COMMERCIAL LAW REFORM IN TERRITORIES SUBJECT TO INTERNATIONAL ADMINISTRATION. KOSOVO & IRAQ: DIFFERENT STANDARDS OF LEGALITY AND ACCOUNTABILITY?

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Summary. I. INTRODUCTION. II. OVERVIEW OF UNMIK AND CPA REGULATORY ACTS AFFECTING COMMERCIAL LAW. III. LEGALITY OF THE COMMERCIAL LAW REFORMS. IV. REVIEWING AND ACCOUNTABILITY PROBLEMS. V. CONCLUSIONS.

I. INTRODUCTION

The paper will address questions of legality and accountability of the legislative functions exerted by international territorial administrations[1] in the field of commercial law in two recent scenarios that are theoretically different: a UN-authorized mission under Chapter VII of the UN Chart and that of a strictly Occupying Power. No attempt will be made to study other important and interrelated issues, such as the problematic privatizations carried out in Kosovo and Iraq, which do not seem to be compatible with the obligation of administration of public assets (Art. 55 of the 1907 Hague Regulations).

This paper will first provide a brief overview of the deep economic legislative reformation that took place in Iraq and Kosovo during the very early stages. Most of the scholar literature focused on criminal law and human rights aspects, leaving aside commercial law reforms; yet, those profound commercial reforms have resulted in a drastic economic transformation from a planned, centrally controlled, socialist system into a liberal, market-oriented, capitalist economy. The radical nature of those changes raises the question of their conformity with relevant international law and the need for public accountability.

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[1] Term proposed by WILDE, R., back in 2001, in "From Danzig to East Timor and Beyond: The Role of International Territorial Administration", 95 AJIL 585, 2001; *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*, Oxford University Press, 2008. Other recent books on international territorial administrations are: STAHN, C., *The Law and Practice of International Administration*, Cambridge University Press, 2008; FOX, G.H., *Humanitarian Occupation*, Cambridge University Press, 2008; KNOLL, B., *The Legal Status of Territories Subject to Administration by International Organisations*, Cambridge University Press, 2008; and AZNAR GÓMEZ, M.J., *La Administración Internacionalizada del Territorio*, Atelier, Barcelona, 2008.

Part III will then explore the sources of legality invoked so far (namely UN Mandates, International Humanitarian Law, and authority invested by local intervention) by the academic world, experts and intervening actors as basis for the commercial reformation in Kosovo and Iraq, and whether the actual results comply with the discretion vested in the temporal administrations by those sources. Finally, in Part IV problems of judicial review and public accountability in relation to the law-making function of those international administrations in Iraq and Kosovo will be considered.

II. OVERVIEW OF UNMIK AND CPA REGULATORY ACTS AFFECTING COMMERCIAL LAW

In Kosovo and in Iraq a profound reform of the existing commercial legislation took place shortly after the military actions stopped. Such a rush into the post-conflict management of the territories evidences a modern (Machiavelli-oriented) paradox pointed out by Outi Korhonen[2]: opposition to, and condemnation of, an unclear use of force seem to be pardoned if quick action is taken in the benefit of the affected population (good ends justify questionable means). Although international transformational[3] interventions in Kosovo and Iraq have been considered as unprecedented challenges[4], in both scope and structural complexity[5], it has been qualified[6] that those approaches are misleading and unhelpful. Previous unusual[7] territorial administrations exercised by international organisations[8] also enjoyed administrative and direct regulatory power[9], although to a different degree.

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[2] KORHONEN, O., "Post as Justification: International Law and Democracy-Building after Iraq", 4 German Law Journal 709, 203.

[3] Term applied by SCHEFFER, D., "Beyond Occupation Law", 97 AJIL 860, 2003.

[4] Report of the Secretary General on the UNMIK, 12.07.1999, S/1999/779; STROHMEYER, H., "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor", 95 AJIL 46, 2001; STAHN, "The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis", Max Planck Yearbook of United Nations Law, Vol. 5, Kluwer Law International, The Hague/London/New York, 2001, 108.

[5] MATHESON, M., "United Nations Governance of Postconflict Societies", 95 AJIL 83, 2001.

[6] See WILDE ("Representing International Territorial Administration: A Critique of Some Approaches", 15-1 EJIL 71-96, 2004) extended discussion of the "exceptionalism" and "progressivism" academic approaches to describe recent international administration projects in Kosovo and East Timor.

[7] WILDE (2004, supra, 91 and 2008) considers UNMIK and other previous examples of territorial administrations by international organisations not as unique or exceptional, but as unusual.

[8] See WILDE (2001 and 2008, supra) for a systematic history of international territorial administration, which explores the official reasons for their deployment (namely a response to either a perceived sovereignty or governance problem).

[9] STAHN, "Accountability and Legitimacy in Practice: Lawmaking by Transitional Administrations", http://www.esil-sedi.org/english/pdf/Stahn.PDF, 2005, 3-5.

1. UNMIK regulatory acts affecting commercial law

Important directly-applicable regulations were promulgated in the commercial sphere by the Special Representative of the UN Secretary-General (SRSG), under European Union expertise. The proclaimed goal was to create a modern market economy through "*the introduction of commercial and economic legislation conforming to European Standards*"[10]. In fact, the document entitled "Standards for Kosovo" (published on 10 December 2003[11] and endorsed by the President of the UNSC in his statement of 12 December 2003[12]) recognized that "*legislation in civil law matters is reviewed and developed to ensure greater conformity with European standards*"[13] and that the economic goal is to "*move Kosovo towards the achievement of European standards.*"

The first UNMIK Regulation (UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo)[14] provided in its Section 1.1 that "***all legislative*** *and executive* ***authority with respect to Kosovo****, including the administration of the judiciary****, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General***" (a formula later copied by the CPA Regulation No.1 expressing that all legislative authority with respect to Iraq was vested in the CPA and exercised by the Administrator).

Section 3 of the same UNMIK Regulation No. 1999/1 stated that "*the laws applicable in the territory of Kosovo prior to 24 March* ***1999*** *shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in section 2* [internationally recognized human rights standards and discrimination principles]*, the fulfillment of the mandate given to UNMIK under United Nations Security Council Resolution 1244 (1999), or the present or any other regulation issued by UNMIK.*" After facing huge criticism coming from the Kosovo Albanian prosecutors and judges[15], such a broad temporal extension of the SFRY applicable laws was soon reduced by UNMIK Regulation No. 1999/24[16] to the "*law* ***in force*** *in Kosovo on 22 March* ***1989***". The same UNMIK Regulation made clear that laws "*in force in Kosovo after 22 March 1989*" should only be subsidiary applied as "*an exception*"[17] in case they regulated (in a non-discriminatory way and in compliance with the internationally recognized human rights standards) a subject matter or situation which was not covered by the laws in force in Kosovo prior to 22 March 1989. It is important to emphasize that UNMIK Regulations clearly refer to laws "*in force*" and, therefore, laws

[10] Old Webpage of the EU Pillar in Kosovo accessible until 8 January 2009, http://www.euinkosovo.org/uk/about/about_pillar.php
[11] UNMIK, available at http://www.unmikonline.org/standards/docs/leaflet_stand_eng.pdf
[12] UNSC press release SC/7951, available at http://www.un.org/News/Press/docs/2003/sc7951.doc.htm
[13] "Kosovo Standards", supra, 7
[14] 25 July 1999
[15] "Vers une Loi du Kosovo, ni Serbe ni Yougoslave", Le Monde, 17 August 1999, quoted in BEMAN, N, "Intervention in a Divided World: Axes of Legitimacy", 19 EJIL 2006, 758.
[16] 12 December 1999
[17] Section 1.2 of the UNMIK Regulation 1999/24.

that were enacted before 22 March 1989 but entered into force after 22 March 1989 were applicable only in exceptional cases[18]. More importantly, some Federal laws (with no discriminatory provisions) that entered into force after 22 March 1989 and that amended, modernized or expanded previous laws on the same subject (such as the 1989 Federal Law on Foreign Exchange[19]) were completely denied application.

In order to clarify and to avoid problems of interpretation, UNMIK Regulation 1999/25[20] repealed Section 3 of the UNMIK Regulation No. 1999/1. Therefore, only the UNMIK Regulation 1999/24 (as amended by the UNMIK Regulation No. 2000/54)[21] determined the applicable law in Kosovo, which consisted of (a) UNMIK regulations and (b) the law in force in Kosovo on 22 March 1989. If a subject matter was not covered by (a) or (b), but was covered by another law in force in Kosovo applicable after 22 March 1989, then such law was applicable, provided it was not discriminatory and complied with the international human rights standards (although the Ombudsperson for Kosovo noted that it was difficult to determine "*whether or not a certain law is discriminatory if there is no independent judicial organ to do so*")[22]. In case of conflict UNMIK regulations were to take precedence over local law[23] (UNMIK regulations did not share "*equal position*" with domestic law as some author has argued[24]). It has been mistakenly indicated[25] that it was the UNMIK Regulation No. 2000/54 to establish the precedence of UNMIK regulations over local law. However, the UNMIK Regulation No. 1999/24 already contained in its Section 1.1 the precedence of UNMIK regulations. The only amendment introduced by the UNMIK Regulation No. 2000/54 was the new Section 1.6 of the UNMIK Regulation 1999/24, not Section 1.1[26].

It must be cleared out that when this work uses the generic term "UNMIK regulation", it refers generally to UNMIK regulations and to "*any subsidiary instruments issued thereunder*" (as expressed in Section 1.1 of the UNMIK Regulation 1999/1), that is,

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[18] STAHN (2008, supra, 665) wrongly uses the term "*laws **enacted** after 22 March 1989 should only be applied…*"

[19] Sluzbeni List SFRJ, N. 85/89. There was a previous Federal Law on Foreign Exchange Operations and Foreign Credit Relations (Sluzbeni List SFRJ, N. 15/1977).

[20] 12 December 1999

[21] 27 October 2000

[22] Fourth Annual Report (2003-2004) of 12 July 2004, at 16. Available at http://www.ombudspersonkosovo.org/repository/docs/E6040712a.pdf

[23] Section 1.1 of the UNMIK Regulation No. 1999/24.

[24] KNOLL (2008), supra, 340.

[25] STAHN (2008), supra, 665.

[26] The UNMIK Regulation No. 2000/54 expressly stated in its Preamble that it "*Hereby amends section 1 of UNMIK Regulation No. 1999/24, by adding a new section 1.6.*" Therefore, it did not amend Section 1.1 of the UNMIK Regulation 1999/24. The OSCE Review entitled "*The Criminal Justice System in Kosovo (February-July 2000)*" (at 16) published on 10 August 2000 (2 months before UNMIK Regulation No. 2000/54 was issued and 8 months after UNMIK Regulation No. 1999/25 replaced Section 3 of the first UNMIK regulation) already made it clear that UNMIK regulations took precedence over domestic law.

UNMIK regulations and UNMIK administrative directions. Therefore, as the Supreme Court of Kosovo hold in the *Bota sot* case[27] (following the interpretation of the UNMIK Office of the Legal Adviser)[28], both UNMIK regulations and administrative directions prevailed over domestic law. In any case, according to Section 2 of the UNMIK Regulation No. 1999/24, the SRSG was the only competent authority to clarify any doubt arising from the implementation of the regulation by the courts in Kosovo[29].

Until the end of 2001 (when the Constitutional Framework was established pursuant to UNMIK Regulation No. 2001/9), all UNMIK regulations stated in their Preamble that they were adopted (i) pursuant to the authority given to the SRSG under UNSC Resolution 1244, and (ii) taking into account UNMIK Regulation No. 1999/1 (as amended). However, since the adoption of the Constitutional Framework, UNMIK regulations included a new potential "source of authority" stating that (i) they were adopted "*in conformity with the Constitutional Framework*" (namely its Chapter 8.1 establishing the reserved powers and responsibilities, which remained exclusively vested on the SRSG) and that (ii), in any case, the SRSG had previously consulted with the Government and the Assembly of Kosovo. On the other hand, promulgating UNMIK regulations generally stated that they were adopted pursuant to the authority given to the SRSG under UNSC Resolution 1244, and in conformity with sections 9.1.44 and 9.1.45 of the Constitutional Framework (UNMIK Regulation No. 2001/9). More importantly, in cases were the promulgating UNMIK regulation introduced changes, the SRSG noted that "*the provisions of the Law shall be without prejudice to the authority of the SRSG under UNSCR 1244 (1999) or his reserved powers and responsibilities under the Constitutional Framework*."

Finally, it must be noted that Section 5.2 of the UNMIK Regulation No. 1999/1 was not repealed by the UNMIK Regulation No. 1999/25 (only Section 3 on the applicable law in Kosovo). Therefore, UNMIK regulations had to be "*issued in Albanian, Serbian and English*" (the English version was to prevail in case of divergence) and had to be "*published in a manner that ensures their wide dissemination by public announcement and publication*"[30] (a formula later copied by the CPA Order No. 1 with respect to Iraq). According to the Ombudsperson for Kosovo[31], this last requirement was further complemented pursuant to established case law of the European Convention on Human Rights[32] requiring the law imposed by UNMIK to be sufficiently accessible and precise. Similar concerns were raised by the OSCE Mission in Kosovo[33] stating that a law should be

[27] AC 37/2004, 20 August 2004, cited and commented by EVERLY (supra, 26).
[28] Cited by EVERLY (supra, 25-26).
[29] According to Section 1.1 of the UNMIK Regulation No. 1999/1, UNMIK was also vested with the judiciary authority with respect to Kosovo.
[30] Chapter 5.2 of the UNMIK Regulation No. 1999/1.
[31] Special Report No. 1 of 26 April 2001, par. 12, available at http://www.ombudspersonkosovo.org/repository/docs/E4010426a.pdf
[32] *Amuur v. France*, ECHR judgment of 25 June 1996, par. 50.
[33] "*Implementation of Kosovo Assembly Laws…*", supra, 29.

adequately accessible and foreseeable[34]. Although since 2005 the Official Gazette[35] and different official websites[36] provided access to legislative materials in English, Albanian and Serbian, this was not the case during many years (as it was strongly criticized by the Ombudsperson for Kosovo)[37]. It resulted in general unawareness of many UNMIK regulations; unawareness that was further motivated by (i) the immediate entry into force (just upon promulgation) of many UNMIK regulations; (ii) changes introduced by the SRSG to the original laws of the Assembly in the promulgating UNMIK Regulation (so both texts had to be carefully compared) and (iii) lack of clarification within the UNMIK regulations about which previous instruments they were revoking or amending. These problems were emphasized in 2005 by the Parliamentary Assembly of the Council of Europe recommending UNMIK to improve the lack of legal certainty[38].

From 25 July 1999 to 14 June 2008, UNMIK issued 449 regulations (some of them contained mere amendments to previous UNMIK regulations and, since July 2002, some others were promulgations –with or without modifications- of laws passed by the Assembly of Kosovo[39]) and 211 administrative directions.

These reforms refer to a broad number of economic aspects such as foreign investments (UNMIK Regulation 2001/3 of 12 January 2001), which main objective was to put in place certain legal guarantees (such as free transfer abroad of income from foreign investment) considered necessary to encourage foreign investment in Kosovo; customs (UNMIK Regulation N. 1999/3 of 31 August 1999, amended by UNMIK Regulations 2000/55 of 6 October 2000 and 2004/1 of 30 January 2004), which were "*based on the EU Customs Code and fully WCO compliant*"[40]; taxes (UNMIK Regulations 2000/2 and 2000/3 and further amendments)[41]; banking (UNMIK Regulation 1999/20 on the Banking and Payments Authority and UNMIK Regulation 1999/21 on Bank Licensing, Supervision and Regulation)[42]; business organisations (UNMIK Regulation 2001/6 of 8 February 2001);

[34] *Hasan and Chaush v. Bulgaria*, ECHR judgment of 26 October 2000, par. 84.
[35] The Official Gazette was established by the Law No. 2004/47 in September 2004 and promulgated by the UNMIK Regulation No. 2005/25 on 12 May 2005.
[36] Assembly of Kosovo (although it posted the laws passed by it without incorporating changes made in the promulgating UNMIK regulation) http://www.assembly-kosova.org/?krye=laws&viti=2005&muaji=11&lang=en, and UNMIK http://www.unmikonline.org/regulations/index.htm
[37] As an example, the Ombudsperson Special Report N.1 (supra, 8 at par. 25) found that UNMIK Regulation 2000/47 was still not translated into Serbian or Albanian one year after its promulgation.
[38] Resolution 1417, "Protection of Human Rights in Kosovo", 25 January 2005, par. 5.ii, available at http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1417.htm#_ftn1
[39] The first legislative period of the Assembly of Kosovo started in November 2001.
[40] "The Unmik/Kosovo Trade Regime Overview as of October 2004", UNMIK, http://www.unmikonline.org/archives/EUinKosovo/upload/The%20UNMIK%20Kosovo%20trade%20Regime%20overview.pdf
[41] 22.01.2000
[42] 15.11.1999

contracts for the sales of goods (UNMIK Regulation 2000/68 of 29 December 2000, which is based on the Vienna Sales Convention); pledges (UNMIK Regulation 2001/5 of 7 February 2001); insurance (UNMIK Regulation 2001/25 of 5 October 2001 on licensing, supervision and regulation of insurance companies and insurance intermediaries); payment transactions (UNMIK Regulation 2001/26 of 8 October 2001); essential labour law (UNMIK Regulation 2001/27 of 8 October 2001); and standards for financial reporting (UNMIK Regulation 2001/30 of 29 October 2001).

2. CPA regulatory acts affecting commercial law

According to some authors[43], post-Saddam Iraq's legal system did not provide an attractive framework with the legal guarantees necessary to encourage foreign trade and investment[44], both of which were considered vital for the rebuilding of the country. It was also criticized that Iraqi's commercial law "*in many respects failed to reflect modern commercial practices or even the contemporary legal standards in other Arab-majority countries*"[45]. In the same line, President Bush "*National Strategy for Victory in Iraq*"[46] considered that one of the multiple challenges that Iraq faced in the economic sphere was "*facilitating progress toward a market-oriented economy by reforming commercial laws...*" However, Professor Cherif Bassiouni observed that Iraq had a well established legal system which did not required to rebuild it "*from scratch*"[47], but just the removal of some encumbrances introduced by Saddam.

Whatever the right answer was, soon after the occupation of Iraq the Coalition Provisional Authority (CPA) was created by the US Government within the US Department of Defence[48]. Its first Regulation[49] established that "*laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation*

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[43] Among others, HOPE, J. and GRIFFIN, E., "The New Iraq: Revising Iraq's Commercial Law is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy", 11 Cardozo J. Int'l & Comp. L. 876, 2003-2004; KASSINGER and WILLIAMS, supra.

[44] BREMER, P (formerly Chief administrator to Iraq), Wall Street Journal, 20.06.03, http://usinfo.state.gov/mena/Archive/2004/Feb/12-536238.html

[45] KASSINGER and WILLIAMS, supra, 221.

[46] http://www.whitehouse.gov/infocus/iraq/iraq_strategy_nov2005.html

[47] "The New Iraq", Online NewsHour, 13.05.2003, http://www.pbs.org/newshour/bb/middle_east/jan-june03/iraq_5-13.html

[48] According to HALCHIN, E. ("The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities", CRS Report for US Congress, April 2004) CPA's status as a Federal Agency and many other questions remain unclear due to the "*lack of an authoritative and unambiguous statement about how this organization was established, by whom, and under what authority*". ROBERTS, A., ("The End of Occupation: Iraq 2004", 35 ICLQ 27-48, January 2005) contend that the CPA is not an exclusively US organisation and, therefore, does not qualify as a US Federal agency.

[49] 16 May 2003

or Order issued by the CPA."[50] According to Section 1.2 of the CPA Regulation No. 1, the CPA was temporarily[51] "*vested with all executive**, legislative** and judicial **authority** necessary to achieve its objectives, **to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war.*" Those objectives were "*to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.*"[52]

Section 3.1 of the CPA Regulation No. 1 further clarified that CPA regulations and orders issued by the CPA Administrator (who was considered as the only authorized person to exercise the legislative authority temporarily vested in the CPA)[53] were to take precedence over all other laws and regulations to the extent the later were inconsistent. In the following 13 months (May 2003-June 2004), the CPA issued 100 directly applicable orders (although some merely introduced amendments to previous CPA orders), 12 regulations and different public notices[54]; more than a quarter of the orders were of a commercial nature[55]. The CPA (on the last days of its existence) also proposed some model laws to the Interim Iraqi Government (IIG) on areas such as commercial agencies, competition, commercial leasing, secured transactions, consumer protection and insurance[56]. In coping with that task, the US government[57] preferred to turn towards US advisers. In fact, the American enterprise BearingPoint Inc. was awarded in 2003 a contract for the examination of Iraq's laws and policies regulating trade, commerce and investment[58]. The legislative review was carried out through the sub-contracted American law firm Squire, Sanders & Dempsey L.L.P[59].

In search of legitimacy, and trying to avoid potential problems of legality, all CPA regulations and orders of a commercial nature (including the first Regulation establishing the CPA) contained in their preamble a reference (as a considered "source of authority") to both, UNSC Resolution 1483 and the laws and usages of war: "*Pursuant to my **authority as Administrator** of the Coalition Provisional Authority (CPA), and **under the laws and***

[50] Section 2 of the CPA Regulation No. 1.
[51] Section 1.1 of the CPA Regulation No. 1.
[52] Section 1.1 of the CPA Regulation No. 1
[53] Sections 1.2 and 3.1 of the CPA Regulation No.1 (which were most probably taken from Section 1.1 of the UNMIK Regulation No. 1999/1)
[54] http://www.iraqcoalition.org/regulations/index.html#Regulations
[55] An overview of the CPA orders affecting commercial law was prepared by the US Department of Commerce http://www.export.gov/iraq/bus_climate/overview_cpa.html
[56] KASSINGER and WILLIAMS, supra, 226-7.
[57] The US Government played a decisive role in the CPA legal drafting.
[58] http://www.usaid.gov/press/releases/2003/pr030725.html
[59] Webpage of Squire & Sanders, http://www.ssd.com/resources/news_detail.aspx?newsid=11955

usages of war**, and consistent with relevant U.N. Security Council resolutions, including **Resolution 1483 (2003)"

Furthermore, since the establishment of the Iraqi Governing Council (IGC) on 13 July 2003, all CPA regulations and orders of commercial nature added a new reference in their preamble (as a potential "source of authority") stressing that the CPA had "*worked closely* (meaning "close consultation and coordination"[60]) *with the Governing Council*" and that it was the "***Governing Council's desire*** [not the own interest of the CPA] *to bring about significant change to the Iraqi economic system*"[61]. Even in orders prior to that date, the CPA tried to obtain some kind of "vicarious authority" (and legitimacy) by stating in the preamble of the orders that it was "*acting on behalf, and for the benefit, of the Iraqi people*" (e.g., CPA Order No. 12 of June 2003).

Section 3.2 of the CPA Regulation No. 1 (almost completely identical to Section 5.2 of the UNMIK Regulation No. 1999/1) established that CPA regulations and orders "*shall be promulgated in the relevant languages and shall be disseminated as widely as possible.*" However, it must be noted that, as in the case of Kosovo, concerns were raised[62] about inconsistencies between the English and Arabic texts of legislation published by the CPA, as well as to the usual delay in releasing the Arabic translations to CPA orders (in any case, according to Section 3.2 of the CPA Regulation No.1, "*in case of divergence, the English text shall prevail*"); all of which caused the Iraqi population a lack of timely awareness –or even complete misinformation- of legal changes undertaken by the CPA. In addition to that lack of information of the local population, the excessive bulk of CPA regulations, the immediate entry into force (just upon promulgation) of some CPA orders[63] and their complexity[64] resulted in a serious lack of implementation[65]. According to one CPA official responsible of drafting commercial laws, "*We gave them a lot of laws, but it would have been smarter to do fewer laws and work more on implementation. Our office was writing away, but in the end we didn't ensure that the Iraqi government and people understood the new laws or how to implement them.*"[66]

[60] See ending sentences of the Preambles to CPA Orders Nos. 39, 40, 56, 64, 74, 78, 80, 81, 83 and 94.
[61] See Preambles to CPA Orders Nos. 39, 40, 56, 64, 74, 78, 80, 81, 83 and 94.
[62] Amnesty International, "Memorandum on concerns related to legislation introduced by the Coalition Provisional Authority", 4.12.2003, http://web.amnesty.org/library/Index/ENGMDE141762003?open&of=ENG-IRQ
[63] e.g., CPA Order No. 39 on foreign Investment
[64] According to one CPA official, some CPA regulations and orders "*would take a lifetime to manage*" (cited by HENDERSON, A.E, "The Coalition Provisional Authority's Experience with Economic Reconstruction in Iraq", United States Institute of Peace, Special Report 138, April 2005, 13).
[65] Idem, 13.
[66] Idem, 13.

In spite of the initial US government proposal of promulgating a new commercial code[67], no significant changes to the Iraqi Commercial Code were adopted. On the contrary, the main reforms dealt with foreign investments and trade. Under the Saddam regime, foreign investment in Iraq was restricted to resident citizens of Arab countries. The highly criticized CPA Order 39 of 19 September 2003 on Foreign Investment, amended by Order 46, of 20 December 2003, radically altered the Iraqi international commercial environment by allowing 100 percent foreign ownership and management of Iraqi companies -excluded some vital sectors such as the natural resources one. Its purpose was to "*attract new foreign investment in Iraq*."[68] Order 64[69] -which significantly amended Iraqi Company Law 21 of 1997- further provided for the elimination of restrictive barriers to the formation of companies and allowed foreign shareholders. In addition, Order 12[70] (latter replaced by Order 54[71]) promoted a trade liberalization policy and abolished the previous strict government trade licensing requirements and inspections. Additional CPA orders also addressed border and customs procedures as well as authorizations for Iraqis to establish direct relationships with foreign trading agencies and companies, formerly prohibited. Those reforms seem to be more oriented towards facilitating US companies to intervene in the reconstruction of Iraq (and exploitation of its natural resources) than restoring basic conditions for public order.

Other important reforms affected the protection of intellectual property rights (Orders 80[72], 81[73] and 83[74] introduced several amendments to Iraqi's laws on trademarks, patents and copyrights in order to align them with the World Trade Organization standards of protection)[75], procurement law (Order 87 of 14 May 2004 on Public contracts), securities (Order 74 was introduced because "*some of the regulations concerning securities markets under the prior regime are not well-suited to a modern, efficient, transparent and independently regulated securities market*")[76] and Banking (Order 94)[77]. Furthermore, CPA Order 37[78] set out a broad review of taxes in Iraq.

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[67] BREMER, supra.
[68] Section 2 of CPA Order 39.
[69] Amendment to the Company Law N. 21 of 1997, 29.02.2004.
[70] Trade Liberalization Policy 2004 (rescinded), 7.06.2003.
[71] Trade Liberalization Policy 2004 (amended), 24.02.2004.
[72] Amendment to the Trademarks and Descriptions Law N. 21 of 1957, 26.04.2004.
[73] Patent, Industrial Design, Undisclosed information, Integrated circuits and Plant Variety Law, 26.04.2004.
[74] Amendment to Copyright Law, 29.04.2004.
[75] As a result, on 11 February 2004, members of the WTO approved Iraq's request for observer status http://www.wto.org/English/thewto_e/acc_e/a1_iraq_e.htm
[76] Interim Law on Securities Markets, 18.04.2004. See para. 5 of the Preamble of CPA Order 74.
[77] Banking law of 2004, 6.06.2004.
[78] Tax Strategy for 2003, 19.09.2003.

III. LEGALITY OF THE COMMERCIAL LAW REFORMS

1. UN Mandate

According to the Brahimi Report[79], UN Mandates are essentially a political compromise, requiring consensus among Security Council's members (in particular the permanent members). Therefore, they result in a too vague drafting, which is open to wide interpretation.

A) Kosovo

After an eleven-week air strike by NATO in the spring of 1999, the Yugoslav/Serb army was demanded by the UNSC to gradually left Kosovo. Since the completion of the withdrawal, the province was under direct administration[80] by the international community based on a UNSC mandatory resolution under Chapter VII of the UN Charter. Under such Chapter, the Security Council is allowed to adopt measures far beyond the traditional concept of restoration of international peace in order to meet new challenges[81]. In doing that, however, the Security Council cannot act over the law, but must keep within the (broad and flexible) boundaries of the UN Charter; although the discretionary decisions of the Security Council taken under Chapter VII are of a political nature (as confirmed by the Brahimi Report), they are to be governed and qualified by the law[82].

Nevertheless, the doctrine of implied powers[83] offers a workable solution to avoid the *ultra vires* condemnation of those Security Council acts not covered by express powers. Under the said doctrine of the implied powers, the Security Council has adopted a broad-reaching, pragmatic approach of what constitutes a threat to peace and the measures to be employed[84] (far beyond the non-exhaustive list of Art. 41 of the UN Charter) when acting pursuant its Chapter VII powers. Some author also points out to the customary powers[85] of the UN as a

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[79] BRAHIMI, "Report of the UN Panel on Peace Operations", A/55/305 S/2000/809, 2000, 58.

[80] De WET, E., ("The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law", Max Plank Yearbook of United Nations Law, Vol. 8, Martinus Nijhoff Pub., Leiden/Boston, 2004, 292) contends that direct administration is characterised by "*the directly applicable nature of the decisions of the external entity in the national legal order of the affected entity.*"

[81] KIRGIS, F., "Security Council Resolution 1483 on the Rebuilding of Iraq", ASIL Insights, May 2003 http://asil.org/insights.htm

[82] Judge JENNINGS in the *Lockerbie* case, 1998 ICJ Reports 110.

[83] In *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion, ICJ Reports 1949, 174 and 182) it was held that the UN is entitled to powers not expressly provided for in the Charter but necessary to fulfil its objectives.

[84] MATHESON (2001) supra, 83; RUFFERT, M., "The Administration of Kosovo and East-Timor by the International Community", 50 ICLQ 616, 2001.

[85] Members consent to new UN powers by accepting their practice. De WET (supra, 308-309).

basis for those Chapter VII UN-authorized missions. As a consequence of the presumption of legality inherently attached to UN Resolutions[86], the required consent to UN practice (applying any implied or customary power) is presumed when Resolutions are given effect without specific objections from the Member States and endorsed by the UN General Assembly. While international community has widely supported UN Chapter VII administration in Kosovo, general acceptance is not so clear in the situation of Iraq (at least at early stages) [87].

UNSC Resolution 1244, passed in June 1999, is the main instrument establishing and authorizing the legal framework for the activities of UNMIK. According to that Resolution, the mission was composed of four main pillars: UN, UNCHR, OSCE and EU were respectively in charge of the civil administration, the humanitarian aspect, the institution-building pillar and the reconstruction component. All were required to act in an integrated manner and under the supervision of the SRSG. Both, UNMIK and the SRSG are to be considered as subsidiary organs of the UNSC (Art. 29 of the Charter) or the UN as a whole (Art. 7.2 of the Charter); therefore, their acts are finally attributable to the UN.

However, UNMIK's legislative power was not directly derived from UNSC Resolution 1244, but from a Report of the Secretary General. Indeed, the Report of the Secretary General on the UNMIK construed Paragraph 10 of the Resolution as vesting in the UNMIK "*all legislative and executive powers*"[88], which were to be exercised by the SRSG through "*legislative acts in the form of regulations*"; those regulations were to "*remain in force until repealed by UNMIK or suspended by rules issued by the Kosovo Transitional Authority once it is established*"[89]. Therefore, UNMIK lacked a strong authoritative source of power vesting it the legislative and executive functions. As a result, UNMIK tried to reinforce its weak legislative power through the vicarious authority provided by intervening domestic political actors (as will be explained later).

According to the Report, the SRSG was allowed to "*change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration.*"[90] Within those purposes, the Report outlined that "*the Special Representative will seek to create a viable, market-based economy*"[91], in order to attain the reconstruction and recovery of Kosovo (Para. 11.g of UNSC Resolution 1244). In doing that, UNMIK (through the EU

[86] *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports 1962, 168.

[87] As showed by the Franco-German-Russian interest in a stronger UN intervention and the lack of express support from the General Assembly. De WET (supra, 315-316).

[88] Para. 35 of the Report S/1999/779 and Section 1.1 of UNMIK Regulation 1999/1 (25.07.1999). However, few days before, the SRSG ad interim had defined his mandate as covering only executive functions (see Kosovo News Report, 21.06.1999, http://www.un.org/peace/kosovo/news/99/jun99_3.htm#Anchor18a).

[89] Ibid, para. 41.

[90] Ibid, para. 39.

[91] Ibid, para. 103.

Pillar) was required to develop policies relating to "*trade and commercial issues, currency and monetary issues, and a banking system.*"[92] However, the Resolution contained no reference to well-established applicable principles of international economic law that could enhance legitimacy and predictability[93]. Furthermore, as it will be explained later, those changes of the domestic legislation are in clear conflict with IHL[94].

B) Iraq

In May 2003, weeks after the US President announced the end of major combat operations in Iraq[95], the Preamble of the UNSC Resolution 1483 recognized the US and UK as the Occupying Powers of Iraq[96]. They were considered subject to "*the specific authorities, responsibilities, and obligations under applicable international law.*" UNSC Resolution 1483 can arguably be considered special in that (i) it expressly provided that the Occupying Powers were to comply with the conventional law on occupation[97] and that (ii) the Occupying Powers in Iraq were in favour of the resolution (in fact, their avowed interest in passing UNSC Resolution 1483 was to "*evade legal difficulties if the occupying powers sought to move beyond the limited rights conferred by the Hague Regulations and Geneva Convention IV to vary existing arrangements.*"[98])

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[92] Ibid, para. 104.

[93] The analysis of Laurence BOISSION DE CHAZORNES ("Taking the International Rule of Law Seriously: Economic Instruments and Collective Security", International Peace Academy, 2005, http://www.ipacademy.org/PDF_Reports/IROL_erpt.pdf) on the impact of international economic principles in the economic reconstruction measures pursued by recent UN transformational interventions under Chapter VII, is also useful to the narrower aspect of commercial legislation reform.

[94] The applicability of IHL provisions to UN-authorized missions will be discussed in III.2.a

[95] "President Bush Announces Major Combat Operations in Iraq Have Ended", 1 May 2003, http://www.whitehouse.gov/news/releases/2003/05/20030501-15.html

[96] The Preamble to the UNSC Resolution 1483 seems to declare that only those states that signed the letter to the UN Security Council on 8 May 2003 (S/2003/538) are occupying powers (ie, the U.K. and the US). However, other countries have contributed forces and resources during the occupation phase resulting in some ambiguity as to their actual status. The government of The Netherlands considers that the Para. 14 of the Preamble of UNSC Resolution 1483 amounts to a discharge (by the UN Security Council pursuant Chapter VII) of the status of occupying powers; similar position was hold by New Zealand (ZWANENBURG, M., "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation", 86 IRRC 756-7 and 764-5, 2004).

[97] According to BENVENISTI, E., ("The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective", 1 IDF Law Review 37, 2003-a), UNSC Resolution 1483 is "*the latest and most authoritative restatement of several basic principles of the contemporary law on occupation*", although it did not addressed some important questions regarding adaptation to contemporary governance.

[98] House of Commons of the UK (International Affairs & Defence Section), "Iraq: Law of Occupation", Research Paper 03/51, 2003, 25

Although the text of the resolution did not offer retroactive approval of the occupation of Iraq, some authors[99] contend that it did provide further authority for the reforms of the Iraqi's commercial legislation. They argue that without that reform, the CPA was impeded in its efforts to comply with its obligations under UNSC Resolution 1483 and especially its paragraph 4, which requires the CPA "*to promote the welfare of the Iraqi people*". For those authors, such reform of the commercial legislation was necessary to rapidly attract foreign capital into Iraq, in order to undertake the economic reconstruction. In fact, Benvenisti[100] explains that UNSC Resolution 1483 called on the occupiers to pursue effective administration as a "*heavily involved regulator*", rather than merely being an "*inactive custodian*" of occupied territory. However, paragraph 5 of UNSC Resolution 1483 also stated that in doing that, the CPA had to fully comply "*with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907*". Therefore, UNSC Resolution 1483 did not give the occupying powers "*carte blanche*": Mr. Akram (then President of the UNSC) and Mr. De La Sablière (then French representative to the UNSC) confirmed that the powers delegated to the CPA under UNSC Resolution 1483 were to be exercised "*especially in conformity with the Geneva Conventions and the Hague Regulations, besides the Charter itself.*"[101] A Research Paper of the House of Commons of the UK adopted the same position[102].

Thus, were all the objectives identified by the Resolution in conformity with the applicable norms of occupation? The answer is no. UNSC Resolution 1483 provided a broader mandate for the Occupying Powers than that envisaged by the treaties on the law of occupation[103]. In particular, the drastic reform of the Iraqi commercial legal system in order to establish a free market-oriented economy (to promote the welfare of Iraqi people) went beyond the minimal interference with the laws and institutions of an occupied state as required by International Humanitarian Law (IHL). Yet, UNSC Resolution 1483 seems to lack a mechanism of reconciliation between the objectives imposed and the applicable IHL provisions. Therefore, a simple interpretation of UNSC Resolution 1483 could lead to the conclusion that the Resolution lacks internal consistency; inconsistency used by the CPA for its own benefit, citing both sources in the Preamble of its Regulations and Orders and choosing the most favourable regime for each particular case.

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[99] KASSINGER and WILLIAMS, supra, 219. Contrarily, McCARTHY, C., "The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq", 10 J. of Conflict & Security Law 70, 2005.

[100] BENVENISTI, E., "Water Conflicts During the Occupation of Iraq". 97 AJIL 861-3, 2003-b.

[101] UN Doc. S/PV.4761, 22 May 2003

[102] "Iraq: Law of Occupation", supra, 18

[103] Contrarily, former Deputy Assistant Attorney General, YOO, J.C, ("Iraqi Reconstruction and the Law of Occupation", 11 UC Davis Journal of Int'l Law & Policy 16, 2004) thinks that Art 43 of the Hague Regulations provides enough authority to the fundamental legislative changes carried out in Iraq.

The ICJ acknowledged that in case a UNSC resolution is inconsistent with a treaty provision, the former would prevail according to Article 103 of the UN Charter[104]. However, debate exists as to whether UNSC Resolution 1483, pursuant to Art. 103 Charter, has suspended (or deviate from) those IHL norms incompatible with the objectives of the Resolution[105]. Had the Security Council really intended to do that, it would have provided for an explicit and determined alternative regime in UNSC Resolution 1483 for the control of the delegated power. In fact, since the Security Council acts by delegation from the UN member states, it should control the exercise of delegated powers under Chapter VII and, for doing that, a standard must be provided[106]. Although there is no legal basis compelling the Security Council to establish such alternative standard, Article 2(2) requires the Security Council (not only member states) to act in good faith and responsibly.

Nevertheless, the problem arises when considering that some provisions of conventional IHL (i.e. Art. 43 of the Hague Regulations) have become a source of international customary law[107]. Furthermore, it seems that some norms (or at least the basic rules) of humanitarian law are even regarded as peremptory or *jus cogens* norms[108]. The distinction is of high practical relevance. In 2006, the ILC[109] adopted the "prevailing opinion" that Article 103 should be read broadly as to affirm the prevailing character of the Charter obligations (and of binding decisions made by UN bodies such as the Security Council, e.g. UNSC Resolutions)[110] not only vis-à-vis international agreements, but also customary international law. However, debate continues open without definite and sound conclusions.

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[104] *Lockerbie* case, Request for the Indication of Provisional Matters, 1992 ICJ Reports 3.

[105] In favour of it: GRANT, T., "How to Reconcile Conflicting Obligations of Occupation and Reform", ASIL Insights, 2003-a, http://www.asil.org/insights/insigh107a1.htm; HOPE and GRIFFIN, supra, 884; on the contrary, ZWANENBURG (2004), supra, 767; McCARTHY, supra, 66; STAHN (2005), supra, 14; SASSÒLI, M., "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", 16 EJIL 681, 2005.

[106] SAROOSHI, D., *The UN and the Development of Collective Security: The Delegation by the Security Council of its Chapter VII Powers*, Oxford University Press, 1999, p. 34.

[107] *Trial of the Major War Criminals*, International Military Tribunal in Nuremberg, 41 AJIL 248-249, 1947; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 226, 247; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ, paras. 89 and 124.

[108] *Nuclear Weapons* Advisory Opinion, 1996 ICJ 226, 247. Although the ICJ did not directly clarify the status of IHL norms, it recognized that some fundamental rules of IHL are "intransgresible" principles of customary international law. The expression "intransgresible" could be read as an intention to treat those basic IHL norms as *jus cogens*. In fact, President Bedjaoui (in his Declaration), Judge Weeramantry (in his Dissenting Opinion) and Judge Koroma (Dissenting Opinion) confirmed their view that the majority of IHL norms should be considered as peremptory norms. Similar opinion is maintained by the ILC Draft Articles on State Responsibility, Commentary on Article 40, paras. 4-6 in *Official Records of the General Assembly, Fifth-sixth Session* (A/56/10), 2001, 283-284.

[109] Report on "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law", A/CN.4/L.682, 13 April 2006, 176 at par. 345.

[110] *Lockerbie* Case (Libyan Arab Jamahiriya v. United States of America) (Provisional Measures) 1998 ICJ Reports para. 42 and *Lockerbie* Case (Libyan Arab Jamahiriya v. the United Kingdom) (Provisional Measures) 1992 ICJ Reports paras. 39-40.

Therefore, it is not clear whether UNSC Resolutions can derogate norms of customary character.

On the contrary, it is clear that a UNSC resolution would have no validity[111] in the case it called to violate *jus cogens* norms of international law. If states cannot derogate *jus cogens* norms, nor can they establish an international organisation empowered to do it. Nevertheless, the expectations[112] on the potential power[113] of the ICJ to review the legality of binding Chapter VII decisions of the Security Council, seems to be more of a desire than a real existing mechanism; yet, academic debate continues open without definite conclusions (the Institut de Droit International established in 2007 a Commission to study the judicial control of Security Council decisions). Notwithstanding the debate on judicial review, it must be noted that an ICJ decision to that respect would have mere declaratory nature, not a constitutive effect. Any UNSC Resolution in conflict with a norm of *jus cogens* is void *ab initio* (i.e. it ceases to be valid and binding from the moment in which the contradiction is born)[114]. Although severability is possible[115], the remaining valid provisions may not be enough to establish a workable framework to face the required objectives of the ill-grounded Resolution.

However, the prohibition codified in Articles 43 of the Hague Regulations and 64 of the IV Geneva Convention does not seem to qualify as *jus cogens* norm, but only as a customary rule. Furthermore, the distinction has no effect in the case of UNSC Resolution 1483 since (according to its wording, the comments made by members of the UNSC itself and the lack of an alternative framework established by the Resolution) it seems justified to consider that the Resolution did not intend to override any customary IHL norm.

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[111] Judge LAUTERPACHT's separate opinion to the Order of 13 September 1993 in the *Bosnian Genocide* Case, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia v. Yugoslavia*), 1993 ICJ Reports 440; Judgment of the Court of First Instance (EU) of 21 September 2005 in Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, par. 281.

[112] Expectations are largely based mainly on the *Lockerbie* case (supra); Judge LAUTERPACHT's separate opinion in the *Bosnian Genocide* case (supra); Judge SKUBISZEWSKI dissenting opinion in the *East Timor* case (1995, ICJ Reports 90, 70, 85-86) and the ICTY decision in *Prosecutor v. Tadíc* (IT-94-1-AR72, 35 ILM 1996, 44-45).

[113] Nor the Chapter XV of the UN Charter, neither the Status of the ICJ contains any explicit or implicit power of judicial review. While the dismissal of the Belgian proposal recorded in the *travaux préparatoires* [UNCIO, Vol. 13, Doc. 843 (IV/2/37), p. 645 and Doc. 933 (IV/2/42 (2)), pp. 709-710], has been pointed out as excluding a judicial review power of the ICJ (ROBERTS, K., "Second-Guessing the Security Council: The International Court of Justice and its Powers of Judicial Review", 7 Pace Intern'l L. Review 281, 1995), the contrary position has also been held (*Certain Expenses* case, 1962 ICJ Report 168).

[114] Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties; Judge Lauterpacht's separate opinion in the *Bosnian Genocide* case (supra at para. 103).

[115] LAUTERPACHT, E., "The Legal Effect of Illegal Acts of International Organisations", in Cambridge Essays in International Law: Essays in Honour of Lord McNair, Stevens & Sons, London, 1965, 89.

2. International Humanitarian Law

The international law of occupation is composed by an imperfect set of rules, which have been honoured basically by their breach[116]. Occupying Powers do not acquire legal title to the occupied territory and, consequently, sovereignty over occupied territory does not pass to the Occupying Power[117]. Therefore, during the period of occupation, they assume transitional authority and a number of basic rights and duties as *de facto* administrator of the territory[118]. The scope of that authority, rights and duties is embodied mainly within Chapter 3 of both the Hague Regulations (1907) concerning the Laws and Customs of War on Land (hereinafter, the "Hague Regulations"), and the IV Geneva Convention Relative to the Protection of Civilian Persons During Times of War (1949) (hereinafter, "IV Geneva Convention").

During the drafting of the Hague Regulations, fundamental disagreements arose among participating states and the gaps left were exploited during the First and Second World Wars[119]. Therefore, significant reform occurred with the promulgation of the 1949 Geneva Conventions (generally designed to supplement the Hague Regulations)[120], which imposed more strident obligations on occupiers and addressed a number of those gaps[121]. However, Article 42 of the Hague Regulations continues to provide the authoritative legal definition of "occupation", which remains applicable to this day. According to it, the law of occupation applies when an Occupying force exercises effective control over foreign territory. Therefore, it is a question of fact that does not require any express declaration[122]. Article 2 of the Geneva Conventions extended the definition in order to embrace those situations of occupation without armed confrontation.

It should be noted that Article 6 of the IV Geneva Convention makes all its provisions (included the legislative restrictions imposed by its Art. 64) applicable for only one year following "*the general conclusion of military operations*." Additional Protocol I was created in 1977 to extend protections and obligations outlined in the Fourth Geneva Convention until the termination of occupation (Art. 3.b). However, neither the US nor Iraq are parties to the protocol. Hence, it did not apply to the US occupation of Iraq. Even so,

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[116] BENVENISTI (2003-a), supra, 20.
[117] BENVENISTI, E., *The International Law of Occupation, Princeton University Press*, Princeton, 1993, 5-6.
[118] PICTET, J., *Commentaire: IV La Convention de Genéve relative a la protection des personnes civiles en temps de guerre*, ICCR, Geneva, 1956, 273.
[119] OPPENHEIM, L, *International Law: A Treatise*, ed. LAUTERPACHT, H, Vol. II, 7th ed., Longmans, Green & Co, London, 1952, Chapter XII "Occupation of Enemy Territory**."**
[120] Art. 154 of the IV Geneva Convention.
[121] According to BENVENISTI (1993, supra, 10 and 98), while weaker parties pushed for an enlargement of the occupant's duties in the Hague Regulations, they strongly opposed to the Allies' wishes of a loose expansion of the occupant's powers in the Geneva Conventions.
[122] House of Commons, "Iraq: Law of Occupation", supra, 19; ZWANENBURG (2004), supra, 748; VITÉ, S., "L'applicabilité du Droit International de L'occupation Militaire aux Activités des Organisations Internationales", 86 IRRC 11, 2004; BENVENISTI (1993), supra, 3-4.

many of its provisions are recognised by the US as customary[123], with only a few articles being contentious.

A) Applicability

UN mandates under Chapter VII of the Charter do not usually contain any explicit mention regarding the law of occupation, yet its provisions apply to the UN-authorized intervention[124]. It must be noted that although Article 18 of the 1969 Vienna Convention on the Law of Treaties provides that only state parties to international agreements are bound by them (though the 1907 Hague Conventions and the 1949 Geneva Conventions provide accession by "Powers" –instead of "States"-, such term is interpreted as excluding international organizations[125] and, more precisely, the UN[126]) some of the IHL provisions have attained customary character and, therefore, apply directly and autonomously to UNSC Resolutions.

In fact, the 1999 UN Secretary General's Bulletin on Observance by United Nations Forces of International Humanitarian Law[127] confirmed the applicability of IHL norms (at least those which constitute customary international law) to UN peace support operations. Some years later, in 2001, a new Report by the UN Secretary-General clarified that the 1999 Bulletin signalled "*formal recognition of the applicability of International Humanitarian Law to United Nations peace operations.*"[128] Of course, the Bulletin is just an internal administrative instrument, not a unilateral act of the UN. The ultimate ground for the applicability of the rules contained in the Bulletin is their nature of customary international law. Although there are customary rules of IHL that are not explicitly listed in the Bulletin, the International Committee of the Red Cross considered that the Bulletin did not intend to be an exhaustive list of applicable humanitarian law [129], but only a reference. Indeed, in

[123] MERON, T., "The Time has come for the United States to Ratify Geneva Protocol I", 88 AJIL 682, 1994; MATHESON, M., "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions", 2 American University Journal of International Law and Policy 419, 1987.

[124] SCHEFFER, supra, 852-853; VITÉ (2005), supra, 190; IRMSCHER, supra, 376; RATNER, S., "Foreign Occupation and International Territorial Administration: The Challenges of Convergence", 16 EJIL 705, 2005.

[125] 88 ASIL Proc. 349 (1994); GREENWOOD, C., "International Humanitarian Law and United Nations Military Operations", 1 Yearbook of International Humanitarian Law 3 (1998); TITTEMORE, B., "Belligerents in blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations", 33 Stanford Journal of International Law 61 (1997); ZWANENBURG, M., *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, 2005, pp. 136-137.

[126] Legal Opinion of the Secretariat of the UN, "Question of the Possible Accession of Intergovernmental Organisations to the Geneva conventions for the Protection of War Victims", UN Juridical Yearbook (1972), 153.

[127] (ST/SGB/1999/13) of 6.08.1999

[128] Road Map towards the implementation of the UN Millenium Declaration, 6 September 2001, UN Doc A/56/326, para. 19

[129] Statement to the Fourth Committee of the General Assembly, 20 October 1999.

relation to the law of occupation, the model agreement between the UN and states contributing to UN missions provides that missions will respect the four Geneva Conventions[130] (even if not all of its rules are contained in the Bulletin). Furthermore, UNSC Resolution 1327 of 13 November 2000, on the strengthening of UN peacekeeping operations, used terms directly taken from the Bulletin. In fact, UNSC Resolution 1327 required compliance with the "*rules and principles of international law, in particular international humanitarian …*"[131] Therefore, UNSC confirmed the applicability of international humanitarian law to UN peace operations. Although it could be argued that the Bulletin and the UNSC Resolution 1327 are directed only towards the conduct of forces deployed under UN authority while engaged as combatants in situations of armed conflicts, IHL norms of customary character would still apply to UN-run administrations once hostilities have ceased.

As some experts[132] have pointed out, the applicability of IHL to UN-authorized mandates is a matter of fact. UNSC binding Chapter VII Resolutions, as well as measures adopted by the authorized administrations, are inherently imposed without the consent of the affected population (in some cases where consent was alleged to have been granted, it has been as result of a threat to use force, e.g. Kosovo[133]). In the end, they are but makeup forms of intrusive intervention (*de facto*) in effective control of the territory under administration[134] and, therefore, they are bound by customary IHL rules.

Consequently, contrary to some suggestions (mainly under the rationale of a "consent" given to the UN deployment)[135], it must be held that the law of occupation was applicable in the case of UNMIK. Of special relevance is the application of IHL norms to the

[130] Draft Model Agreement Between the UN and Member States Contributing Personnel and Equipment UN Peace-Keeping Operations, Annex, 28, UN A/46/185 (1991)
[131] Chapter I, par. 3
[132] Report of the Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces, FAITE, A., and GRENIER, J. (Eds), ICRC, Geneva, 2004, 9.
[133] De WET, supra, 321; MATHESON (2001), supra, 83; RUFFERT, supra, 616. Although in the letter of the President of the Federal Republic of Yugoslavia to the Security Council of 13 December 2000 (S/2000/1184), the newly elected Yugoslav authorities expressed their commitment to respect the provisions of UNSC Resolution 1244 and the military-technical Agreement, it cannot be disregarded that the initial "consent" was vitiated and, according to BAIN, W. (Between Anarchy and Society – Trusteeship and the Obligations of Power, CUP, 2003, 152) relates to "*an arrangement of power rather than one of law*".
[134] Most authors –e.g. ROBERTS, A. ("What is a military occupation", 55 BYIL 289-291, 1984) and BENVENISTI (1993, supra, 3ss)-, noted that some UN transformational administrations may find themselves in situations similar to the IHL definition of occupation. Although SARGA, D. ("The UN as an actor bound by international humanitarian law", in Les Nations Unies et le droit international humanitaire: Actes du Colloque international à l'occasion du 50e anniversaire de l'ONU, Pedone, Paris, 1996, 328) contend that a UN transitional administration should be characterized as "*cooperation*" not as "*occupation*", she does not exclude the possibility of a UN administration being bound by IHL (at 328).
[135] FAITE, supra, 74; VITÉ (2005), supra, 29.

legislative power of the SRSG, which does not derive directly from the UNSC Resolution as already discussed in III.1.a.

The application of IHL norms is not so problematic in the case of Iraq, where -for the first time- (i) a belligerent Occupying Power fully acknowledged (*de facto*) its obligations, and (ii) the UN Security Council endorsed the occupation. Indeed, the US and the UK, although not formally acknowledging their status as Occupying Powers in Iraq[136], committed to comply with the obligations and duties enshrined in the IHL[137]. This represents a significant and rare departure from state practice in virtually all UN era belligerent occupations[138].

Contrary to what has been held by some scholars[139], the Hague Regulations applied both as customary law and as required by the UNSC Resolution 1483. Furthermore, some authors[140] have advocated that state practice, in extensively reforming legislation of occupied territories such as Germany during the WWII, provided for a customary source of authority to endeavour fundamental legislative reform in Iraq excluding the application of IHL provisions. However, those drastic reforms were based on the *debellatio* doctrine, which according to Benvenisti[141] refers to a situation characterised by the total defeat in war of a party to a conflict, disintegration of its national institutions and lack of military support of its allies; that "stateless" situation (or lack of sovereign authority) was used by the allies as a back door to avoid the application of the Hague Regulations and to make fundamental changes. It has rightly been contended that there is no place for it in contemporary practice[142]: sovereignty is no longer the exclusive domain of states[143], but of the people (the preamble to UNSC Resolution 1483 stressed the right of the Iraqi people to determine their own political future).

B) Limitations imposed by Articles 43 of the Hague Regulations and 64 of the IV Geneva Convention

According to Article 43 of the Hague Regulations, when legitimate power passes to the occupying power, the latter must "*take all measures in his power to restore and ensure as far as possible public order and safety while respecting, unless absolute prevented, the laws in force in the country*." This obligation (of means not of results) does not arise until

[136] The only explicit recognition lies in the preamble of UNSC Resolution 1483. Nevertheless, application of the law of occupation is factual and does not require formal declaration.
[137] Although in their letter to the Security Council the US and the UK ambiguously committed to abide by their obligations under international law, they both voted in favour of UNSC Resolution 1483 which obliges them to specifically comply with IHL obligations.
[138] BENVENISTI (2003-a), supra, 20.
[139] YOO, supra, 16.
[140] KASSINGER and WILLIAMS, supra, 218-219; YOO, supra, 16-17; HOPE and GRIFFIN, supra, 886.
[141] BENVENISTI (1993), supra, 92.
[142] SCHEFFER, supra, 848.
[143] BENVENISTI (1993), supra 94-96.

an occupying power has achieved "*effective control*"[144], independently of the lawfulness of the use of force that resulted in the occupation[145] and of the total or partial character of the occupation[146]. It has been criticised that the scope of the authentic French wording of the Article ("*l'ordre et la vie publics*") is much broader than the non-authoritative English version; indeed, according to the French text, the Article encompasses not only "safety", but "*ordinary transactions which constitute ordinary life*"[147] (included the "*commercial life of the community*"[148]). Nevertheless, the legislative history shows that the restriction to legislate affects all regulatory functions of the Occupant and not only those oriented to restoring "*l'ordre et la vie publics*"[149]. Furthermore, the wording "*laws in force*" must be read in a broad sense as meaning ordinary and extraordinary laws, decrees and ordinances.

The IV Geneva Convention does not provide any specific provision regarding the rights or responsibilities in relation to the commercial legislation in force in the occupied territory. Nevertheless according to its Article 64, Occupying Powers can implement provisions which are essential to enabling the Occupying Power to fulfil its obligations to "*maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.*" Although from a literal interpretation of the article it seems to address only penal legislation, in practice its second paragraph affects all types of legislation[150], including commercial legislation[151].

Some authors[152] contend that Article 64 of the IV Geneva Convention supplements (but does not replace[153]) Article 43 of the Hague Regulations. However, it would be more precise to speak of a broadening[154] or relaxation[155] of the possibilities for regulatory intervention by the Occupying Powers. Nevertheless, as a general rule, IHL requires

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[144] KELLY, M., Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework, Kluwer Law International, 1999, 185.
[145] Report of the Expert Meeting on Multinational Peace Operations, supra, 13.
[146] Article 2 of the 1949 Geneva Conventions.
[147] SASSÒLI, supra, 663-664; SCHWENK, E., "Legislative Power of the Military Occupant under Article 43, Hague Regulations", 54 Yale Law Journal 398, 1944-1945; BENVENISTI (1993), supra, 10.
[148] *WHEATON's International Law*, 1929, London, 783.
[149] SASSÒLI, supra, 663; SCHWENK, supra, 395-397.
[150] The explanation given by PICTET (supra, 337) stating that emphasis was put on penal legislation due to concerns of insufficient observance of penal legislation in previous conflicts, has been criticised by BENVENISTI (2003-a, supra, 30) who considers that Occupying Powers have always primarily breached non-penal legislation.
[151] According to BENVENISTI (1993, supra, 101-103) the adjective "penal" was intentionally deleted from the final text of the second paragraph.
[152] ZWANENBURG (2004), supra, 750.
[153] However, BENVENISTI (1993, supra, 103) contends that there exists an effective replacement.
[154] BENVENISTI (1993, supra, 103-104) states that Art. 64 of the IV Geneva Convention has superseded Art. 43 of the Hague Regulations, while VITÉ (2004, supra, 17) considers that it amounts to an excessive "*marge de manoeuvre.*"
[155] BENVENISTI (2003-a), supra, 30.

municipal laws to remain in force during a military occupation. Minimal disruption to civil society is promoted by non-interference with local laws. However, it has been held[156] that the preservation of the *status quo* does not preclude adopting regulatory measures to develop the economy of the administered territory and, even more, that the expression "*ensure*/*assurer*" adopted by Article 43 of the Hague Regulations does not necessarily impose an obligation to preserve the previous *status quo*[157]. Moreover, it has been contended that in a prolonged occupation there is more flexibility to introduce incremental and gradual developments[158]. That approach cannot be shared, as it would amount to a tailored way out of the restrictions imposed by customary IHL (based on an intentional prolongation of the occupation).

The minimal regulatory changes allowed as an exception to the restrictive language of the IHL conventions are to be construed very narrowly. As Pictet[159] sharply puts it, municipal laws cannot be changed by the Occupying Powers "*simply to bring them into accord with its own juridical conceptions.*"[160] Contrary to the false premise that IHL confers a positive right to legislate, international law of occupation seeks to restrict and prohibit the regulatory activity of the Occupying Power. However, the subjective interpretation by the Occupying Powers usually leads to abuse: in the Kosovo case, it was held by the UE Pillar that the reforming of the commercial legislation was aimed to conform to European standards[161]. The same can be argued about the Iraqi liberalization of commercial legislation, which aimed to provide US companies and investments with a better economic environment (though the results were not so good as expected due to security problems and legal uncertainty about future adoption of CPA's reform by the Iraqi government)[162].

Even if Articles 43 of the Hague Regulations and 64 of the IV Geneva Convention are to be considered as rights to legislate (instead of limitations/prohibitions), their exercise should be limited by the application of the doctrine of "abuse of rights". Although the applicability of the doctrine of "abuse of rights" to public international law is not well developed, the majority of the authors who have dealt with it support its application to international relations[163]; especially in regard to State responsibility. Occupying powers are not allowed

[156] FAITE, supra, 75.
[157] VITÉ (2004), supra, 17.
[158] McCARTHY, supra, 63; ROBERTS, A., "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967", 84 AJIL 44, 1990; SASSÒLI, supra, 679. See BENVENISTI (1993, supra, 147) criticisms to this approach.
[159] Supra, 360.
[160] It cannot be accepted the position of DINSTEIN, Y. ("The Israeli Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulations", 25 IYHR 12-16, 1995) and BENVENISTI (1993, supra, 15) that a measure of the legitimacy of a regulatory act depends on the existence of similar measure in the Occupying Power's state.
[161] Website of the EU Pillar in Kosovo, http://www.euinkosovo.org/uk/about/about_pillar.php
[162] CROCKER, B., "Reconstructing Iraq's Economy", 27 The Washington Quarterly 73, 79 and 84, 2004.
[163] GARCIA AMADOR, F.V. in *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, Oceana Sijthoff, 1974, 12-14; RICCI-BUSATTI in *Proceedings of the Advisory Committee of Jurists*, 1920,

to (abusively) exercise their "rights" to legislate in a way which is prejudicial to the interests of the administered territory or which negatively affects "community interests"[164]. Therefore, occupying powers cannot introduce drastic commercial law reform prejudicial to the administered people's fundamental right to freely determine its economic system and policy; fundamental right to self-determination, which could be considered as part of *jus cogens*[165] (and, therefore, as an *erga omnes* obligation).

This obligation imposed by the doctrine of "abuse of rights" would also be applicable to the Security Council. According to Article 2(2) the Security Council should act in good faith and, therefore, it cannot use its rights in an abusive way that prejudices the *jus cogens* right to self-determination of the administered population. Therefore, even if it is argued that UNSC Resolutions are allowed to override customary international law (limitations imposed by Articles 43 of the Hague Regulations and 64 of the IV Geneva Convention) the UNSC is still bound by an imperative obligation and should respect the *jus cogens* right of the administered population to freely determine their own economic system and policy.

An early example of the application of the doctrine of the abuse of rights to occupation is a 1905 American case, *Galban and Company, a Corporation v. the United States*. The court of claims considered that should the merchandise of US citizens imported into Cuba from the US have been exempted from the payment of customs duties (by regulation imposed by the US as occupying power) would have been "*an act of bad faith toward the people of Cuba.*"[166] Some years later, in 1923, the US Department of State instructed its Ambassador in France that, as the power occupying the Ruhr, France was to be considered to be able to exercise the fullest administrative powers if there was "*no abuse of power.*"[167] Although the examples provided are only from the US state practice, they show how the doctrine of "abuse or rights" could be applied to occupying powers.

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pp. 315-6; KISS, A-C., *L'Abus en Droit International*, 1953; LAUTERPACHT, H., *The Function of Law in the International Community*, 1933, p. 298; CHENG, B., *General Principles of Law as Applied by International Courts and Tribunals*, 1953, pp. 121 and 136.

[164] See famous *obiter dictum* of the ICJ in the *Barcelona Traction* case (ICJ Reports 1970, at 32) to characterize obligations *erga omnes* as commitments towards the international community as a whole. Simma, B, "From bilateralism to community interest in international law", 250 RdC 217-384, 1994.

[165] Separate opinion of Judge Ammoun, *Barcelona Traction* case (ICJ Reports 1970, at 72); GROS ESPIELL, H, "Report on the Right of Self-determination", UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/405/rev.1, 1980, at 12; ILC Draft Articles on State Responsibility, Commentary on Article 40, paras. 4-6 in *Official Records of the General Assembly, Fifth-sixth Session* (A/56/10), 2001, 283-284; pronouncements of various states in the UN General Assemblies regarding the discusion on the Draft Articles on the Law of Treaties in 1963 (UN Conference on the Law of Treaties, First Session, 1968, and Second Session, 1969, Official Records) and in 1970 regarding the discusión on the Declaration on Friendly Relations (GAOR, 25th Session, Sixth Committee, A/C.6/SR.1180).

[166] HACKWORTH, *Digest of International Law*, Vol I, US Government printing office, 1940, p. 157.

[167] Ibid, p. 147.

Historically, the municipal laws (of the occupied territory) that regulate private rights, continued in force during the occupation. Changes of the commercial law of the occupied territory were unusual and limited to the normal functioning of the territory. As an example, during the military occupation of California, since the US occupying officers were not acquainted with the Spanish language and forms of conveyancing, titles to many millions of real estates were transferred by the simple deeds of conveyance commonly used in the Unites States (without the stamped paper required by Mexican law)[168]. But that was a temporary usage introduced without reforming the entire commercial legislation and economic policies of Mexico.

Complete replacement of existing commercial legislation in the administered territory could only be exceptionally justified within the limits established by Articles 43 of the Hague Regulations and 64 of the IV Geneva Convention, and as far as those changes do not amount to a drastic transformation of the economy: "*an occupant has no right to transform a liberal into a communist or fascist economy*"[169] (and vice versa, an occupant has no right to transform the economic system of the administered territory into a deregulated free market economy). Nevertheless, some authors[170] contend that without the removal of the hindrances and obstacles to foreign investment and trade contained in the post-Saddam commercial legislation, the CPA would have not been able to effectively administer the territory, ensure security and comply with the obligations laid down in the IHL such as providing for the basic needs of Iraq's population or restoring civil life. CPA's General Counsel, Scott Castle, justified CPA's commercial reforms, "*particularly where those measures support coalition objectives and the security of coalition forces*", on the grounds that "*there's a close nexus between the economic health of Iraq and the security of Iraq.*"[171] Nevertheless, it was clear that the he law of occupation itself was not enough to provide a sound legal framework for some drastic reforms carried out in Iraq (such as Orders 39 on investments and 64 on companies) and Occupying Powers strongly relied on UNSC Resolution 1483 to justify their actions (e.g. the UK Secretary of State for Foreign and Commonwealth Affairs stated that UNSC Resolution 1483 provided a "*sound legal basis for the policy goals of the CPA Foreign Investment Order*")[172].

However difficult it sometimes may be, an important distinction must be drawn between mere "desirability" of the economic reforms and its "absolute necessity"[173]; only the latter

[168] *HALLECK's International Law*, Vol II, London, 1878, p. 461.
[169] FEILCHENFELD, E., *The International Economic Law of Belligerent Occupation*, Carnegie Endowment for International Peace, Washington, 1942, 89-90; BUSTAMANTE, A.S, *Derecho Internacional Público*, Carasa, La Habana, 1937, 324.
[170] KASSINGER and WILLIAMS, supra, 218; HOPE and GRIFFIN, supra, 877 and 888; YOO, supra, 19.
[171] EVIATAR, D., "Free-Market Iraq? Not So Fast," *New York Times*, 10 January 2004.
[172] HC Deb. 20 November 2000 C. 1304 W
[173] SCHWENK (supra, 401) construes the conveniently vague wording "*unless absolute prevented*" (Art. 43 Hague Regulations) as "absolute necessity". It seems more adequate than the "*sufficient justification*" suggested by FEILCHENFELD, supra, 89.

is a matter under the discretion of the Occupying Power in relation to IHL, while the former belongs to the occupied people. In fact, even if the Occupying power is considered entitled to exercise legislative functions, it "*must not exercise this right in a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have bona fide reasons for what it does, and not act arbitrarily and capriciously.*"[174]

As Anghie[175] has remarked, Western benevolent attempts to advance "good governance" (including not only the promotion of democracy, but also the introduction of neo-liberal deregulatory free market economic policies, the "Washington Consensus"[176]) seek to reproduce a set of economic principles and institutions which are considered to be ultimately perfected by western states and which every country should adopt in order to prosper and progress. This form of economic imperialism (which Jessup considered inconsistent with the modern concepts on which the UN is built)[177] merely reproduces the old "civilizing mission"[178]; the idea of paternally imposing, for the "benefit"[179] of the administered population but without their consent[180], so-called "universal" economic standards and policies developed by western countries. Although there is some kind of concern for the administered population, the main goal is to foster and protect the economic interest of the occupying powers (opening the market of the administered territory and establishing a "familiar" legal environment for the international investments).

Similar criticisms can be made in respect to commercial legislation reform in Kosovo (e.g. UNMIK Regulation 2001/3 on foreign investments clearly go beyond mere "*protection or security needs*" and prejudices Kosovo's "internal" self-determination right). Some authors go even further in stating that while the legislation promulgated by the international administrators may appear to pursue a useful result for local population, "*appearance can*

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[174] Judge FITZMAURICE, G., "The law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law", 27 BYIL 12-3, 1950.

[175] ANGHIE, A, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 1st Paperback ed, 2007, 249.

[176] The term firstly coined by WILLIAMSON, J (*Latin American Readjustment: How Much has Happened*, Peterson Institute for International Economics, Washington, 1989) to describe a set of 10 economic policy prescriptions (such as privatization, liberalization of foreign direct investment inflows and trade liberalization) which Washington thought would be good for Latin American crisis-wracked countries gradually transformed into a broader concept, a synonym of (free) market fundamentalism.

[177] JESSUP, P, *A Modern Law of Nations*, Macmillan, New York, 1948, 117.

[178] ANGHIE, supra.

[179] The concept of (free) market fundamentalism (the idea that only deregulatory free market philosophy can provide development and prosperity) has been criticized, among others, by Nobel Laureate, former Senior Vice President and Chief Economist of the World Bank STIGLITZ, J (Globalization and its Discontents, Penguin Books, London, 2002). In May 2003, the IMF partially confirmed the complaints about its liberalization policies: the IMF acknowledged that forcing developing countries to open their markets to foreign investors could increase the risk of financial crises ("Effects of Financial Globalization on Developing Countries: Some Empirical Evidence", IMF, 2003, http://www.imf.org/external/np/res/docs/2003/031703.pdf).

[180] "*Everything for the people, nothing by the people*", Joseph II, Holy Roman Emperor

be deceptive"[181] and that imposed legislation increased instability and uncertainty. This evidences the tension existing among those scholars who support the approach that a market-oriented economy facilitates the stabilization of a post-conflict society[182], and those who contend precisely the contrary; namely that a situation of stability is required in order to develop a capitalist-oriented economy[183]. The case of Iraq clearly evidences that a fast economic transformation into a market-oriented economy, is not the panacea for security problems leading to stability.

C) Temporality and effective publicity of the measures

As stated before, sovereignty over occupied territory does not pass to the Occupying Power. Only transitional authority is assumed. Therefore, no irreversible (legislative) reforms that could not be undone by future governments are permitted. The problem is particularly acute in relation to legislative action on monetary and trade policy and on investments.

In the case of Kosovo, legislative acts adopted by the SRSG in the commercial sphere during the first years of UNMIK (end of 1999-beginning of 2001) continued to have an important impact far beyond the implication of local political institutions. In practice, the SRSG kept a veto-type control and leadership over any legislative act of the Kosovar Parliament (which required to be promulgated by the SRSG). But the solution of the present ambiguous status for Kosovo[184] will not amount to a complete replacement of that commercial legislation. It has already been noted the great involvement of the EU in shaping that legislation under the European standards and its efforts in the European integration of Kosovo. Not only a potential future integration in the EU, but also further loans from the European Investment Bank are at stake and could be compromised in case of "undesired" changes to the EU-style commercial legislation imposed. This can be shown by the deployment of a EU mission (EULEX) in Kosovo with the approval of the UN. The primary goal of EULEX is to "*assist and support the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs areas*"; in order words, to monitor the development of the custom law of Kosovo in compliance with EU principles and standards. In fact, the UN has welcomed the EU's continuing efforts "*to advance the European perspective of the whole of the western Balkans.*"[185]

[181] CHANDLER, D., "The Problems of Nation Building: Imposing Bureaucratic Rule from Above", 17 Cambridge Review of International Affairs, 578-9, 2004.
[182] BARNES, S., "The Contribution of Democracy to Rebuilding Postconflict Societies", 95 AJIL 92, 2001.
[183] GERSON, A., "Peace Building: The Private Sector's Role", 95 AJIL 105, 2001.
[184] Kosovo declared its independence on 17 February 2008 and is seeking recognition.
[185] UNSC SC/9512, 26 November 2008, http://www.un.org/News/Press/docs/2008/sc9512.doc.htm

In Iraq, all CPA's legal reforms remained in force after the transfer of political power to the Interim Iraqi Government. In March 2004, the Iraqi Governing Council (IGC)[186] unanimously approved an Interim Constitution -the Transitional Administrative Law, TAL-[187]. Its Article 26.C stated that legislation promulgated by the CPA was to remain in force "*until rescinded or amended by legislation duly enacted and having the force of law*." Although UNSC Resolution 1546 (dated 8 June 2004) did not contain any mention to the TAL, it imposed on the IGC the obligation to refrain from taking any actions that would have affected Iraq beyond the limited interim period. However, the Constitutional draft[188] approved by public referendum on October 2005, raised certain concerns in respect to the CPA legislation (not expressly mentioned in the text). It could be argued that since the TAL was repealed[189], no grounds for local ratification of CPA's legislation remained. However, it could also be argued that CPA Orders become general valid Iraqi legislation and, therefore, Article 140 ("*Legislation remains in effect as long as it is not nullified or amended in accordance to the rules of this constitution*") should be applied[190].

Following UNSC Resolution 1483, the UN and the World Bank (in conjunction with the International Monetary Fund and other expert organisations) issued the UN/World Bank Joint Iraq Needs Assessment[191], evidencing the acute economic problems. It is against this background that the Secretary General reaffirmed the need to undertake the drastic transformation from a centrally planned economy to a market-oriented one[192]. There exists a strong pressure on the Iraqi government not to return to the *status quo* previous to the occupation and to maintain the commercial regulations imposed by the CPA. Undesired modification of specific CPA Orders (such as those regarding the protection of intellectual property rights) could harm its desire to join the WTO; more importantly, it could also risk the fulfilment of the economic program imposed by the International Monetary Fund (IMF) as a condition for the granted loans (stand-by agreements): SDR 475.4 million in 2005[193] and SDR 745.36 million in December 2007[194]. Such loans were a first-step condition for debt reduction negotiations with Iraq's Paris Club creditors. Furthermore, although two

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[186] Appointed by CPA Regulation N. 6 to serve as a transitional government and formally recognised by UNSC Resolutions 1500 and 1511.

[187] For a commentary on the TAL, BROWN, N., "Transitional Administrative Law Commentary and Analysis", 7/8 march 2004 (updated 30 December 2005). http://www.geocities.com/nathanbrown1/interimiraqiconstitution.html

[188] http://www.iraqigovernment.org/Content/Biography/English/consitution.htm

[189] Arts. 152 of the Constitution and 62 of the TAL make it explicit.

[190] According to BROWN (supra, 15) a committee started reviewing CPA legislation in 2004 and recommended the repeal or amendment of some measures.

[191] http://siteresources.worldbank.org/IRFFI/Resources/Joint+Needs+Assessment.pdf#search=%22UN%20World%20bank%20joint%20iraq%20needs%20assessment%22

[192] Report of 17.07.2003 (S/2003/715)

[193] IMF Fifth Review of the Stand-by Agreement, August 2007, http://www.imf.org/external/pubs/ft/scr/2007/cr07301.pdf

[194] IMF Second Review of the 2nd Stand-by Agreement, Dec. 2008, http://www.imf.org/external/pubs/ft/scr/2008/cr08383.pdf

thirds of the Iraqi's debt is held by non-Paris club governments, there was a strong US promotion –inside and outside the Paris club- for relevant Iraq debt relief[195]. To corroborate this, in October 2006 the Government of Iraq's Council of Representatives passed a National Investment Law[196] (published in the Official Gazette as Law No. 13 of 2006 on January 17, 2007) that stills need to be implemented[197]. Although its article 34 formally revoked CPA Order 39 on foreign investment, generally follows the investor-friendly guidelines established by the later.

Finally, it must be noted that Article 65 of the IV Geneva Convention clearly requires that adopted measures "*shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language.*" However, in both scenarios –Kosovo and Iraq- the administered population lacked timely awareness –or even complete misinformation- of the legal changes introduced by the CPA/UNMIK. As it has been noted before (II.1 and II.2), there were long delays in releasing translations of the CPA/UNMIK regulations and inconsistencies with the prevailing English version were frequent.

D) Incompatibility with transformational interventions

Unsurprisingly, some scholars have contended that the law of occupation is insufficient[198] and inadequate[199] for recent transformational interventions. They call for a revision[200] of the law of occupation, which allows for more latitude[201] or even for a new particular regime[202]. Others have even argued that the recent experience of the CPA in Iraq shows that the restriction to legislate (in economic matters) imposed by the law of occupation could no longer be considered as customary international law[203]. In the most extreme position, it has been argued that in UN-authorized missions the law of occupation should be "*returned to the box*" and that strict application of the law of occupation "*could have the perverse effect*

[195] WEISS, M., Report for the US Congress, CRS, updated 19 January 2005. http://fpc.state.gov/documents/organization/44019.pdf#search=%22%22Iraq%3A%20Paris%20Club%20Debt%20Relief%22%22

[196] The 2006 National Investment Law does not cover banking, insurance and the extraction and production of oil and gas. Those areas are covered by separate laws.

[197] For an English version, http://www.investpromo.gov.iq/english/investment-law.htm or http://www.isx-iq.net/page/english/Investment%20Law%20No.%2013%20of%202006.pdf

[198] PERRITT, "Structures and Standards for Political Trusteeship", 8 UCLA J. Int'l & For. Aff. 414, 2003; De WET, supra, 329; McCARTHY, supra, 66.

[199] SCHEFFER, supra, 851; OTTOLENGHI, M., "The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation", 72 Fordham L. Rev. 2209, 2003-2004; BHUTA, N., "The Antinomies of Transformative Occupation", 16 EJIL 740, 2005.

[200] GOODMAN, D.P., "The Need for Fundamental Change in the Law of Belligerent Occupation", 37 Stan LR 1579, 1985.

[201] SCHEFFER, supra, 849.

[202] VITÉ (2005), supra, 25-26.

[203] LANCASTER, N.F, "Occupation Law, Sovereignty and Political Transformation: Should the Hague Regulations and The Fourth Geneva Convention Still be Considered Customary International Law?", 189 Mil. L. Rev. 51-91, 2006

of harming the population more than would a UN-authorized deployment tailored to the specific needs of the target society"[204]. On the contrary, it has been contended that the law of occupation can still be considered an important working framework without any need for reform (except for some specific derogations -by the UN Security Council- of certain provisions in exceptional cases[205]).

In any case, confusion between *lex ferenda* (what the law should be) and *lex lata* (what the law actually is) should be avoided. In both cases, Kosovo and Iraq, Articles 43 of the Hague Regulations and 64 of the IV Geneva Convention imposed strict limitations and allowed only minimal regulatory changes. However, it is true that Article 6 of the IV Geneva Convention makes all its provisions applicable for only one year following "*the general conclusion of military operations*" and that it is not clear whether or not art. 3.b of the 1977 Protocol I has become customary. Therefore, it could be argued that limitations imposed by Articles 43 of the Hague Regulations and 64 of the IV Geneva Convention do not apply to long, transformative occupations. Nevertheless, as it has been noted before, both occupying powers and the UNSC should act in good faith (without using their rights in an abusive way) and should respect the *jus cogens* right of the administered population to freely determine their economic system and policy. Therefore, they are not entitled to introduce drastic reforms in the economic institutions and commercial legislation that could prejudice such right of the administered population.

3. Involvement of local political actors and vicarious authority

The current approach supporting the wholesale imposition of artificial solutions designed and pre-selected in Western capitalist countries[206] "*is a bureaucratic fantasy, which causes more problems than it solves.*"[207] Therefore, implication of the local population of the administered territory should be the highest possible in order to give it ownership of the transition process.

The Secretary General[208] strongly emphasised not only the need to enhance legitimacy, but also to respond to local expectations and to protect local cultural traditions rather than merely follow donors' interests (donors tend to determine and impose "rule of law" reform priorities, in particular, the reformation of the commercial laws of the administered territory). However, it has been noted[209] that some historical shortcomings (vitiated from

[204] SCHEFFER, supra, 853 and 859.
[205] ZWANENBURG (2004), supra, 768; BENVENISTI, 2003-a, supra, 37.
[206] Western countries, mainly US, assume they have some kind of leading, exclusive role of legal reformation and "*transitional countries are bombarded with fervent but contradictory advice on judicial and legal reform*" (CAROTHERS, T., "The Rule of Law revival", 77 Foreign Affairs 95-106, 1998).
[207] CHANDLER, supra, 578.
[208] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN doc. S/2004/616, 3 August 2004.
[209] STAHN (2005), supra, 9-10.

the trust model) of the law-making process still remain: the predominance of the preferences and choices of the international administration, the (almost) irrelevant involvement of local political actors, or even their non-democratic appointment by the international administrators. The release of the Brahimi Report in 2000[210] gave raise to controversial scholarly discussion around the adoption of pre-formulated interim legal codes (to be used in critically instable early stages and subject to later replacement by local codes). However, the bulk academic discourse, as well as the Report, focuses on criminal justice, disregarding civil and commercial legal aspects. The reason being that the rationale behind the promotion of criminal justice codes (the need of dealing with critically instable and violent early stages), does not apply in the commercial sphere. In any case, the important risks of clash with local legal culture and strategies[211], as well as the strong policy implications of such commercial reforms, would be enough to discourage any attempts towards a precooked commercial code with artificial solutions.

Some experts[212] contend that sufficient local involvement should not prejudice the imperative exercise by the transitional administration of a robust authority to fulfil the mandate in an adverse environment. The rationale behind it –to secure imposition of international community objectives when confronted with opposed strategic objectives of local actors-[213], is at odds with the principle (recognised in UNSC Resolution 1244 and the law of occupation) that sovereignty remains in the territory under temporal administration. The conflict is addressed with the concept of "conditional independence"[214], that is, the territory under administration –although sovereign- will not be given full independence until it achieves certain conditions imposed by the international community, such as a viable market-based economy. This has been the case in both, Iraq and Kosovo. That rationale is connected with the criticised[215] paradigm of "failed states"[216] (inherited from the trust system) according to which recent international interventions have responded to the collapse of local institutions and government, where there is no availability of local actors with legitimacy and capacity to fill the governmental vacuum. However, fundamental legal reformation with long-term, or even irreversible, effects (such as the establishment of a liberal market-oriented economy), should not be carried out by international administrations, but by representative local institutions.

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[210] Supra.

[211] See HARPER, E., ("Beyond Brahimi, The effectiveness and Sustainability of UN Legal Codes in Post-Conflict Situations", FRIDE, 2005) analysis on the Brahimi codes, connected with her field experience in East Timor.

[212] International Peace Academy Report, "You The People: Transitional Administration, State-Building and the United Nations", 2002, 9.

[213] See the paternalistic approach of HOPE and GRIFFIN (supra, 900-902) which encourages local involvement only because it is the best way to ensure continuity of the CPA commercial reforms.

[214] BAIN, supra, 162.

[215] WILDE (2004), supra, 85-91.

[216] HELMAN, D., and RATNER, S., "Saving Failed States", 89 Foreign Policy 3, 1992; BAIN, supra.

UNMIK Regulation 2000/1, of 14 January 2000, provided for a Joint Interim Administrative Structure for Kosovo in order to (at least theoretically) promote local involvement. Within such administrative structure, the Interim Administrative Council (whose members were elected by the SRSG[217]) was vested with some pragmatic power to make recommendations to the SRSG for amendments to the applicable law and for new regulations, as well as to "*propose policy guidelines for Administrative Departments in applying the applicable law.*"[218] However, the IAC was tightly controlled by the SRSG who presided over its meetings[219] and was entitled to take unilateral decision when the minimum of three quarters majority (of those present and voting) was not reached[220]. The SRSG was also allowed to disregard a duly adopted decision of the IAC, by merely advising in writing within seven days explaining the reasons for his differing decision[221].

UNMIK Regulation 2001/9 further established a Constitutional Framework for the exercise of public authority by Kosovo's institutions of self-government during the UN transitional administration. It was a mere UNMIK Regulation that did not enjoy any special prevalence and, therefore, was subject to amendments by the SRSG on its own initiative[222]. Chapter 9, Section 1, established an Assembly as "*the highest representative and legislative Provisional Institution of Self-Government of Kosovo*". The Assembly was entitled to adopt laws and resolutions[223] in the areas of responsibility of the Provisional Institutions of Self-Government as set out in Chapter 5, such as economic and financial policy; fiscal issues; and domestic and foreign trade, industry and investments[224]. However, the SRSG kept an inherent informal veto over any law adopted by the Assembly[225]. Since the Assembly of Kosovo was not allowed to "*affect or diminish the authority of the SRSG to ensure full implementation of the UNSCR 1244*"[226], no commercial law adopted by the Assembly in contradiction with the UN goal of establishing a market-oriented economy received promulgation by the SRSG (e.g., the Law on obligations No. 2004/25 adopted by the Assembly on 28 July 2004 was never promulgated by the SRSG).

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[217] Ibid, Chapter 4.1
[218] Ibid, Chapter 3.1
[219] Ibid, Chapter 5.1
[220] Ibid, Chapter 6.3
[221] Ibid, Chapter 6.2
[222] UNMIK Regulation 2001/9, Chapter 14.3
[223] Ibid, Chapter 9.1.26.
[224] Different commercial laws were adopted by the Assembly of Kosovo pursuant to those responsibilities. Among others, the Law N. 2002/4 on Mortgages adopted on 17.10.2002 (promulgated by the SRSG UNMIK/REG/2002/21 on 20.12.2002); Law 2004/17 on Consumer Protection adopted on 16.06.2004 (promulgated by the SRSG UNMIK/REG/2004/42 dated 19.10.2004); Law 2004/18 on International Trade adopted on 16.06.2004 (promulgated by the SRSG UNMIK/REG/2004/43 dated 20.10.2004); Law 2004/36 on Competition adopted on 8.09.2004 (promulgated by the SRSG UNMIK/REG/2004/44 dated 29.10.2004); Law N. 2004/49 on Patents adopted on 27.09.2004 (promulgated by the SRSG UNMIK/REG/2004/56 on 21.12.2004) …
[225] Coordinated lecture of Chapters 9.1.27, 9.1.44 and 9.1.45 of the UNMIK Regulation No. 2001/9.
[226] Chapter 12 of the UNMIK Regulation No. 2001/9.

More importantly, in some cases the SRSG introduced changes to the original law in the promulgating UNMIK regulation (which was the only enforceable version by the courts since laws and resolutions of the Assembly, *per se*, were non-binding[227]), or even conditioned its promulgation to the adoption of supplementary legislation[228]. The OSCE Mission in Kosovo critically denounced[229] that those modifications ranged from the replacement of individual wording[230] to the introduction of completely new paragraphs and sections[231]. Therefore, UNMIK did not act just as a mere "*negative legislator*"[232] (as suggested by some author[233]) -annulling or not promulgating unconstitutional laws passed by the Assembly of Kosovo-, but as the ultimate legislative power in Kosovo actively introducing changes to the laws passed by the Assembly of Kosovo –which goes well beyond the passive role of the constitutional courts-.

In Iraq, an Interim local government (the IGC) was also appointed by CPA Regulation N. 6 and later formally recognised by UNSC Resolutions 1500 and 1511. The latter Resolution emphasised the "*temporary nature*" of the CPA transitional administration, which was to cease once "*an internationally recognized, representative government established by the people of Iraq is sworn in.*"[234] However, although the IGC was the temporal recipient of the Iraqi's sovereignty, it was not entitled to exercise it. The exact powers and authorities of the IGC were not detailed and the supposed coordination with the CPA was unclear. Nevertheless, the CPA relied in the IGC "puppet" involvement not just because "*Iraqis are in the best position to determine what promotes their welfare*"[235], but as a way of acquiring vicarious legitimacy in order to derogate from the law of occupation[236]. However, the IGC had to fight itself for legitimacy from the beginning[237]. This was mainly due to the fact that the IGC was perceived as a "creature"[238] of the CPA (which had leading role and veto) and

[227] Chapter 9.1.27 and 9.1.45 of the UNMIK Regulation No. 2001/9.
[228] See e.g. UNMIK Regulation No. 2002/22 on the Law No. 2002/5 on the Establishment of an Immovable Property Rights Register.
[229] "*Implementation of Kosovo Assembly Laws, Report II*" (in relation to laws promulgated during 2004), December 2005, 29. Available at http://www.osce.org/documents/mik/2005/12/17515_en.pdf
[230] See e.g. UNMIK Regulation No. 2004/56 on the Patent Law No. 2004/49; UNMIK Regulation No. 2006/17 on the Industrial Designs Law No. 02/L-45.
[231] See e.g. UNMIK Regulation No. 2004/44 on the Competition Law No. 2004/36; UNMIK Regulation No. 2004/30 on the International Financial Agreements Law No. 2004/14; UNMIK Regulation No. 2006/28 on the Foreign Investment Law No. 02/L-33.
[232] A role attributed by Kelsen to the constitutional courts. See KELSEN, H, *General Theory of Law and State*, Vol 1, Russell & Russell, New York, 1961, 268-269.
[233] KNOLL (2008), supra, 347.
[234] Para. 1 of UNSC Resolution 1511.
[235] ZWANENBURG (2004), supra, 767.
[236] McCARTHY, supra, 57.
[237] International Crisis Group, "Governing Iraq", Middle East Report N. 17, August 2003
[238] GRANT (2003-a, supra)

that most of the IGC members were Iraqi exiles (due to the initial de-Ba'athification[239] carried out by the CPA and promoted by UNSC Resolution 1483[240]).

In addition, it must be stressed that Article 47 of the IV Geneva Convention prohibits the weakening of the rights enshrined in the Convention through changes in the local institutions or agreements with the authorities of the occupied territory. Therefore, the CPA cannot be used to justify structural changes contrary to Article 64 of the Convention. Similar conclusion can be reached in relation to the Interim governance bodies in Kosovo, which were established by the SRSG and put under its tight control.

IV. REVIEWING AND ACCOUNTABILITY PROBLEMS

An elusive essential factor that any transformational intervention should meet is the requirement of public accountability. Although the rule of law doctrine –which dictates that no one is above the law[241]-, remains applicable during a military occupation (as none of the applicable treaties on occupation confer immunity on Occupying Powers from the jurisdiction of local courts) or any UN-authorized mission[242], its application is somewhat distorted.

Even though the trusteeship system provided for in Chapter XII of the UN Charter is generally rejected[243] as a model for these transitional administrations, some experts have pointed out[244] that it benefited from the advantage of some built-in accountability procedures that recent transformational missions lack. Indeed, in the cases of the Danzig[245] and Saar[246] administrations under the League of Nations, the Permanent Court of International Justice had a role as an instance of review. On the contrary, the important lack of reviewing and accountability structures (for law-reforming and law-making powers) in

[239] CPA Order N. 1, De-Ba'athification of Iraqi Society, 19 May 2003.
[240] One of the reasons was to avoid an alternative government-in-exile, which could "*expose the CPA and the interim administration to the charge of usurpation*" (Grant, 2003-b, supra, 828).
[241] Report of the UN Secretary General, UN Doc S/2004/ 616, para. 33.
[242] STAHN (2005, supra, 6) notes the UN reluctance towards independent review of UN transitional administration in general and lawmaking functions in particular.
[243] De WET (supra, 306); International Peace Academy Report, supra, 9. However, some authors (PERRITT, supra, 38 9) advocate in favour of a so called "*Political Trusteeship*" modelled on a common law trust and borrowing concepts and legal basis from the League of Nations mandate system and Chapter XII of the UN Charter (as well as State practice since WWII). Arguably, the most striking point advocated by PERRITT (at 420-421) is that sovereignty should be trusted on the international intervening administration (contrary to recent cases in Kosovo and Iraq but based on the Trusteeship model) to be exercised for the benefit of local population. This (he argues at 424) would avoid the limitations imposed by IHL to pursue drastic legislative reforms as required by the UN Resolutions (as was the case in Kosovo and Iraq).
[244] International Peace Academy Report, supra, 9.
[245] The Danzig case is not exactly the same as the main legislative powers remained within the local Legislative Assembly.
[246] Decrees issued by the Governing Commission were directly applicable in the administered territory.

recent transformational interventions is evidenced in the cases of Kosovo and Iraq. Thus, resulting in what Chandler identifies as "*autocratic rule of unelected and unaccountable international mandarins*"[247] and others define as "*benevolent dictators*"[248]. Neither the UNSC Resolutions 1244 (Kosovo) and 1483 (Iraq), nor the laws of occupation contain a mechanism for their duly enforcement. Therefore, without specific ad hoc mechanisms and taking into account that the ICJ may only exercise jurisdiction where the states party to the dispute have given their consent[249], the enforcement is essentially left to the discretion of the intervening powers.

Furthermore, the doctrinal categorization of the legislative acts adopted by international administrations as "*sui generis*"[250] has been criticised[251] for being used as an excuse for excluding them from pure domestic legislation (in order to avoid the review of the legality of such legislative acts by domestic authorities). It must be noted that international transformational administrations involved in the government or co-government of the territory enjoy a "functional duality"[252] as acting both internationally and domestically (as surrogate authority of the territory under administration). Therefore, some of the legislative acts promulgated by the UNMIK and the CPA should be considered as domestic[253] and subject to legal review by domestic courts.

UNMIK Regulation 2000/38[254] established the only mechanism for control of the UNMIK legislative activity. The institution of the Ombudsperson, acting independently, was created to provide, among other functions, "*accessible and timely mechanisms for the review and redress of actions constituting an abuse of authority by the interim civil administration*"[255]. However, its powers were limited to soft functions without enforcing effect; namely, to "*receive complaints, monitor, investigate, offer good offices, take preventive steps, make recommendations and advise*"[256]. Furthermore, the SRSG not only was entitled to refuse cooperation with the ombudsperson by merely providing the reasons of such a refusal in

[247] CHANDLER, supra, 578.
[248] International Peace Academy Report, supra, 9.
[249] In light of the adverse findings against the US in *Nicaragua v United States of America* (Merits ICJ Reports 1986), occupying powers are unlikely to consent to the ICJ handling disputes involving potential violations of the law of occupation.
[250] See RUFFERT (supra, 624) in relation to UNMIK Regulations and De WET (supra, 331) for CPA's Orders.
[251] STAHN (2005), supra, 6
[252] STAHN (2005), supra, 21-22 and (2001), 145-148 citing the Constitutional Court of Bosnia and Herzegovina, Case N. U 9/00 of 3.11.2000; WILDE, R., "The Complex Role of the Legal Adviser when International Organizations Administer Territory", in American Society of International Law, Proceedings of the 95th Annual Meeting, 2001, 254-255;
[253] STAHN (2005), supra, 22; De WET, supra, 331.
[254] http://www.unmikonline.org/regulations/2000/re2000_38.htm
[255] UNMIK Regulation 2000/38, Section 1.2
[256] Ibid, Section 4.1

writing[257]; it was also the authority in charge of appointing the ombudsperson and deciding over its renewal[258]. Such power vested on the SRSG was at odds with the alleged independence of the ombudsperson. In addition, according to the Report of the Secretary General on UNMIK[259], the SRSG was the final authority in the interpretation of UNSC Resolution 1244. Therefore, the impact of the Ombudsperson has been small.

Without prejudice to the 1946 Convention on the Privileges and Immunities of the United Nations, Section 3 of UNMIK Regulation 2000/47 "on the status, privileges and immunities of KFOR and UNMIK and their personnel in Kosovo" granted UNMIK as institution, its international and local personnel and the SRSG, immunity (subject to discretionary waiver by the Secretary-General) in respect of all acts performed by them in their official capacity (included their legislative acts). Section 4 even extended that immunity to UNMIK contractors, their employees and sub-contractors in matters relating to the terms and conditions of their contracts (i.e. international consultants in relation to legislative reviewing and reform). However, the Ombudsperson held that the rationale for classical grants of immunity did not apply to the circumstances prevailing in Kosovo, where UNMIK acted "*as a surrogate state*"[260]. It further recalled[261] that UNMIK Regulation 2000/47 did violate the international requirement that any legislative authority should be subject to an independent judicial review and, more precisely, that such regulation breached the right of access to court guaranteed under Article 6 of the European Convention on Human Rights[262] (granting immunity from any civil liability claim against UNMIK). UNMIK Regulation 2000/47 only provided for the creation of "claims commissions"[263] to settle certain third party claims[264], but did not include cases of authority abuse by UNMIK. Furthermore, those claims commissions did not comply with the objective criteria of independence and impartiality[265]. No effective measure was adopted in response.

It has been criticized[266] that the institution of the Ombudsperson is not enough and that a more comprehensive mechanism is required. In this line, some experts advocated for the creation of "*clear codes of behaviour for international administrators or advisors and mechanisms to hold them accountable for infringing them.*"[267] At the time, there only exists a Handbook of Peacekeeping best practices[268], which "*is not intended to provide strategic*

[257] Ibid, Section 4.7
[258] Ibid, Section 6.2
[259] Supra, para. 44
[260] Special Report N. 1, supra, Para. 23.
[261] Ibid, Para. 24
[262] Ibid, Para. 69.
[263] Section 7 of the Regulation.
[264] Claims of property loss or damage and personal injury, illness or death that arise from or may be directly attributed to UNMIK or its personnel.
[265] Special Report N.1, supra, Para. 78.
[266] International Peace Academy Report, supra, 9.
[267] Ibid.
[268] UN Department of Peacekeeping Operations, November 2003

or policy guidance". The establishment of the UN Peacebuilding Commission was very much welcomed, though it is not clear to what extend it will help in reviewing and analyzing legal and practical problems of past Chapter VII interventions to develop some general guidelines.

CPA Order N. 17[269] (amended on 27 June 2004 to greatly extend its effects far beyond the dissolution of the CPA) also formally stated that coalition personnel, as well as contractors and subcontractors –including international consultants to the Iraqi government- supplying services in Iraq under contracts or grants with foreign governments[270], were not subject to Iraqi laws or the jurisdiction of Iraqi courts, but to the exclusive jurisdiction of the state contributing them to the Coalition.
Nor the UNSC Resolution 1483, neither the law of occupation provided for any effective mechanism of accountability in the case of Iraq. Although according to the latter, the Occupying Powers are not allowed to absolve themselves of any liability incurred in respect of grave breaches[271], violations of Articles 43 of the Hague Regulations and/or 64 of the IV Geneva Convention in relation to legislative modification do not qualify as grave breaches[272]. Furthermore, although Article 90 of Additional Protocol I to the Geneva Conventions[273] provides for a Fact-Finding Commission, it has never achieved a tangible result[274] and lacks real enforcement powers. Furthermore, as it has been stated before in this paper, the US is not a party to the Protocol and it is not clear the customary character of its norms.

V. CONCLUSIONS

The profound reforms introduced in the commercial laws of Kosovo and Iraq outlined two basic problems: legality of those reforms and public accountability for the abuse of the legislative function.

As to the issue of the legality of the extensive regulatory function exercised in Iraq and Kosovo by international territorial administrations, practice has shown that strictly

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http://www.peacekeepingbestpractices.unlb.org/pbpu/handbook/Handbook%20on%20UN%20PKOs.pdf#search=%22Handbook%20on%20multidimensional%20peacekeeping%22

[269] Order on the Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, 26.06.2003

[270] It is the case of law firms and lawyers (i.e. the US Squire, Sanders & Dempsey) assisting the CPA in reforming commercial legislation.

[271] Art. 148 of the IV Geneva Convention

[272] Art. 147 of the IV Geneva Convention and (in relation to the UK) Art. 85 of the Additional Protocol I to the Geneva conventions.

[273] ICRC's Commentary to Art. 90 of the Additional Protocol I, http://www.icrc.org/IHL.nsf/1a13044f3bbb5b8ec12563fb0066f226/749bdbbd381e48a6c12563cd00437e6d?OpenDocument

[274] No enquiry has ever been conducted under Art 90 mechanism, even though (since 1991) the required number of State Parties agreed to accept the competence of the Commission.

Occupying Powers and UN-authorized administrations under Chapter VII, however different they appear to be, converge on their search for the best approach to apply multiple and competing legal frameworks. Indeed, UN Chapter VII interventions are intrusive interventions *de facto* in effective control of the territory under administration, so the law of occupation is also applicable to them and not only to strictly belligerent Occupying Powers.

Articles 43 of the Hague Regulations and 64 of the IV Geneva Convention still impose strict limits on the regulatory authority of an occupying power and, therefore, occupying powers are not entitled to introduce profound reforms in the commercial laws of the administered territory. This limitation is further strengthened by the doctrine of "abuse of rights" and the obligation contained in art. 2(2) of the UN Charter to act in good faith: occupying powers are not entitled to legislate in a way that prejudices the right of the administered people to freely determine their own economic system and policy.

Before any unforeseen revision allowing for more latitude in the law of occupation takes place, international territorial administrators tend to rely on extremely vague UNSC Resolutions. Art. 103 of the UN Charter seems to entitle the Security Council to derogate from (conventional and customary) limitations imposed by the law of occupation. However, the Security Council must act in good faith (art. 2.2 of the UN Charter) and cannot derogate from *jus cogens* norms (e.g. right of self-determination). Therefore, UNSC resolutions (i) should provide an alternative legal standard to be applied (for the control of the delegated regulatory power) in case they expressly override obligations imposed by the law of occupation and, more importantly, (ii) UNSC resolutions cannot entitle international administrations to profound commercial reform that prejudices the right of the administered people to freely determine their own economic system and policy.

In addition, both cases of international territorial administrations have also tried to rely on the potential authority derived from the involvement of local political actors. Yet, practice has shown that the alleged local involvement is deceitful and has been tightly controlled, so cannot be used to justify profound structural changes (such as transformation from a socialist economy to a market-oriented system) contrary to the limits imposed by the IHL.

Furthermore, public accountancy for the abuse of the legislative function continues to be an important concern. Although the rule of law doctrine remained applicable in both cases of transformational intervention, there was no effective and independent mechanism for the reviewing and accountability of the regulatory functions carried out by the transformational administrations in Iraq and Kosovo.