<sup>th</sup> Session (Dec 9, 1970).

<sup>147</sup> Concluding Observations of the U.N. Human Rights Committee: Israel, Aug. 18, 1998.

<sup>148</sup> See *Loizidou v. Turkey* (Merits), 108 ILR 443 (1996) (ECHR).

<sup>149</sup> Report of the U.N. Secretary General, 24 U.N. GAOR (No. 61) UNDoc A/7720 at 12, ¶ 23 (1969) (emphasis added).

<sup>150</sup> Quigley, *supra* note 142, at 3.

of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.”<sup>151</sup>

The European Court of Human Rights expressly stated that the European Convention on Human Rights applies to the exercise of extraterritorial jurisdiction by contracting states when a contracting state exercises effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation.<sup>152</sup> Furthermore, the Assembly has repeatedly stated that it is guided generally by “the principles embodied in the U.N. Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights and accepted humanitarian rules as set out in the Geneva Conventions.”<sup>153</sup>

The U.N. Committee for Human Rights stated that a state party to the International Covenant on Civil and Political Rights (ICCPR) can be held accountable for violations of the convention committed by a state party on

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<sup>151</sup> U.S. Department of State on “Human Rights”, *available at* <http://www.state.gov/g/drl/hr>.

<sup>152</sup> *Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H.R. (2001) (Dec. on Admis.), *available at* <http://www.echr.coe.int/Eng/Judgments.htm>; *see also* Loizidou, 108 ILR at 443.

<sup>153</sup> U.N. G.A. Res. 46/136 on the Situation of Human Rights in Afghanistan, Preamble. International Committee of the Red Cross Statement on Humanitarian Law and Human Rights; U.N. G.A. Res. 46/135 on the Human Rights in Kuwait under Iraqi Occupation; and U.N. G.A. Dec. 47/133 on the Protection of People Against Forced Disappearances.

the territory of another state.<sup>154</sup> The U.S. and U.K. are parties to this convention and, therefore, must respect their ICCPR obligations in Iraq.<sup>155</sup> Additionally, the International Court of Justice (ICJ) has reinforced this declaration, stating that the protections of the ICCPR do “not cease in times of war, except . . . whereby certain provisions may be derogated from in time of national emergency.”<sup>156</sup> Both the ICCPR Human Rights Committee and other bodies monitoring states’ implementation of human rights obligations under treaties they have ratified “have consistently ruled that such obligations extend to any territory in which a state exercises jurisdiction or control, including territories occupied as a result of military action.”<sup>157</sup> Thus, the U.S. is bound to recognize and abide by the applicable human rights standards in these instruments while acting as the occupying force in Iraq.

## 2. Specific Customary International Law Standards Applicable to the CPA and Occupied Inhabitants of Iraq

While Resolution 1483’s reference to other “relevant international law” implicates many rights and duties the CPA must observe, this article focuses on the right to self-determination and the right to permanent sovereignty over natural resources.<sup>158</sup> These rights have been focused on because first, they are foundational rights required for the exercise and enjoyment of other human

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<sup>154</sup> Lopez Burgos v. Uruguay, 68 ILR 29, 38 (1981).

<sup>155</sup> See generally United Nations Office of the High Commissioner (listing all parties that have ratified ICCPR), available at [www.unhchr.ch/pdf/report.pdf](http://www.unhchr.ch/pdf/report.pdf).

<sup>156</sup> Legality of Threat or Use of Nuclear Weapons, 1996 ICJ Rep. 226, 240 (1996).

<sup>157</sup> Amnesty International, *Memorandum: Concerns Relating to International Human Rights and the Occupation of Iraq*, available at <http://web.amnesty.org/library/index/engmde141572003>.

<sup>158</sup> S.C. Res. 1483, *supra* note 17, at ¶ 4.

rights enshrined in the U.N. Charter, other human rights treaties, and established principles of customary international law.<sup>159</sup> Second, these rights are both acknowledged by Resolution 1483 and Order 39.

*a. Right to Self-Determination*

The right to self-determination is a fundamental human right that developed in the context of the disintegration of colonialism and the recognition of the rights and autonomy of previously colonized peoples and individuals.<sup>160</sup> The ICJ defines “self-determination” as “the need to pay regard to the freely expressed will of peoples.”<sup>161</sup> Self-determination entails the freedom to freely determine one’s political status and freely pursue one’s economic, social, and cultural development.<sup>162</sup> Furthermore, the right to self-determination can be implicated by the actions of an occupying force that affect the economic system or political process of an occupied area.<sup>163</sup> The right will apply to peoples, individuals, and nations under occupation who inhabit a historically recognized territory.<sup>164</sup> Moreover, the right to self-determination entails the right of inhabitants to resist

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<sup>159</sup> U.N. CHARTER, *supra* note 81.

<sup>160</sup> ICCPR, art. 1.1 (1966); Karen Parker, Understanding Self-Determination: The Basics, Presentation to First International Conference on the Right to Self-Determination, United Nations, Geneva, August 2000, available at <http://www.webcom.com/hrin/parker/selfdet.html>.

<sup>161</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ Advisory Opinion. Namibia Advisory Opinion, 1971 ICJ Rep. 16, 31 (1971).

<sup>162</sup> U.N. G.A. Res. 1514 (1960).

<sup>163</sup> U.N. CHARTER, *supra* note 159.

<sup>164</sup> Hugo Rojas, *Cluster I: Stop Cultural Exclusions (in Chile)!: Reflections on the Principle of Multiculturalism*, 55 FLA. L. REV. 121, 139 (2003).

occupation by all available legal means, including lawful applications of force.<sup>165</sup>

The right to self-determination has also been identified as a prerequisite for the exercise of other human rights.<sup>166</sup> This right is enshrined in the U.N. Charter, ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR), other conventions, and U.N. Resolutions. The U.N. Charter identifies self-determination as foundational to the U.N. system, which is "based on respect for the principle of equal rights and self-determination of peoples."<sup>167</sup> Although the right to self-determination as a rule of international law initially emerged in the context of colonialism, the right has evolved to cover individuals and peoples living in occupied territories.<sup>168</sup> According to the General Assembly of the U.N., occupied populations must be "protected not just by humanitarian law, but by insistence upon the right to self-determination."<sup>169</sup> Therefore, self-determination should not be denied to persons or peoples on the basis of perceived insufficient social, political, or economic development.<sup>170</sup>

The primary objective of self-determination is to "ensure the right of peoples to the necessary level of autonomy that would guarantee the support of their own cultural identity, the establishment of priorities by the community's internal decision-making processes, and the management of collective matters by themselves."<sup>171</sup> However, "the right to maintain a cultural identity is not

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> U.N. CHARTER, art. 1 ¶ 2.

<sup>168</sup> ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 116 (1994).

<sup>169</sup> *Id.*

<sup>170</sup> U.N. G.A. Res. 1803 (XVII) (1962).

<sup>171</sup> Rojas, *supra* note 164, at 149.

limited to the right to maintain peoples' distinctive cultural features, but rather to maintain its capacity for autonomous decisions."<sup>172</sup> Article 27 of the UDHR arguably recognizes this right, stating: "Everyone has the right to participate freely in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."<sup>173</sup>

This sentiment is echoed by Judge Higgins who observed, "[s]elf-determination has never simply meant independence. It has meant free choice of peoples."<sup>174</sup> According to Higgins, although the right to political independence is often highlighted with respect to self-determination, it is more than the right to freely determine political status, rather, "the entitlement is also to 'freely pursue their economic, social, and cultural development.'"<sup>175</sup>

The right of self-determination should also extend to the choice of economic system within a state, an issue particularly relevant to post-war Iraq.<sup>176</sup> The changes made by Order 39 in Iraq instituted an economic regime that the Iraqi people did not approve and, importantly, cannot easily change, thus depriving the Iraqis of the right to pursue their political, economic, and social development in the future.<sup>177</sup> The influx of Western multinationals and the institution of a neoliberal economic regime will create a power structure in Iraq that may not be easily dismantled by a future democratically elected Iraqi government.

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<sup>172</sup> *Id.*

<sup>173</sup> UDHR, art. 27.

<sup>174</sup> HIGGINS, *supra* note 168, at 119.

<sup>175</sup> *Id.* at 120.

<sup>176</sup> *Id.* at 123.

<sup>177</sup> Ord. 39, *supra* note 9 (noting that Order 39 was a product of unilateral action of the Coalition and Iraqi people didn't vote on it).

*b. Right to Permanent Sovereignty Over Natural Resources*

The right to PSNR recognizes the harm resulting from the activities of corporations and occupying powers in occupied territories.<sup>178</sup> Opportunist companies and governments frequently use the weakened state of occupied territories to further their own economic interests to the detriment of the often economically fragile host state.<sup>179</sup> The right of states and peoples to PSNR is accepted by the international community as a requirement for the exercise of the right to self-determination and other fundamental human rights as reflected by, for example, General Assembly Resolutions and the ICCPR.<sup>180</sup>

The General Assembly formalized the right to PSNR as “the recognition of the inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States.”<sup>181</sup> Similarly, the ICCPR Article 1(2) states, “all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”<sup>182</sup> Therefore, the right to PSNR is very important to the people of Iraq due to the great wealth of natural resources of the country and the extreme interest of

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<sup>178</sup> See generally NICOLAAS JAN SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES CH. 5 (1997).

<sup>179</sup> See U.N. G.A. Res. 3201 (S-VI) (1974).

<sup>180</sup> SCHRIJVER, *supra* note 178; see also U.N. G.A. Res. 1803.

<sup>181</sup> U.N. G.A. Res. 1803. U.N. G.A. Res. 626. This is perceived as the genesis of PSNR. See also U.N. G.A. Res. 57/269.

<sup>182</sup> ICCPR art. 1(2).

Western governments and multinationals in acquiring or controlling such resources.

The right to PSNR extends to all national “resources and wealth” of developing nations and populations, including those living under foreign occupation.<sup>183</sup> Under this right, states have the legal obligation to combat and redress the infringement of their economic sovereignty arising from oppressive and inequitable contracts and other arrangements “that inevitably occur in the context of colonization or occupation.”<sup>184</sup> According to the General Assembly, the exploration, development, and disposition of resources and the import of foreign capital in developing states must occur under conditions freely chosen by the population.<sup>185</sup> The right to PSNR includes the right to “restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those states, territories and peoples.”<sup>186</sup> The international community, through the General Assembly and the ICCPR, has dealt with the right to PSNR in the context of occupation and recognized the unique corresponding problems for national wealth. These issues are central to an assessment of the legality of Order 39.

### III. BASIS OF THE ILLEGALITY OF ORDER 39

This section analyzes the legitimacy of CPA economic reforms in Iraq under Resolution 1483 and the argument that Resolution 1483 authorizes the reforms in Order 39. The first part of this section situates the Order

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<sup>183</sup> U.N. G.A. Res. 3336. *See also* Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, *available at* <http://www.arso.org/Olaeng.pdf>.

<sup>184</sup> *Id.*

<sup>185</sup> *See* HIGGINS, *supra* note 168; SCHRIJVER, *supra* note 178.

<sup>186</sup> *See* HIGGINS, *supra* note 168.



39 reforms in the context of U.S. foreign and economic policy and explains how the reforms create a domestic investment model for Iraq. The section then analyzes the model established by Order 39 and its purported benefits and impacts in light of U.S. and U.K. obligations under the U.N. Charter and the Iraqis' right to self-determination and PSNR. Finally, the section applies the rules of occupation to Order 39, concluding that the reforms are prohibited under the Geneva Convention and Hague Regulations.

### *A. Resolution 1483 and CPA Legitimacy*

#### 1. The U.S. Position on Resolution 1483 and the CPA's Ability to Institute Structural Investment Law Reforms in Post-War Iraq

According to the U.S., the current occupation of Iraq followed a legitimate use of force that was "fully justified, and expressly recognized under Security Council Resolution 1483."<sup>187</sup> Furthermore, the U.S. argues that Resolution 1483 enables it to institute structural reforms such as those under Order 39.<sup>188</sup> This resolution calls upon the CPA to "promote the welfare of the Iraqi people through the effective administration of the territory," including "working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future."<sup>189</sup> The CPA maintains that a neo-liberal, free market system is essential for the exercise of freedom and democracy and that without such an economic system,

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<sup>187</sup> James C. Ho, *International law and the Liberation of Iraq*, 8 TEX. REV. LAW & POL. 79, 83 (2003) referencing Sec of State Colin Powell, Press Conference on Iraq Declaration (Dec 19, 2002) available at <http://www.state.gov/secretary/rm/2002/16123.htm>.

<sup>188</sup> *Id.*

<sup>189</sup> Ord. 39, *supra* note 9, at ¶ 4.

the Iraqis cannot freely determine their security, stability, and political future.<sup>190</sup>

The U.S. also argues that Resolution 1483 requires the U.S. to take actions in Iraq not typically required of occupying powers.<sup>191</sup> Accordingly, the U.S. appears to believe that Resolution 1483 overrides the existing international law of occupation, allowing it to take actions in Iraq that it otherwise could not take, such as the structural investment law reforms contained in Order 39.<sup>192</sup> The U.S. appears to argue that the Resolution's mandate extends beyond the law of occupation law, and thus, the laws must be interpreted to allow the CPA to fulfill its mandate imposed by the Security Council.<sup>193</sup>

The CPA argues that it was given express permission to reform the institutions of Iraq under Resolution 1483.<sup>194</sup> Proponents of this argument maintain that Order 39 conceives of the CPA "effecting on Iraqi politics, law, and institutions an overhaul, the scope of which will be nothing short of radical."<sup>195</sup> Even if the U.S. has increased responsibilities—as opposed to rights—in Iraq, it should be prohibited from destroying the political, economic, social, and cultural fabric of the country.

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<sup>190</sup> President Bush's Remarks on the 20th Anniversary of the National Endowment for Democracy, PUB. PAPERS (Nov. 6, 2003).

<sup>191</sup> Kim R. Holmes, United States Department of State, *Understanding United Nations Resolution 1483*, at <http://fpc.state.gov/fpc/20930.htm>.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* See generally S.C. Res. 1483, *supra* note 17.

<sup>195</sup> Thomas Grant, *Iraq: How to Reconcile Conflicting Obligations of Occupation and Reform*, ASIL INSIGHTS, Jun. 2003, available at <http://www.asil.org/insights/insigh107a1.htm>.

## 2. Response to U.S. Position that Resolution 1483 Permits Investment Law Reforms in Post Conflict Iraq.

In spite of the U.S. argument, evidence indicates that Resolution 1483 prohibits the institution of Order 39 and, further, fails to recognize the legitimacy of the U.S. and U.K. in Iraq.<sup>196</sup> Resolution 1483 refers to the U.S. and U.K. as occupying powers and requires them to abide by the customary international human rights law, the U.N. Charter, Geneva Conventions, and Hague Regulations.<sup>197</sup> These bodies of law apply to both lawful and unlawful occupying powers.<sup>198</sup> Resolution 1483 merely recognizes the status of the U.S. and U.K. as occupying powers in Iraq and does not, however, address whether the U.S. and U.K. are lawful or unlawful occupiers.<sup>199</sup>

Furthermore, the mandate and legal framework of Resolution 1483 should be read in plain terms and in light of the fact that the Security Council has not addressed or resolved the legality of the original use of force in Iraq and has nothing to say regarding the legitimacy of the CPA's overall objectives in Iraq. Resolution 1483 is explicit in its mandate to the U.S. and U.K. and the designation of applicable rules of law, which prohibit the U.S. and U.K. from instituting economic reforms that are not in the best interests of Iraqis and deny Iraqis the right to make decisions about their economic, political, and cultural life.<sup>200</sup> Accordingly, the U.S. and U.K. are expressly bound by both humanitarian law and other relevant international

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<sup>196</sup> See generally John Innes, *US and UK Action in Post-War Iraq May be Illegal*, THE SCOTSMAN, May 22, 2003, available at <http://news.scotsman.com/index.cfm?id=576102003>.

<sup>197</sup> S.C. Res. 1483, *supra* note 17.

<sup>198</sup> *Id.*

<sup>199</sup> HAGUE REGULATIONS, *supra* note 5, at art. 42.

<sup>200</sup> S.C. Res. 1483, *supra* note 17, at ¶¶ 2, 4, 7 and 8.

law, which disproves the U.S. assertion that it is free to act in a manner inconsistent with occupation law to further the aims of Resolution 1483. The Security Council was clear in its delineation of the legal framework constraining CPA activities when referencing the Geneva Convention, Hague Regulations, and other international law.<sup>201</sup> Thus, the CPA must interpret the permissible activities under Resolution 1483 in a manner consistent with the legal obligations enabling and limiting their effectuation.

The CPA may point to Paragraph Eight of Resolution 1483, which addresses institutional change and economic reconstruction as evidence of its mandate in Iraq and the permissibility of its investment reforms in Order 39.<sup>202</sup> However, Paragraph Eight, unlike Paragraph Four, is not directed solely to the CPA as occupying force.<sup>203</sup> Rather, the provision calls upon the Secretary General to appoint a U.N. Special Representative to Iraq who would work “intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance,” “facilitate the reconstruction of key infrastructure,” and promote “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.”<sup>204</sup>

This language outlines the responsibility for institutional and economic reconstruction with the Special Representative, who will work with the CPA in these

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<sup>201</sup> S.C. Res. 1483, *supra* note 17.

<sup>202</sup> Ord. 39, *supra* note 9; S.C. Res. 1483, *supra* note 17, at ¶

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<sup>203</sup> S.C. Res. 1483, *supra* note 17, at ¶¶ 4 and 8.

<sup>204</sup> *Id.*

efforts.<sup>205</sup> This provision further contemplates the promotion of economic reconstruction and not necessarily the abolition of current laws and institutions, which are expressly prohibited by the bodies of law governing CPA activities, including the Geneva Conventions, Hague Regulations, and customary international law.<sup>206</sup> Reconstruction could be advanced through the rebuilding and development of existing institutions with technical assistance provided to the Iraqis for future changes in economic system. Additionally, Paragraph Eight should be read in accordance with both the legal mandate established in the Resolution itself and international law generally, in light of the ordinary meaning to be given to its express terms in their context and in light of the object and purpose.<sup>207</sup> Consequently, a fair reading of the text of Resolution 1483 does not authorize the CPA to install a neo-liberal market system in Iraq.

Under Resolution 1483, the *responsibilities* of the U.S. and U.K. were expanded when compared with the obligations of occupiers in the absence of such a resolution under the international law governing occupation.<sup>208</sup> However, the legal framework established by Resolution 1483 clearly limits the *rights* of the U.S. as an occupying force as per the Geneva Conventions, Hague Regulations, and other relevant international law.<sup>209</sup>

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<sup>205</sup> *Id.* at ¶ 8.

<sup>206</sup> *Id.*

<sup>207</sup> VIENNA CONVENTION ON THE LAW OF TREATIES art. 31 (1969).

<sup>208</sup> *U.S. Council on Foreign Relations Roundtable Discussion on UNSC Resolution 1483*, May 29, 2003, available at [http://www.cfr.org/pub6058/david\\_l\\_phillips/roundtable\\_on\\_unsc\\_resolution\\_1483.php](http://www.cfr.org/pub6058/david_l_phillips/roundtable_on_unsc_resolution_1483.php).

<sup>209</sup> S.C. Res. 1483, *supra* note 17, at Preamble, ¶ 13.

Only a new Security Council Resolution specifically authorizing structural economic reforms could legitimize the actions taken by the CPA.<sup>210</sup> This was the opinion of U.K. Attorney General Lord Goldsmith who, in a memo to Prime Minister Blair, indicated that many of the CPA's actions may have been unlawful in the continuing absence of a new U.N. resolution specifically authorizing them.<sup>211</sup> Lord Goldsmith wrote, "[m]y view is that a further Security Council resolution is needed to authorize imposing reform and restructuring of Iraq and its government."<sup>212</sup> The memo suggests almost everything the U.S.-led CPA has done, from forming an interim Iraqi administration to the control of oil and the award of reconstruction contracts to U.S. firms, may have been invalid.

### *B. Impact and Context of Order 39*

This section provides the context for the reforms in Order 39 and presents the economic philosophy underpinning the reforms. First, this section analyzes the investment regime created under Order 39 as a domestic investment model utilizing transnational corporations for economic growth and documents the manner in which it purports to attract and regulate investment and benefit the Iraqis. Second, it critiques the model established by Order 39 in light of the right to self-determination and right to PSNR and argues that the reforms violate these rights, noting that the benefits identified by the CPA will not occur under the reforms. This section then responds to the benefits identified by the CPA and compares the CPA model to existing internationally recognized domestic law models for attracting and retaining FDI in a human rights

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<sup>210</sup> U.N. CHARTER arts. 39 and 41.

<sup>211</sup> Innes, *supra* note 196.

<sup>212</sup> *Id.*; see also O'Connell, *supra* note 89.

oriented and sustainable manner. Finally, it argues that Order 39 violates the law of occupation and that the U.S. and U.K. have not met their obligations under the Resolution 1483.

### 1. Context and Philosophical Foundations of Order 39

Because the U.S. oversees the CPA and acts as the primary architect and impetus behind the reforms in Order 39, it will be the primary subject of this analysis. Order 39 is based on an American, neo-liberal world view that hails economic liberalization as a precondition for freedom and economic, social, and political development.<sup>213</sup> According to President Bush, governments who do not maximize private enterprise and the exploitation of natural resources effectively stifle “freedom,” “independent thought and creativity,” and will never have a “strong and successful society.”<sup>214</sup> Speaking of the Middle East as a whole, President Bush stated, “[w]hole [Middle Eastern] societies remain stagnant while the world moves ahead. These are not the failures of a culture or a religion. These are the failures of political and economic doctrines. . . . Successful societies privatize their economies and secure the rights of property.”<sup>215</sup>

The Order 39-type reforms are part of the U.S.’s overall foreign policy and strategy for regional reform in the Middle East.<sup>216</sup> The reforms did not originate

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<sup>213</sup> See Carl J. Schramm, *Building Entrepreneurial Economies*, 83 FOREIGN AFFAIRS No. 4, (July/August 2004).

<sup>214</sup> President George W. Bush, *Remarks By The President At The 20th Anniversary Of The National Endowment For Democracy*, Nov. 6, 2003, available at <http://www.whitehouse.gov/news/releases/2003/11/20031106-3.html>.

<sup>215</sup> *Id.*

<sup>216</sup> See *Let's All Go to the Yard Sale: Iraq's Economic Liberalization*, *The Economist*, Sept. 27, 2003; President George W.

organically in the context of Iraq but are part of the U.S.'s overall national security strategy as documented in the National Security Strategy of The United States, a 2002 Presidential document detailing the U.S.'s global security strategy.<sup>217</sup> According to the document, the U.S. national security strategy is based on spreading a "distinctly American internationalism that reflects the union of our values and our national interests."<sup>218</sup> To protect its interests globally, the U.S. implements policies that strengthen market incentives and market institutions, because it has an incentive to expand markets for its top businesses and secure solid deals for its top industries, such as the oil industry.<sup>219</sup> An important example of this policy is the U.S. support for bilateral and multilateral investment and free trade agreements, such as the Central American Free Trade Agreement, that include business friendly policies that further the ability of U.S. business to sell their goods and operate abroad.<sup>220</sup>

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Bush, Fact Sheet: Proposed Middle East Initiatives, May 9, 2003, available at

<http://www.whitehouse.gov/news/releases/2003/05/20030509-12.html>;  
President George W. Bush, US-Middle East Free Trade Area, June 9, 2004, available at

<http://www.whitehouse.gov/news/releases/2004/06/20040609-37.html>.  
See also Becky Branford, *US Legal Legacy for Iraqi Economy*, (April 7, 2005) available at

[http://news.bbc.co.uk/2/hi/middle\\_east/4417759.stm](http://news.bbc.co.uk/2/hi/middle_east/4417759.stm). This source includes a lively debate between two economists on whether this policy has been beneficial for Iraq.

<sup>217</sup> National Security Council, *National Security Strategy of the United States of America*, available at

<http://www.whitehouse.gov/nsc/nss.pdf>.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See, e.g., Robert B. Zoellick, Deputy Secretary of State, *CAFTA is a win win*, available at

<http://www.state.gov/s/d/rem/46638.htm>; *President Signs Central*



The Bush Administration characterized the U.S. “goal” in Iraq as “help[ing] the Iraqi people build a stable, just and prosperous country that *poses no threat to America or the world.*”<sup>221</sup> According to the U.S., free trade and free markets are beneficial and “relevant for all economies— industrialized countries, emerging markets, and the developing world.”<sup>222</sup> Conveniently, it also expands U.S. markets and economic and political influence worldwide. According to President Bush, “[t]he establishment of a free Iraq at the heart of the Middle East will be a watershed event in the global democratic revolution.”<sup>223</sup> The U.S. views Iraq as a strategic actor in the region and designed Order 39 for regional impact that will advance the its economic and political agenda by, for example, providing a system that furthers the establishment of U.S. and other Western multinationals in Iraq.

Both the U.S. and U.K. believe that market reform, including privatization and democracy in Iraq, will spread across the region as a whole, and there is no indication that the Iraqi oil industry would be immune to such reforms.<sup>224</sup> Investors openly predict that once privatization of Iraq takes root, Iran will be forced to privatize its oil to compete.<sup>225</sup> Furthermore, Oil company executives publicly

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*American-Dominican Republic Free Trade Agreement (CAFTA-DR)*, August 2, 2005, available at <http://www.state.gov/p/wha/rls/rm/2005/50492.htm>; See National Security Council, *supra* note 217 at 17-20..

<sup>221</sup> George W. Bush, U.S. President, Radio Address, PUB. PAPERS (Oct. 11, 2003) (emphasis added).

<sup>222</sup> See National Security Council, *supra* note 217, at 17-20.

<sup>223</sup> President Bush Discusses Freedom, *supra* note 214.

<sup>224</sup> *Bush, Blair Discuss Sharon Plan; Future of Iraq in Press Conference*, April 16, 2004, available at <http://www.whitehouse.gov/news/releases/2004/04/20040416-4.html>

<sup>225</sup> S. Rob Sobhani, *Ordinary Iranians Applaud Bush's 'Axis of Evil' Talk*, WALL ST. J., Feb. 6, 2002.

acknowledge their interest in Iraq's oil fields.<sup>226</sup> This interest is reflected in the U.S. Presidential Middle East Partnership Initiative (MEPI), which encourages liberalization and privatization in the Middle East.<sup>227</sup> According to President Bush, the MEPI strives to link the Arab world, the U.S., global private sector businesses, non-governmental organizations, civil society elements, and governments together to develop innovative policies and programs that support reform in the region.<sup>228</sup> This initiative is evidence that the economic policies instituted in Iraq through Order 39 are part of a wider U.S. foreign policy initiative in the Middle East and not part of a reformation and reconstruction process that sets up the Iraqis for an independent future. But, it must be reiterated that the Bush Administration seeks to link economies in the Middle East to promote U.S.-led reform in violation of the Iraqis' right to self-determination and PSNR and the activities permitted by occupiers under the Geneva Convention and Hague Regulations.

## 2. Model Established by Order 39

Order 39 establishes an open door domestic investment framework for Iraq to attract and retain privately owned foreign business and capital.<sup>229</sup> This framework utilizes MNEs as tools for economic and social development and liberal regulations to attract investors.<sup>230</sup> Order 39 is based on the classical economic theory of foreign investment, which suggests that foreign capital

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<sup>226</sup> Dan Morgan and David Ottaway, *In Iraqi War Scenario, Oil is Key Issue as American Drillers Eye Huge Petroleum Pool*, WASHINGTON POST, September 15, 2002.

<sup>227</sup> *Middle East Partnership Initiative*, United States Department of State, available at <http://mepi.state.gov/mepi/>.

<sup>228</sup> *Id.*

<sup>229</sup> Ord. 39, *supra* note 9, at § 2.

<sup>230</sup> *Id.*

brought into the host state aids development by providing increased domestic capital available for public benefit.<sup>231</sup> The theory maintains that the foreign investor brings in technology and knowledge not available in the host state that leads to diffusion of technology within the host economy.<sup>232</sup> Furthermore, the theory conceives that the implemented reforms will allow for new employment opportunities and better-trained employees possessing managerial and technical skills.<sup>233</sup> Thus, in theory, incoming companies will build infrastructure, health, and education facilities to benefit the foreign investor, which will, in turn, benefit the society as a whole.<sup>234</sup>

The United Nations Conference on Trade and Development recognizes the contribution of FDI to economic growth in developing countries and shows that “FDI inflows are heavily concentrated in a few host developing countries.”<sup>235</sup> The U.S. contends that Iraq must attract FDI in order to bring money into the economy to aid Iraqi development efforts.<sup>236</sup> The idea is that the more the laws provide flexibility and freedom to companies, the more opportunity for foreign investment in Iraq. Some proponents of this model argue that American MNEs operating abroad export democratic values and human rights.<sup>237</sup> According to this argument, when Western MNEs invest abroad, they send personnel into the host state who interact with local inhabitants and communities and

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<sup>231</sup> SORNARAJAH, *supra* note 65, at 38-42.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> United Nations Conference on Trade and Development, *supra* note 55, at 13.

<sup>236</sup> President Bush’s Radio Address, *supra* note 221.

<sup>237</sup> Debora Spar, *The Spotlight and the Bottom Line: How Multinationals Export Human Rights*, 77 FOREIGN AFFAIRS No. 2 (March/April 1998).

spread information and democratic values generally, while exposing local populations to new products, ideas, and possibilities.<sup>238</sup> Thus, according to this rationale, the regime established by Order 39 would permit a current of Western culture and values to flow into Iraq.

*C. Response to the Bush Administration Model for FDI Under Order 39*

While FDI through MNEs can potentially assist the economic development of Iraq, the positive effects of FDI are not automatic, but determined by the conditions prevailing in the host countries, the investment strategies of investors, and host state policies.<sup>239</sup> Without restrictions and supervision, FDI will be unsustainable and will yield detrimental results, especially in fragile economies with weak institutions such as the one found in Iraq.<sup>240</sup> To be sustainable, FDI laws should be narrowly tailored to the specific context and needs of the host state.<sup>241</sup> Therefore, for states seeking to attract investment primarily from MNEs, the FDI process should be tailored “to target investors, guide their resource allocation and induce them to undertake more complex value-added activities than they would perhaps otherwise have done.”<sup>242</sup>

Resolution 1483 requires the U.S. and U.K. to abide by their obligations under the U.N. Charter and other relevant international law.<sup>243</sup> World Trade Organization

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<sup>238</sup> *Id.*

<sup>239</sup> United Nations Conference on Trade and Development, *supra* note 55.

<sup>240</sup> Report of the High Commissioner for Human Rights, *supra* note 16, at 7.

<sup>241</sup> *Id.*

<sup>242</sup> United Nations Conference on Trade and Development, *supra* note 55, at 50.

<sup>243</sup> See S.C. Res. 1483, *supra* note 17, at Preamble.

member states have undertaken to respect, protect, and fulfill human rights in all contexts and have committed to international cooperation and assistance to promote human rights and create a social and international order through which all human rights and fundamental freedoms can be fully realized.<sup>244</sup> These obligations apply to investment liberalization exercises undertaken by members, whether national or international in scope, and require that liberalization and privatization not compromise state action and policy to promote and protect human rights.<sup>245</sup> Furthermore, states should formulate national investment policies that improve the well-being of their entire population on the basis of their active participation in development and the fair distribution of resulting benefits.<sup>246</sup> In the context of occupation generally and the US mandate in Iraq in particular, these rules are essential to establish a regime that promotes “the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.”<sup>247</sup>

Unfortunately, as will be explored in the next section, the investment model propagated by Order 39 undermines the potential benefits FDI can bring to Iraq and violates the Iraqis’ right to self-determination and PSNR. First, the influx of powerful, Western MNEs into Iraq, in the wake of weak governmental institutions and commercial infrastructure, crowds out indigenous enterprises and makes Iraq economically and socially

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<sup>244</sup> Report of the High Commissioner for Human Rights, *supra* note 16, at 2.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 18.

<sup>247</sup> S.C. Res. 1483, *supra* note 17, at ¶ 4.

dependent on the presence of foreign companies. Second, the reforms are not human rights or development oriented, but designed and implemented by an undemocratic regime, the CPA. Utilization of such reforms will cause the new Iraqi government to be unable to undo the CPA's effects and effectuate the will of the Iraqi people. Third, the reforms were implemented in a corrupt fashion, which allowed investors to participate in the formation of the policies themselves. Fourth, the reforms fail to consider the cultural heritage in the context of Iraq<sup>248</sup> and impose a neo-liberal economic system that will potentially benefit the U.S. to the detriment of the Iraqi people. Finally, Order 39 fails to recognize the inalienable right of Iraq to freely dispose of its natural wealth and resources in accordance with its national interests.

#### 1. Requirements for a Domestic FDI Regime that Supports the Right to Self-Determination and Right to PSNR

According to the U.N. High Commissioner for Human Rights, state policies regarding the admission, entry, and establishment of FDI have extreme human rights impacts.<sup>249</sup> States have a duty to regulate investment to protect and promote human rights generally and must take action in four key areas.<sup>250</sup> First, states must regulate forms of investment that can have negative economic effects on performance and reduce state resources.<sup>251</sup> Second, states must have the flexibility to use performance requirements and other measures.<sup>252</sup> If they are prohibited, as is the case with Order 39, states must still be able to use local content

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<sup>248</sup> Rojas, *supra* note 164, at 150.

<sup>249</sup> Report of the High Commissioner for Human Rights, *supra* note 16, at 19.

<sup>250</sup> *See generally id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

and other requirements to promote the human rights of certain individuals or groups. Third, states must have the ability to withdraw commitment to liberalize when liberalization has negative impacts on human rights.<sup>253</sup> Fourth, states must have the ability to introduce new regulations to promote and protect human rights.<sup>254</sup> FDI must be sustainable and directed to the needs of those living in the host state.<sup>255</sup>

The strategy toward FDI selected by a government reflects the economic position, beliefs, and capabilities of the government's concerns.<sup>256</sup> The United Nations Conference on Trade and Development (UNCTAD) cites four main approaches to FDI taken by governments in the world, ranging from the most liberal, passive, open-door approach, with little to no restrictions on foreign investors, to the most protectionist model with heavy restrictions on FDI and the implementation of policies to strengthen only the indigenous manufacturing sector.<sup>257</sup> Order 39 adopts one of the most liberal investment models conceivable, which should be reserved for strong, stable economies with complex and established government and commercial infrastructure.<sup>258</sup> The legal infrastructure in Iraq suffers from "being in a time warp" as Iraq has been "shielded and excluded from the process of commercial development."<sup>259</sup> Consequently, Iraq is not prepared for the regime imposed by Order 39.

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Report of the High commissioner for Human rights, *supra* note 16.

<sup>256</sup> United Nations Conference on Trade and Development, *supra* note 55.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> Philip Hoult, *From War to Law*, LAW SOCIETY GAZETTE, Oct. 2, 2003, at 22.

According to UNCTAD, the “best practice” in FDI management for sustainable development in developing host countries is the model adopted by Singapore, which requires “pervasive and selective guidance and inducement of foreign investors” to upgrade their contributions to the development of the host state, as opposed to a more liberal open market model that is less, if at all, selective.<sup>260</sup> The best approach combats the negative effects of FDI on a host state by restricting FDI and guiding MNE activities to maximize their contribution to the host through “operational measures such as performance requirements.”<sup>261</sup> Order 39 does not limit the amount of foreign participation in Iraq and does not implement performance requirements.<sup>262</sup> Gradually, developing host countries may be moving away from the passive open-door model and moving toward the more sustainable domestic investment models containing more restrictive regulations on investors so as to ensure capital flows benefit the economy, development, and local communities.<sup>263</sup> In fact, even countries with a more open approach on the books do not, in practice, allow investors the type of complete access permitted by Order 39.<sup>264</sup>

According to prevailing international standards, a domestic model for sustainable development in Iraq would include seven characteristics that are lacking in Order 39.<sup>265</sup>

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<sup>260</sup> United Nations Conference on Trade and Development, *supra* note 55, at 55.

<sup>261</sup> *Id.*

<sup>262</sup> CPA, *supra* note 29, at § 4(2).

<sup>263</sup> United Nations Conference on Trade and Development, *supra* note 55.

<sup>264</sup> United Nations Conference on Trade and Development, *Admission and Establishment*, at 11, UNCTAD/ITE/IIT/10 (vol. II) (1999) at [http://www.unctad.org/en/docs/iteiit10v2\\_en.pdf](http://www.unctad.org/en/docs/iteiit10v2_en.pdf).

<sup>265</sup> See generally Transcript of Meeting, summarized in *Report of the Expert Meeting on Existing Regional and Multilateral Investment*



First, liberalization must occur gradually and incrementally in the context of clear and transparent government institutions capable of supporting and regulating investors.<sup>266</sup> Second, domestic industries must be protected by restricting some sectors from investment or limiting the forms of investment.<sup>267</sup> Third, modern production and management technologies must be transferred to local workers and business.<sup>268</sup> Fourth, local workers must be hired and trained to do all levels of work in the corporations.<sup>269</sup> Fifth, corporations must be required to provide adequate compensation and health care and other benefits to its employees.<sup>270</sup> Sixth, corporations must be required to reinvest a reasonable percentage of profits back into the local economy and business before repatriation.<sup>271</sup> Seventh, investors must be required, when possible, to use local materials and undertake joint ventures with local enterprises while host states screen investors upon entry to ensure they will contribute to the development of the state.<sup>272</sup>

Implementation of such measures better enables the host state to preserve national economic policy goals, health and safety standards, and public morals.<sup>273</sup> These controls are essential for the exercise of self-determination,<sup>274</sup> because states have a sovereign right

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*Agreements and their Development Dimensions*, TD/B/COM.2/11 & TD/B/COM.2/EM.3/3 (1998).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Transcript, *supra* note 265.

<sup>272</sup> *Id.*

<sup>273</sup> PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 184-194. (1999).

<sup>274</sup> See United Nations Conference on Trade and

under customary international law to regulate the entry of foreign investors into the state and need a wide margin of discretion to determine the terms on which they admit investment.<sup>275</sup>

According to this rationale, host states should enact laws that place requirements on corporations not directly relating to the commercial motive of the enterprise, such as requirements that they build infrastructure or hire local employees.<sup>276</sup> Without regulation, the use of corporations for FDI may increase economic dependence.<sup>277</sup> Such performance requirements serve as a way for developing countries to achieve development goals through technology transfer and to develop supplier industries as links to the domestic sector.<sup>278</sup> Performance requirements serve as an important way for host states to regulate investor impacts on the domestic economy and society.<sup>279</sup> Yet, Order 39 prohibits performance requirements.<sup>280</sup> Order 39's national treatment and related provisions implicitly prohibit every element described above in the list of attributes of sustainable development for developing host states, reinforcing the argument that the provisions were not designed for Iraq to meet the needs of the Iraqis.<sup>281</sup>

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Development, *supra* note 264, at 11.

<sup>275</sup> *Id.* at 12.

<sup>276</sup> See United Nations Conference on Trade and Development, *supra* note 264.

<sup>277</sup> World Bank, *Private Capital Flows Return to a Few Developing Countries as Aid Flows to the Poorest Rise Only Slightly*, News Release No. 2004/284/S. (April 19, 2004).

<sup>278</sup> See generally ANDREAS F. LOWENFELD, INTERNATIONAL PRIVATE INVESTMENT (1982).

<sup>279</sup> *Id.*

<sup>280</sup> Ord. 39, *supra* note 9, at §§ 4, 13, 14.

<sup>281</sup> *Id.*

MNEs are not altruistic entities seeking to aid the peoples inhabiting the states in which they invest. Host state objectives in attracting investment are different than those of entering investors. Firms invest abroad because of ownership advantages and the potential enhancement of their competitiveness and market share in an international context.<sup>282</sup> Large, manager-controlled corporations are a major source of market distortion and failure.<sup>283</sup> Through their size and technological capacity, they can monopolize and distort product markets, undermine consumer choice through advertising, avoid market regulation, and avoid making losses that smaller, often domestic, firms cannot avoid.<sup>284</sup> This reality must be acknowledged and controlled.<sup>285</sup> Thus, in the context of a fragile occupied host state, the strategy of attracting large multinationals to serve as the major development force may fail to aid the host state's quest for independence, economic stability, and sustainable development.

## 2. Specific Examples of Problems Emanating from Order 39

It has been asserted that Order 39 will aid Iraq by creating jobs and capital, transferring technology and skills to the local businesses and employees, and increasing the competitiveness of the economy.<sup>286</sup> The actual impact of Order 39 on each of these issues will be addressed in turn.

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<sup>282</sup> See generally United Nations Conference on Trade and Development, *supra* note 55.

<sup>283</sup> MUCHLINSKI, *supra* note 273, at 94.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Ord. 39, *supra* note 9, at ¶¶ 4 and 5.

### *a. Employment*

In terms of employment, the CPA argues that Order 39 will enhance employment in the host state by creating new jobs in Iraq.<sup>287</sup> However, since the institution of Order 39, the CPA has laid off thousands of workers in the process of privatizing formerly state-owned enterprises.<sup>288</sup> Workers lost not only their jobs, but their pensions and benefits as well, leaving countless families vulnerable and without the means for family support.<sup>289</sup> Furthermore, Order 39's national treatment and related provisions prohibit any domestic law requiring foreign investors to hire Iraqis, as these provisions prohibit Iraqi domestic law from regulating the operations of foreign investors.<sup>290</sup> When new foreign investor companies enter the host state, further loss of employment sometimes results due to the corresponding job losses in the Iraqi firms that are unable to compete with the large Western MNEs.<sup>291</sup>

The stability of new jobs created by foreign investment is questionable because investors' commitments to remaining in Iraq are not known and not necessarily long term. Also, investor security is low, and the future enforceability of the CPA contracts is uncertain.<sup>292</sup> Finally, even if the corporations remain, local personnel seldom end up in high management positions where confidences are

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<sup>287</sup> *Id.* at ¶5.

<sup>288</sup> Naomi Klein, *How to End the War*, In *These Times*, May 5, 2005.

<sup>289</sup> James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491, 546 (2004).

<sup>290</sup> Ord. 39, *supra* note 9, at §§ 4, 13, 14.

<sup>291</sup> MUCHLINSKI, *supra* note 273, at 91.

<sup>292</sup> Thomas Catan, *Iraq Business Deals May Be Invalid*, *Law Experts Warn*, FIN. TIMES, Oct. 29, 2003, at 14.

shared.<sup>293</sup> Thus, it does not appear that these provisions of Order 39 make sense in the context of post-war Iraq, especially when the provisions are assessed in light of their mandate and purpose, which is to provide a better life for Iraqis and assist in the development and reconstruction effort.

The text of Order 39 asserts that “that facilitating foreign investment will help to develop infrastructure, foster the growth of Iraqi business, create jobs, raise capital, result in the introduction of new technology into Iraq and promote the transfer of knowledge and skills to Iraqis.”<sup>294</sup> If, as discussed above, it is commonly understood that the U.S. implemented such provisions even though they undermine or simply do not further the goal of sustainable development and reconstruction, the U.S. is acting *ultra vires* in Iraq and in violation of the authority granted in Resolution 1483.

#### *b. Inflow of Capital and Balance of Payments*

As for the inflow of capital and balance of payments, the CPA asserts that the inflow of foreign investment into Iraq will assist Iraq’s overall economy in transitioning from recovery to sustainable growth.<sup>295</sup> While a host state’s balance of payments may be improved by the initial investment, this initial benefit must be weighed against several contrary factors. Though money may initially enter the economy when the investment is initiated, the longer-term outflow of capital through loan repayments and dividend remittances creates a net loss of money in the

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<sup>293</sup> SORNARAJAH, *supra* note 65, at 40.

<sup>294</sup> Ord. 39, *supra* note 9, at Preamble ¶ 5.

<sup>295</sup> GATHII, *supra* note 289, at 540.

national economy.<sup>296</sup> Thus, the net effect of the operations of foreign investors in Iraq could be a loss of capital.

Furthermore, if the investor is a large and highly integrated MNE that is obliged to purchase supplies from affiliates in other states for an amount that exceeds the initial inflow of capital, the Iraqi economy could be adversely affected, because foreign investors operating within the country are using revenues generated by or associated with the operations in Iraq to purchase supplies from other countries.<sup>297</sup> When this occurs, domestic sources of such supplies do not receive the benefit of selling to the foreign investors operating in the host state, and revenues that could be pumped into the host economy are spent elsewhere.

Furthermore, while infrastructure is often built by MNEs, it is usually built for the enjoyment of home state employees and is rarely enjoyed by the local population.<sup>298</sup> Therefore, only the elite would be able to afford to live according to the standards of foreigners and afford to pay to enjoy the healthcare and education facilities enjoyed by the foreign nationals working for the MNE.<sup>299</sup> Thus, it appears that such provisions will not create opportunities, fight unemployment, and improve living conditions in Iraq. The regime does not enable Iraqi industry to grow in connection with the increased investment that occurs when foreign investors are required to negotiate with Iraqi companies first for supplies and related goods, while also creating jobs, skills, and technology transfer.

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<sup>296</sup> MUCHLINSKI, *supra* note 273, at 91.

<sup>297</sup> *Id.* at 92.

<sup>298</sup> See SORNARAJAH, *supra* note 65, at 40.

<sup>299</sup> *Id.*

*c. Technology and Skills Transfer*

In terms of technology and skill transfer, the U.S. argues that because MNEs are the principal holders of advanced productive technology and managerial skills, they will be able to enhance the host economy "through the transfer and dissemination of competitive benefits."<sup>300</sup> However, this argument fails to account for the typical resistance MNEs have to sharing their most sophisticated technology.<sup>301</sup> The more unique and valuable the information, the less likely the MNE is willing to share it.<sup>302</sup> Typically, MNEs use lower level technology in developing states that is outdated or capital-intensive and unsuitable for labor-intensive production in developing countries.<sup>303</sup> MNEs often invest in developing states because newer goods requiring newer technology have replaced the product cycle for the goods it manufactured in the home state.<sup>304</sup> The older products are then moved to a developing market that has yet to receive such a product.<sup>305</sup> Thus, state of the art technology is generally not transferred.<sup>306</sup>

Furthermore, MNEs limit technology transfer by setting up wholly-owned subsidiaries in the host state to control the use of technology and skills, or by entering into licensing agreements that restrict the dissemination of valuable information.<sup>307</sup> Therefore, specific rules as to joint venture requirements or technology transfer

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<sup>300</sup> MUCHLINSKI, *supra* note 273, at 92.

<sup>301</sup> *Id.*

<sup>302</sup> U.N. Eminent Person's Report on the Role of MNCs on Development and International Relations, 13 ILM 800, 844 (1974).

<sup>303</sup> SORNARAJAH, *supra* note 65, at 39.

<sup>304</sup> *Id.* at 39-40.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> MUCHLINSKI, *supra* note 273, at 92.

requirements must be implemented in the host state to protect against these tactics and the natural conflict of interest between the MNE that owns specific valuable technology and the host state that seeks technology transfer.

Provisions requiring foreign investors to operate through joint ventures make it more difficult for them to keep their technology secret.<sup>308</sup> However, Order 39 specifically prohibits rules that require investors to operate through joint ventures.<sup>309</sup> Therefore, it appears that if the CPA was interested in promoting technology transfer to provide knowledge, skills, training, and opportunities to Iraqis, it would have structured these provisions as noted above.

#### *d. Increased Competition*

Finally, regarding competition, the U.S. argues that the presence of Western MNEs in Iraq will “spur domestic firms into greater efficiency by exposing them to new competition.”<sup>310</sup> However, without rules that facilitate spillover effects that make new technology available to local firms and without adequate investment capital for local firms to develop and compete, foreign firms will drive domestic competition out of business, thus eradicating indigenous business and leaving the provision of goods and services up to foreign MNEs.<sup>311</sup> It is likely that anti-competitive effects will result from this arrangement, especially in Iraq where there are few if any indigenous businesses operating in competition with increasing presence of foreign MNEs.

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<sup>308</sup> SORNARAJAH, *supra* note 65, at 37.

<sup>309</sup> Ord. 39, *supra* note 9, at §§ 4 and 7.

<sup>310</sup> MUCHLINSKI, *supra* note 273, at 92.

<sup>311</sup> *Id.*



Furthermore, in light of the lack of government infrastructure and stagnant business practices due to sanctions, the effect of powerful MNEs entering Iraq will be that indigenous companies will be unable to emerge as viable businesses because they will not possess a sufficient opportunity to grow and stabilize in order to compete with the powerful MNEs. However, Order 39 prohibits the provision of special government assistance to Iraqi businesses.<sup>312</sup> Therefore, in order for an Iraqi business culture to grow organically and be sustainable, a more transparent and level playing field must be created.

### 3. Lack of Competition and Transparency in Implementation of Order 39

While the reforms in Order 39 emphasize competition and free markets, the process used to attract FDI in Iraq was not based on such principles. Before the war began, the U.S. Agency for International Development (USAID) secretly asked six U.S. companies to submit bids for a \$900 million government contract to reconstruct various Iraqi infrastructures, including the reconstruction of Iraqi oil fields.<sup>313</sup> When considering the project, USAID only contacted U.S. companies and failed to even consider firms from other countries, including Iraq.<sup>314</sup>

The selected firms, like Halliburton, which were awarded an USAID contract to rebuild Iraqi oil fields, have been accused of participating in the decision-making processes for reconstruction regulation even before the

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<sup>312</sup> Ord. 39, *supra* note 9, at §§ 4, 13, 14.

<sup>313</sup> See Danny Penman, *US Firms Set for Post War Iraq*, GUARDIAN UNLIMITED (London), March 11, 2003, available at <http://guardian.co.uk/usa/story/0,,911941,00.html>.

<sup>314</sup> *Id.*

occupation.<sup>315</sup> USAID explained that they limited the selection to six U.S. companies because it was necessary for “security” and because U.S. taxpayers were funding the reconstruction.<sup>316</sup> However, foreign companies were made eligible and have been included in the subcontracting work.<sup>317</sup>

The competition for these contracts was particularly fierce, as firms stood to gain not only from the immediate contract but also from the inside track to post-war Iraqi business opportunities long-term, especially oil industry contracts.<sup>318</sup> The notion that these firms would have an inside track on Iraqi business opportunities and be sufficiently established in Iraq in the long-term suggests that the U.S. and U.K. project in Iraq was designed to outlive the occupation, which would compromise the Iraqi’s right to self-determination. This suggestion is supported by President Bush’s quest to “link” U.S. and Middle Eastern economies and business sectors.<sup>319</sup>

Although Order 39 prohibits investment in the oil industry, the U.S. has taken steps to situate U.S. oil company involvement in Iraqi oil long-term.<sup>320</sup> Shortly before the war, President Bush and Vice-President Cheney created and chaired the National Energy Policy

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> Sen. Joseph Lieberman, Lieberman Seeks More Answers on USAID Bidding Process for Post-War Construction Contracts, Senate Committee on Government Affairs, (April 16, 2003), *available at*

[http://hsgac.senate.gov/index.cfm?FuseAction=PressReleases.Detail&Affiliation=R&PressRelease\\_id=253&Month=4&Year=2003](http://hsgac.senate.gov/index.cfm?FuseAction=PressReleases.Detail&Affiliation=R&PressRelease_id=253&Month=4&Year=2003).

<sup>318</sup> *Id.*

<sup>319</sup> United States Department of State, *Middle East Partnership Initiative*, *available at* <http://mepi.state.gov/mepi/>.

<sup>320</sup> See Morgan & Ottaway, *supra* note 226.

Development Group, a government organization that studied the challenge posed to the U.S. by non-U.S. oil companies.<sup>321</sup> The group produced a summary of its findings, including a map of Iraq identifying its major oil fields and corresponding "Foreign Suitors for Iraqi Oilfield Contracts."<sup>322</sup> U.S. companies were not included on the list, and the group concluded that this absence could "undermine our [U.S.] economy, our standard of living, our national economy."<sup>323</sup> These documents were only released by a decision of the U.S. Supreme Court.<sup>324</sup> Since 1995, U.S. petroleum giants have admitted that "Iraq is the biggie" in terms of future oil production, that the U.S. oil companies are "worried about being left out" of Iraq's oil dealings due to the antagonism between Washington and Baghdad, and that they fear that "the companies that win the rights to develop Iraqi fields could be on the road to becoming the most powerful multinationals of the next century."<sup>325</sup>

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<sup>321</sup> See *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 367 (2004).

<sup>322</sup> See *Maps and Charts of Iraqi Oilfields: Cheney Energy Task Force* (July 17, 2003), available at [www.judicialwatch.org/071703.c\\_.shtml](http://www.judicialwatch.org/071703.c_.shtml).

<sup>323</sup> *Reliable, Affordable and Environmentally Sound Energy for America's Future, Report of the National Energy Policy Development Group*, May 16, 2001, available at <http://www.netl.doe.gov/publications/press/2001/nep/nep.html>; Documents regarding Vice-President Cheney's panel are available at <http://www.judicialwatch.org/>.

<sup>324</sup> *Larry Everest, Cheney, Energy and Iraq Invasion Supreme Court to Rule on Secrecy*, SAN FRANCISCO CHRON., March 21, 2004, at E-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/03/21/ING0H5LTDA1.DTL>.

<sup>325</sup> *Id.*

Since the end of the war, the U.S. has engaged in negotiations with the companies holding pre-war contracts for Iraqi oil and is negotiating the division of Iraqi oil fields with them.<sup>326</sup> Furthermore, President Bush has signed Executive Order 13303, giving immunity to oil companies for all activities and agreements relating to Iraqi oil.<sup>327</sup>

The participation of U.S. firms in the reconstruction and development of Iraqi oil fields has had significant implications for the Iraqis' ability to control the disposition of their assets after the transfer of sovereignty. Meanwhile, Iraqi companies have been excluded from the decision-making process and will be unable to decide what happens to their national wealth and resources long-term, which is a fundamental human right and essential element of any stable, independent, and successful Iraqi democratic state. The compromise of this right may undermine any future change for a democratic Iraq, as established corporate and foreign interests in the country may create an entrenched shadow power structure.

#### *D. Application of the Law of Occupation*

As discussed in the Part I of this article, an occupying power has an obligation to the inhabitants of the territory it occupies primarily to act as usufruct over the national assets and resources of the territory and to respect the interests of the population.<sup>328</sup> An occupying power should not use its authority to exploit the population or local resources for the benefit of its own population and territory and, likewise, should not alter the laws in force in the territory unless it is absolutely prevented from

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<sup>326</sup> Ed Vulliamy et al., *Scramble to Carve up Iraqi Oil Reserves Lies Behind US Diplomacy*, THE OBSERVER, Oct. 6, 2002.

<sup>327</sup> *Id.*

<sup>328</sup> See *supra* Part I.

upholding them.<sup>329</sup> Furthermore, private property should be respected in the territory, which includes proprietary rights granted in state contracts.<sup>330</sup> Absent specific authorization in the existing law of the occupied territory or military necessity, occupying powers are prohibited from nullifying or suspending legitimate state contracts with foreign parties by amending the law of the occupied territory by legislative or other means.<sup>331</sup> Occupants may let or utilize public land and buildings but cannot make a contract or lease extending beyond the conclusion of the war.<sup>332</sup>

Keeping the above in mind, Order 39 violates the law of occupation because it (1) altered existing Iraqi law when not required by military necessity;<sup>333</sup> (2) confiscated the private property of Iraqi citizens when it terminated state employees during privatization and denied them benefits packages and pensions to which employees were entitled;<sup>334</sup> (3) terminated the existing contracts between non-U.S. oil companies and the state of Iraq;<sup>335</sup> (4) imposed an economic regime that worked to the detriment of the local population and to the benefit of the occupying force, in violation of existing Iraqi law;<sup>336</sup> (5) imposed contracts with foreign investors for 40-year lease terms, which

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<sup>329</sup> Human Rights Watch, *supra* note 106; HAGUE REGULATIONS *supra* note 5, at art. 43.

<sup>330</sup> Bekker, *supra* note 114; Paust, *supra* note 114.

<sup>331</sup> *Id.*

<sup>332</sup> Army Field Manual, *supra* note 121.

<sup>333</sup> Gathii, *supra* note 289.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

extend beyond the duration of the occupation;<sup>337</sup> (6) failed to act as usufruct over Iraqi assets.<sup>338</sup>

The obligation for an occupying force to act as usufruct is especially important in the context of Order 39 and post-war Iraq. To act as usufruct means to act in the best interest of the Iraqis as guardian and protector of their assets while also acting in a manner that does not devalue their assets.<sup>339</sup> However, Order 39 reforms do not benefit the Iraqis and are not in their best interest because through Order 39, the U.S. and the U.K. have completely overhauled the Iraqi political and economic system and restructured Iraqi society on many levels. These changes have created a foreseeable power structure in Iraq where Western MNEs can possess significant decision-making power or, at a minimum, persuasive authority, depriving Iraqis of their right to self-determination and PSNR.

As discussed above, the decisions of large MNEs can have serious economic impacts on fragile economies.<sup>340</sup> This impact would likely be amplified in Iraq as Iraq transitions from a centrally-planned economy to one rich with foreign investment. Iraqi economic interests could not have been considered because Order 39 grants 40-year renewable leases to foreign investors, which means that Western, CPA-backed investors will be present long after the June 28, 2004, "handover of sovereignty." This is a legally incorrect characterization because, under the law of

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<sup>337</sup> Ord. 39, *supra* note 9, at § 8.

<sup>338</sup> Dobie Langenkamp & Rex. J. Zedalis, *What Happens to the Iraqi Oil: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields*, 14 EURJIL 417 (2004).

<sup>339</sup> Webster Online Dictionary, <http://www.webster-dictionary.org/definition/Usufruct> (last visited Mar. 27, 2006).

<sup>340</sup> U.N. Eminent Person's Report on the Role of MNCs on Development and International Relations, 13 ILM 800, 844 (1974).

occupation, Iraq never lost its legal sovereignty.<sup>341</sup> As suggested, the presence of these foreign investors and their corresponding influence on the Iraqi economy may make it difficult for a true democracy to develop as the country becomes increasingly dependent on the cooperation and revenues of foreign MNEs.

Furthermore, the privatization measures, which resulted in the termination of thousands of employees and the corresponding denial of their pensions and benefits, closely mirrors an unlawful taking of private property under the Hague Regulations.<sup>342</sup> The Hague Regulations and Geneva Convention are clear that an occupying power may not take action in violation of the law of the occupied territory unless required by military necessity.<sup>343</sup>

Finally, the involvement of U.S. companies in the reconstruction of Iraqi oil is not only an issue of human rights law but also of humanitarian law because, by contract, the oil fields in question previously belonged to various foreign oil companies.<sup>344</sup> The U.S. has purportedly cancelled these non-U.S. contracts in violation of the Hague Regulations, under which the private property of foreign non-belligerents may not be confiscated under any circumstances.<sup>345</sup> Accordingly, the U.S. and U.K. should be made to pay compensation for such violations, a duty in which both countries have failed to partake.<sup>346</sup> It is unclear

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<sup>341</sup> Press Briefing on Iraq Transition, Office of the Press Secretary, June 28, 2004, *available at* <http://www.whitehouse.gov/news/releases/2004/06/20040628.html>.

<sup>342</sup> Gathii, *supra* note 289.

<sup>343</sup> HAGUE REGULATIONS, *supra* note 5, at arts. 43, 48-9, 53 and 55.

<sup>344</sup> See Jeffrey D. Sachs, *American intentions are tainted by Iraq's oil*, Financial Times, May 22, 2003.

<sup>345</sup> See generally HAGUE REGULATIONS *supra* note 5.

<sup>346</sup> O'Connell, *supra* note 89.

why the U.S. cancelled these contracts rather than allow Iraq to generate desperately needed revenues from the operation of these companies and why the U.S. has not paid compensation to the owners of this property. One may speculate that the U.S. has always wanted to exclude these companies in order to provide an inside track into the Iraqi oil business for both U.S. and U.K. companies.

### CONCLUSION

The CPA was formed by the action of both the U.S. and U.K., without Security Council authorization or U.N. involvement promised at the start of the war.<sup>347</sup> The CPA, as a self-governing body led by the U.S., is immune from the Iraqi legal and judicial process.<sup>348</sup> The self-proclaimed mandate of the CPA, found in Regulation One, states that the CPA is to “create conditions where the Iraqis can freely determine their own political future” and facilitate the “sustainable reconstruction and development of Iraq.”<sup>349</sup> In the context of Iraq, the U.S. has emphasized accountability, democracy, and transparency in government.<sup>350</sup> If accountability is a major goal, then why has the Bush Administration shielded itself from accountability through the passage of Executive Orders granting immunity to

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<sup>347</sup> See *supra* section I.A. of this article.

<sup>348</sup> CPA Public Notice Regarding the Status of Coalition, Foreign Liaison and Contractor Personnel, 26 June 2003, *available at* [http://www.cpa-iraq.org/regulations/20030626\\_20030626\\_CPANOTICE\\_Foreign\\_Mission\\_Cir.html.pdf](http://www.cpa-iraq.org/regulations/20030626_20030626_CPANOTICE_Foreign_Mission_Cir.html.pdf).

<sup>349</sup> CPA, *supra* note 29.

<sup>350</sup> President Bush’s Remarks at a Reception for Heads of United Nations General Assembly Delegations in New York City, PUB PAPERS (Sept. 12, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html>.



Coalition forces and their agents in Iraq and the U.S., as well as to U.S. oil companies acting in Iraq?<sup>351</sup>

Additionally, as this article discusses, the CPA lacks the authority to implement the Order 39 reforms under either the international law of belligerent occupation or Resolution 1483. This resolution does not give the CPA explicit authorization to initiate institutional economic reforms in Iraq. Rather, the U.N. is given the responsibility to engage in economic reconstruction, and the it may “work with” the CPA in these efforts.<sup>352</sup> All of the duties prescribed by Resolution 1483 must be understood within the legal system in which they were given. Thus, the mandate cannot be understood in a manner that violates the Hague Regulations, Geneva Conventions, the U.N. Charter, or the rights to self-determination and PSNR.

Furthermore, Order 39 fails to take a human rights approach to liberalization and privatization in Iraq, as required by the U.N. Charter,<sup>353</sup> thus undermining the ability of the Iraqis to utilize their wealth and resources in a manner beneficial to their development and national objectives. Although the U.S. argues that Order 39 benefits the human rights of the Iraqis indirectly,<sup>354</sup> as the nation as a whole improves and a democratic culture emerges, this approach will not meet the U.S. and U.K. obligations under the U.N. Charter, which can be interpreted to require the promotion of human rights and development to be recognized as the *purpose* of attracting FDI.<sup>355</sup>

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<sup>351</sup> Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22,2003).

<sup>352</sup> S.C. Res. 1483, *supra* note 17.

<sup>353</sup> U.N. CHARTER, *supra* note 81.

<sup>354</sup> See Juhasz, *supra* note 6.

<sup>355</sup> U.N. CHARTER, *supra* note 81.

When improperly utilized, privatization can create severe income and class disparities, "brain-drain" from the public sector to the private sector, under-funding of the public sector, overemphasis on commercial objectives at the expense of social objectives, and "a large and powerful private sector that can threaten" the ability of the government to promote human rights.<sup>356</sup> In Iraq, the privatization of public services, or aspects thereof such as oil, water, and sanitation, threatens Iraqis' access to basic services and the advancement of the Iraqis' well-being, especially because the private sector participation in essential services revolves solely around commercial concerns and not social, political, cultural, and environmental concerns.<sup>357</sup> As such, Iraqis will be unable to determine their political, economic, and social future because the reforms implement a system that ensures the primacy of foreign investors in the political and economic spheres and undermines Iraqi autonomy and development. Additionally, as a result of the reforms, Iraqis will be denied the ability to freely dispose of their national wealth, resources, and assets in the manner they see best fit to aid their development.

The human rights approach to investment, as articulated by the U.N., requires the implementation of complementary measures to ensure the balance of rights and obligations.<sup>358</sup> The promotion and protection of human rights and fundamental freedoms must be an express objective of domestic investment policy, as required by the U.N. Charter,<sup>359</sup> Resolution 1483,<sup>360</sup> and customary

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<sup>356</sup> See United Nations Conference on Trade and Development, *supra* note 55, at 24.

<sup>357</sup> *Id.* at 28.

<sup>358</sup> U.N. CHARTER, *supra* note 81.

<sup>359</sup> *Id.*

<sup>360</sup> S.C. Res. 1483, *supra* note 17.

international law.<sup>361</sup> This obligation, in conjunction with the duty to respect and protect the institutions and population of the occupied territory under the Hague Regulations<sup>362</sup> and Geneva Convention,<sup>363</sup> demonstrates the duty of the occupying force to act in the best interest of the occupied population.

However, Resolution 1483's recognition of the complementary and mutually reinforcing nature of international human rights law and the law of occupation and use of force is in line with international developments over the last half-century. Statements by U.S. and U.K. representatives seem to demonstrate an understanding that international human rights apply in Iraq. For example, according to the U.K. mission to the U.N., "[a] vital part of guaranteeing that the future political, legal, and social structures of Iraq work for the benefit of all Iraqis is to ensure that human rights and the rule of law are central."<sup>364</sup>

Furthermore, President Bush has repeatedly cited eradicating the human rights abuses of Saddam Hussein as an essential part of the war against Iraq and maintained that the U.S. would rid Iraq of such abuses.<sup>365</sup> Indeed, President Bush explicitly stated his aim in Iraq was "build[ing] a government that represents all Iraqis, a government based on respect for human rights, economic liberty, and internationally supervised elections."<sup>366</sup> According to

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<sup>361</sup> See United Nations Conference on Trade and Development, *supra* note 55, at 29.

<sup>362</sup> HAGUE REGULATIONS, *supra* note 5, at art. 43.

<sup>363</sup> See GENEVA CONVENTION, *supra* note 77.

<sup>364</sup> U.K. Mission to the United Nations, *UNSCR 1483—Second Quarterly Report: Annex*, Nov. 21, 2003, available at [http://www.ukun.org/articles\\_show.asp?SarticleType=17&Article\\_ID=716](http://www.ukun.org/articles_show.asp?SarticleType=17&Article_ID=716).

<sup>365</sup> President Bush's Remarks, *supra* note 350.

<sup>366</sup> *Id.*

President Bush, “[i]n the twenty-first century, only nations that share a commitment to protecting basic human rights and guaranteeing political and economic freedom will be able to unleash the potential of their people and assure their future prosperity.”<sup>367</sup> It appears inconsistent for the U.S. to call for an Iraqi government based on human rights while the U.S. itself, as an occupying and temporary governing power, does not observe or promote human rights standards and development in Iraq.

Humanitarian law was designed to protect the inhabitants of occupied territories post-conflict through the application of the rules discussed throughout this article. The duty to act as usufruct—in the best interest of the Iraqis—by respecting their private property, national resources, assets, and way of life, is essential to achievement of this purpose. The U.S. and U.K. have violated these rules by placing Iraqis in a situation where they are held hostage by the unsustainable and corrupt economic and political system installed by the West.

Because the largest Western MNEs in Iraq have participated in the formation of reconstruction policy and strategy, it appears that such companies will also have the power to manipulate markets and influence politicians and local communities through the application of their wealth and power. It should be uncontested that the revenues of many MNEs investing in Iraq far exceed the gross national product of many developing nations, and can influence political and economic events on a global or micro scale.<sup>368</sup> In time, these companies will be able to exert control, or at least significant influence, over Iraq’s political realm as

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<sup>367</sup> National Security Council, *supra* note 217.

<sup>368</sup> Ruth Wedgwood, Harold K. Jacobson & Allen Gerson, *Peace Building: The Private Sector’s Role*, 95 AM. J. INT’L L. 102, 103 (2001).

moves by these entities have the power to shatter the Iraqi economy making it forever dependent upon American policies.

The American companies in Iraq, including oil companies, are already a central component of Iraq's economy, linking the U.S. and Iraq closely, as the American companies in Iraq are now active participants in the economic and political processes of the state.<sup>369</sup> Such linkage may effectively neutralize future Iraqi threats to the U.S., whether it be physical or economic. And so, with the unlimited repatriation of profits and rich oil fields now regulated by the U.S., the American economy has a great deal to gain from the Order 39 reforms at the expense of Iraq.

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<sup>369</sup> See generally SORNARAJAH, *supra* note 65.



