

An Overview of Legal Restraints on Security Council Chapter VII Action with a Focus on Post-Conflict Iraq

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1. Introduction

The debate about the limits of the Security Council enforcement powers dates back to the Dumbarton Oaks proposals and the *travaux préparatoires* of the UN Charter. The Security Council was meant to be a political organ with broad police-like functions, endowed with the primary responsibility to maintain international peace and security, which is the main purpose of the United Nations. The UN itself was likewise structured from the outset to be ‘a universal instrument of geopolitics’.¹ The post-Cold War revival of the debate was not only due to the impressive quantitative² and qualitative³ reactivation of the Security Council, but it was also seen as an essential component of the increasing endeavors to foster the rule of law in international relations. Although the question of legal limits on the Council’s powers is more properly discussed in conjunction with the question of judicial review, these are two separate issues.⁴ Indeed, an *ultra vires* act of the Council can arguably have distinct legal consequences,⁵ notwithstanding its judicial review.

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¹ Falk, ‘The United Nations and the Rule of Law’, 4 *TLCP* (1994) 625. See also Eagleton, ‘International Law and the Charter of the United Nations’, 39 *AJIL* (1945) 751-752; Kunz, ‘The United Nations and the Rule of Law’, 46 *AJIL* (1952) 505.

² Since 1990 the Security Council has adopted more than 900 resolutions as compared to the 646 resolutions it had adopted in the first forty-five years of its function.

³ Acting under Chapter VII of the Charter, the Security Council has gone as far as, *inter alia*, to establish a Compensation Commission for Iraq, a Demarcation Commission for the Iraq-Kuwait boundary (SC Res. 687, 3 April 1991), two International Criminal Tribunals, for the former Yugoslavia (SC Res. 827, 25 May 1993) and Rwanda (SC Res. 955, 8 November 1994) and far-reaching Transitional Administrations in Kosovo (SC Res. 1244, 10 June 1999) and East Timor (SC Res. 1272, 25 October 1999).

⁴ Skubiszewski, ‘The International Court of Justice and the Security Council’, in V. Lowe and M. Fitzmaurice (Eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (1996) 626-627; Gowlland-Debbas, ‘UN Sanctions and International Law: an Overview’, in V. Gowlland-Debbas (Ed.), *United Nations Sanctions and International Law* (2001) 14.

⁵ For instance, this can be the case of the controversial ‘right of last resort’ of Member States to refuse, under certain conditions, to abide by an *ultra vires* decision of the Council. Earlier proponents of this right include Virally, ‘L’ONU devant le droit’, 99 *JDI* (1972) 531; D. Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (1975) 174. *Contra* Wright, ‘The Strengthening of International Law’, 98 *RCADI* (1959-III) 125; Osieke, ‘The Legal Validity of Ultra Vires Decisions of International Organizations’, 77 *AJIL* (1983) 255.

The present paper aims to sum up the main points of the debate and then focus on the Council's controversial involvement in post-conflict Iraq. Thus, Part One will trace the legal basis for such restraints in the UN purposes and *jus cogens* norms. As a case-study, Part Two will then consider whether Security Council resolutions on Iraq 1) had any legalizing effect upon the US-led war of March 2003; 2) were impermissibly at variance with the international law of occupation; or 3) impinged upon the right of the Iraqi people to self-determination.

2. An Overview of Legal Restraints on Security Council Enforcement Action

A. The Legal Basis of Such Restraints

The initial question is whether the Security Council is bound by the law or whether it is omnipotent and *legibus solutus*. The answer to this question is that the Council is not sovereign; it is not above the law.⁶ Despite its predominantly and *par excellence* political character and functions, it is still an organ of an international organization, deriving its very broad powers from a treaty concluded by States. It is very unlikely that an organization based on the principle of sovereign equality of its Member States would confer unlimited powers to any of its organs.⁷ This has been reaffirmed in the early jurisprudence of the ICJ⁸ and more recently by the ICTY Appeals Chamber in the *Tadic* case.⁹

It is also maintained that article 25 of the UN Charter serves as a specific legal basis for the Council's obligation to respect the Charter. Under such interpretation of article 25, States should accept and carry out only those decisions of the Council which are *intra vires* and consistent with the Charter.¹⁰ In the *Namibia* Advisory Opinion, the ICJ found that the relevant Security Council decisions were adopted in conformity with the purposes and principles of the Charter and in accordance with Articles 24 and 25; the decisions were 'consequently binding on

⁶ See, *i.a.*, Pellet, 'Peut-on et doit-on contrôler les actions du Conseil de Sécurité?', in SFDI (Ed.), *Le Chapitre VII de la Charte des Nations Unies* (1995) 233; Dugard, 'Judicial Review of Sanctions', in Gowlland-Debbas (Ed.), *supra* note 4, at 86. But see J. F. Dulles, *War or Peace* (1950) 194-195.

⁷ Simma, 'From Bilateralism to Community Interest in International Law', 250 *RCADI* (1994-VI) 270.

⁸ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, ICJ Reports (1948) 64 ('[t]he political character of an organ cannot release it from the observance of treaty provisions established by the Charter, when they constitute limitations on its powers or criteria for its judgment').

⁹ *Prosecutor v. Tadić*, No. IT-94-1-AR72, at para. 28 ('[t]he Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be').

¹⁰ See, *eg.*, Schilling, 'Die 'neue Weltordnung' und die Souveränität der Mitglieder der Vereinten Nationen', 33 *AVR* (1995) 68, 94, 96; Zemanek, 'The Legal Foundations of the International System. General Course on Public International Law' 266 *RCADI* (1997) 96. For the opposite view, see, *i.a.*, Nawaz, 'Law and International Organization – A Perspective on the United Nations', 17 *Indian JIL* (1977) 239; Suy, 'Article 25', in J.-P. Cot and A. Pellet (Eds.), *La Charte des Nations Unies* (1991) 481.

all States Members of the UN, which [we]re *thus* under obligation to accept and carry them out'.¹¹

B. The Substantive Limits of Security Council Enforcement Action

Indeed, it is article 24 of the Charter and the very purposes and principles of the UN to which it is referring, that can serve as workable limits on the SC powers.¹² Even if the UN purposes are ambiguous, conflicting and indeterminate,¹³ the Council has to act in accordance with (all of) them and, thus, strike in all cases the concrete and proper balance between the primary goal of maintaining peace and security and the other UN purposes.¹⁴ This implies respect for core provisions of human rights¹⁵ and humanitarian law,¹⁶ as well as the right to self-determination¹⁷ and territorial integrity of States;¹⁸ indeed, any violation of these would in all probability amount to a violation of a *jus cogens* norm.¹⁹

C. The Power of the Security Council to Override (Non-Peremptory) Norms of International Law under its Chapter VII Powers

¹¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 53, at para. 115 (emphasis added).

¹² See to that effect, J. Verhoeven, *Droit international public* (2000) 826; Angelet, 'International Law Limits to the Security Council', in Gowlland-Debbas (Ed.), *supra* note 4, at 74-75. According to Frowein, Krisch, 'Introduction to Chapter VII', in B. Simma (Ed.), *The Charter of the United Nations. A Commentary* (2002) 710, UN purposes and principles 'establish guidelines rather than concrete limits for SC action'.

¹³ Koskeniemi, 'The Police in the Temple – Order, Justice and the UN: A Dialectical View', 6 *EJIL* (1995) 327; Martenczuk, 'The Security Council, The International Court of Justice and Judicial Review: What Lessons from Lockerbie?', 10 *EJIL* (1999) 537.

¹⁴ Cf. with respect to human rights, Paust, 'Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions', 19 *Southern Illinois ULJ* (1994) 141-142; Frowein, Krisch, *supra* note 12, at 711.

¹⁵ See, *i.a.*, Cohen-Jonathan, 'Le Conseil de Sécurité et les droits de l'homme', in J.-F. Flauss and P. Wachsmann (Eds.), *Le droit des organisations internationales. Recueil d'études à la mémoire de Jacques Schwob* (1997) 40; de Wet, 'Human Rights Limitations to Economic Enforcement Measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime', 14 *LJIL* (2001) 279.

¹⁶ See Gardam, 'Legal Restraints on Security Council Military Enforcement Action', 17 *Michigan JIL* (1996) 302; Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', 95 *AJIL* (2001) 860-861.

¹⁷ See *infra* notes 37-38 and accompanying text.

¹⁸ See Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures', 5 *EJIL* (1994) 96; Herdegen, 'The 'Constitutionalization' of the UN Security System', 27 *Vanderbilt JTL* (1994) 156.

¹⁹ Gill, 'Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter', 26 *NYIL* (1995) 111.

International law as such is not the primary consideration when the UN is faced with issues of peace and security and adopts enforcement measures under its Chapter VII powers. In fact, international law is mentioned in Article 1 para. 1 of the Charter among the UN purposes, but only with respect to the peaceful settlement of disputes.²⁰ Indeed, fundamental rules of international law, such as the prohibition of the use of force, respect for State sovereignty or non-intervention do not apply in case of Chapter VII action. Yet, by virtue of Article 103 of the Charter binding Security Council decisions prevail *only* over treaty law, but not over customary law.²¹ Nevertheless, the Council is empowered to derogate *temporarily* from rules of both treaty and customary law, as long as it is acting under Chapter VII to maintain and restore international peace and security; this authority is inherent in the very nature of enforcement action and implicit in Chapter VII itself.²² Under no circumstances, however, may the Council act in a way which would defeat the other purposes and principles of the UN, or override any other rules of *jus cogens*.²³

3. Some Questions of Legality Arising from the Security Council Involvement in Post-conflict Iraq

A. *Ex post facto* Attribution of Legality to the Intervention?

Before considering the Security Council involvement in post-conflict Iraq it is useful to comment on the consequences of Resolution 1483 on the (il)legality of the initial military action. In the preamble of the resolution the Council recognized ‘the specific authorities, responsibilities, and obligations under applicable international law of [the USA and the UK] as occupying powers under unified command.’²⁴

²⁰ See, *i.a.*, L. M. Goodrich, E. Hambro, A. P. Simons, *Charter of the United Nations, Commentary and Documents*, 3rd ed. (1969) 27-28; Akande, ‘The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?’, 46 *ICLQ* (1997) 318; Frowein, Krisch, *supra* note 12, at 710.

²¹ See El Erian, ‘The Legal Organization of the International Society’, in M. Sørensen (Ed.), *Manual of Public International Law* (1968) 79-80; Combacau, *Le pouvoir de sanction de l’ONU. Etude théorique de la coercition non militaire* (1974) 282; Gardam, *supra* note 16, at 304; Zemanek, *supra* note 10, at 230; But see *contra*, Bernhardt, ‘Article 103’, in Simma (Ed.), *supra* note 12, at 1299.

²² See Gowlland-Debbas, ‘Security Council Enforcement Action and Issues of State Responsibility’, 43 *ICLQ* (1994) 78; Arangio-Ruiz, ‘On the Security Council’s «Law-Making»’, 133 *Rivista di Diritto Internazionale* (2000) 627; Gill, *supra* note 19, at 62. Cf. Cohen-Jonathan, *supra* note 15, at 40.

²³ See also Pellet, ‘La formation du droit international dans le cadre des Nations Unies’, 6 *EJIL* (1995) 423; C. F. Amerasinhe, *Principles of the Institutional Law of International Organizations* (1996) 186; E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) 187-191; Verhoeven, *supra* note 12, at 826; Gowlland-Debbas, *supra* note 4, at 14; Akande, *supra* note 20, at 322. But see Martenczuk, *supra* note 13, at 546.

²⁴ SC Res. 1483, 22 May 2003.

Most commentators are in agreement that the resolution had no impact whatsoever upon the lawfulness of the use of force.²⁵ The law of occupation, being part of *jus in bello*, applies regardless of whether the use of force that resulted in the occupation was legal. In addition, several Council members made clear that their votes in favour of Resolution 1483 should not be interpreted as acceptance of the legality of the use of force. However, the last in a series of (not surprising) Council failures to condemn or otherwise disapprove occasional use of force allegedly carried out to ‘enforce the collective will’ might be seen as adding to the validity of arguments that such unauthorized interventions ‘are exempted from legal disapproval and sanctions, because their outcome meets an internationally recognized and collectively defined community interest, and/or because the new status quo produced by the use of military force requires further common action’.²⁶

B. The Council’s Endorsement of the (Wide-Ranging Goals of the) Occupation

Having recognized the USA and the UK as the occupying powers, the Council then went on in the same resolution to ‘[c]all upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the *effective* administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future’ and also ‘[c]all[ed] upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907’.²⁷

However, it is questionable whether this broad ‘mandate’ to the Coalition Provisional Authority (CPA/Authority) fell squarely within existing occupation law.²⁸ Indeed, the drafting history of the resolution indicates that, upon insistence of the US and UK negotiators, the Council did not (intend to) limit CPA to the rights and obligations of the 1907 Hague Regulations and the 1949 Geneva Conventions.²⁹ Not surprisingly, there existed a remarkable discrepancy between

²⁵ Kirgis, ‘Security Council Resolution 1483 on the Rebuilding of Iraq’, *ASIL Insights*, May 2003, available at <<http://www.asil.org/insights/insigh107.htm>>; Stahn, ‘Enforcement of the Collective Will after Iraq’, 97 *AJIL* (2003) 817-818; Orakhelashvili, ‘The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law’, 8 *JCSL* (2003) 310-311; Hmoud, ‘The Use of Force against Iraq: Occupation and Security Council Resolution 1483’, 36 *Cornell ILJ* (2004) 453; R. Ben Achour, ‘La résolution 1546 du Conseil de Sécurité ou l’apogée de l’art de la fiction’, *Actualité et Droit International*, July 2004, available at <<http://www.ridi.org/adi>>. See, however, Bermejo Garcia and Ruiz Miguel, ‘La legalidad de la reanudación de la Guerra en Iraq’, IV *Anuario Mexicano de Derecho Internacional* (2004) 85.

²⁶ Stahn, *supra* note 25, at 818.

²⁷ SC Res. 1483, paras. 4 and 5 respectively (emphasis added). In addition, in para. 8 the Council endowed the Special Representative of the Secretary-General, *in coordination with the Authority*, with, *inter alia*, (e) promoting *economic reconstruction* and the conditions for sustainable development, (g) promoting the protection of human rights and (i) encouraging international efforts to promote *legal and judicial reform*. (Emphasis added).

²⁸ Murphy, ‘Security Council Recognition of U.S. Postwar Role in Iraq’, 97 *AJIL* (2003) 681-682; Roberts, ‘The End of Occupation in Iraq’, July 2004, available at <<http://www.ihlresearch.org/iraq/pdfs/briefing3461.pdf>>, at 9.

²⁹ Hmoud, *supra* note 25, at 448.

the static rationales and assumptions underlying the law of occupation and the CPA goals and practice, aspiring to societal and economic transformation.³⁰ This is all the more so if one adopts a strict interpretation of the relevant provisions of the law of occupation,³¹ as opposed to an evolutionary one. In the latter case, an occupying power may plausibly acquire more extensive legislative powers.³² Such an interpretation appears more favorable nowadays, being in line with modern developments, in particular in the area of human rights, democratic government, or economic development that did not exist or had a totally different meaning a century or even half a century ago.³³

Be that as it may, the crucial point for present purposes is the legal effect of the Council's endorsement of any CPA activities beyond the applicable law of occupation. While falling short of a *stricto sensu* Chapter VII authorization,³⁴ the relevant SC resolutions were not devoid of legal implications. They effectively sanctioned and legitimized under Chapter VII the (wide-ranging goals of the) occupation and had both a facultative and validating effect.³⁵ Indeed, all potentially controversial acts of the Authority, which might be at variance with the law of occupation, were either prospectively sanctioned in Resolution 1483 or retrospectively endorsed in subsequent resolutions of the Council. Admittedly, such a 'legalizing' effect would better be 'served' through an unequivocal authorization to either the Authority or, preferably, a UN Mission to carry out the reconstruction of Iraq.³⁶ In any event, it would still be within the Council's Chapter VII powers to endorse such activities (allegedly undertaken for the benefit of

³⁰ See extensively, Scheffer, 'Beyond Occupation Law', 97 *AJIL* (2003) 844-846; Ottolenghi, 'The Stars and Stripes in Al-Fardos Square: the Implications for the International Law of Belligerent Occupation', 72 *Fordham LR* (2004) 2200-2208.

³¹ Most relevant provisions include Article 43 of the Annex to the 1907 IV Hague Convention on the Laws and Customs of War on Land ('... the occupant ... shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [*vie public* in the french only authentic text], while respecting, *unless absolutely prevented*, the laws in force in the country'); Article 47 ('Protected persons who are in occupied territory shall not be deprived ... of the benefits of the present Convention by *any change introduced*, as the result of the occupation of a territory, *into the institutions or government* of the said territory ...') and Article 64 of the IV 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War ('The Occupying Power may ... subject the population of the occupied territory to *provisions which are essential to enable the Occupying Power* to fulfil its obligations under the present Convention, *to maintain the orderly government of the territory* ...'). (Emphasis added).

³² For a very broad reading of the relevant provisions, see Yoo, 'Iraqi Reconstruction and the Law of Occupation', 11 *U.C. Davis JILP* (2004) 16-22.

³³ See Benvenisti, 'Water Conflicts during the Occupation of Iraq', 97 *AJIL* (2003) 864 ('the old doctrine needed an overhaul to bring it up to date with contemporary legal and political perceptions'). See also Goodman, 'The Need for Fundamental Change in the Law of Belligerent Occupation', 37 *Stanford LR* (1985) 1590-1593; Brown, 'Intervention, Self-Determination, Democracy and the Residual Responsibility of the Occupying Power in Iraq', 11 *U.C. Davis JILP* (2004) 41-43.

³⁴ See also Stahn, *supra* note 25, at 817 n. 94 ; But see de Wet, *supra* note 23, at 315.

³⁵ See to the same effect Hmoud, *supra* note 25, at 448. See also Grant, 'The Security Council and Iraq: an Incremental Practice', 97 *AJIL* (2003) 829 ('the resolution *confers* certain political powers on the CPA'). (Emphasis added).

³⁶ Scheffer, *supra* note 30, at 850, 853, 859; Ottolenghi, *supra* note 30, at 2209-2214.

the Iraqi people), even beyond existing occupation law, insofar as the Council did not impinge upon a rule of *jus cogens*, such as the right to self-determination.³⁷

C. The Council's Involvement and the Right of the Iraqi People to Self-determination

Self-determination constitutes a limit to SC Chapter VII action³⁸ and implies that the Council does not have the power to impose or introduce under Chapter VII any particular form of government, rule or administration upon the entire or part of the population of any State against its *people's* will.³⁹

All post-conflict Council resolutions on Iraq underscore that the sovereignty of Iraq resides in the State of Iraq, reaffirm the right of the Iraqi people freely to determine their own political future and control their own natural resources, and have emphasized the provisional character of the Authority which would cease when an internationally recognized, representative government established by the people of Iraq was sworn in and assumed the responsibilities of the Authority. This process was gradual and controversial and culminated in June 28, 2004 with the dissolution of CPA, the transfer of power to an (unelected but apparently representative) Iraqi interim Government, with the task to prepare direct democratic elections no later than 31 January 2005. The ensuing Transitional National Assembly will then, *inter alia*, 'have responsibility for forming a Transitional Government of Iraq and drafting a permanent constitution for Iraq leading to a constitutionally elected government by 31 December 2005'.⁴⁰ In the meantime, the earlier authorized multinational force⁴¹ under the command of the (officially) former occupying forces, shall continue to have the authority to take all necessary measures to contribute to the maintenance of security and stability in an increasingly insecure and unstable Iraq, subject to the continuous consent of the current and future Iraqi Governments. The role of the UN in this process was reportedly marginal.⁴²

However fictive this situation appears to be,⁴³ any involvement of the Council in the reconstruction of Iraq by the occupying powers, with the stated intent to benefit the Iraqi people, as described above, would not be legally questionable unless it impinged upon the right of the Iraqi people to self-determination. However, self-determination and occupation are antithetical notions.⁴⁴ For this reason, the Council's welcome reaffirmation of the right to self-determination, the emphasis on the temporary nature of the occupation and its insistence on democratic elections were no more crucial than the Council's endorsement of the reconstruction of Iraqi society and

³⁷ See in support of self-determination as a *jus cogens* norm, Gros Espiell, 'Self-Determination and *Jus Cogens*', in A. Cassese (Ed.), *U.N. Law/Fundamental Rights: Two Topics in International Law* (1979) 167; A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (1995) 320; I. Brownlie, *Principles of Public International Law* 5th ed. (1998) 515.

³⁸ M. Bedjaoui, *The New World Order and the Security Council. Testing the Legality of its Acts* (1994) 35; Richardson, 'Constitutive Questions in the Negotiations for Namibian Independence', 78 *AJIL* (1984) 112; Paust, *supra* note 14, at 141; Orakhelashvili, *supra* note 25, at 312.

³⁹ Cf. Gill, *supra* note 19, at 75-76; Herdegen, *supra* note 18, at 157.

⁴⁰ SC Res. 1546, para. 3(c), 8 June 2004.

⁴¹ SC Res. 1511, para. 13, 16 October 2003.

⁴² Roberts, *supra* note 28, at 10.

⁴³ See Ben Achour, *supra* note 25.

⁴⁴ Boisson de Chazournes, 'The United Nations on Shifting Sands: About the Rebuilding of Iraq', 5 *FORUM* (2003) 257.

economy by the occupying powers – to some extent at least – beyond applicable international law. Although such a derogation from existing law is not reproachable *per se* within the ambit of Chapter VII, from the angle of self-determination such transformation will necessarily have to stand the test of the Iraqi people; they will have to be the ultimate judge and ‘validate’ *ex post facto* anything the Authority was not required to do,⁴⁵ but eventually did (and the Council endorsed) in their name. Despite numerous shortcomings and obstacles to the genuine expression of the people’s will in post-conflict societies,⁴⁶ democratic elections is the most appropriate available means to that end.

4. In Lieu of Conclusion: A State of Affairs of ‘Provisional’ Legality?

Thus, pending the exercise of self-determination by the Iraqi people in the above sense, the legality of the current and previous state of affairs in post-conflict Iraq remains unsettled.⁴⁷ The Council’s involvement could not have a definite, but only a *prima facie*, validating effect upon any aspects of the CPA management of the Iraqi society that might have been beyond applicable occupation law. It is only fair, as well as consistent with all interpretations of occupation law, the stated goals of the CPA, the powers of the Council, as well as its actual involvement in post-conflict Iraq, that the ‘liberated’ Iraqi people is left free to determine its own future (and repudiate the past, including the recent one) and that their will is respected. In the words of an early commentator, which may have acquired a different meaning nowadays, but are still valid, ‘in so far as the occupant acts within the scope of the authority permitted to him by international law, it is customary for the legitimate government, if and when it reacquires possession of the territory, to recognize his measures and give effect to rights acquired thereunder’.⁴⁸

⁴⁵ This will require a detailed scrutiny of both occupation law and the work of CPA, which, however, falls beyond the limited scope of this paper.

⁴⁶ See Korhonen, ‘Post’ as Justification: International Law and Democracy-Building after Iraq’, 4 *German Law Journal* (2003) 712 (‘[t]he many ‘post’-conflict governance examples ... show that the representative bodies of the local populations often seem to be more for show than for real and the usual elections are often organized in conditions of haste, lacking information, political intimidation, boycotting, violence and general confusion’).

⁴⁷ Cf. Ben Achour, *supra* note 28 (‘toute solution non validée par des élections libres et honnêtes reste une *solution provisoire*’); Orakhelashvili, *supra* note 28, at 313 (‘[t]o *validly* commit the Iraqi people, the government in question must be elected by the people, and only this option can guarantee the observance of their right to self-determination’). (Emphasis added).

⁴⁸ Sir A.D. McNair, *Legal Effects of War* (1944) 321.