

THINK PIECES

LAW AFTER WAR

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[This think piece considers the legal context of state and democracy-building at the end of conflict. It considers the debate over the capacity of the rules of international humanitarian law to regulate modern exercises in state-building, particularly in the context of post-invasion Iraq. The think piece argues that a principle of democratic inclusion is useful in setting the contours of international law in this area.]

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The creation of the Australian Red Cross Chair of International Humanitarian Law in 1997 was a significant step for Australian international lawyers. In an institutional sense, the Chair formally linked a leading humanitarian organisation with one of Australia's finest universities; but perhaps more importantly, the energy and commitment of its first incumbent, Tim McCormack, have provided a valuable focus for research in international humanitarian law and have nurtured a new generation of scholars in this area. In this sense, the Chair has brought the world to Australia. Through his tireless international work, Tim has also brought Australia to the world.

This think piece addresses the humanitarian law dealing with one aspect of the 'after war' period: what capacity does international humanitarian law have to regulate manifestations of state or democracy-building after conflict? The case of Iraq since 2003 is often invoked as evidence of the irrelevance of the traditional principles of occupation.¹ Many scholars have argued in this context that international humanitarian law does not accommodate the modern exigencies of state-building and that new rules should be developed. After a brief survey of the

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¹ See, eg. Grant T Harris, 'The Era of Multilateral Occupation' (2006) 24 *Berkeley Journal of International Law* 1; David J Scheffer, 'Future Implications of the Iraq Conflict: Beyond Occupation Law' (2003) 97 *American Journal of International Law* 842.

relevant principles of international humanitarian law and the role they have played in Iraq, I consider some challenges for law after war.

I INTERNATIONAL HUMANITARIAN LAW AND POST-WAR OCCUPATION

International humanitarian law principles with respect to belligerent occupation are a relatively recent development. Nehal Bhuta describes their emergence following the Congress of Vienna in 1815 as a way of preserving the 19th century European territorial order.² The creation of a regime distinct from that of invasion and conquest (which allowed the permanent acquisition of territory) preserved the sovereignty of a territory in theory, but accounted for the occupier's powers to administer and govern.³ *Geneva Convention IV*⁴ and *Additional Protocol I*⁵ deal with both the duties of parties to a conflict with respect to civilians during the conflict, and duties of occupying powers once a conflict has ended. The Convention does not itself define the term 'occupying power'. Rather, it incorporates the definition of occupation contained in the *Hague Regulations*.⁶ Article 42 of the *Hague Regulations* states that '[t]erritory is considered occupied when it is actually placed under the authority of the hostile army'. This test is considered a factual one. Thus von Glahn writes that

as long as the territory as a whole is in the power and under the control of the occupant and as long as the latter has the ability to make his will felt everywhere in the territory within a reasonable time, military occupation exists from a legal point of view.⁷

The invasion and occupation of Iraq in 2003 by a 'Coalition of the Willing' raised the issue of whether all members of the Coalition with troops in Iraq jointly constitute an occupying power under international law. The law of belligerent occupation was developed with a single military occupying force in mind and is not easily translated to the context of a coalition whose members may be playing quite different roles with respect to the same physical territory.⁸ Was Australia, for example, an occupying power in Iraq or simply an agent of the occupying powers? Certainly, the Australian government seemed keen to avoid categorisation as an occupying power.⁹ Whatever the answer to this

² Nehal Bhuta, 'The Antinomies of Transformative Occupation' (2005) 16 *European Journal of International Law* 721.

³ *Ibid* 724–7.

⁴ *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*').

⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) ('*Additional Protocol I*').

⁶ *Hague Convention (IV) respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, (1910) UKTS 9 (entered into force 26 January 1910) ('*Hague Regulations*').

⁷ Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957) 29.

⁸ Eyal Benvenisti, *The International Law of Occupation* (2004) 181.

⁹ See, eg, Mark Forbes, 'Hill Censured over Iraq Abuse', *The Age* (Melbourne, Australia) 22 June 2004, 4.

question, Australia was bound to act in accordance with *Geneva Convention IV* in any dealings affecting civilians.¹⁰

International humanitarian law imposes significant obligations on occupying powers during the period of occupation. They include a series of injunctions that have analogues in human rights treaties: the right of due process for protected persons when charged with criminal offences by the occupying power;¹¹ the right of protected persons to humane treatment;¹² protection against all threats and acts of violence and respect for protected persons' 'honour, their family rights, their religious convictions and practices, and their manners and customs';¹³ non-discrimination on the basis of race, religion or political opinion;¹⁴ a prohibition on physical or moral coercion¹⁵ or causing physical suffering of civilians including any 'measures of brutality whether applied by civilian or military agents';¹⁶ a prohibition on punishment of civilians for an offence they have not committed personally, including collective penalties and 'all measures of intimidation' and reprisals against civilians and their property;¹⁷ ensuring the food and medical supplies of the population;¹⁸ and the provision of the basic needs of the civilian population.¹⁹

But the major feature of international humanitarian law with respect to the period of occupation is what has been termed the 'no-change' or 'conservationist' principle with respect to the pre-war governmental and legal system of the occupied country. The *Hague Regulations* state that an occupier must 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.²⁰ *Geneva Convention IV* incorporates the spirit of art 43 of the *Hague Regulations*, although it adds that an occupier can change laws and institutions that constitute a threat to the security of the occupying power or 'an obstacle to the application of the present Convention'.²¹ It also provides that occupying powers may subject the population to provisions that are

essential to enabling the Occupying Power to fulfil its obligations under [*Geneva Convention IV*], to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishment and lines of communication used by them.²²

Geneva Convention IV declares itself 'supplementary' to the *Hague Regulations*,²³ which has led some commentators to suggest the latter limits the

¹⁰ *Geneva Convention IV*, above n 4, art 1.

¹¹ *Ibid* arts 64–78.

¹² *Ibid* art 3(1).

¹³ *Ibid* art 27.

¹⁴ *Ibid*.

¹⁵ *Ibid* art 31.

¹⁶ *Ibid* art 32.

¹⁷ *Ibid* art 33.

¹⁸ *Ibid* art 55.

¹⁹ *Additional Protocol I*, above n 5, art 69.

²⁰ *Hague Regulations*, above n 6, art 43.

²¹ *Geneva Convention IV*, above n 4, art 64.

²² *Ibid*.

²³ *Ibid* art 154.

additional terms of *Geneva Convention IV*.²⁴ A further limitation on occupying powers is art 47, which provides that protected persons in an occupied territory may not be deprived of the benefits of the Convention by any change introduced into the institutions or government of the territory.

The conservationist spirit of the international humanitarian law principles relevant to occupation, then, does not seem to offer a secure basis for the transformative agenda of international state or democracy-building ventures. It is designed to allow mopping up operations after armed conflict, but it assumes that the occupation of another country will be temporary and leave little mark on its governmental structures. Until the invasion of Iraq in 2003, an international humanitarian law lens was not applied to modern international state-building enterprises; this was not only because a form of consent to state-building could be implied (think Kosovo, East Timor and Afghanistan), but also because of Security Council authorisation for a military presence and the multinational character of the military force.²⁵

II DEMOCRACY-BUILDING IN IRAQ

The idea of democracy has played a significant role in the Iraq conflict. The leading rationale for the 2003 invasion articulated by the leaders of the 'Coalition of the Willing' was Iraq's failure to comply with Security Council resolutions relating to possible caches of weapons of mass destruction. For example, although he made references to the oppression of the Iraqi people by Saddam Hussein, Australian Prime Minister John Howard ruled out regime change as a justification for the invasion,²⁶ and his legal argument for the invasion referred only to Iraq's failure to abide by resolutions of the Security Council.²⁷ Regime change and democracy-building were, by contrast, a more explicit current in public statements by the United States before the invasion.²⁸ This current was picked up after the invasion by other members of the 'Coalition of the Willing' once no weapons of mass destruction were found.²⁹ It was not just democracy in Iraq that was at stake; members of the Coalition began to argue that the invasion

²⁴ See, eg, ICRC, Commentaries, *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949, (2005) 273, available from <<http://www.icrc.org/ihl>> at 18 October 2007. Cf John Yoo's approach which interprets art 64 as granting occupying powers wide discretion to amend constitutional, civil, administrative and criminal law: 'Iraqi Reconstruction and the Law of Occupation' (2004) 11 *UC Davis Journal of International Law and Policy* 7, 18.

²⁵ Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 *American Journal of International Law* 580, 604.

²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2003, 12506 (John Howard, Prime Minister).

²⁷ Bill Campbell and Chris Moraitis, 'Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq', reprinted in (2003) 4 *Melbourne Journal of International Law* 178, 181. This was also the UK's view: UK, *Daily Debates*, House of Commons, 18 March 2003, vol 401, column 760 (Tony Blair, Prime Minister).

²⁸ See Roberts, above n 25, 605.

²⁹ See, eg, Patrick Wintour, 'We Were Over-Optimistic about Regeneration, Blair Adviser Says', *The Guardian* (London, UK) 13 September 2007, 28; Commonwealth, *Parliamentary Debates*, House of Representatives, 13 August 2007, 66–8 (Maria Vamvakinou, Representative for Calwell).

could in fact achieve democracy in the whole of the Middle East.³⁰ The ‘tsunami’ theory of Iraqi democracy reasoned that a reconstructed Iraq could become a model government for the region, which would then be unable to resist the great wave of democracy.³¹ Indeed, in June 2003 Prime Minister Howard described the invasion of Iraq as ‘the best opportunity in a long time to achieve a lasting settlement in the ongoing and painful dispute between the State of Israel and the Palestinians’.³²

As has been well documented, the US had little strategy to deal with post-invasion Iraq and only a broad-brush approach to democracy. Initially, democracy was simply equated with liberation from Saddam Hussein’s regime, and the violence after the invasion was seen to be evidence of freedom. Donald Rumsfeld, US Secretary of Defence, memorably observed of the post-invasion chaos and violence: ‘Stuff happens and it’s untidy, and freedom’s untidy, and free people are free to make mistakes and commit crimes and do bad things’.³³ As George Packer has noted, Rumsfeld ‘looked upon anarchy and saw the early stages of democracy’.³⁴

Later versions of democracy applied by the US in Iraq made elections, the separation of powers and a free market defining elements.³⁵ Indeed, Rumsfeld told the Council on Foreign Relations in May 2003 that a liberated Iraq would be encouraged to privatise its state-owned enterprises.³⁶ These conceptions of democracy are, of course, hallmarks of the American political system and were imported into Iraq with almost no consultation: in other words, the Coalition Provisional Authority (‘CPA’), established by the US in early May 2003, imposed democracy in a completely undemocratic way. There seems to have been great confidence in the power of this account of democracy to overcome any local reticence.³⁷ A standard White House response to concerns about the effect of the violence in Iraq on the development of democracy indeed was that the early American republic also experienced considerable unrest and violence.³⁸ US President George Bush was also apparently advised before the invasion that Iraq was in a similar position to post-World War II Germany and Japan and that

³⁰ See, eg, Conor O’Clery, ‘Iraq Key to Middle East Peace, Says Bush’, *Irish Times* (Dublin, Ireland) 28 February 2003, 12.

³¹ Tim Reid, ‘Bush Offers Vision of Middle East Peace’, *The Times* (London, UK) 27 February 2003, 1.

³² Patrick Walters, ‘Farewell to Arms’, *The Weekend Australian* (Sydney, Australia) 7 June 2003, 24.

³³ George Packer, *The Assassins’ Gate: America in Iraq* (2005) 136.

³⁴ *Ibid.*

³⁵ US Department of State, International Information Programs, *Defining Democracy* (1998) <<http://usinfo.state.gov/products/pubs/whatsdem/whatdm2.htm>> at 18 October 2007.

³⁶ Donald Rumsfeld, ‘A Meeting with Secretary of Defence Donald H Rumsfeld’ (Speech delivered at Council of Foreign Relations, New York City, US, 27 May 2003), available from <<http://www.cfr.org>> at 18 October 2007.

³⁷ See, eg, George Bush, ‘President Outlines Steps to Help Iraq Achieve Democracy and Freedom’ (Speech delivered at United States Army War College, Carlisle, Pennsylvania, US, 24 May 2004), available from <<http://www.whitehouse.gov>> at 18 October 2007.

³⁸ ‘Iraq Like Civil War: Rice’, *The Australian* (Sydney, Australia) 7 September 2006, 10.

it would find the American democracy package irresistible, just as those countries had.³⁹

Given the significance of the democracy-building agenda in Iraq, it seems surprising that the 'Coalition of the Willing' accepted the formal applicability of international humanitarian law to the occupation.⁴⁰ States are typically eager to avoid being characterised as an occupying power because of the legal obligations that are associated with this status.⁴¹ Many international lawyers had in fact considered the notion of belligerent occupation long defunct in a practical sense; the post-war occupations of Germany and Japan, for example, had gone far beyond the constraints of the law.⁴² In 2003, there were certainly differences between the leaders of the 'Coalition of the Willing' on this issue: the US generally preferred the language of 'liberation' of Iraq, de-emphasising the applicability of international humanitarian law rules on occupation, while the United Kingdom was prepared to acknowledge early on that belligerent occupation was at stake.⁴³

The rigours of the international humanitarian law occupation regime were however considerably lessened by the United Nations Security Council's adoption of *Resolution 1483* on 22 May 2003.⁴⁴ The Resolution was a significant step by the Security Council, which had failed to endorse the invasion, because it acknowledged the fact of US control over Iraq. The Resolution used the term 'occupying power' in relation to the US and the UK, the first such reference by the Security Council.⁴⁵ Nehal Bhuta suggests that this invocation of international humanitarian law should be understood as an attempt to limit the powers of the US and the UK in Iraq and to emphasise the 'preservationist' duties of occupiers.⁴⁶ *Resolution 1483* did not, however, explicitly connect the status of occupying power to distinct legal obligations. Indeed, it called upon 'all concerned to comply fully with their obligations under international law',

³⁹ Richard Armitage, Deputy Secretary of State during the first Bush Administration, as quoted in Patrick Walters, 'Australia Warned off Quick Exit from Iraq', *The Australian* (Sydney, Australia) 7 November 2006, 1.

⁴⁰ McGurk states that the 'Coalition of the Willing' accepted the rules of occupation law as soon as the first wave of combat operations finished in April 2003: Brett H McGurk, 'Revisiting the Law of Nation-Building: Iraq in Transition' (2005–06) 45 *Virginia Journal of International Law* 451, 452. Even earlier, however, SC Res 1472, UN SCOR, 58th sess, 4732nd mtg, UN Doc S/RES/1472 (28 March 2003) referred to the duty of occupying powers under art 55 of *Geneva Convention IV* to ensure the food and medical supplies of the Iraqi population. The US and the UK, by contrast, avoided the term 'occupying powers' but promised to 'strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq': Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2003/538, 8 May 2003.

⁴¹ Benvenisti, *The International Law of Occupation*, above n 8, ch 6, provides examples of regular state evasion of the term 'occupying power'.

⁴² See Bhuta, above n 2, 733–4. As Bhuta notes, the exception has been the consensus that the international law of occupation applies to Israel's occupation of Gaza, the West Bank, East Jerusalem and the Golan Heights: 735 (fn 78).

⁴³ Roberts, above n 25, 608–9.

⁴⁴ SC Res 1483, UN SCOR, 58th sess, UN Doc S/RES/1483 (22 May 2003).

⁴⁵ Eyal Benvenisti, 'Water Conflicts during the Occupation of Iraq' (2003) 97 *American Journal of International Law* 860, 861.

⁴⁶ Bhuta, above n 2, 735.

particularly their obligations under the *Geneva Conventions*⁴⁷ of 1949 and the *Hague Regulations* of 1907.⁴⁸

While *Resolution 1483* endorsed the international humanitarian law regime on occupation, it also sanctioned actions by the Coalition that clearly went beyond the strictures of international humanitarian law. In this sense, it was a rather unstable merger of the traditional rules of occupation with Security Council peacemaking powers under Chapter VII of the *Charter of the United Nations* — a combination which, in Carsten Stahn's words, 'left the limits of reconstruction in legal limbo'.⁴⁹ On the one hand, *Resolution 1483* reaffirmed the sovereignty and territorial integrity of Iraq and referred to the US and the UK as occupying powers. It called upon the CPA to promote the welfare of the Iraqi people and to create the conditions for Iraqis to 'freely determine their own political future'.⁵⁰ The Resolution emphasised the transitional nature of the CPA and looked forward to 'an internationally recognized, representative government ... established by the people of Iraq'.⁵¹ On the other hand, *Resolution 1483* contemplated a sweeping role for the CPA, with a subsidiary role to be played by the UN and an interim Iraqi Administration (to be created primarily by the Coalition).⁵² *Resolution 1483* allowed the Coalition to exercise full governmental authority in Iraq and provided few restrictions on its actions; there was a minimal accountability mechanism through an obligation to report to the Security Council.⁵³ Under *Resolution 1483* the CPA, rather than the UN, was given power to disburse the proceeds of the sale of Iraqi oil.⁵⁴ The Resolution cancelled all existing legal rights to Iraq's oil, giving the CPA the right to sell the oil freely.⁵⁵ Although the Resolution required that the funds be used to benefit the people of Iraq, the benefit was to be judged by the CPA.⁵⁶

Whatever the sweeping powers conferred on the CPA, one of its legal advisers, Brett McGurk, reports that the Coalition felt constrained in its actions in Iraq by the traditional principles of international humanitarian law and the law of occupation, and was careful to comply with the mechanisms laid out in *Resolution 1483* to ensure coordination with local and international institutions.⁵⁷

⁴⁷ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention IV*, above n 4 (collectively, '*Geneva Conventions*').

⁴⁸ *Resolution 1483*, above n 44, [5].

⁴⁹ Carsten Stahn, "'Jus ad Bellum', 'Jus in Bello' ... 'Jus Post Bellum'? — Rethinking the Conception of the Law of Armed Force' (2006) 17 *European Journal of International Law* 921, 929.

⁵⁰ *Resolution 1483*, above n 44, [4].

⁵¹ *Ibid* [9].

⁵² *Ibid* [6], [8(c)].

⁵³ *Ibid* [8].

⁵⁴ *Ibid* [13].

⁵⁵ *Ibid* [20]–[22].

⁵⁶ *Ibid* [13]–[14].

⁵⁷ McGurk, above n 40, 460–1.

Resolution 1511, adopted by the Security Council on 16 October 2003, reinforced the Coalition's authority by recognising the Iraqi Governing Council, established by the Coalition, and entrusting the Council with a large agenda for reform.⁵⁸ *Resolution 1511*, however, also had traces of a certain impatience with the length of the occupation in its reiteration of its resolve 'that the day when Iraqis govern themselves must come quickly';⁵⁹ its emphasis on 'the temporary nature' of the CPA's authority;⁶⁰ and its call to the CPA 'to return governing responsibilities and authorities to the people of Iraq as soon as practicable'.⁶¹

Despite the formal acknowledgement of the relevance of international humanitarian law relating to the duties of occupying powers to the occupation of Iraq, its principles had little obvious effect. The disestablishment of the Ba'ath Party⁶² and the dismantling of the entire Iraqi defence forces and bureaucracy⁶³ in May 2003 are perhaps the most dramatic examples of changing the political and legal structure without any local consultation. The CPA also significantly altered the Iraqi economy by allowing foreign investors to purchase full ownership of Iraqi companies and send all profits abroad.⁶⁴ But there were many other violations of occupation law. The fundamental duty placed on occupying powers to restore and ensure public order and safety⁶⁵ was breached by the failure to plan adequately for the inevitable breakdown of law and order after the invasion. A report by Human Rights Watch in June 2003, during the formal period of occupation, documented many failures that constitute violations of international humanitarian law.⁶⁶ It noted, for example, that the Coalition had not communicated with the local population about security;⁶⁷ had not deployed international police or judicial personnel, relying on combat troops without adequate training for policing duties;⁶⁸ and had not protected victims and witnesses in criminal matters.⁶⁹ Other breaches of the law of occupation included a failure to ensure food and medical supplies for the population: the medical situation in Iraq during the occupation was much worse than before the war; there was no functioning health ministry; and water shortages caused cholera as families drank from rivers that contained sewerage.⁷⁰ UNICEF estimated in 2003

⁵⁸ SC Res 1511, UN SCOR, 58th sess, 4844th mtg, UN Doc S/RES/1511 (16 October 2003) [2]–[4], [10].

⁵⁹ *Ibid* preamble.

⁶⁰ *Ibid* [1].

⁶¹ *Ibid* [6].

⁶² CPA, *De-Ba'athification of Iraqi Society*, Order No 1, CPA/ORD/16 May 2003/1 (2003).

⁶³ CPA, *Coalition Provisional Authority Order Number 2: Dissolution of Entities* [sic], Order No 2, CPA/ORD/23 August 2003/2 (2003).

⁶⁴ CPA, *Foreign Investment*, Order No 39, CPA/ORD/19 September 2003/39 (2003). See also the discussion of these three measures in Roberts, above n 25, 614–5.

⁶⁵ *Hague Regulations*, above n 6, art 43.

⁶⁶ Human Rights Watch, *Basra: Crime and Insecurity under British Occupation* (Human Rights Watch Report, 3 June 2003) 4 <<http://hrw.org/reports/2003/iraq0603/Iraq0603.pdf>> at 18 October 2007.

⁶⁷ *Ibid*.

⁶⁸ *Ibid* 17.

⁶⁹ *Ibid* 4.

⁷⁰ *Ibid* 17.

that 7.7 per cent of Iraqi children under five years of age were suffering from acute malnutrition, almost double the rate before the war began.⁷¹

The US regarded the period of occupation, and thus the relevance of international humanitarian law, as ending on 28 June 2004 when the CPA disbanded and an Iraqi government was appointed.⁷² Security Council *Resolution 1546* of 8 June 2004, however, referred to the continuing applicability of ‘obligations under international humanitarian law’,⁷³ implying that the occupation was not over in practice.⁷⁴ Indeed the political shape of the formal post-occupation period was determined to a considerable degree by CPA rules on major issues such as the electoral law, the law of political parties and the qualifications of individuals for public office.⁷⁵

III THE FUTURE OF INTERNATIONAL HUMANITARIAN LAW AND DEMOCRACY-BUILDING

The occupation of Iraq has tested the relevance of international humanitarian law. The goal of the occupying powers was to create a democracy in Iraq and this was at odds with the purposes of *Geneva Convention IV*. Adam Roberts has summarised this dissonance:

The traditional assumption of the laws of war is that bad ... occupants are occupying a good country ... [while] especially in some Western democratic states, various schools of thought have been based on the ... idea ... [of] good occupants occupying a bad country ...⁷⁶

The tension between occupation law and the Coalition’s political agenda in Iraq was resolved in practice by the Coalition sidestepping international humanitarian law’s principles, allowing the good to clean up after the bad. In this sense, the Coalition harked back to a pre-Congress of Vienna tradition of the rights of a conqueror, which included the power of complete domination over local populations and the capacity to alter governmental structures in a permanent way.⁷⁷

In the wake of Iraq, do international humanitarian law’s principles regarding occupation have any continuing value? Brett McGurk contends that the law of occupation ‘explicitly prohibit[s] state-building as commonly understood’.⁷⁸ He criticises the ‘no-change’ principle of international humanitarian law as ‘a state-centered, nineteenth century conception of European warfare ... bear[ing] no relation to modern military conflict or the contemporary thrust of public international law’.⁷⁹ McGurk argues that ‘[t]he Iraq experience has revealed an

⁷¹ UNICEF, ‘Iraq: Restore Public Health System for Malnourished Children’ (Press Release, 25 May 2003) <http://www.unicef.org/emerg/media_9419.html> at 18 October 2007.

⁷² McGurk, above n 40, 461.

⁷³ SC Res 1546, UN SCOR, 58th sess, 4987th mtg, UN Doc S/RES/1546 (8 June 2004).

⁷⁴ Roberts, above n 25, 617.

⁷⁵ Bhuta, above n 2, 737.

⁷⁶ Roberts, above n 25, 601.

⁷⁷ See G F von Martens, *Summary of the Law of Nations, Founded on the Treaties and Customs of Modern Nations of Europe* (W Cobbett trans, 1795 ed) 286–7 [trans of: *Précis du droit des gens moderne de l’Europe, fondé sur les traités et l’usage*], as cited in Bhuta, above n 2, 726–7 (fn 30).

⁷⁸ McGurk, above n 40, 454.

⁷⁹ *Ibid* 458.

inexcusable gulf between what international law clearly permits and what any successful state-building exercise requires'.⁸⁰ Prohibited but, in his view, vital activities include:

Building transparent and accountable institutions; implementing power-sharing arrangements; reforming legal codes to protect human rights; reforming economic codes to foster growth and development; fostering representative capacities within formerly disenfranchised groups; and, structuring and carrying out genuine and credible multi-party elections.⁸¹

McGurk regrets the need to rely on ad hoc Security Council resolutions to salvage the unsatisfactory legal situation.⁸² He is concerned that the traditional law on occupation may destabilise and delegitimize the actions of the CPA in 'eliminating the vestiges of tyranny'⁸³ and proposes the reinterpretation of international humanitarian law's no-change rule to provide a 'coherent overarching framework' for modern post-conflict democracy-builders.⁸⁴ His reinterpretation is based on a mixture of translation from the original French text of art 43 of the *Hague Regulations*, historical practice, textual analysis, human rights norms and the notions of popular sovereignty and consensual self-government.⁸⁵ The two elements of such a framework described by McGurk are an occupier's right to institute reform consistent with the *International Covenant on Civil and Political Rights* ('ICCPR')⁸⁶ and to create a framework for free and fair elections.⁸⁷

Other proposals to strengthen or redefine international humanitarian law involve infusing it with human rights norms. Adam Roberts, for example, argues that 'transformative' occupations should not be considered a category separate to other manifestations of state-building after conflict.⁸⁸ He recommends that they be regulated in the same way as state-building with the notional consent of the people, such as the UN missions in Kosovo and East Timor.⁸⁹ Roberts is keen to retain the conservationist heart of international humanitarian law, but also regards (mainly civil and political) human rights norms as central to this regulatory order, including the right to self-determination.⁹⁰ Others have argued for a new *jus post bellum*. Carsten Stahn offers six principles based on international practice as the foundation of such a legal order: fairness and inclusiveness of peace settlements; abandoning the concept of punishment of

⁸⁰ Ibid 452.

⁸¹ Ibid 454.

⁸² Ibid 453.

⁸³ Ibid 452.

⁸⁴ Ibid 463. Cf John Yoo's approach, which is to argue that international humanitarian law in fact supports all coalition actions in Iraq: above n 24, 22.

⁸⁵ McGurk, above n 40, 463–4.

⁸⁶ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁸⁷ McGurk, above n 40, 463.

⁸⁸ Roberts, above n 25, 619.

⁸⁹ Ibid.

⁹⁰ Ibid 599–601, 619–22. For a critique of proposals to merge the law of occupation with human rights law, see Aeyal M Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 *European Journal of International Law* 1.

aggression; humanising reparations and sanctions; moving from collective to individual responsibility for wrongs committed during conflict; combining justice and reconciliation models for criminal responsibility; and fostering people-centred governance.⁹¹

However, creating more law may not be the solution to rebuilding states after conflict. As David Kennedy reminds us, the tendency to legalise warfare and its aftermath can limit our sense of personal responsibility and capacity to make ethical decisions.⁹² The laws of war, he points out, 'provide the vocabulary not only for restraining the violence and incidence of war — but also for waging war and deciding to go to war'.⁹³

There is also an uncomfortable dissonance in invoking *humanitarian* law in a context where humanitarianism has failed so dramatically. Recent evidence shows that daily life in Iraq is growing less secure and sustainable. For example, the number of people without access to safe water supplies has grown from 50 per cent just after the invasion in 2003 to 70 per cent in 2007;⁹⁴ in 2004, 2.6 million people did not have adequate food, while in 2006 the number was four million.⁹⁵ Today 43 per cent of Iraqis are living in absolute poverty,⁹⁶ and up to eight million Iraqis require emergency assistance.⁹⁷ But I do not think we can simply give up on legal principles, regarding transformative occupation as outside international law and subject only to self-serving claims of legitimacy. It is critical to delegitimize actions based simply on the military strength of the occupying power. The principle of democratic inclusion, described by Susan Marks, is useful in this task, influencing the interpretation and application of international law.⁹⁸ The idea of democratic inclusion reaches beyond institutional forms of democracy to emphasise the enlargement of 'opportunities for popular participation in political processes and [to] end social practices that systematically marginalize some citizens while empowering others'.⁹⁹ In this sense democratic inclusion focuses less on 'forms and events than ... relationships and processes'.¹⁰⁰

How might the principle of democratic inclusion influence the law applicable at the end of war? Here are some thoughts:

⁹¹ Stahn, above n 49, 938–41.

⁹² David Kennedy, *Of War and Law* (2006).

⁹³ *Ibid* 167.

⁹⁴ NGO Coordination Committee in Iraq and Oxfam International, *Briefing Paper 105: Rising to the Humanitarian Challenge in Iraq* (Press Briefing, 30 July 2007) 3 <http://www.oxfam.de/download/Humanitarian_Challenge_in_Iraq.pdf> at 18 October 2007.

⁹⁵ *Ibid* 8.

⁹⁶ *Ibid* 10.

⁹⁷ *Ibid* 3.

⁹⁸ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (1999) 109–18.

⁹⁹ *Ibid* 109.

¹⁰⁰ *Ibid* 110.

A *Democracy and Legitimacy Are Closely Entwined*

Leaders of the 'Coalition of the Willing' have argued that focus on the legality of an intervention is irrelevant, once it has occurred.¹⁰¹ Their argument seems to be that if democratic states are involved in state-building, the legality of their presence is not a continuing issue and democracy can be imposed undemocratically through military occupation. But the case of Iraq suggests that in fact the chances of establishing democracy are closely linked to the legitimacy of the intervention, as perceived by the objects of the intervention. As Nehal Bhuta has observed:

The success of transformative occupation is precariously dependent on the quality of the subordination that it achieves over the occupied territory, and the military occupier qua sovereign dictator therefore locates itself in a paradox: it has to subordinate before it can legitimate effectively, and the more it tries to subordinate, the harder becomes the legitimation.¹⁰²

B *Stability Should Not Be Confused with Democracy*

Since the invasion, the terrible violence in Iraq has led our politicians to reduce their hopes of democracy and to settle for stability.¹⁰³ International lawyers also have debated whether there should be a 'two track' conception of democratic governance: a minimalist conception, perhaps simply requiring periodic elections for unstable states, and a more demanding institutional conception for more secure societies.¹⁰⁴ But this dual approach perpetuates inequalities within the society and sows the seeds for future conflict. A substantive definition of democracy based on democratic inclusion is generally applicable. It emphasises the creation of conditions of equality between citizens and the development of indigenous governance structures rather than their importation.¹⁰⁵

C *Local Voices Must Be Engaged*

We rarely consider democracy and justice-building projects from the perspective of those most affected by them; the people being saved have no 'subjectivity or autonomy'.¹⁰⁶ It is striking that almost all international attempts to build democracy and establish justice have been in non-Western countries. When the international community becomes involved in countries not usually considered part of the 'global South' (for example the former Yugoslavia), they become relocated to the South in the sense of being depicted as immature

¹⁰¹ See, eg, Tony Blair, Prime Minister, 'Speech to The Foreign Policy Center' (Speech delivered at the Foreign Policy Center, London, UK, 21 March 2006) <<http://politics.guardian.co.uk/foreignaffairs/story/0,,1736106,00.html>> at 18 October 2007.

¹⁰² Bhuta, above n 2, 739.

¹⁰³ George Bush, President, 'Address by the President to the Nation on the Way Forward in Iraq' (Address delivered at the White House, Washington DC, US, 14 September 2007), available from <<http://www.whitehouse.gov>> at 18 October 2007.

¹⁰⁴ See, eg, Richard Posner, *Law, Pragmatism, and Democracy* (2005) 130.

¹⁰⁵ Susan Marks, 'International Law, Democracy and the End of History' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (2000) 532, 533; Marks, *The Riddle of All Constitutions*, above n 98, 116.

¹⁰⁶ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004) 113.

societies which cannot be left to run themselves. The major players in the democracy-building business are almost invariably from developed countries and they do their work literally and figuratively in a language foreign to those they aspire to assist. This quickly leads to a sense that democracy-building is a substitute for empire-building.

The language used by the democracy-builders regularly has colonial and paternal overtones towards the apparent beneficiaries: thus President Bush told Iraqis in October 2006 that he could not be 'patient forever' and that he expected them to take more responsibility to ensure security in their own country.¹⁰⁷ This image of a patient, benevolent invader, sorely tried by the failure of Iraqis to get their act together, is sharply at odds with perceptions of Iraqis from all sides.¹⁰⁸

International law currently positions people in the developing world as having a limited ability to articulate their aspirations and concerns and to be involved in politics. The engagement of local populations in the democracy-building process requires a basis of knowledge about indigenous political concepts and power structures on the part of those claiming to build democracy.

D State and Democracy-Builders Should Be Accountable

No international system makes state or democracy-builders accountable for their activities; indeed, it has been pointed out that modern democracy-builders are less accountable than those working under the old Mandate or Trusteeship systems.¹⁰⁹ Democracy-builders typically view themselves as good Samaritans, making sacrifices to rescue chaotic societies, and failures of state-building are attributed to the failures of the population being democratised. But democracy-building can also bring great financial benefits and rewards. For example, a coterie of large American corporations has reaped huge profits from the rebuilding of Iraq,¹¹⁰ and allegations of corruption and mismanagement are rife.¹¹¹ Large amounts of money from Iraqi oil are unaccounted for.¹¹²

A significant part of the costs of democracy-building missions go to the salaries of expatriates. These missions have created a new elite cadre of state-building experts who move on to new conflict situations, while the unemployment rate in the recently democratised countries remains at extremely high levels.¹¹³ The constituency of many democracy-builders is other governments, not the people.¹¹⁴ There are many other spin-offs for the

¹⁰⁷ Jim Rutenberg and David S Cloud, 'Bush, Facing Dissent on Iraq, Jettisons "Stay the Course"', *The New York Times* (New York City, US) 24 October 2006, 14.

¹⁰⁸ Amit Paley, 'Most Iraqis Favor Immediate US Pullout, Polls Show; Leaders' Views Out of Step with Public', *The Washington Post* (Washington DC, US) 27 September 2006, A22.

¹⁰⁹ Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (2004) 45.

¹¹⁰ Wolfram Lacher, 'Iraq: Exception to, or Epitome of Contemporary Post-Conflict Reconstruction?' (2007) 14 *International Peacekeeping* 237, 245.

¹¹¹ NGO Coordination Committee in Iraq and Oxfam International, above n 94, 17.

¹¹² Arab Commission on Human Rights et al, *War and Occupation in Iraq: Chapter 9: Corruption, Fraud and Gross Malfeasance* (Global Policy Forum Report, June 2007) 86–100 <<http://www.globalpolicy.org/security/issues/iraq/occupation/report/full.pdf>> at 18 October 2007.

¹¹³ Lacher, above n 110, 244.

¹¹⁴ Jarat Chopra, 'Building State Failure in East Timor' (2002) 33 *Development and Change* 979, 998.

democracy-builders. Outi Korhonen has observed that '[t]he media opportunities and the opportunities for the media itself, the career opportunities, the double to triple salaries, and the "experience on the ground" give a boost [to] everyone's business'.¹¹⁵

I think that we should scrutinise more closely the cultures of the democracy-builders themselves. For example, in the case of the UN, few women hold senior positions in agencies concerned with state-building, an absence that sends a strong message in post-conflict societies. Evidence from the last decade of democracy-building also shows an institutional insouciance or forgetfulness about the position of women, who generally fare badly from the process.¹¹⁶

IV CONCLUSION

The four propositions I have sketched do not translate easily into the language of international law; the case of occupation and democracy-building in Iraq may indeed show up the limitations of the discipline, and point to major challenges.

In the West, we have a tendency to believe that democracy and justice are inherently virtuous concepts; that they have a fixed content and that they will inevitably be accepted. If only people truly understood what democracy meant, they would welcome it with open arms. We assume that intervention in post-conflict societies can act as a decisive break between a problematic traditional order and the clean and shiny new world of modern democracy. However, no evidence supports this assumption: indeed, the best cases of democracy-building have achieved only ambivalent success.

State and democracy-building appear on the agenda when a 'fragile', 'failing', 'failed', 'rogue', 'weak' or 'post-conflict' state — or indeed a whole 'arc of instability' — is on the horizon. These terms echo the language of the *Covenant of the League of Nations*, which refers to those peoples who are unable to cope with 'the strenuous conditions of the modern world'.¹¹⁷ They not only justify intervention but demarcate outsiders and 'others', who are quite distinct from 'our' successful, strong democracies. But it is clear that these terms are malleable and contingent. The idea of a 'post-conflict' state does not fit any objective reality, for example. The term suggests a neat transition from a state of conflict to peace. It also implies that 'post-conflict' societies are discrete and separate types: we would not, for example, usually understand Australia in such terms. Post-conflict societies carry the sense of being unruly, teetering on the edge of chaos, of a tentative redemption by the international community; and they are measured in contrast to the mature, secure, democracies of the West. In this sense, the term 'post-conflict' fudges the identity of the actors involved and represents them either as the nurturers — the agents of change — or the

¹¹⁵ Outi Korhonen, "'Post" as Justification: International Law and Democracy-Building after Iraq' (2003) 4 *German Law Journal* 710, 715.

¹¹⁶ See, eg, Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law' in John Braithwaite et al (eds), *Regulating Law* (2004) 246, 246; Tammy Smith, 'Post-War Bosnia and Herzegovina: The Erosion of Women's Rights under International Governance' (2005) 3(2) *Critical Half* 38.

¹¹⁷ *Covenant of the League of Nations* art 22.

nurtured. These categories obscure the way that we, the democracy-builders, can be complicit in the dysfunctions that make 'building democracy' necessary.¹¹⁸

International humanitarian law's conservationist heart still has relevance today, although some of its specific rules may be outdated.¹¹⁹ Ambiguity about the applicability of international humanitarian law has allowed transformative occupiers largely to escape legal constraints. The uncertain international legal framework applicable at the end of conflict has thus benefited the interveners more than the supposed beneficiaries of intervention; it allows us to construct the 'other' as chaotic and 'ourselves' as ordered, benevolent and magnanimous. We can thus deflect scrutiny of the failures of democracy and justice in our own societies.

¹¹⁸ Michael Pugh, 'Peacekeeping and Critical Theory' (2004) 11 *International Peacekeeping* 39, 54.

¹¹⁹ For a helpful discussion of reform strategies, see Jean L Cohen, 'The Role of International Law in Post-Conflict Constitution-Making: Towards a *Jus Post Bellum* for "Interim Occupations"' (2006–07) 51 *New York Law School Law Review* 497.