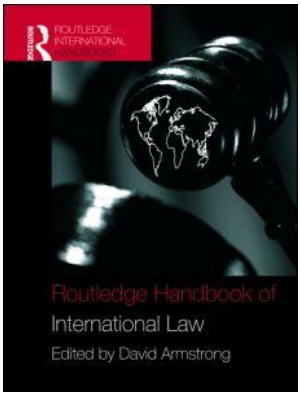

Routledge Handbook of International Law

David Armstrong, Jutta Brunée, Michael Byers, John H. Jackson, David Kennedy

The Iraq War and International Law

Publication details
https://test.routledgehandbooks.com/doi/10.4324/9780203884621.ch15
Wayne Sandholtz
Published online on: 22 Dec 2008

15

The Iraq war and international law

Wayne Sandholtz

The 2003 war in Iraq, perhaps more than any other event since the Second World War, touched on the historic core issues of public international law, as well as twentieth-century developments in international human rights. Existing rules on the use of force and the treatment of detainees appeared to be under strain; some governments argued for their revision or replacement. This chapter examines the implications of the Iraq war and its aftermath for three areas of international law: the use of force, the treatment of detainees, and occupation. The legal debates surrounding the invasion and occupation of Iraq have largely reaffirmed existing fundamental norms but also highlighted areas of the law in need of further development.

Rarely, if ever, has the spotlight of public attention shone on international law as intensely as it has since the March 2003 invasion of Iraq. Leading stories in the newspapers and on television have regularly discussed, for example, The Hague and Geneva Conventions, and debated the interpretation of Security Council resolutions. International law has been at the heart of some of the vital controversies of the day – war, occupation, the treatment of prisoners.

The war in Iraq, perhaps more than any other event since the Second World War, touched on the historic core issues of public international law – sovereignty, the use of force, the rules of war, occupation – as well as twentieth-century developments in international human rights. Traditional norms of international law seemed to be under strain; indeed, some American officials asserted that the challenge of global terrorism necessitated the revision or replacement of existing rules on the use of force and of parts of the Geneva Conventions. International lawyers joined the debate with passion and insight.

How have the events of the Iraq war and the legal arguments surrounding them affected the development of international law? For example, was the invasion of Iraq the first step in the emergence of new norms on the use of force, or did it largely reaffirm existing rules? Comprehensive answers may be decades away, when legal analysts will be able to assess patterns of state practice and legal interpretation since the Iraq war. But it is possible now to distill preliminary conclusions, and this chapter aims to suggest some. It examines the implications of the Iraq war and its aftermath for three areas of international law: the use of force, the treatment of detainees, and occupation. The legal literature on each of these topics is already voluminous. This chapter cannot, therefore, cite every relevant work, but it does strive to represent the key

controversies and the principal arguments. To preview, it concludes that the legal debates surrounding the invasion and occupation of Iraq have, on balance, reaffirmed existing fundamental norms but also highlighted areas of the law in need of further development.

The use of force

On March 19, 2003 a U.S.-led coalition began bombarding selected targets in Iraq and coalition troops crossed the border the following day. According to U.S. officials, the coalition included 30 states, with another 15 countries privately expressing support for the action (Guynn and Infield 2003). The United States supplied the greatest share of the troops (over 250,000), followed by the United Kingdom (45,000) and Australia (2000); these three countries were the only ones whose forces participated in the land invasion. The slenderness of the coalition was directly connected to the breadth of international opposition to the war. Important traditional allies of the United States, including Canada, France, and Germany, not only refused to participate in the coalition but criticized the war as unjustified. Middle Eastern countries that had actively contributed to the coalition that drove Iraq out of Kuwait in 1991 (like Kuwait and Qatar) declined to join in 2003. Turkey, a NATO partner, refused to allow coalition troops to attack Iraq through its territory. Russia, China, and other states from every region of the world condemned the invasion. The opposition to the Iraq war may have been tied to political, strategic, or economic interests, or to pragmatic concerns, but it also had a vigorous legal component: for much of the world, without authorization from the United Nations Security Council, the use of force against Iraq was illegal and illegitimate.

That the United States and its allies attacked Iraq without a mandate from the Security Council might seem to weaken the Charter system for regulating the use of force in international affairs. But the reliance of both advocates and opponents of the Iraq war on the Security Council process, with Security Council resolutions at the heart of the debates, may in fact reinforce the Council's role. Although the United States claimed Security Council authorization for its actions in Iraq, it did not assert a general, unilateral right to decide on the use of force. The legal dispute, therefore, centers on the interpretation of Council resolutions, not on the viability (or non-viability) of the Security Council as the central international mechanism for overseeing peace and stability. The U.S.-led coalition may well be judged, ultimately, to have waged an illicit war. But, for the system of international rules, it is far better that such a judgment be made in a context of interpreting and applying Council resolutions than in a setting in which the survival of Article 2(4) and of the Security Council role in regulating the use of force are in question (Murphy 2004: 176–7).

The key international law controversy surrounding the use of force against Iraq, then, centers on the contention that a series of Security Council resolutions provided a legal basis for the invasion. This is the only law-based claim that the United States and the United Kingdom articulated in a formal (that is, United Nations) setting. U.S. officials did, however, suggest a second justification for military action against Iraq, namely, that the United States could in any case exercise its right to preventive self-defense.[1] The language of self-defense may have had largely political purposes, but it did contain a legal claim, which international law commentators seized on and explored.

Security Council resolutions and the use of force against Iraq

In their formal communications to the Security Council, the governments of both the United Kingdom and the United States argued that Iraq's ongoing refusal to comply with Security Council resolutions justified the

use of force. U.S. Secretary of State Colin Powell's extended presentation to the Security Council on February 5, 2003 repeatedly invoked Resolution 1441 as Iraq's "one last chance" to rid itself of weapons of mass destruction (WMD); presented evidence that Iraq remained in "material breach" of its obligations under Resolution 1441 (2002); and intimated that it was time for the Security Council to use force to compel Iraqi compliance (United Nations 2003d). The following month, after it became clear that the Security Council would not pass a new resolution explicitly authorizing the use of force, the leading coalition members claimed that Iraq's failure to comply with Resolution 1441 left it in ongoing material breach of disarmament obligations contained in Resolution 687 (1991). Because Resolution 687 was the basis for the ceasefire that ended the Persian Gulf war, Iraq's violation of its provisions terminated the ceasefire and revived the original authorization of force contained in Resolution 678 (1991). Resolution 678 "authorizes Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area."

The British government delineated the legal argument prior to the invasion. A secret memorandum of March 7, 2003 (later leaked and subsequently released officially) from Lord Peter Goldsmith, British Attorney General, to Prime Minister Tony Blair, offers what is probably still the most nuanced analysis of the Resolution 1441 argument in favor of using force against Iraq. Goldsmith concludes that, at a minimum, the Security Council would have to discuss evidence that Iraq had failed to comply fully with Resolution 1441. He leans toward the interpretation that, ideally, a second resolution (even a vague one) would then trigger the use of force, but notes that the United States had made a forceful argument that the mere fact of continued Iraqi non-compliance was sufficient to reactivate the "all necessary means" clause of Resolution 678, even without a new Security Council resolution. The memo also warns that regime change by itself could never provide legal justification for using force against Iraq (Goldsmith 2003b).[2]

Ten days later, Lord Goldsmith submitted to parliament a more succinct and far less qualified legal justification for attacking Iraq. Presumably, by then the British government needed not an exploration of legal subtleties but as solid a justification as possible for a decision to go to war. The March 17 statement declares that Iraq's continued non-compliance with its disarmament obligations revived the Resolution 678 authorization to use force, without the need for a new resolution (Goldsmith 2003a). A letter of March 20, 2003 from the United Kingdom's Permanent Representative to the President of the Security Council offered the same legal justification as the Goldsmith memoranda (United Nations 2003c). A letter from the Permanent Representative of the United States on the same date made the same case (United Nations Security Council 2003b). The Australian government had also received from the Attorney General's office and the Department of Foreign Affairs and Trade a legal opinion justifying the use of force in identical terms. Iraq's refusal to rid itself of all weapons of mass destruction was a material breach of Resolution 687; "[c]onsequently, the cease-fire is not effective and the authorisation for the use of force in SCR 678 is reactivated" (Australia 2003).

The question is whether the coalition's invocation of prior resolutions was a legally sound basis for using force against Iraq. Despite some supportive analyses by academic lawyers (see Yoo 2003) the overwhelming conclusion of the commentators is that the coalition arguments are strained and untenable. The principal problems with the coalition legal argument are the following.

First, when Resolution 678 mentions Resolution 660 "and all subsequent resolutions" (paragraph 2), the most plausible read-

ing is that it refers to the 10 resolutions identified in the preamble, all of them prior to Resolution 678. Resolution 678 authorizes the use of force if Iraq failed to comply with those resolutions by 16 January 1991. That authorization could not apply to later resolutions, like 687, for the simple reason that Iraq could not possibly comply by 16 January 1991 with resolutions that would not yet exist as of that deadline (Murphy 2004: 181). Furthermore, it seems implausible in the extreme that the Security Council would grant permission to use force against Iraq to all members of the 1991 Persian Gulf war coalition, into the unbounded future. Similarly, the Resolution 678 mandate "to restore international peace and security in the area" cannot create an open-ended authority to use force against Iraq for any purpose. "Restore" logically refers to a return to the situation before Iraq's invasion of Kuwait; it does not confer a license to install a new regime in Iraq. Moreover, Resolution 687 established a new mandate for the "restoration of peace and security in the region," superseding that of Resolution 678 (Murphy 2004: 183–4).

Second, as Murphy notes, the U.S. (and British) argument regarding Resolution 687 ignores the context created by Resolution 686. In Resolution 686 (1991), the Security Council lists the steps that Iraq must take in order to "permit a definitive end to the hostilities" (United Nations Security Council 1991a). On March 3, 1991 Iraq indicated its acceptance of the obligations detailed in Resolution 686, and one month later the Security Council adopted Resolution 687, which was the "definitive end to the hostilities" foreseen by Resolution 686 (Murphy 2004: 192). Resolution 687 then establishes a ceasefire and a new, post-conflict set of conditions on Iraq. It further declares that it would be up to the Security Council – not individual states – to "take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region" (United Nations Security Council 1991b: 34). Finally, rather than announcing that Resolution 678 (specifically, its provisions on the use of force) remained in effect, as Resolution 686 had done, Resolution 687 details a new set of mechanisms (not including military force) for compelling Iraq to meet its obligation to disarm.

Third, even if military means of enforcing Resolution 687's disarmament provisions appeared to be required, any use of force would have to be proportionate to the Iraqi offense. Force could be used to destroy Iraqi WMD production facilities or storage sites, for example, or to compel access for inspectors. If regime change appeared to be the only way to achieve Iraqi compliance, then the decision to replace the government by force would have to be made by the Security Council (Murphy 1992; Murphy 2004: 197). Fourth, resolution 687 is not an armistice or ceasefire treaty (as argued by Yoo (2003)) whose violation would permit the offended states to resume hostilities. In fact, Resolution 687 is not a treaty at all.[3] The coalition argument that Iraqi non-compliance with Security Council resolutions entitled coalition members to suspend the 1991 ceasefire is thus inapposite. Yoo's argument that the coalition was justified by its right to suspend or abrogate treaties is likewise unsustainable (Yoo 2003, contending that Iraq's breach of Resolution 687 was equivalent to material breach of a treaty obligation, permitting the coalition states to set aside their obligations under it). But no treaty between Iraq and the coalition members existed. Resolution 687 is not a treaty; it is a decision of the United Nations Security Council, binding on all member states. When a Security Council resolution is the obligation in question, only the Council can decide on appropriate responses to a state's non-compliance with its terms.

Fifth, Resolution 1441 did not in itself authorize the use of force. The United Kingdom and the United States argued in the weeks leading up to the invasion that Resolution 1441 (November 2002) constituted Iraq's last chance. Resolution 1441 required

of Iraq a full and accurate declaration regarding all of its WMD programs. The United States argued that if either the International Atomic Energy Agency (IAEA) or UNMOVIC (the United Nations inspection team), or a member state, reported to the Security Council that the Iraqi declaration was incomplete, the Security Council needed only to meet to consider that submission. Crucially, the coalition leaders asserted that once the Council had met, member states could use military means to enforce U.N. resolutions in Iraq – no further, explicit decision (or "second resolution") was required.

Despite the ambiguities in Resolution 1441, ambiguities traceable to the difficult political compromises required to obtain consensus on its adoption, one thing is certain: the resolution does not explicitly authorize the use of force. It threatens unspecified "serious consequences" (United Nations Security Council 2002b). In the debates over earlier drafts of the resolution, the United States pressed for language that would have directly authorized the use of force. A solid majority of the Council resisted. In the discussion immediately following passage of Resolution 1441, nine countries expressed their understanding that, in the words of the French representative, the resolution reflected their "request that a two-stage approach be established and complied with," and that "all elements of automaticity have disappeared" (United Nations Security Council 2002a: 5).[4] In the same meeting the British delegate acknowledged that "there is no 'automaticity' in this resolution," and the U.S. representative agreed that the resolution contained "no 'hidden triggers' and no 'automaticity' with respect to the use of force" (United Nations Security Council 2002a: 3, 5). In other words, the Security Council adopted Resolution 1441 on the basis of a solid consensus that a second resolution would be required to authorize military action. In January and February 2003 U.S. and British efforts to gain passage of a second resolution failed. Again, the solid majority of Security Council members were not willing to pass a second resolution that, they had agreed, alone could permit the use of force against Iraq. Thus arguments to the effect that Resolution 1441 implicitly authorized the use of force, or that the members of the Security Council understood it to do so, do not stand up to the factual record. If the Council members that voted in favor of Resolution 1441 had intended it to authorize force, they could simply have reaffirmed that decision in a second resolution, as the United Kingdom and the United States urged them to do.

Despite the Security Council's refusal to authorize the use of force against Iraq, the United States appeared committed to war. In the same meeting in which the Security Council passed Resolution 1441, Ambassador Negroponte of the United States warned that if the Security Council "fail[ed] to act decisively . . . this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq or to enforce relevant United Nations resolutions" (United Nations Security Council 2002a: 3). As the now-famous "Downing Street Memo" reveals, the Bush administration had decided on war, well before the Security Council debates.[5] Even so, on balance, it is better for international law that the United States worked through the Security Council and offered legal justifications based on Security Council resolutions. Ignoring the Security Council process, or dismissing it as irrelevant, would have been more damaging to international order.

In summary, the balance of legal arguments weighs against the U.S. and British interpretation of Resolutions 678, 687, and 1441. The Security Council did not, either in 1991 or in 2002, authorize the 2003 invasion of Iraq. The war in Iraq was therefore a significant violation of one of the fundamental norms of international law, the Article 2(4) prohibition on the use of force.

The debates surrounding the invasion of Iraq did generate questions regarding Security

Council practices and the interpretation of Security Council resolutions.[6] For example, what significance should we attach to language the Security Council omits from its resolutions? What is the meaning of silence? Taft and Buchwald argue that because Resolution 1441 omitted proposed clauses that would have required a second decision, a second resolution was not necessary and the use of force was therefore justified by Resolution 678 (Taft and Buchwald 2003: 561–62). In other words, in this view, the omission of language authorizing the use of force should not be seen as a decision to withhold such authority. But the omitted language argument must work both ways. If the absence of an explicit authorization to use force should not be seen as a decision to withhold such authority, then the absence of an explicit requirement for a second resolution should not be seen as a decision to dispense with the need for a second Council decision.

In any case, both omissions would be consistent with a Council that assumed that explicit authorization was necessary to use force and that, as a consequence, a second resolution was required.

More generally, requiring that the authorization to use force always be explicit best serves international law and international order (Murphy 2004: 172). Otherwise, arguments will inevitably arise about whether a particular resolution was or was not meant to authorize the use of force. In the absence of specific language, actors would be forced to infer the intentions of members of the Security Council. Arguments would revolve around what Council members "really" meant or were thinking. Not only would such a setting be more open to political maneuvering, it would also be more susceptible to unilateral use of force, with states claiming that they alone were carrying out the "true" intentions of the Security Council. A bright line of explicit authorization is the best bulwark for the Charter norms regulating the use of force.

Preventive self-defense

Although it is true, as commentators have noted, that the United Kingdom and the United States did not offer a self-defense justification in the Security Council (Brunnée and Toope 2004: 794; Kritsiotis 2004: 248; Murphy 2004: 174–7), various U.S. officials did raise such an argument in other settings. The U.S. government's September 2002 National Security Strategy had declared that "[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively," before such threats are fully realized or imminent (United States of America 2002: 15). President Bush seemed to be preparing the way for such preventive action when, in his January 2003 State of the Union address, he declared, "America will not accept a serious and mounting threat to our country"; if "Saddam Hussein does not fully disarm," he continued, "we will lead a coalition to disarm him" (Bush 2003).

In a speech immediately following the invasion, William Howard Taft IV, Legal Adviser to the Department of State, invoked the Security Council resolutions argument but also remarked that "the President may also, of course, always use force under international law in self-defense" (United States Department of State 2003). Similarly, in a memorandum to the Council on Foreign Relations, John B. Bellinger III, of the National Security Council, invoked a U.S. "right to use force in its inherent right of self-defense . . . in anticipation of an armed attack" (Bellinger 2003).

Traditional international norms permitted states to use force against an attack that was about to occur; this "imminence" criterion was generally seen as fundamental, at least since the exchange of letters between the United States and Great Britain regarding the British use of force in the Caroline incident. The four overlapping Caroline criteria, which have generally been taken as expressing customary international law on

anticipatory self-defense, require, for the use of force to be lawful, that:

1. the threat be imminent, that is, about to be realized, leaving "no moment for deliberation" (quoted in Jennings 1938: 89)
2. the use of force be necessary, in that no other means could prevent the imminent attack from occurring
3. the force used be proportionate to the threat, "limited by that necessity and kept clearly within it" (quoted in Jennings 1938: 89)
4. the use of force be a last resort, after peaceful means have been exhausted or proven impracticable.[7]

Some commentators have advocated the adaptation of the Caroline criteria to the modern dangers of international terrorists and weapons of mass destruction, granting states greater leeway in the use of force for anticipatory self-defense. Wedgwood, for example, calls for new rules, arguing that states may have a responsibility to act against "terrorist *capability* before it is employed and, better yet, before it is acquired" (Wedgwood and Roth 2004: 282–3). Yoo contends that the right of self-defense justified the invasion of Iraq, independently of Security Council resolutions (Yoo 2003: 563–4). He argues, first, that "imminence" should refer not just to the "temporal proximity of a threat" but also to "the probability that the threat will occur," and, second, that "the threatened magnitude of harm must be relevant." Yoo also contends that overthrowing the Ba'athist regime in Iraq was a proportional response to the threat Iraq posed, as Saddam Hussein himself was the source of Iraq's "hostile intentions" (Yoo 2003: 572–4).[8]

Most commentators, however, have seen serious risks in the prospect of more permissive rules of anticipatory self-defense. The notion of a right to preventive self-defense – against a threat that might emerge at some indefinite time in the future – replaces the imminence criterion with subjective judgments that are liable to abuse. The proposed right of self-defense against potential threats could, to the extent that other states concur that such a right exists, form the basis in the future for the unilateral use of force. The result would be the obliteration of normative limits on anticipatory self-defense (Brunnée and Toope 2004: 792). Indeed, permissive rules of anticipatory self-defense would undermine international law constraining the use of force. If states are free to identify potential future threats and to take military action against them, virtually any unilateral use of force could be justified as anticipatory self-defense.

The prospect of unwinding modern international legal restraints on the use of force has provoked considerable commentary affirming the continued validity and utility of the Caroline criteria. Even members of the U.S. administration sometimes expressed support for the traditional principles. In a November 2002 memorandum to the Council on Foreign Relations, State Department Legal Adviser William H. Taft IV, although touching on the need to adapt the rules of preemptive self-defense to the era of weapons of mass destruction and global terrorist groups, affirms the core of the customary norms: "Within the traditional framework of self-defense, a preemptive use of proportional force is justified only out of necessity. The concept of necessity includes both a credible, imminent threat and the exhaustion of peaceful remedies" (Taft and Buchwald 2003). Wippman (2004) suggests that the traditional criteria invoked by Taft continue to be widely shared internationally, arguing that the "further the United States moves from self-defense" against actual or imminent attacks, "the harder it will likely be to convince others of the legitimacy of military intervention" (Wippman 2004: 46).

Even the United States' most fervent ally, the United Kingdom, was not prepared to abandon the Caroline criteria. In fact, the British Attorney General's March 7, 2003 advice to Prime Minister Tony Blair sum-

marizes the traditional norms and then declares: "I am aware that the USA has been arguing for recognition of some broad doctrine of a right to use force to preempt danger in the future. If this means more than a right to respond proportionately to an imminent attack . . . this is not a doctrine which, in my opinion, exists or is recognised in international law" (Goldsmith 2003b: ¶ 3). Prime Minister Blair himself, responding to questions in a meeting of the Liaison Committee of the House of Commons, explicitly rejected the preventive self-defense basis for using force against Iraq (United Kingdom Parliament 2003: ¶¶ 51–52).

Although there is a right to self-defense against an attack that is not yet occurring but is imminent (the Caroline context), there is no right under international law to use force against future threats. Greenwood points to the Nuremberg Tribunal decision on Germany's invasion of Norway and to international reaction to the 1981 Israeli bombing of an Iraqi nuclear reactor as affirming the principle that anticipatory self-defense is justified only when the threat is imminent (Greenwood 2003: 13–14). Greenwood concludes that: "[I]n so far as talk of a doctrine of 'pre-emption' is intended to refer to a broader right of self-defense to respond to threats that might materialize at some time in the future, such a doctrine has no basis in law" (Greenwood 2003: 15). Lowe criticizes the notion of self-defense against potential future threats as a "dangerous doctrine . . . patently lacking in any basis in international law" (Lowe 2000b: 865).

In sum, the more persuasive arguments support the conclusion that the Caroline criteria remain viable and necessary as safeguards against self-interested exploitation of the doctrine of anticipatory self-defense. That said, international rules regarding anticipatory self-defense could be adapted to deal with the threat of terrorist groups. In fact, Reisman and Armstrong point out that many of the states claiming a right to preemptive attacks assert it in the context of an imminent threat, and that most do so with respect to terrorist groups, not states. They conclude that the Caroline criteria for anticipatory self-defense continue to apply, although they have been "relaxed" with respect to terrorism (Reisman and Armstrong 2006: 538–48). Brunnée and Toope argue that an actual or imminent attack from a terrorist group, with convincing evidence of "direct support or at least tacit approval" from a harboring state should be necessary in order to justify preemptive use of force in the territory of that state (Brunnée and Toope 2004: 415).

Occupation

On May 1, 2003, President Bush famously, and theatrically, proclaimed the "end of major combat operations" in Iraq (New York Times 2003). The U.S. and British governments quickly established a Coalition Provisional Authority (CPA), headed by L. Paul Bremer III, President Bush's envoy to Iraq. In mid-May, Bremer issued the CPA's first Regulation, which announced that the CPA would "exercise powers of government temporarily" and that it was "vested with all executive, legislative and judicial authority necessary to achieve its objectives" (Coalition Provisional Authority 2003). The CPA shut down on June 28, 2004 and the Iraqi Interim Government (IIG) assumed authority. Iraqi voters ratified a new constitution in an October 15, 2005 referendum and elections in December 2005 filled the new Iraqi Council of Representatives.

The application of occupation law to Iraq under the CPA was non-controversial. A joint U.S.–U.K. letter to the Security Council (May 8, 2003) affirmed that the coalition members would "strictly abide by their obligations under international law" (United Nations Security Council 2003d). Furthermore, the Security Council adopted Resolution 1483 (May 22, 2003), which refers to the coalition members as "occupying powers" and, under Chapter VII authority, "calls upon" them to

comply with, "in particular," the 1949 Geneva Conventions and the 1907 Hague Regulations (United Nations Security Council 2003a), those being the fundamental instruments of international occupation law. Both the United Kingdom and the United States voted to approve Resolution 1483.[9]

The beginning of an occupation depends on empirical conditions defined by Article 42 of the 1907 Hague Regulations: "Territory is considered occupied when it is actually placed under the authority of the hostile army" (*Hague Convention (IV), Convention Respecting the Laws and Customs of War on Land*). Thus, in Iraq, occupation was a factual state of affairs, not a matter of coalition policy or labeling. The fall of Baghdad on 9 April 2003 marked the end of organized resistance by Iraqi armed forces and the collapse of the Iraqi government. As of that date, therefore, coalition forces were in de facto control of the country as occupiers. A plausible date for the end of the occupation is June 28, 2004, when the CPA passed governing authority to the Iraqi Interim Government (IIG) and dissolved itself. In fact, the Security Council, in Resolution 1546, endorsed in advance the "sovereign" IIG, noting that it would "assume full responsibility and authority . . . for governing Iraq" and declaring that the occupation would end by June 30, 2004 (United Nations Security Council 2004a: ¶¶ 1, 2).

In any case, the period between April 2003 and June 28, 2004 was clearly that in which the CPA exercised full legislative, executive, and judicial authority in Iraq and issued far reaching orders and regulations regarding the country's political, legal, and economic institutions.

The deep and extensive reforms decreed by the CPA have raised questions regarding the degree to which the coalition occupation conformed with international law. The fundamental tension is between international rules that grant narrowly limited powers to occupiers, on the one hand, and the ambitious reformist acts of the CPA, on the other. At the heart of international law on occupation is the "conservationist principle" that is codified in the 1907 Hague Regulations, especially Article 43, and the 1949 Geneva Convention IV.[10] Both the Hague and Geneva Conventions are now accepted as customary international law, binding on all states (Yoo 2003).[11] Under the conservationist principle, occupying powers exercise temporary, de facto control over the occupied territory. They may exercise that control for essentially administrative purposes – to "restore, and ensure, as far as possible, public order and [civil life]" (*Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907* 1907).[12] The occupier, because it does not exercise sovereign authority, cannot engage in fundamental restructuring of the legal and political institutions of the occupied territory. Article 43 of the Hague Regulations requires the occupying power to respect, "unless absolutely prevented, the laws in force in the country." GC IV supplements and reinforces the Hague Regulations in this respect. Article 47 provides that citizens of the occupied territory shall not be deprived of their rights under the Convention by any changes introduced by the occupation into "the institutions or government of the said territory" (*Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949* 1949). The International Committee of the Red Cross commentary on Art. 47 declares that "international law prohibits such actions" as "changes in constitutional forms or in the form of government, the establishment of new military or political organizations, the dissolution of the State, or the formation of new political entities" (International Committee of the Red Cross: 273). Article 64 of GC IV further specifies that the occupier must maintain in force the penal laws of the territory, subject only to suspension or modification when necessary to ensure security or to

meet the occupier's obligations under the Convention.

The reforms enacted by the Coalition Provisional Authority in Iraq went far beyond the minimal, custodial role set out by Hague and Geneva law and these major reforms can be usefully grouped under the following headings:

1. *De-Ba'athification*: abolished the Ba'ath Party and banned its members from government positions and public sector employment.
2. *Security and military organizations*: dissolved the Iraqi army and created new army and law enforcement organizations.
3. *Human rights*: created a new Ministry of Human Rights, to ensure that Iraq complied with its obligations under human rights treaties.
4. *Criminal law and law enforcement*: reformed criminal law, police procedures, and the court system, though all remained under CPA authority.
5. *Economy*: the most ambitious part of the reform program aimed at creating a market economy, and notably removed restrictions on foreign investment.
6. *Good government*: to promote transparency and reduce corruption (Fox 2005: 208–225).

Although there is little question that the CPA reforms exceeded the circumscribed authority conferred by occupation law, commentators have explored other potential legal bases for the restructuring of Iraqi institutions. The most prominent alternative legal justifications for far reaching reform of occupied Iraq emphasize Security Council resolutions or international human rights law:

- *Security Council resolutions endorsed extensive reforms*. It can be argued, for example, that Resolutions 1483 and 1511 "remove any doubt" that altering Iraq's constitution and political structures was part of the U.N.-approved program (see Yoo 2004: 10–12).[13] Indeed, Resolutions 1483 (May 2003), 1511 (October 2003), and 1546 (June 2004) do endorse the establishment of a new (and representative) political system in Iraq (United Nations Security Council 2003a: ¶¶ 1, 22; 2003a; 2004a).[14] What is striking about the resolutions, however, is that, although they support the creation of new governing institutions in Iraq, they do not confer on the CPA the authority to effect those institutional reforms. Rather, the Security Council places the competence to devise new institutions in the Iraqi people themselves, with an assisting role for the United Nations (see United Nations Security Council 2003a: ¶ 7; and 2004: Preamble). Resolution 1546 also declares that the IIG will refrain "from taking any actions affecting Iraq's destiny" (¶ 1) before the election of a transitional government. If the IIG was not authorized to undertake long-term reforms, surely the CPA, as a foreign actor, would be under a similar limitation.

  In short, Resolutions 1483 and 1546 mention the United Nations as having a vital role in assisting the people of Iraq to build democratic institutions, while reminding the coalition authorities of their duty to respect Hague and Geneva law, which limit the prerogatives of occupying powers.
- *Many of the structural reforms in Iraq were consistent with international human rights law, which might create obligations superior to those of occupation law*. In several cases since 1945, national and international bodies have held that occupiers did have an obligation to apply human rights law in occupied territories. Indeed, it would be absurd to require the coalition to preserve the governing institutions under which hundreds of thousands of Iraqis were detained

> arbitrarily, tortured, executed without trial, or subjected to military attack, including with chemical weapons, by their own government. Thus the Hague and Geneva Conventions should be interpreted in light of modern human rights law (Fox 2005: 270–274). In this perspective, the CPA's human rights reforms in Iraq are compatible with international human rights norms, for example, those established by the Universal Declaration of Human Rights (UDHR) and the International Covenant for Civil and Political Rights (ICCPR).

The establishment of representative democracy in Iraq, an objective of the CPA endorsed by Security Council resolutions, is also consistent with what is increasingly seen as a right to democracy under international law (Fox 1992; Franck 1992; Fox and Roth 2000). Brown Weiss argues that such a right under international human rights law attenuates the obligation of an occupying power to respect or preserve the legal order of the defeated regime (Brown 2004: 41–44). It can also be argued that states have not always been willing to condemn changes in the form of government of an occupied country, especially when the reforms aimed at the establishment of constitutional democracy, or when, after a war, the former rulers of the occupied territory were not going to return to power.

The authority of the occupiers to impose democracy, however, is limited by the right of the local population to self-determination. That is, a new set of political institutions, even democratic ones, must be accepted as legitimate by Iraqis (Brown 2004: 41–44). The Transitional Administrative Law, promulgated by the CPA and the Iraqi Governing Council, led to a process that was congruent with the Iraqis' right to self-determination: election of an assembly to draft a constitution, a national referendum to approve the constitution, and a government elected under the new constitution.[15]

Still, human rights norms cannot provide a legal basis for all of the reforms enacted under the CPA. The CPA's refashioning of Iraq's military and security organizations, its ambitious economic reforms, and its good-government reforms may not be justified by the demands of human rights law. The thorough transformation of Iraq's economy in particular has provoked legal controversy. Iraq's prior constitutions had established national control over natural resources and the means of production, prohibited foreign (non-Arab) ownership of enterprises, and instituted state planning of the economy (McCarthy 2005: 52). The aim of the CPA reforms was to create a market economy, through new laws for banking and securities, trade, foreign investment, privatization, incorporation and bankruptcy, the currency, and taxation. The market model is clearly the dominant one in today's world. The major international economic institutions – the World Trade Organization, the World Bank, and the International Monetary Fund – explicitly promote market liberalization. But there is no international legal requirement (under human rights law or any other body of law) that states must adopt the liberal, market model.

Some commentators in the field of IL have thus concluded that the CPA's economic reforms in Iraq are harder to justify under international law than, for example, the legal reforms while others argue that the transformation of Iraq's economy exceeded the authority conferred by the international law of occupation. Furthermore, the reforms, especially the removal of restrictions on foreign ownership and repatriation of profits, appear self-serving, especially given the prominent role of U.S. firms in Iraqi reconstruction. The economic restructuring will be difficult for a future Iraqi government to modify or reverse, imposing durable restrictions on the country's economic sovereignty.

The controversies surrounding the legality of the institutional reforms carried out by the coalition in Iraq highlight the need for further development of occupation law.

Scheffer suggests that a new body of occupation law would provide much needed international standards for permissible institutional and legal changes in the rebuilding of failed or formerly repressive states. New rules could apply both to belligerent occupations and to U.N. peacekeeping and intervention missions (Scheffer 2002). Ratner has further developed that theme, arguing that occupation by states and occupation by international organizations share a common legal framework. Both operate at the intersection of international humanitarian law, international human rights law, local law, and mandates from international organizations (Ratner 2001–2002). It could, furthermore, be argued that the gap between conservationist occupation law and the need for institutional transformation in many post-conflict societies could be bridged by the application of human rights law to military occupations and by a formal Security Council role in specifying the goals of an occupation and authorizing specific reforms.

Treatment of detainees

The worldwide dissemination in April and May 2004 of photographs from Abu Ghraib prison revealed appalling abuses committed by U.S. personnel against detainees in Iraq. The mistreatment of prisoners in Iraq had actually begun much earlier. Beginning in May 2003, the International Committee of the Red Cross (ICRC), Amnesty International, and the Special Representative of the Secretary General had reported to U.S. authorities numerous instances of detainee abuse (International Committee of the Red Cross 2005: sec. 3.4; Amnesty International 2003: sec. 5; United Nations 2003d: ¶ 47).

The Red Cross had also expressed concern over mistreatment it observed during visits to Abu Ghraib in October 2003. The U.S. military responded by asserting that many Iraqi prisoners were not covered by the Geneva Conventions and by attempting to curtail Red Cross visits to the prison (Jehl and Schmitt 2004). A number of NGO reports[16] and official investigations[17] have since detailed various categories of physical and psychological mistreatment of Iraqi prisoners. This analysis focuses on detainee abuse,[18] as well as on "ghost detainees" and renditions.

At all times in Iraq, the applicable international rules included, at a minimum, the Geneva Conventions. All persons detained by coalition forces in Iraq are therefore protected either as prisoners of war (GC III, Relative to Prisoners of War) or as civilians (GC IV, Relative to the Protection of Civilian Persons in Time of War) (Sadat 2007: 325). GC III covered Iraqi combatants captured by the coalition during the hostilities (that is, until May 2003). GC IV protected all other categories of detainees, namely, persons arrested for crimes, persons arrested for hostile acts against coalition forces, and persons detained for "imperative reasons of security."

After the end of combat operations, the coalition faced armed resistance from various groups and militias. Because these groups did not represent the Iraqi state or its armed forces (both of which had ceased to exist), their members were not covered by GC III (Prisoners of War). They were, however, protected by GC IV, whose Article 4 extends its protections to all those "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or an Occupying Power of which they are not nationals" (*Convention (IV) Relative to the Protection of Civilian Persons in Time of War* 1949).[19] Coalition troops are still, as of this writing, fighting various kinds of insurgents in Iraq, which means that they are engaged in ongoing "armed conflict not of an international character" (GC IV, Article 3). GC IV therefore continues to apply to suspected insurgents detained by coalition forces in Iraq. GC IV requires that all detainees "be treated humanely" and prohibits, "at any time and in any place whatsoever . . . violence

to life and person, . . . cruel treatment and torture," and "outrages upon personal dignity, in particular humiliating and degrading treatment" (Article 3). In short, the Geneva Conventions ban any abuse of detainees in Iraq, from the date of the invasion to the present.

The detainee abuses documented at Abu Ghraib and other sites clearly violated these norms. The *Taguba Report* concludes that U.S. military personnel had "committed egregious acts and grave breaches of international law" (*Article 15-6 Investigation of the 800th Military Police Brigade (The Taguba Report)* 2005: 50), and repeatedly recommends that detainees, guards, interrogators, and their officers all be instructed in the requirements of the Geneva Conventions and that the Geneva rules be clearly displayed in detention facilities. The *Schlesinger Report* likewise declares that the war in Iraq "is an operation that clearly falls within the boundaries of the Geneva Conventions and the traditional law of war. From the beginning of the campaign, none of the senior leadership or command considered any possibility other than that the Geneva Conventions applied" (*Schlesinger Report* 2004: 82).

The same report also determines that coercive interrogation techniques had been applied unlawfully in Iraq to "detainees who did fall under the Geneva Convention protections" (*Schlesinger Report* 2004: 14).

Whereas U.S. officials condemned the physical mistreatment of detainees in Iraq, they have sought to justify two other highly controversial practices: "ghost detainees" and renditions. "Ghost detainees" are prisoners held by coalition (in practice, U.S.) forces but whose names are not entered on prison records and whose detention is therefore kept secret. According to all of the reports, the Central Intelligence Agency (CIA) was responsible for the problem of ghost detainees. The CIA brought "high value" detainees (that is, prisoners suspected of belonging to Al Qaeda or other terrorist groups) to Abu Ghraib for interrogation. These prisoners were kept "off the books." The *Taguba Report* found that on at least one occasion, military police at Abu Ghraib moved 6–8 ghost detainees around within the facility "to hide them from a visiting . . . [Red Cross] survey team," a practice that the report condemned as a "violation of international law" (*Taguba Report* 2004: 26–27). The Department of Defense reportedly acknowledged that the number of ghost detainees may have reached 100. The *Jones-Fay Report* criticized the CIA's ghost detainee program as leading to a "loss of accountability." The report strongly recommended that military personnel ensure that the CIA follow Department of Defense procedures for registering detainees, so that military personnel would "never be put in a position that potentially puts them at risk for noncompliance with the Geneva Convention or Laws of Land Warfare" (*Jones-Fay Report* 2004: Executive Summary). The *Schlesinger Report* notes that Defense Secretary Donald Rumsfeld "publicly declared he directed one detainee be held secretly at the request of the Director of Central Intelligence" (*Schlesinger Report* 2004: 87).

The existence of ghost detainees in itself violates the Geneva Conventions, as the *Taguba Report* noted. GC III requires that prisoners of war "be enabled to write direct" to their families, immediately on capture or no more than one week after arrival in a camp (Article 70). Prisoners must be allowed to correspond to the outside via letters and cards (Article 71). Representatives of the Red Cross are entitled to visit all detention and transit facilities, to determine the length and frequency of such visits, and to interview prisoners without witnesses present (Article 126). GC IV creates identical rights and obligations with respect to all other categories of detainees (Articles 76, 108, and 143). By holding ghost detainees, U.S. personnel violated these provisions.

"Rendition" (sometimes also called "extraordinary rendition") is a practice by which U.S. agents have secretly transferred

detainees to the custody of another country. The purpose of such transfers is to allow the detainees to be subjected to coercive interrogation techniques, including torture, in the receiving country. Through renditions, the United States has sent persons seized or detained in Afghanistan, Iraq, and several European countries to Egypt, Jordan, Morocco, Saudi Arabia, Syria, and Yemen – all of which have been cited by the U.S. State Department for interrogations involving the use of torture (Association of the Bar of the City of New York and Center for Human Rights and Global Justice 2004: 8–9). The U.S. government, not surprisingly, is officially silent with respect to renditions, but numerous officials have acknowledged the practice obliquely or informally. In Iraq, about 12 detainees were transferred to other countries through rendition prior to October 2004.

International humanitarian law prohibits such transfers. Article 49 of GC IV stipulates that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive". Article 76 of the same convention requires that the detaining power notify the ICRC of any transfers of protected persons, even those of brief duration and within the occupied territory. The rendition of detainees from Iraq violates Article 49; the secrecy of the transfers contravenes Article 76.

A draft opinion prepared by the Office of Legal Counsel in the U.S. Department of Justice opens an exception to the U.S. government's oft stated position that all persons detained in Iraq are fully covered by the Geneva Conventions. The draft opinion, dated March 19, 2004, concludes that the United States may legally transfer protected persons "who are illegal aliens from Iraq pursuant to local immigration law" and may relocate protected persons (whether or not they are illegal aliens) to other countries "to facilitate interrogation, for a brief but not indefinite period" (Goldsmith 2007: 2). Although the opinion was a draft, the CIA reportedly has relied on it as the legal basis for its program of renditions. That reliance appears to be misplaced: there has been a comprehensive refutation of the opinion's interpretation of Article 49, arguing on the basis of the plain meaning of the text, linguistic considerations, the historical context of the Geneva conventions, and customary law and international practice (Sadat 2006: 237–38). Indeed, commentators have concluded that extraordinary renditions are a grave breach of the Geneva Conventions and that they violate various international human rights conventions, including the Convention against Torture, the ICCPR, the Universal Declaration of Human Rights, the Convention and Protocol Relating to the Status of Refugees, and the Vienna Convention on Consular Relations (Sadat 2006: Weissbrodt and Bergquist 2006).

Conclusions

The coalition invasion of Iraq was an impermissible use of force. The invasion did not fall within either of the two exceptions to the general prohibition (U.N. Charter Article 2(4)) on the use of force: it was not an exercise of the right of self-defense in response to an imminent threat, neither was it authorized by the Security Council. States decisively rejected the U.S. and British contention that the use of force was authorized by prior Security Council resolutions; legal scholars have pointed out any number of crippling flaws in the U.S. and British arguments. The more speculative assertion, that a doctrine of anticipatory self-defense actually justified the attack on Iraq, has similarly suffered from telling critiques. Indeed, the debates seem to have strengthened the traditional Caroline criteria governing anticipatory self-defense: the use of force is permitted in advance of an actual attack only if such an attack is about

to occur, other modes of responding would be unavailing, and the use of force is both necessary and proportionate.

The occupation of Iraq raised pressing questions regarding the tension between traditional international rules that narrowly limit the prerogatives of occupying powers and the need for transformation in Iraq's political, legal, and economic institutions. More than anything, the legal debates have highlighted the need to adapt occupation law to take into account modern human rights law, thereby establishing international standards for the reform and restructuring of failed and formerly repressive regimes. The new norms should govern transformative occupations whether the agents of change are international bodies (such as the United Nations) or coalitions of states.[20]

Issues relating to the treatment of detainees are of more than historical or doctrinal interest; they raise ongoing questions of responsibility for violations of international law. Torture; cruel, inhuman, or degrading treatment; ghost detainees; and renditions have occurred in Iraq, Afghanistan, Guantánamo Bay, and secret sites on several continents. The global pattern of U.S. conduct with regard to detainees suspected of terrorist connections disproves the Bush administration's assertions that the crimes committed at Abu Ghraib were the work of a small number of "bad apples." More troubling, the unlawful practices documented in Iraq have been, and continue to be, at the heart of the U.S. government's approach to dealing with captives in its so-called "war on terror." Recent reports reveal that Justice Department memoranda from 2005 authorized the CIA to employ "painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures." (Shane et al. 2007) The existence of the still unpublished opinions, approved by then Attorney General Alberto Gonzales, shows that the Bush administration continues, to the date of this writing, to authorize torture and related abusive practices.

Indeed, in its quest to gain intelligence on terrorist groups and their plans, the Bush administration has systematically sought to evade international rules governing the humane treatment of detainees. From September 2001 on, the Bush administration has claimed that coercive interrogation techniques, including methods that are widely regarded as torture, are necessary in order to extract from suspected terrorists timely information that could prevent further attacks. The documentary trail is by now conclusive in establishing that the Bush administration has based its policies and operational directives on its own decisions that:

1. Existing international law on torture is an outmoded obstacle to gaining useable intelligence from detainees.
2. The President of the United States, when acting as Commander-in-Chief of the armed forces, is unbound by international law, the U.S. Constitution, or domestic statute.
3. The president is acting under his commander-in-chief power when taking actions under the so-called "global war on terror."
4. Iraq is a "central front" in the war on terror.
5. The president may therefore authorize harsh and coercive interrogation techniques to be used on detainees in Afghanistan, Iraq, Guantánamo Bay, and elsewhere.
6. Techniques that intentionally inflict physical or mental "severe pain or suffering" (*Convention against Torture*, Art. 1) do not fit within the U.S. government's narrow definitions of torture.
7. U.S. personnel who employ such techniques are immune from prosecution under U.S. law.
8. In any case, certain categories of detainees – "unlawful combatants" – fall outside Geneva and other legal protections.

In other words, both the White House and the Department of Defense, through a series of official policies and interpretations, have made it clear that, when interrogating detainees, traditional limits no longer apply; the end of gaining intelligence justifies the coercive means needed to obtain it. Even if high-level military and government leaders did not openly order torture, their subordinates down to the operational level (at Abu Ghraib, for example) could not help but understand that they were expected to extract information from detainees even if it meant employing cruel, inhuman, or degrading methods, or torture. Thus one (unnamed) U.S. official could still go on record to declare: "If you don't violate someone's human rights some of the time, you probably aren't doing your job." The official reports issued in the wake of Abu Ghraib all establish that the legal and policy decisions that justified and encouraged abusive interrogation practices filtered down to the units guarding and interrogating detainees. The *Jones-Fay Report* concludes that U.S. personnel at Abu Ghraib felt "intense pressure . . . from higher headquarters, to include CENTCOM, the Pentagon, and the DIA [Defense Intelligence Agency] for timelier, actionable intelligence" (as reproduced in Danner 2006: 47–8). The *Schlesinger Report* affirms that coercive interrogation techniques authorized by the Secretary of Defense for use at Guantánamo Bay "migrated to Afghanistan and Iraq where they were neither limited nor safeguarded" (as reproduced in Danner 2006: 37; see also the *Jones-Fay Report*).

A substantial body of analyses overwhelmingly concludes that the legal bases for the Bush administration's authorization of torture and cruel, inhuman, or degrading treatment are profoundly and irreparably flawed.[21] By justifying and promoting harsh detention and interrogation practices, the U.S. government has encouraged conduct that violates the Geneva Conventions and therefore constitutes war crimes. Specific officials responsible for authorizing, ordering, or providing legal cover for illegal activities may thus have participated in a common plan to permit war crimes, or abetted the commission of war crimes, raising the prospect of individual civil or criminal liability. Legal action against U.S. officials is unlikely, given current political realities. But, as the *Pinochet* case reminds us, realities can change.

Notes

1 Both legal commentators and public officials deploy a variety of words to capture the idea referred to here. The terms "preemptive," "preventive," and "anticipatory" are all in common use, sometimes interchangeably. For the sake of clarity, I use "anticipatory self-defense" to refer to any use of force by a state against a threat, before that threat has produced an actual attack. "Preemptive self-defense" is a subcategory of anticipatory self-defense, in which a state uses force to counter an attack that is imminent (about to occur). "Preventive self-defense" is another subcategory of anticipatory self-defense, in which a state uses force to halt the development of a threat that could, at some future time, produce an armed attack (that attack not yet being imminent).

2 This conclusion assumes significance in light of repeated post-war U.S. assertions that, despite the absence of weapons of mass destruction and links to al Qaeda, the war was justified because "the world is better off without Saddam Hussein in power."

3 Papastavridis argues persuasively against the applicability of standard principles of treaty interpretation, including the Vienna Convention on the Law of Treaties, to Security Council resolutions (see Papastavridis 2007).

4 The other eight countries expressing similar convictions were Bulgaria, Cameroon, China, Colombia, Ireland, Mexico, Russia, and Syria.

5 The "Downing Street Memo" was first published in the *Sunday Times* on May 1, 2005. The document, dated 23 July 2002, summarizes the report of British director of foreign intelligence Sir Richard Dearlove following a visit to Washington, DC. Dearlove reported that, in the U.S. government, "military action was now seen as inevitable," and that the "intelligence and facts were being fixed around the policy."

6 The controversies have generated calls for clearer standards for interpreting Security

Council resolutions. For one such appeal, and a proposed set of interpretive principles, see Papastavridis 2007.

7 The discussion here presumes that the customary criteria for anticipatory self-defense continue as international law alongside the U.N. Charter rules on the use of force, especially Art. 2(4). An alternative view is that Art. 2(4) supplants previous customary law and permits the use of force only in the case of an actual armed attack. The debate on this point is beyond the scope of this essay, but Shaw (2003) offers overviews of the main positions.

8 Dinstein adopts yet a different view. He asserts that there is no right to preventive self-defense under either the Charter or customary international law; force is justified only against an attack actually occurring. Dinstein argues that no Security Council resolutions were necessary for the Persian Gulf war (1991), which was justified simply as collective self-defense; that the coalition had been in a continuous state of war with Iraq since then, with an extended period of ceasefire (1991–2003); that Iraq's violation of Resolution 687 released the coalition from its obligation to observe the ceasefire; and that, therefore, the 2003 invasion of Iraq was fully justified under the inherent right to collective self-defense that initially justified the war in 1990 (see Dinstein 2005).

9 As various commentators have observed, U.S. officials consistently avoided referring to the U.S. presence in Iraq as an "occupation" or to U.S. forces there as "occupiers." U.S. officials preferred to describe coalition troops as "liberators." Yet it has been pointed out that the choice of terms was a rhetorical tactic rather than a meaningful legal distinction. In any case, the United States never questioned the applicability of occupation law.

10 Yoo contends that occupation law permits far reaching reforms of the institutions of the occupied territory, especially given state practice in the 1940s and since (Yoo 2004).

11 Although Yoo argues that the Hague Regulations do not apply in Iraq because Iraq is not a party to that convention; see ibid.

12 The authentic French text of Hague Regulations Art. 43 establishes the obligation of the occupier "de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics." The French version thus requires the occupier to *restore* and *maintain* both public order and public, or civil, life. The (non-authentic) English version still in use incorrectly translates the relevant phrase as "public order and safety."

13 Dorosin was at the time Attorney-Adviser in the U.S. Department of State, speaking in his private capacity.

14 The discussion here avoids the vexed question of the extent to which Security Council resolutions adopted under Chapter VII can override general international law. Dorosin cites Article 103 of the U.N. Charter to support his argument that the resolutions regarding Iraq did supersede traditional occupation law.

15 Wheatley argues that the creation of the transition government was not compatible with the right of Iraqis to self-determination, though the establishment of a constitutional government was; see Wheatley (2006), arguing that imposition of democracy by an occupying power violated Article 43 of the Hague Regulations (533).

16 Both Amnesty International and Human Rights Watch have published numerous reports on torture and other abuses of detainees.

17 The principal official investigations of the prisoner holding area at Abu Ghraib and other instances of detainee abuse are the *Taguba Report*, the *Fay-Jones Report*, and the *Independent Panel Report* (also known as the *Schlesinger Report*). The *Taguba Report* is available online at http://www.fas.org/irp/agency/dod/taguba.pdf. The *Jones-Fay Report* is available at http://www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf, and the *Schlesinger Report* is available at http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf.

18 This category includes physical and psychological mistreatment of detainees, including punching, kicking, and beating detainees; prolonged forced nudity; sexual humiliation; simulation of electric torture; use of unmuzzled dogs; and rape and threatened rape; see *Article 15-6 Investigation of the 800th Military Police Brigade (The Taguba Report)* (2004).

19 Both Geneva Conventions also applied during the period of occupation; Article 2 of each Convention stipulates that each "shall also apply to all cases of partial or total occupation."

20 Unilateral occupation for the purpose of regime change and institutional transformation would be indistinguishable from the illegal, unilateral use of force.

21 For a sample of such analyses, revisit any of the references already given in this chapter.