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The Era of Multilateral Occupation

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I.
INTRODUCTION

Military interventions in Afghanistan in 2001 and in Iraq in 2003 made the U.S. an occupying power of two large countries for the first time since World War II. Yet unlike those following World War II, these occupations took place against a backdrop of an expanded framework of international law, active international institutions, and strong international human rights norms. Already, a host of questions has arisen: Did the U.S. administer its occupations consistent with its responsibilities under international law? What is the appropriate role of the international community and the United Nations in occupation? And how did U.S. needs for international assistance affect its actions and policies during the occupations? The aftermath of the U.S. intervention in Iraq presented a rare instance in which the word "occupation" was used without dispute, yet serious doubts exist as to whether the international law of occupation remains the most appropriate guidepost in the era of modern warfare.

Though useful for a long period of history, the international law of occupation is meant to govern an outdated model of occupation. Humanitarian and regime change interventions have birthed a new model of occupation for which nation-building is the overriding policy goal. However, nation-building is antithetical to the traditional law of occupation. Hence the new model has created a chasm between what is "lawful" and what is "legitimate." Many actions taken by the U.S. in Afghanistan and Iraq and by the United Nations (UN) in various UN-administered territories are technically unlawful under the international law of occupation but are nevertheless viewed as legitimate by the international community.

The international law of occupation has been largely replaced by an evolving "de facto modern law of occupation" in which multilateralism serves as an alternative source of legitimacy and guidance. The resource and legitimacy needs of modern occupations create an "invisible hand" that pushes occupying powers toward international cooperation and compliance with international norms of behavior. A successful modern occupation requires extensive international support, which can only be obtained by acceding to international

demands for shared authority, transparency, and respect for human rights. The occupant therefore has enormous incentives to multilateralize the occupation for political, economic, and security reasons. Hence, we are in an era of multilateral occupation.

This Article explains the emergence of multilateral occupation in three parts. Part II reviews how the international law of occupation originated in state practice under the old model of occupation. At that time, occupation was conceived to be mere temporary custodianship of occupied territory. Part III explains the new model of occupation as explicitly intended to create or rebuild a state. The dated assumptions and policy goals of the international law of occupation render it unable to govern or confer legitimacy on this new model of occupation. For that reason, modern occupying powers have been forced to seek new sources of direction and legitimacy. Part III then outlines the budding "de facto modern law of occupation" and applies this discussion to the occupations of Afghanistan and Iraq. Part IV confronts the shortfalls of the "invisible hand" as a means of regulating the behavior of modern occupying powers and suggests means by which the international community might better protect inhabitants of occupied territory.

II.
THE "OLD MODEL" OF OCCUPATION AND THE LAW IT INSPIRED

The international law of occupation was originally developed to serve an interstitial function based on a prevailing model of occupation that assumed temporary custodianship, *laissez-faire* government, and the existence of a "legitimate power" (the displaced government). In the old model, occupation was the temporary byproduct of war and consisted of foreign occupation of enemy territory pending a peace agreement that would provide for an eventual return of the territory to the ousted sovereign or annexation by the victor.[1] The deal struck at the formal conclusion to the war would determine the final status of occupied territory through a political agreement based on the respective military balance of power between the states in conflict and did not consider how the territory was previously administered (that is, how the ousted government had treated its citizens).[2]

The traditional international law of occupation generally assumed the temporary administration of a *European* power with a functioning infrastructure and system of taxation, undisputed government control over the entire territory, little or no history of colonialism, and a relatively homogenous society in terms

1. *See* Insurance Co. v. Canter, 26 U.S. 511, 542 (1828) ("The usage of the world is, if a nation be not entirely subdued, to consider the holding of acquired territory as a mere military occupation until its fate shall be determined at the treaty of peace."); Conor McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq*, 10 J. CONFLICT & SEC. L. 43, 44 (2005); *see also infra* Section II.B.

2. *See* Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 262 (2005) ("'Misrule' by a defeated regime was only rarely of concern to a victorious occupying power.").

of culture, religion, ethnicity, tribalism, and language.[3] The law of occupation generally assumes a functioning rather than a failed or collapsed state and, to the extent that a state apparatus in occupied territory was unable to function, it would concern the occupying power only as to the risks it posed to the occupant's military force, and not as to the risks posed to the population of that territory due to a lack of security or provision of state services.

A. Foundations of the Law of Occupation

The traditional international law of occupation is a subset of the law of war, also termed international humanitarian law or the laws of armed conflict. Although it is generally agreed that codification of modern international humanitarian law began with the First Geneva Convention in 1864, the law of war has its roots largely in customary rules dating at least as far back as 3000 BCE.[4] Occupation began to be distinguished from acquisition of territory in the latter half of the eighteenth century, yet the concept of military occupation was mostly developed after the Napoleonic Wars.[5] Until that time, the common law principle that "a conquered country forms immediately part of the King's Dominion" was generally accepted.[6]

International humanitarian law became increasingly codified over time. The Lieber Code, written for the conduct of U.S. armies in the U.S. Civil War, is the root of a large portion of present-day rules. That Code represented "the first instance in western history in which the government of a sovereign nation established formal guidelines for its army's conduct toward its enemies."[7]

The bedrock of the international law of occupation is found in the 1907

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3. There are some exceptions to these assumptions (such as Germany's attempted division of Belgium into Flanders and Wallonia in World War I), but such counterexamples did not prepare the law of occupation to anticipate the ethnic and cultural divisions—many of which were exacerbated or altered through colonialism—and dilapidated or non-existent infrastructures encountered in occupations in countries such as Afghanistan and Iraq. For additional background, see EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 32-48 (2004) (recounting the German occupation of Belgium during World War I); Davis P. Goodman, Note, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1591 (1985) ("The Hague Conventions were designed to meet nineteenth century European political, economic, and social conditions."); Michael Ottolenghi, Note, *The Stars and Stripes In Al-Fardos Square: The Implications for the International Law of Belligerent Occupation*, 72 FORDHAM L. REV. 2177, 2183-84 (2004) (describing the "prevailing European attitude toward war at the time of the Hague Conferences"); NOAH FELDMAN, WHAT WE OWE IRAQ 1 (2004) (explaining that "[e]conomic, political, social, and cultural conditions in Iraq after the U.S. invasion were distinct from any occupation situation that anyone had ever encountered . . ."); TOM LANSFORD, A BITTER HARVEST: U.S. FOREIGN POLICY AND AFGHANISTAN 10-50, 113-56 (2003) (relating the ethnic groups and troubled history of Afghanistan).

4. MARCO SASSÒLI ET AL., HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 97 (1999).

5. GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 7 (1957).

6. *Id.* at 7. Claims asserting this common law principle were made as late as 1814. *Id.*

7. LIEBER'S CODE AND THE LAW OF WAR 1-2 (Richard Hartigan ed., 1995).

Hague Regulations, which establishes occupation as a question of fact[8] and provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.[9]

The Hague Regulations were considered to be largely declaratory of the law and customs of war at the time and are now regarded to constitute customary international law.[10]

The conduct of occupations during and following World War II called into question the application and relevance of the Hague Regulations. The occupations of Germany and Japan completely disregarded the deference to the previous government and its institutions enshrined in the Hague Regulations because "the prime purpose" of those occupations was "to drastically change certain economic, cultural, governmental, and even religious institutions."[11] At the conclusion of the war, the Allies faced pressing challenges that "had not been contemplated by the Hague Regulations," including the destruction of

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8. Determination of whether a force constitutes an occupying power is based on that force's authority and control over the territory in question. Convention Respecting the Laws and Customs of War on Land (Hague, IV), art. 42, Oct. 18, 1907, 36 Stat. 2277, 2306, 205 Consol. T.S. 277, 295 [hereinafter Hague Regulation IV]. "The test is whether the force present is not just passing through, is not engaged in actual combat and is, in effect, the sole authority capable of exercising control over the civilian population, or any remaining authority requires the approval or sanction of the force to operate." MICHAEL J. KELLY, RESTORING AND MAINTAINING ORDER IN COMPLEX PEACE OPERATIONS: THE SEARCH FOR A LEGAL FRAMEWORK 154 (1999). Some "markers" that may indicate the existence of occupation include: (1) the presence of a military force "whose presence in a territory is not sanctioned or regulated by a valid agreement, or whose activities there involve an extensive range of contacts with the host society not adequately covered by the original agreement under which it intervened," (2) the "ordinary system of public order" has been displaced by the military force (or the force has shown the ability to do so), (3) the military force and inhabitants of the territory are of different nationalities (and the local population owes no allegiance to the military force), and (4) that "within an overall framework of a breach of important parts of the national or international legal order, administration and the life of society have to continue on some legal basis, and there is a practical need for an emergency set of rules." Adam Roberts, *What is a Military Occupation?* 55 BRIT. Y.B. INT'L L. 249, 300-01 (1985).

9. Hague Regulation IV, *supra* note 8, art. 43. The term "civil life" is regarded as the best translation of the phrase "la vie publics" from the authoritative French text, though many English translations use the word "safety." Edmund H. Schwenk, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 YALE L.J. 393, 393 n.1 (1945). This formulation of inserting the bracketed phrase "civil life" in place of "safety" in the English translation is taken from BENVENISTI, *supra* note 3, at 7.

10. IV COMMENTARY ON GENEVA CONVENTION 614 (Jean S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY IV]; *see also In re* Goering and Others, Trial of the Major War Criminals, Case No. 92, 1946 Ann. Dig. 203, 254 (Int'l Mil. Trib., Nuremberg, Germany), *available at* http://www.yale.edu/lawweb/avalon/imt/proc/judlawre.htm ("[B]y 1939 these rules laid down in the [Hague] Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war."); U.S. DEP'T OF ARMY, PAM 27-1, TREATIES GOVERNING LAND WARFARE at i (Dec. 7, 1956) (explaining the Hague Regulations "have been held declaratory of the customary law of war to which all States are subject, in so far as such Conventions are not superseded by the 1949 Geneva Conventions").

11. PHILIP TAYLOR & RALPH BRAIBANTI, ADMINISTRATION OF OCCUPIED AREAS: A STUDY GUIDE 8-9 (1948).

Germany on a scale that had not been seen in earlier warfare and the existence of laws in Germany that "included the race and anti-democratic laws that the war was now largely all about."[12] These circumstances placed enormous stress on the Hague Regulations regime and led to varying degrees of total disregard of, and legal creativity to discover loopholes in, the international law of occupation.[13]

In short, the assumptions of the Hague Regulations poorly tracked with the facts on the ground. The Hague Regulations assumed "an invading army which is trying to live on the invaded country" and therefore attempted to "confine [the invading army's] exactions strictly within the narrowest limits of military requirements."[14] Yet the world's newly emerged hegemon, the United States, did not fit that assumption in its occupation of territory.[15] These discrepancies and the variations of occupations seen in the wars since the drafting of the Hague Regulations exposed a need to further clarify the international law of occupation.

The Fourth Geneva Convention of 1949 was crafted as a result of the World War II experience to better extend the protections of the laws of war to civilians and to further address the rights and duties of occupying powers.[16] Section III of the Fourth Geneva Convention addresses occupied territories and was meant to "supplement" the relevant sections of the previous Hague Regulations "by making numerous points clearer."[17] Of particular importance, the Fourth Geneva Convention attempts to reduce ambiguity in the application of the law of occupation by explicitly clarifying that the Convention applies to *any* case of occupation, thus incorporating any kind of non-treaty based occupation.[18]

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12. KELLY, *supra* note 8, at 125-26.

13. Legal creativity was used to justify the disregard of certain German laws despite a lack of legal support for such action in the Hague Regulations. *See id.* at 125 ("It would now come to be articulated as a result of the war that many of these [German] laws were contrary to general principles and standards of international law, even though no conventions dealt with the subject, and as such were a legitimate international concern and target for action."); Fox, *supra* note 2, at 291-94.

14. TAYLOR & BRAIBANTI, *supra* note 11, at 8-9.

15. *See id.* at 9 ("[I]n every modern American occupation, not only have American forces existed largely from their own resources, but they have provided material supplies, especially of food, for the nations occupied.").

16. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; *see also* ICRC COMMENTARY IV, *supra* note 10, at 3-6 (reviewing the goals of the Geneva Conventions in extending protections to civilians in light of new forms of warfare and the shortcomings of existing international humanitarian law at that time).

17. ICRC COMMENTARY IV, *supra* note 10, at 272. *Compare id.* at 9 (arguing the Fourth Geneva Convention "does not, strictly speaking, introduce any innovations in this sphere of international law" or "put forward any new ideas," but rather "it reaffirms and ensures, by a series of detailed provisions, the general acceptance of the principle of respect for the human person in the very midst of war"), *with* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 364 (1987) ("But in their range and depth, most of the provisions in the [Fourth Geneva] Convention retain only a tenuous link with the brief and fairly primitive Hague Regulations; those involving procedures and implementation have no such antecedents.").

18. Common Article 2 provides in relevant part that the Convention shall "apply to *all cases*

The four Geneva Conventions of 1949 have been said to "constitute the heart of international humanitarian law."[19] Furthermore, the Geneva Conventions are generally considered customary international law because of their almost universal adoption[20] and because they are to a great extent declaratory of previous customary law.[21] The international community later addressed certain aspects of occupation in the 1977 Additional Protocol I to the Geneva Conventions of 1949,[22] but there is disagreement as to which of its provisions represent customary international law.[23]

B. Policy Goals and Obligations

The law of occupation was meant to balance the security needs of the

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of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Fourth Geneva Convention, *supra* note 16, art. 2 (emphasis added). Article 4 reads: "Persons protected by the Convention are 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 Occupying Power of which they are not nationals." *Id.* art. 4 (emphasis added). Thus, the Geneva Conventions eliminated the previous distinction between belligerent and non-belligerent occupation and clearly established that application of the law of occupation is not dependent on the existence of armed conflict. *See* Roberts, *supra* note 8, at 276; KELLY, *supra* note 8, at 152.

19. FRANÇOISE BOUCHET-SAULNIER, THE PRACTICAL GUIDE TO HUMANITARIAN LAW 115 (Laura Brav ed., trans., 2002).

20. More than 190 states have adhered to the Geneva Conventions as of April 2005. *See* INT'L COMM. OF THE RED CROSS, STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS (2005), http://www.icrc.org/Web/eng/siteeng0.nsf/html/party_gc.

21. *See* BOUCHET-SAULNIER, *supra* note 19, at 65; Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal, ¶ 577 (May 7, 1997), *reprinted in* 36 I.L.M. 908 ("Implicit in the Appeals Chamber Decision is the conclusion that the Geneva Conventions are a part of customary international law"); LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 338-39 (2d ed. 2000) ("It was clearly established at Nuremberg that the Hague Conventions together with the 1929 Geneva Convention had hardened into customary law. The 1949 Conventions are part of the same system and, therefore, the system established thereby has achieved the same level."); INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 218 (2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5ZBHH7/$File/IRRC_853_FD_IHL_Challenge.pdf. Yet there is some disagreement as to exactly which provisions of the Fourth Geneva Convention constitute customary international law. Lieutenant Colonel Michael Kelly argues that a lack of *opinio juris* surrounding the Fourth Geneva Convention means that "the only support for the customary status of the entire Convention is its widespread adoption and this would not appear to be enough. It would, therefore, seem that only the Hague Regulations and those humanitarian provisions of the Convention [deemed declaratory of customary law] can be accepted as having obtained that [customary] status." KELLY, *supra* note 8, at 158-59. *See generally* Meron, *supra* note 17 (discussing the treatment of the Geneva Conventions by international tribunals as well as the implications of a lack of *opinio juris*).

22. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

23. *See* SASSÒLI, *supra* note 4, at 109 (arguing it is "uncontroversial that most, but clearly not all rules of the two 1977 Additional Protocols today provide a formulation for parallel rules of customary international law"). The U.S., which has not ratified Additional Protocol I, contends that Additional Protocol I does not represent customary international law. *See* Garth J. Cartledge, *Legal Constraints on Military Personnel Deployed on Peacekeeping Operations*, *in* THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW 121, 129 (Helen Durham & Timothy L.H. McCormack eds., 1999).

occupant against desired protections for the civilian population of the territory in an overall framework meant to preserve the *status quo ante* until ultimate sovereignty of the territory could be decided. To this end, the primary responsibilities of an occupying power according to the international law of occupation are to (1) temporarily preserve basic public order without prejudicing a final outcome and (2) preserve local institutions and law.

The main thrust of the international law of occupation is to provide a set of interstitial rules for the administration of territory during an interim period while the fate of the territory is decided.[24] The occupying power administers the territory until the territory is reconquered by the opposing side or, upon conclusion of the war by a peace agreement, the territory is either returned to the "legitimate sovereign" or formally annexed by the occupant. The occupying power is obligated to allow life in the territory to continue as normally as possible[25] but, "[s]ince a belligerent occupant is not a permanent sovereign, it is deemed to be beyond his competence to engage in permanent changes in regard to fundamental institutions."[26] Most importantly, "international law tries to ensure that no measures are taken during the occupation which compromise a return to the former sovereign."[27]

Occupying powers must operate within strict confines when making institutional changes and legal revisions. Occupants are expected to make only those changes to the pre-existing institutions and laws of the state that are absolutely necessary.[28] "The principle is that the penal legislation of the occupied territory remains in force, except in so far as it constitutes a threat to the Occupying Power."[29] Penal laws can also be changed if they make adverse distinctions in contravention of the protections of the Geneva Conventions.[30]

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24. *See* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 25, 28 (Emma Playfair ed., 1992) ("An important, but implicit, assumption of much of the law on occupation is that military occupation is a provisional state of affairs."); *see also* SASSÒLI, *supra* note 4, at 154 (explaining that international humanitarian law is "strong in protecting the *status quo ante*, while weak in responding to new needs of the population of the occupied territory").

25. SASSÒLI, *supra* note 4, at 154; *see also supra* note 9 and accompanying text.

26. ERNST H. FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 89 (1942); *see also* Christopher Greenwood, *The Administration of Occupied Territory in International Law*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES, *supra* note 24, at 241, 257; FRÉDÉRIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES 177 (1987).

27. SASSÒLI, *supra* note 4, at 155.

28. *See* Hague Regulation IV, *supra* note 8, art. 43. Article 64 of the Fourth Geneva Convention "expresses, in a more precise and detailed form, the terms of Article 43 of the Hague Regulations." ICRC COMMENTARY IV, *supra* note 10, at 335. Article 64 provides in relevant part: "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." Fourth Geneva Convention, *supra* note 16, art. 64.

29. INT'L COMM. OF THE RED CROSS, BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS 49 (1987); *see also* Fourth Geneva Convention, *supra* note 16, art. 64; BENVENISTI, *supra* note 3, at 14.

30. Fourth Geneva Convention, *supra* note 16, art. 64.; *see also* ICRC COMMENTARY IV,

Though the Fourth Geneva Convention refers specifically to "penal laws," the International Committee of the Red Cross (ICRC) maintains that "[t]he idea of the continuity of the legal system applies to the whole of the law (civil law and penal law) in the occupied territory."[31] Thus, the two exceptions outlined above may permit temporary abrogation of the administrative and legislative structures and the political process in occupied territory, "but any attempt at effecting permanent reform or change in [those] structure[s] will be unlawful."[32]

The law of occupation was able to bestow legitimacy on occupations because its central policy goals aligned with those of occupying powers at that time.[33] State practice and the formal body of law coincided in the old model of occupation, as the driving force of each was to enable the occupant to protect its armed forces while temporarily administering territory with as little effort and resources as possible pending a final determination of sovereignty of the territory. The main source of legitimacy for occupations was conduct in accordance with the law of occupation, and this body of law served as the primary gauge by which the international community could determine what it considered to be "legitimate" or "illegitimate" actions on the part of the occupying power.[34]

C. Status of the Law of Occupation

The international law of occupation has become essentially irrelevant as a force that compels action by occupying powers. Occupants rarely comply with the letter or spirit of that body of law. As a result, the law of occupation's legal authority and status are uncertain.

The history of disregard for the law of occupation is as rich as it is long. According to Professor Eyal Benvenisti, the "principles underlying the law of occupation had already been on the decline" by the end of the nineteenth century.[35] By the close of World War II, continued neglect provided ample

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supra note 10, at 335; U.S. DEP'T OF ARMY, FM 41-10, CIVIL AFFAIRS OPERATIONS 103 (Aug. 3, 1967).

31. ICRC COMMENTARY IV, *supra* note 10, at 335. "The reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts; there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution." *Id.*

32. Greenwood, *supra* note 26, at 257; *see also* David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 851 (2003) (explaining that the international law of occupation "permits tinkering on the edges of societal reform" but is "not a license to transform" society).

33. This was originally true by definition given that state practice of occupants created the law of occupation. The Hague Regulations and the Fourth Geneva Convention sought to codify and expand upon this customary international law. *See supra* notes 5, 10, 16-21 and accompanying text.

34. History abounds with instances of occupying powers breaching the international law of occupation (as will be discussed presently), but the law of occupation still presented the international community with the most relevant standard by which to judge the lawfulness—and thereby determine the legitimacy of—those actions. The central point is the use of the law of occupation as the yardstick for judgment, not historical compliance with that body of law.

35. BENVENISTI, *supra* note 3, at 29.

cause to conclude that the Hague Regulations had "lost their legal authority."[36] The main tenets of the law of occupation were reiterated in the Fourth Geneva Convention soon after the war's conclusion. Nonetheless, "in all of the recent cases of occupation, except for the Israeli control over the West Bank (not including East Jerusalem) and Gaza, the framework of the law of occupation was not followed even on a de facto basis."[37] At a minimum, the bulk of the law of occupation has, to borrow a phrase from Justice William Brennan, "long been in a state of innocuous desuetude."[38]

Consistent and almost universal disuse calls into question to what extent the international law of occupation retains legal authority. Professors Anthony Arend and Robert Beck use the dual criteria of "authority" and "control" to evaluate if a "putative norm" may be properly regarded as "law."[39] They apply this test to treaty as well as customary international law, and argue that "states have in practice effectively withdrawn their consent from a particular provision of a treaty, and hence, that it is not 'law,' if: 1) the provision is not believed by them to be authoritative, and 2) there is very little compliance with the provision, even though the treaty may remain technically 'in force.'"[40] Applied to the topic at hand, the legal force of the overarching framework of the law of occupation (rooted in both customary international law and treaties) is dubious. A century of state practice indicates almost no compliance and very little authority (as illustrated by the general lack of meaningful international condemnation or protest when the law of occupation is disregarded).[41]

Regardless of the precise legal status of the law of occupation, it is clear that the non-humanitarian tenets of that body of law are no longer consonant with the norms of the international community. Only those provisions that have tracked the changes in policy goals in occupation, such as the protection of civilians, remain relevant in the modern era. In that vein, the humanitarian and human rights-related safeguards of the law of occupation continue to provide an important baseline for the protection of occupied populations.[42] However, as

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36. *Id.* at 59.

37. *Id.* at 189-90; Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 ISR. DEF. FORCES L. REV. 19, 24, 27, 34-35 (2003).

38. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 821 (1986) (Brennan, J., dissenting). *But see* Benvenisti, *supra* note 37, at 36, 38 (contending that the law of occupation "almost reached the stage of desuetude" but was reinvigorated by its application by the UN Security Council to the recent occupation of Iraq). In contrast, this Article holds, as will be discussed below, that the law of occupation was invoked in Iraq in name only, and not in spirit or practice. *See infra* Section III.D.2.

39. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 9 (1993).

40. *Id.* at 9-10.

41. Indeed, Professor Beck notes that, using the "authority" and "control" test, "it is tempting to question seriously whether any genuine 'law' of occupation ever existed." Robert J. Beck, *The International Law of Occupation by Eyal Benvenisti*, 4 LAW & POL. BOOK REV. 88, 89 (1994) (book review), *available at* http://www.unt.edu/lpbr/subpages/reviews/benvenis.htm.

42. The Fourth Geneva Convention includes a broad spectrum of basic protections

this Article will elaborate, even those select precepts that are generally obeyed (the law's basic humanitarian provisions) are followed more because of international expectations, resource and legitimacy needs, and the international human rights regime writ large than because of any intent to comply with the international law of occupation per se.

The law of occupation, like all laws, is the product of a certain set of assumptions and policy goals. In the old model of occupation, practice and law were premised on the same policy goals; the law provided relevant guidance as to acceptable action by occupying powers and consistency with the law served as a source of legitimacy for occupants. The remainder of this Article details how international relations and the objectives of occupation evolved, but the law of occupation did not. As a result, modern occupations are left without a viable overarching legal framework and are searching for a source of legitimacy that cannot be found in a body of law with outdated policy goals and assumptions.

III.
THE ERA OF MULTILATERAL OCCUPATION (THE "NEW MODEL")

Many observers of Iraq and Afghanistan have intuitively sensed that modern occupations are somehow "different" and that new or changed rules apply. That inchoate intuition is correct. A new model of occupation has emerged, with new policy goals in response to changed international expectations.[43] International developments have altered our conceptions of, among other things, sovereignty and human rights, and occupation is now increasingly morphing into nation-building.[44] The resources and legitimacy necessary to successfully conduct nation-building create an "invisible hand" that

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including, inter alia, special provisions to effect: humane treatment of protected persons (Article 27); supply of food and medical supplies to occupied populations (Article 55); protection of children (Article 50); prohibition of the forced transfer of protected persons (Article 49); and prohibition of coercion and certain types of punishment (Articles 31-33). *See generally* Fourth Geneva Convention, *supra* note 16. As will be discussed below, many of the provisions of the international human rights regime are stronger and more comprehensive than the protections of the law of occupation. *See infra* Section III.B.1. Nevertheless, the humanitarian tenets of the law of occupation, particularly due to their status as customary international law, provide a clear minimum baseline of protections to be applied by state actors during occupation. In contrast, application of other sources of international human rights law may present ambiguity in the extent to which those laws apply to the parties in question, are customary, or apply in—or can be derogated during—situations of armed conflict.

43. Many of the underlying trends of the international developments that inspired the new model of occupation can trace their roots at least as far back as World War II, but the culmination of these trends in the emergence of the new model of occupation took place primarily following the Cold War.

44. Nation-building encompasses a broad variety of projects, including creation and/or strengthening of state institutions, aimed at fostering "peace, economic growth and democratization." JAMES DOBBINS ET AL., THE UN'S ROLE IN NATION-BUILDING: FROM THE CONGO TO IRAQ, at xxi (2005). "When conducted by external interveners, nation-building involves the exercise of domestic authority by foreign actors with a view to establishing a desired institutional framework prior to the return of sovereignty to representatives of the indigenous population." Asli U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 435-36 (2005).

pushes occupying powers to multilateralize to share burdens and acquire international support. Thus, multilateralism has replaced the traditional law of occupation as the primary source of authority and legitimacy in occupation.

Part III of this Article articulates: (1) the general framework of modern occupations, (2) the international developments that gave rise to the new model of occupation, (3) how a new de facto modern law of occupation is developing to govern occupation, and (4) how these de facto rules are illustrated in the occupations of Afghanistan and Iraq.

A. Outline of the New Model of Occupation

The new model of occupation as seen in humanitarian and regime change interventions reveals the following general formula:

- Occupation is an end goal rather than a temporary byproduct of military intervention,[45] and the conduct of the occupant and outcome of the occupation directly affect the legitimacy of the military intervention in the eyes of the international community.[46]

- The international law of occupation is generally disregarded by occupying powers.

- Occupation morphs into nation-building due to the goals of the intervention and efforts to protect the human rights of the occupied population. Regime change and humanitarian interventions explicitly seek to redesign and recreate the government of the occupied territory.[47]

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45. *See* Goodman, *supra* note 3, at 1592-93 ("Modern conflicts, such as the United States invasion of Grenada, often have as their prime purpose a fundamental change in the occupied territories' social, legal, or political structures."); *see also* Fox, *supra* note 2, at 263 ("[P]articularly since the end of the Cold War, military interveners have increasingly proclaimed changes in domestic governance as a central war aim.").

46. Admittedly, the term "international community" does contain "a degree of looseness of meaning." Don Greig, *"International Community", "Interdependence" and All That . . . Rhetorical Correctness?*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 521, 530-31, 566 (Gerard Kreijin et al. eds., 2002). In this Article, use of the term alternates between, on the one hand, rhetorical shorthand for reference to the complex mix of actors in the international system and, on the other, a term loaded with normative content by which an expression of international opinion (to the extent it can be accurately gauged and described), particularly of nation-states, implies a plausible veneer of lawfulness to the actions of occupants acting contrary to the positive international law of occupation.

47. The exact definitions of these two terms are of little import in the context of this Article. This Article will define a humanitarian intervention as "the use of armed force by a state (or states) to protect citizens of the target state from large-scale human rights violations there." AREND & BECK, *supra* note 39, at 113. For the purposes of the discussion at hand, regime change intervention will be defined as a state considering the regime of another state as a threat to its vital national security interests and militarily intervening in that state with the express goal of changing the regime in power. This definition assumes that the intervening state will seek to rebuild the target state in a new image rather than leave previous institutions intact or merely replace a few individuals (i.e., install a puppet government). Characterization of particular interventions as "regime change" and/or "humanitarian intervention" (motivations that are not mutually exclusive) is not central to the crux of the argument made in this Article; the real issue is that these types of interventions and occupations seek to restructure the government and society in the target country, thereby making the occupation (1) a more central component of warfare than it has been previously and (2) a means of gauging the success of the actual intervention.

Additionally, there is oftentimes no functioning state apparatus in the occupied territory and no ousted "legitimate power" (or the ousted regime is considered to be illegitimate due to its previous human rights violations).

- The occupant's resource requirements and its need for international legitimacy force some degree of multilateralism, even if the initial intervention was unilateral. In some cases, inclusion of the international community is necessary because of its previous involvement in the state or territory under occupation.

- The occupant exercises temporary de facto sovereignty in the occupied territory.

- The United Nations is asked to "bless" and assist occupations almost without fail and is often entrusted with directly administering primary components of the occupation.

- A nascent and inchoate de facto law of modern occupation is emerging as key decisions related to the administration of the occupation and the devolution of sovereignty are mediated by multilateral cooperation and the need for international resources rather than by a formal body of law. The need for material aid and legitimacy has created an "invisible multilateral hand" that has supplanted a large portion of the traditional law of occupation.[48] This "invisible hand" pushes the occupation toward greater transparency and multilateralism because countries demand concessions (including participation in decision making) and observance of international norms in exchange for assisting the occupation.

Figure 1 contrasts the old and new models of occupation,[49] while the subsequent section details the trends behind, and the policy goals of, this new model of occupation.

48. *See infra* Section III.C.1.

49. This Article generalizes two overarching models of occupation to allow for identification and understanding of changes that have occurred over time in the practice of occupation. Great diversity exists in the circumstances of individual occupations, and there are exceptions to the two models presented. The "new model" is primarily focused on—but not strictly limited to—modern regime change and humanitarian interventions. Some instances of the "old model" of occupation may continue to occur in modern times (such as Israel's occupation of the West Bank), but the old form of occupation is not the prevailing model in a world where interventions normally and intentionally vanquish ruling powers and build new institutions in their wake.

Figure 1

OLD MODEL		NEW MODEL (MULTILATERAL OCCUPATION)
Temporary administration until sovereignty of territory is decided Preservation of rights of ousted government	**PRIMARY POLICY GOALS**	Occupation and nation-building as end goals of intervention Protection of occupied population as consistent with international norms and human rights law
Primarily unilateral	**FRAMEWORK**	Multilateral, involvement of UN
International law of occupation (Hague Regulations, Geneva Conventions, customary law)	**PRIMARY SOURCE OF LEGITIMACY**	International support and compliance with relevant principles of international law
International law of occupation	**PRIMARY REGULATOR OF OCCUPANT'S ACTIONS**	"Invisible hand," resource and legitimacy needs
Remains with "legitimate power" (the ousted government) The victor can annex the territory if the previous government is completely vanquished	**SOVEREIGNTY**	Occupant is de facto sovereign; ad hoc devolution of sovereignty to occupied population Annexation is unacceptable because sovereignty inheres in the people, not the government
Deference; previous institutions and laws left intact with only minimal exceptions	**TREATMENT OF PREVIOUS STATE INSTITUTIONS**	Institutions and laws expected to be brought into conformity with international human rights norms

B. International Developments Giving Rise to the New Model

The evolution of international relations has altered the nature of occupation. The elements of the new model of occupation are derived from five

key international developments that have individually and collectively undercut major tenets of the international law of occupation: (1) the rise of international human rights law; (2) a changed notion of sovereignty; (3) the emergence of the welfare state; (4) the increased prominence of the UN; and (5) the advent of modern humanitarian and regime change warfare.

1. The International Human Rights Regime

The creation of a robust international human rights regime has dramatically altered international expectations with regard to the treatment of inhabitants of occupied territory. The doctrine of human rights holds that individuals are endowed with certain rights merely by being human, and this phenomenon has changed the way a government can interact with its citizens.[50] Whereas citizens were traditionally only viewed as "objects" rather than "subjects" of international law,[51] the modern human rights regime bases certain inalienable rights in the individual. The advent of international human rights law has revolutionized international relations because the state is no longer the sole focal point of international law.[52]

In general, the distinction between the laws of war and human rights law is becoming blurred, and the international human rights regime is increasingly being applied to situations of armed conflict.[53] Various United Nations organs have called for the application of human rights law to armed conflicts since the late 1960s.[54] Additionally, "international human rights bodies have developed a progressive interpretation of th[e] concept [of jurisdiction] which permits, to a certain extent, an extraterritorial application" of certain human rights treaties.[55]

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50. *See generally* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 7-13 (2d ed. 2003) (describing the conceptual underpinnings of human rights).

51. 1 L. OPPENHEIM, INTERNATIONAL LAW 636-39 (H. Lauterpacht ed., 8th ed. 1955).

52. *See generally* JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 3-35 (2d ed. 1998) (relating how the international human rights regime has altered international relations).

53. *See generally*, Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 1 (2004) ("Increasingly, the use of force during armed conflict is being assessed through the perspective of human rights law, as well as under international humanitarian law."); Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 86 I.R.R.C. 789, 812 (2004), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EUA/$File/irrc_856_Heintze.pdf ("Research shows that there is a convergence between the protection offered by human rights law and that of international humanitarian law.").

54. HUMAN RIGHTS IN TIMES OF OCCUPATION: THE CASE OF KUWAIT 15 (Walter Kälin ed., 1994); *see, e.g.*, G.A. Res. 2675, ¶ 1, U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2675 (Dec. 9, 1970) (stating that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict"); World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 29, U.N. Doc A/CONF.157/23 (July 12, 1993), *reprinted in* 32 I.L.M. 1661, 1671 ("[C]all[ing] upon States and all parties to armed conflicts strictly to observe international humanitarian law . . . as well as minimum standards for protection of human rights, as laid down in international conventions . . .").

55. Jérémie Labbé Grenier, *Extraterritorial Applicability of Human Rights Treaty Obligations to United Nations-mandated Forces*, *in* INT'L COMM. OF THE RED CROSS, EXPERT

International expectations to apply human rights norms to occupied territory follow *a fortiori* from these efforts because, although the law of occupation is technically a subset of the laws of war, the exceptions and derogation clauses that exist in many human rights instruments are easier to defend under the doctrine of military necessity in the heat of battle than in the administration of occupied territory.

As a result, the international community generally expects human rights law to be applied to situations of occupation to the fullest extent possible.[56] This expectation is illustrated in various modern occupations, including those in Iraq, Kosovo, and East Timor.[57] This conclusion was bolstered by the International Court of Justice in an advisory opinion declaring that international human rights law (including the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child) applies to Israel's occupation of the West Bank and Gaza Strip.[58] At a minimum, the international community expects application of the spirit, if not the letter, of human rights law even where such law may allow for derogations or technically not apply.

The application of international human rights law to occupations is a primary cause of the fundamental shift in the policy goals of modern occupations because the need to protect human rights obliges occupants to engage in nation-building. Occupying powers are expected to meet modern human rights standards and to put in place state structures and a representative form of government to fulfill human rights obligations both during and following the occupation. Modern occupants often encounter a weak or failed state with no institutions in place or with institutions that are ineffective or antithetical to the protection of human rights. In such situations, deference to local laws and institutions (as called for in the traditional law of occupation) that do not adequately safeguard human rights would violate the obligations of the

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MEETING ON MULTILATERAL PEACE OPERATIONS 79, 79 (Alexandre Faite & Jérémie Labbé Grenier eds., 2004).

56. *See* Eyal Benvenisti, *Water Conflicts During the Occupation of Iraq*, 97 AM. J. INT'L L. 860, 862-63 (2003) ("The principle that human rights remain applicable in a certain territory despite occupation of that area . . . has become widely accepted . . . . What remain less clear are areas of potential conflict between the two sets of norms."). For a useful discussion of the interaction between international humanitarian law and international human rights law in occupied territory, see Watkin, *supra* note 53, at 26-28.

57. *See* S.C. Res. 1546, pmbl., U.N. SCOR, 4987th mtg., U.N. Doc. S/RES/1546 (June 8, 2004) ("Affirming the importance of . . . respect for human rights including the rights of women, fundamental freedoms, and democracy including free and fair elections" in the occupation of Iraq); Ottolenghi *supra* note 3, at 2212 (describing how the first regulations handed down by the UN Mission in Kosovo and the UN Transitional Administration in East Timor "proclaimed their observance of a series of international human rights conventions in the administration of Kosovo and East Timor"); *see also* SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 127 (2004).

58. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶¶ 111-13 (July 9), *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm; *see also* BENVENISTI, *supra* note 3, at xvii ("The [ICJ] opinion confirms the applicability of human rights law to occupied territories.").

occupant under international human rights law. Moreover, even the most elastic interpretation of the exceptions in the law of occupation (such as the Fourth Geneva Convention's permission to make minor changes to local laws to protect the rights guaranteed in the Convention) would not condone nation-building.[59]

Nation-building therefore represents both a means and an end in the modern human rights regime. International human rights norms require the occupant to institute a system of government and to create institutions that preserve and respect human rights precisely because an effective government is the only means to secure the protection of human rights.[60] Additionally, the form of government is becoming a human right in and of itself rather than merely a means to protect other rights. The international human rights regime encompasses various rights, including the right to self-determination,[61] that

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59. *See supra* notes 30, 32 and accompanying text. The law of occupation would not permit nation-building as necessary to comply with international human rights law for three reasons. First, the international human rights regime is broader in scope and depth than the basic humanitarian provisions contained in the law of occupation. Greenwood, *supra* note 26, at 250; Fox, *supra* note 2, at 271; Goodman, *supra* note 3, at 1600. For application of this point to Iraq, see Fox, *supra* note 2, at 243-45 (explaining how exceptions in the Fourth Geneva Convention are not sufficiently flexible to justify the breadth of reforms promulgated in the occupation of Iraq). Second, even assuming some functioning state institutions (contrary to the cases of Afghanistan and Iraq), quick fixes and minor tweaks are inadequate to protect the full panoply of human rights (especially self-determination and, increasingly, democracy) required by international human rights law. Third, any interpretation that the law of occupation would require or even condone nation-building would, at best, represent purely wishful thinking in direct opposition to the origins, history, and intent of that body of law. Indeed, distrust of occupants' intentions was an important impetus in severely limiting the ability of occupying powers to restructure the occupied territory under the mantle of supposed "humanitarian motives." ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 10, 115 (1978); *see also* Scheffer, *supra* note 32, at 849 ("In recent years, multilateral or humanitarian occupation, particularly that aimed at enforcing international human rights law and atrocity law, has become the more relevant factor in occupation practice. Occupation law was never designed for such transforming exercises."). Additionally, as Professor Adam Roberts explains, "[t]here is an assumption in the laws of war that occupying powers should respect the existing laws and economic arrangements within the occupied territory," so "[i]n particular cases, including Iraq, this assumption may be considered to be in conflict (a) with certain applicable provisions of human rights law; and (b) with the policy goals not just of certain occupying powers, but of the international community more generally." Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT'L & COMP. L.Q. 27, 36 (2005).

60. *See* Stephen Holmes, *Constitutionalism, Democracy, and State Decay*, *in* DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 116, 120-22 (Harold Hongju Koh & Ronald C. Slye eds., 1999) (arguing that human rights enforcement is directly linked to state capacity and that human rights, because they are resource-based, require an effective state); Ruti Teitel, *Millennial Visions: Human Rights at Century's End*, *in* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 339, 340 (Carla Hesse & Robert Post eds., 1999) ("Full vindication of individual rights under international law presumes a working state with liberal institutions that reflect the rule of law.").

61. *See, e.g.*, International Covenant on Civil and Political Rights, art. 1, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3. The right to self-determination is *erga omnes*, meaning it is an obligation owed to "the international community as a whole." Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, ¶ 33 (Feb. 5) (Second Phase); East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102, ¶ 29 (June 30). For additional background, see Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 40-41 (2004) (discussing application of the right of self-determination to occupation); Youngjin Jung, *In Pursuit of Reconstructing Iraq: Does Self-*

collectively add up to the right to an effective system of government in the long-term.[62] Indeed, there is a budding international consensus that democracy is a human right.[63] Several international fora have moved toward embracing a right to democracy, including the United Nations Commission on Human Rights and the United Nations General Assembly,[64] and legal scholars have increasingly taken up the issue as well.[65] Moreover, the UN Security Council has increasingly embraced the importance of democratic principles[66] and regularly calls for their application to occupations.[67]

Determination Matter?, 33 DENV. J. INT'L L. & POL'Y 391, 406 ("Given that self-determination is a principal factor undermining the legitimacy of belligerent occupation, the final result of occupation should be to lay down the necessary conditions under which the people in the occupied territory can build their own government—one based on a freely expressed will."); A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 23-24 (1995) (describing the debate as to whether the norm of self-determination is *jus cogens*).

62. According to Harold Hongju Koh, Dean of the Yale Law School, the human rights regime, in its protection of the myriad of human rights embodied in the major human rights conventions, increasingly "imposes on governments an obligation to organize themselves in such a way that these rights are respected." Harold Hongju Koh, Address at the International Human Rights Law and Policy class, Yale Law School (Jan. 29, 2003) (on file with the author).

63. *See* FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY, 141-46 (2d ed. 1997) ("There can be little doubt that a principle of democratic rule is today part of international law."); DONNELLY, *supra* note 50, at 186 ("[I]nternational human rights norms require democratic government."). For examples of democratic principles enshrined in international human rights law, see, for example, Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 21, ¶ 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); ICCPR, *supra* note 61, art. 25. For useful background on the efforts of the Clinton Administration to establish democracy as a human right, see Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 304-05, 324-26 (2002).

64. *See* U.N. Commission on Human Rights (UNCHR) Res. 1999, 55th Sess., 57th mtg., U.N. Doc. E/CN.4/RES/1999/57 (Apr. 27, 1999); UNCHR Res. 2000, 56th Sess., 65th mtg, U.N. Doc. E/CN.4/RES/2000/62 (Apr. 26, 2000); G.A. Res. 107, U.N. GAOR, 55th Sess., Agenda Item 114(b), U.N. Doc. A/RES/55/107 (Mar. 14, 2001); *see also* G.A. Res. 96, U.N. GAOR, 55th Sess., Agenda Item 114(b), U.N. Doc. A/RES/55/96 (Feb. 28, 2001). In June 2000, more than one hundred nations supporting democracy known as the "Community of Democracies" held a ministerial conference in Warsaw, Poland. The final communiqué of that meeting welcomed the two previous resolutions of the UN Commission on Human Rights declaring a right to democracy and "pledged support for future efforts towards adopting a similar resolution in the UN General Assembly." Communiqué, Towards a Community of Democracies Conference, Warsaw, Poland, ¶ 5 (June 27, 2000), *available at* http://usembassy.state.gov/posts/pk1/wwwhpr07.html.

65. *See generally* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 83-139 (1995); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

66. *See* Gregory H. Fox, *Democratization*, *in* THE UN SECURITY COUNCIL 69-82 (David M. Malone ed., 2004) (describing democracy as one of the "policy objectives regularly pursued" by the UN Security Council); David M. Malone, *Conclusion*, *in* THE UN SECURITY COUNCIL, *supra*, 617, 628-29 (explaining that the Security Council has been "increasingly engaged in the promotion of democracy" since the end of the Cold War); *see also* KOFI A. ANNAN, UNITED NATIONS, THE QUESTION OF INTERVENTION: STATEMENTS BY THE SECRETARY-GENERAL 32 (1999) (describing the basic values of the UN Charter as including "democracy, pluralism, human rights and the rule of law").

67. *See, e.g.*, S.C. Res. 1483, pmbl., ¶ 5, U.N. SCOR, 4761st mtg., U.N. Doc. S/RES/1483 (May 22, 2003) (emphasizing the importance of establishing representative government in Iraq);

Modern occupations present the international community with the choice of calling for observance of the law of occupation (deference to previous institutions) or international human rights law (through nation-building, the antithesis of the law of occupation), and the world has clearly opted for the latter.[68] An occupying power cannot defer to previous institutions that do not exist when human rights law demands that functioning institutions be created. For the same reason, an occupant cannot defer to previous institutions that do exist but have a defective composition or lack of capacity that prevents them from securing human rights. The driving policy goal of the law of occupation (to preserve the institutions of the deseised sovereign) is, at best, mooted by obligations of the occupant to protect human rights and, at worst, completely irrelevant because the policy goal of many modern interventions and occupations is precisely to destroy, change or rebuild the previous institutions.

Therefore, international human rights law has largely overtaken the traditional law of occupation in providing guidance for the treatment of civilians and informing occupant responsibilities with respect to the type and capacity of institutions in the occupied territory. Furthermore, it is reasonable to expect international human rights law will continue to encroach on (if it has not already completely subsumed) the prerogatives of the law of occupation as the human rights regime continues to increase in strength, and as more of its tenets reach the status of customary international law and *jus cogens*.

2. Sovereignty of the People

The modern notion of sovereignty renders the international law of occupation and related doctrines incapable of governing the new model of occupation because it denies the end states of conflict foreseen by those antiquated bodies of law. No longer can sovereignty be usurped through annexation or retained by an ousted regime. This has created a gap in international law, for a modern occupant has no obvious source of guidance when acting as temporary de facto sovereign in occupied territory. This phenomenon challenges modern concepts of sovereignty and results in the ad hoc parsing and piecemeal return of sovereign functions to occupied populations.

Throughout most of history, occupied territory has been subject to one of

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S.C. Res. 1244, ¶¶ 10-11, U.N. SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (June 10, 1999) (mandating the creation of provisional democratic institutions as a primary responsibility for the international civilian presence in Kosovo); S.C. Res. 1453, pmbl, U.N. SCOR, 4682d mtg., U.N. Doc. S/RES/1453 (Dec. 24, 2002) (recognizing the Transitional Administration as the legitimate government of Afghanistan pending democratic elections); *see also* Brown, *supra* note 61, at 41-42; Frederic L. Kirgis, *Security Council Resolution 1483 on the Rebuilding of Iraq*, ASIL INSIGHTS (2003), *available at* http://www.asil.org/insights/insigh107.htm#_edn3 ("Resolution 1483 may be seen as a further step in the development of th[e] principle" of "what may be an emerging right under international law to a democratic form of government").

68. *See supra* notes 56-58 and accompanying text; *infra* Sections III.D.1, III.D.2; *infra* notes 142-147 and accompanying text.

two outcomes: a return to its previous sovereign or annexation by the occupant. In the days in which war was the "sport of kings," the law of occupation was designed to temporarily govern territory sitting in purgatory as it awaited the determination of its fate. State practice for three centuries was that a peace treaty between the warring powers would determine the final status of occupied territory,[69] and occupation was merely a way station between a return to previous rule or annexation under the terms of the political settlement. Alternatively, in the case of complete subjugation, the occupant could annex the territory under the doctrine of *debellatio*, which holds that the victor can acquire the sovereignty of the conquered state if the defeated government is completely vanquished and there is no other power left to carry on the struggle.[70] The doctrine of *debellatio* corresponds to a separate legal framework related to state succession.[71]

Contemporary notions of sovereignty and modern forms of warfare conspire to deny the outcomes of war for which the law of occupation was designed. Many modern conflicts end without a peace treaty or other formal end to conflict. At the same time, regime change and humanitarian interventions explicitly seek to eliminate, contain, or significantly alter the previous regime. Oftentimes there is no ousted sovereign waiting in the wings to return to power; many interventions result in situations of vanquished sovereigns that would in previous eras have led to annexation under *debellatio*. This is problematic because *debellatio* is a defunct doctrine. Sovereignty now rests in the people, not in the government, and can no longer be permanently transferred to the victor of the war.[72] International law now outlaws aggressive war and rejects annexation,[73] and *debellatio* is simply not politically palatable in modern times.[74]

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69. D.P. O'CONNELL, INTERNATIONAL LAW 441 (2d ed. 1970).

70. *See* BENVENISTI, *supra* note 3, at 92 ("As it is generally understood, '*debellatio*,' also called 'subjugation,' refers to a situation in which a party to a conflict has been totally defeated in war, its national institutions have disintegrated, and none of its allies continue militarily to challenge the enemy on its behalf.").

71. *See* FEILCHENFELD, *supra* note 26, at 7 ("If one belligerent conquers the whole territory of an enemy, the war is over, the enemy state ceases to exist, rules on state succession concerning complete annexation apply, and there is no longer any room for the rules governing mere occupation."); *see also* Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOREIGN AFF. 385, 411-14 (2003) (distinguishing between *debellatio* and belligerent occupation).

72. *See* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 65, at 243; BENVENISTI, *supra* note 3, at 94-96; O'CONNELL, *supra* note 69, at 433.

73. *See* U.N. Charter art. 2, para. 4; *see also* Fox, *supra* note 2, at 265 ("Annexation is, of course, profoundly condemned by contemporary international law.").

74. *See* BENVENISTI, *supra* note 3, at 95 (arguing that *debellatio* is "inconsistent with contemporary law and political philosophy"); Scheffer, *supra* note 32, at 848 (arguing that *debellatio* has "little if any place in contemporary practice"); Benvenisti, *supra* note 56, at 862 (arguing that UN Security Council Resolution 1483 with respect to Iraq "confirms the demise of *debellatio*"). Even assuming it remained a lawful and politically feasible option, the doctrine of *debellatio* would still give states pause due to the burdens entailed in state succession. The Four Powers confronted

The modern occupant temporarily acts as de facto sovereign of the occupied territory. There is no ousted "legitimate power" because the people rather than the fleeing or destroyed government are sovereign.[75] Yet the occupied population lacks the means (and oftentimes the institutions) to exercise that sovereignty. Furthermore, the law of occupation only provides guidelines for temporary custodianship—not temporary sovereignty—because situations lacking an ousted "legitimate power" were left to its sister doctrine, *debellatio*, to permit annexation. Herein lies the dilemma of modern occupations. Occupants act in a lacuna of international law because there is no body of law regulating the conditions of the devolution of sovereignty to the occupied population. The law of occupation has been weakened by the retention of sovereignty in the people and the lack of an ousted "legitimate power" to which deference is due. Simultaneously, the demise of *debellatio* has left a gap in international law that cannot be filled by the interstitial laws of occupation.

As a result, there is no meaningful set of laws or guidelines as to how the occupant must relinquish its de facto sovereignty over occupied territory. What has emerged instead is an ad hoc and contextual practice of international negotiation to determine the means, timeframe, and manner of creation of civil administration and devolution of sovereignty to the occupied population. Relevant international norms pertaining to human rights, self-determination, and democracy inform the process but are silent as to the exact methods of devolution of sovereignty. In simple terms, there is no overarching legal framework or source of ex ante guidelines.

At the same time, the idea that sovereignty inheres in the people has reached such stature that it is not considered politically correct for occupants to describe themselves as de facto sovereigns, and there is immense political pressure on occupants to return to the occupied population as much sovereignty as is practicable as soon as possible.[76] In this vein, the new model of occupation is partly based on a legal fiction in which sovereignty theoretically remains uninterrupted in the hands of the occupied population.[77] In practice, however, the occupant exercises all meaningful foreign and domestic decision-making within the occupied state and, through a simultaneous and gradual process,

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this dilemma in Germany following World War II and, as a result, drew a distinction between the state and its government: "The German State continuing, its government being vested in the Four Powers." O'CONNELL, *supra* note 69, at 441. Had the Four Powers assumed German sovereignty under the doctrine of *debellatio*, they would have become responsible for the German national debt and German prisoners of war would have no longer been prisoners. *See id.*

75. BENVENISTI, *supra* note 3, at 183.

76. In the case of Iraq, see *infra* notes 282, 298 and accompanying text.

77. For examples of this point, see Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT'L L. 836 (2003) (explaining that UN Security Council Resolutions 1500 and 1511 pertaining to Iraq clarify that "the sovereignty of Iraq" is "a continuous phenomenon, not broken by . . . an assumption of the incidents of sovereignty by an outside agency"); Kirgis, *supra* note 67 ("[T]he fact that a country is occupied and is under the effective, but temporary, control of the occupying powers does not affect its continuing status as a sovereign state.").

devolves sovereign rights as it builds institutions of the state.

The world is witnessing the parsing of sovereignty as the concept is broken into its individual components and returned piecemeal in the new model of occupation. This incremental sovereignty presents the latest twist in the evolving concept of sovereignty. Sovereignty has long been considered a "vague formula,"[78] the content of which "is continuously changing, especially in recent years."[79] This modern phenomenon parallels to some degree the emergence of weak or "quasi-states" in the wake of decolonization in which "statehood is posited rather than real."[80] Such states lack capacity and, in such cases, sovereignty "no longer depends on meeting certain qualitative criteria but has basically been conferred by the international community by means of recognition *and* as a matter of right."[81]

Modern occupations have spawned new variants of sovereignty in which the rights and duties of sovereignty are disaggregated and returned according to an ad hoc negotiated process.[82] Even quasi-states have—at least in theory—the

78. Thomas C. Heller & Abraham D. Sofaer, *Sovereignty*, *in* PROBLEMATIC SOVEREIGNTY 24, 24 (Stephen D. Krasner ed., 2001).

79. Henry Schermers, *Different Aspects of Sovereignty*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 46, at 185, 185; *see also* Marcel Brus, *Bridging the Gap Between State Sovereignty and International Governance*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 46, at 3, 7; Milton J. Esman, *State Sovereignty: Alive and Well*, *in* SOVEREIGNTY UNDER CHALLENGE 375, 375 (John D. Montgomery & Nathan Glazer eds., 2002); Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, *in* SOVEREIGNTY IN TRANSITION 115, 129 (Neil Walker ed., 2003).

80. Gerard Kreijen, *The Transformation of Sovereignty and African Independence*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 46, at 45, 46; *see generally* R.H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990) (describing the emergence and characteristics of "quasi-states").

81. Kreijen, *supra* note 80, at 46; *see also* Brus, *supra* note 79, at 7 (explaining the importance of capacity to govern territory and stating there is general agreement "that for a purposeful exercise of sovereignty a strong basis *within* the State is needed").

82. The ad hoc nature of the international negotiation and tailored circumstances of devolution of sovereignty is clearly seen in cases such as Bosnia, Cambodia, Kosovo, East Timor, Afghanistan, and Iraq. The occupations of Afghanistan and Iraq are discussed *infra* in Sections III.D.1 and III.D.2. For additional background, see generally Perritt, *supra* note 71, at 469-70 (discussing devolution of sovereignty in Kosovo and Bosnia); Grant, *supra* note 77, at 823, 825, 829, 838, 842 (explaining how relevant UN Security Council Resolutions in Iraq allow flexibility in the handover of sovereign responsibilities and "incremental movement toward the terminal point—recognition and full self-government"); Alexander Thier & Jarat Chopra, *Political and Institutional Reconstruction in Afghanistan*, *in* RECONSTRUCTING WAR-TORN SOCIETIES: AFGHANISTAN 93, 94 (Sultan Barakat ed., 2004) (contrasting the "assistance" role of the international community in the occupation of Afghanistan with "the increasingly intrusive trend in transitional administration, from the international exercise of executive and legislative powers in Eastern Slavonia, Brcko and Kosovo to global sovereignty in East Timor"); Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and its Implications in International Politics*, 13 EUR. J. INT'L L. 1043-45, 1047-49 (2002) (discussing the condition of sovereignty in Cambodia, East Timor and Kosovo under international administration); Christian Tomuschat, *Yugoslavia's Damaged Sovereignty over the Province of Kosovo*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 46, at 323 (describing the special variant of autonomy created by the international community for Kosovo); Simon Chesterman, *Virtual Trusteeship*, *in* THE UN SECURITY COUNCIL *supra* note 66, at 219, 231 (explaining how the UN exercised "effective sovereignty" over East Timor for over two years); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical*

trappings of sovereignty. In contrast, the new model of occupation unbundles sovereignty and returns it piecemeal in accordance with a manner and time frame produced from negotiations between the occupying power, on the one hand and, on the other, various states, international institutions, and select internal elites and/or expatriates from the occupied territory. For occupied states such as Afghanistan and Iraq, sovereignty in the new model of occupation becomes an individually negotiated process as well as a juridical state of being. In both cases, the occupant created an entity and declared it to be the repository of the "sovereignty" of the nation, even though the actual authorities and abilities of those entities were highly circumscribed.[83]

This parsed sovereignty expresses a clear intent but is often divorced from capability and reality. That is to say, invocation of the label "sovereign" does not a functioning government make. In modern occupations, the rights and duties of sovereignty often do not match the rhetoric or labels used, or the capacity that exists in practice. It is for this reason that "sovereignty" could be returned to Iraq in June 2004 even with only minimal state institutions, no security apparatus, no ability to change policies of a previous occupying power or negotiate treaties, and despite the continued presence of foreign forces numbering 160,000 troops.[84]

3. The Modern (Welfare) State

The rise of the welfare state has forever altered expectations regarding provision of services by an occupying power. The *laissez-faire* governance envisaged by the law of occupation was rooted in the dominant role of the state at the time.[85] In that vein, the law of occupation, especially the Hague Regulations, placed emphasis on "the state elites as the primary beneficiaries [of the law of occupation] and on minimal involvement of the occupant in the management of the affairs of the population under its temporary rule."[86] The Geneva Conventions placed greater focus on the protection of occupied populations, but the general thrust of the law remains the basic and temporary

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Perspectives and Contemporary Practice, 42 VA. J. INT'L L. 81, 91-92 (2001) (elucidating how "the Security Council assumed a quasi-sovereign prerogative" in establishing the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda); Michael P. Scharf & Paul R. Williams, *Report of the Committee of Experts on Nation Rebuilding in Afghanistan*, 36 NEW ENG. L. REV. 709, 717-19 (2002) (urging the U.S. to use the concepts of "intermediate sovereignty" and "phased recognition" in Afghanistan).

83. Conceived in terms of the various facets of sovereignty used by Professor Stephen Krasner, those entities in Iraq and Afghanistan were recognized as sovereign by key international actors (thus providing "international legal sovereignty"), but they had no ability to exert authority within their own borders ("domestic sovereignty") or prevent foreign interference or the exertion of external authority within their borders ("Westphalian sovereignty"). Stephen D. Krasner, *Problematic Sovereignty*, *in* PROBLEMATIC SOVEREIGNTY, *supra* note 78, at 1, 5-12; *see infra* Sections III.D.1, III.D.2.

84. *See infra* notes 305-310 and accompanying text.

85. *See* BENVENISTI, *supra* note 3, at 209.

86. *Id.* at 6.

preservation of public order.[87]

Laissez-faire is no longer the prevailing international standard of government, and modern international expectations for occupation align more with nation-building than with temporary custodianship. The involvement of national governments in the everyday lives of their citizens has dramatically increased over time, and what are now considered to be standard government activities are much more expansive than those envisaged when the law of occupation was first codified.[88] Indeed, modern occupants may have "a positive duty to interfere" with social welfare in a manner prohibited by the international law of occupation.[89] The dominant form of government has also changed; democracy is the preeminent ideology of the post-Cold War world,[90] thus further solidifying the more direct relationship between citizen and state.

Occupying powers can no longer hide behind the limited mandate of the international law of occupation. Occupations are not immune from these raised expectations, and the international community increasingly expects occupants to "intervene in the lives of the occupied population."[91] As illustrations of this point, the occupying powers in Iraq, Afghanistan, and Kosovo engaged in development projects and sought to provide services to the occupied populations far beyond the minimal involvement of occupants foreseen in the old model of occupation.[92] In sum, the minimalist goal of restoring some semblance of "public order" as laid out in the Hague Regulations is no longer sufficient. As a result, contemporary expectations of governance and occupation directly conflict with the law of occupation's mantra to permit only minimal meddling into the daily lives of occupied populations.[93]

4. The Centrality of the United Nations

The United Nations plays an important role in the conduct of modern occupations as a provider of resources and legitimacy, and even as an occupying power. UN-occupied territory exposes yet another anachronistic assumption in

87. *See supra* notes 16-17 and accompanying text; *supra* Section II.B.

88. Goodman, *supra* note 3, at 1592; *see also* BENVENISTI, *supra* note 3, at 27-30. For general background on the position of social rights within public international law, see generally Thilo Marauhn, *Social Rights Beyond the Traditional Welfare State*, *in* THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW 275 (Eyal Benvenisti & Georg Nolte eds., 2004).

89. Goodman, *supra* note 3, at 1592.

90. *See* Communiqué, Towards a Community of Democracies Conference, *supra* note 64; *see also* Harold Hongju Koh, *Preserving American Values: The Challenge at Home and Abroad*, *in* THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11, at 143, 145-47 (Strobe Talbott & Nayan Chanda eds., 2001) (describing an "emerging global culture of democracy"); *see generally* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1993) (discussing certain trends underlying the post-Cold War democratic movement).

91. Benvenisti, *supra* note 56, at 863. Benvenisti argues that the "inactive custodian" approach to occupation in which the occupying power "does not intervene in the lives of the occupied population . . . has been rejected as unacceptable." *Id.*

92. *See infra* Sections III.D.1, III.D.2; *infra* note 143 and accompanying text.

93. *See supra* Section II.B.

the law of occupation: that only state actors and not international institutions will be occupants. Though the centrality of the UN in modern occupation is clear, ambiguity as to if, when, and how the law of occupation applies to the United Nations creates an unacceptable level of uncertainty as to the organization's duties in territory under its control.

a. UN as Gatekeeper

The UN acts as a gatekeeper to legitimacy through its ability to confer (or withhold) an international seal of approval on occupations. A United Nations stamp of approval determines much of the international legitimacy of an occupation and often directly affects the willingness of other countries to participate in—and provide material support to—the occupation.[94] This is a result of the UN's increasingly important role in global affairs, its ability to bestow legitimacy upon international action, and its recognized experience in peacekeeping and nation-building.[95]

For these reasons, acquiring some type of UN support (in the form of a blessing and/or actual support in administering parts of the occupation) is an important goal of modern occupations. Indeed, even when unilateral actors and broad coalitions disregard the UN or otherwise fail to secure Security Council sanction for the use of force (for example, in the U.S. invasion of Iraq in 2003 and the North Atlantic Treaty Organization (NATO) bombing of Kosovo in 1999), they will still go back to the United Nations *after* the intervention in search of the organization's blessing and moral and material support for the occupation.

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94. The U.S. occupation of Iraq vividly illustrates this point. *See infra* note 274 and accompanying text. In addition, some countries may have domestic legal provisions against participation in actions taken outside of the UN framework. *See United States Policy and Operations in Iraq: Hearing Before the H. Armed Servs. Comm.*, 108th Cong. (2003) (statement of Paul D. Wolfowitz, Deputy Secretary of Defense) [hereinafter Wolfowitz Testimony] ("To facilitate more international assistance, we are actively pursuing the option of a UN resolution, which would lead other countries, whose laws or domestic politics require such a resolution, to contribute more"); DOMINIC MCGOLDRICK, FROM "9-11" TO THE "IRAQ WAR OF 2003," at 144 (2004).

95. *See* Michael W. Doyle, *Introduction: Discovering the Limits and Potential of Peacekeeping*, *in* PEACEMAKING AND PEACEKEEPING FOR THE NEW CENTURY 1, 10 (Olara A. Otunnu & Michael W. Doyle eds., 1998) ("Reflecting both legal legitimacy and practical support, the United Nations holds a unique claim on legitimate authority in international peace and war."); Grant, *supra* note 77, at 830 (explaining that the UN "holds the advantage of representing a broader international constituency than any other political organization," and that UN Security Council Resolution 1483 in Iraq "lends the transition the respect of an international organization with an impressive record of administering transitional arrangements in war-torn societies"); Malone, *supra* note 66, at 639 (noting the UN has "a unique capacity for conferring legitimacy"); Brown, *supra* note 61, at 72 (explaining the UN is essential in post-conflict reconstruction because of its "legitimating moral authority . . . based on its credibility as an independent institution promoting shared global interests").

b. UN as Occupier

Aside from its role in the conferral of legitimacy upon occupations administered by states, the United Nations has taken an increasingly active role in the administration of territory in modern occupations. However, questions related to the international legal personality of the organization and the applicability of the rules of armed conflict to the various types of UN-led and authorized missions create ambiguity as to the rights and duties of the UN as an occupying power.

The UN directly assumes control of territory through a number of varied and complex paths, none of which are foreseen or clearly governed by the international law of occupation. The diversity of types and contexts of UN missions make it difficult to discern when the UN is an occupying power. Even once that determination is made, application of the international law of occupation to the UN is complicated by the organization's unique international legal personality. A fuller understanding of this point requires background in several issues, including the most prevalent types of UN missions as well as when—and how—the laws of war apply to the UN. Such is the focus of the remainder of this section.

The UN can become an occupying power through either peace enforcement or peacekeeping missions, each of which operates under a different legal regime.[96] Peace enforcement missions refer to forces authorized by the UN Security Council to use offensive force under Chapter VII of the UN Charter in a nonconsensual environment.[97] Peace enforcement implies the presence of armed conflict, which triggers the application of international humanitarian law.[98] Therefore, the international law of occupation would presumably apply to UN peace enforcement missions through the laws of war.

In contrast, traditional peacekeeping missions are generally undertaken under Chapter VI of the UN Charter.[99] These missions are normally deployed into consensual environments and are subject to an agreement concluded between the UN and the host state.[100] Peacekeepers are lightly armed,

96. For additional background on the various kinds of UN military missions, see HILAIRE MCCOUBREY & NIGEL D. WHITE, THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS 11-36 (1996).

97. *See* Brian D. Tittemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 80-81 (1997).

98. For additional consideration of when the law of war applies to UN peacemaking operations, see generally MCCOUBREY & WHITE, *supra* note 96, at 160-61, 170-73. *See also infra* note 107 and accompanying text.

99. *See generally* United Nations Department of Peacekeeping Operations, United Nations Peacekeeping: Q&A, http://www.un.org/Depts/dpko/dpko/faq/ (last visited Nov. 8, 2005) (explaining that, depending on the specific mandate of the mission, UN peacekeepers "monitor and observe peace processes that emerge in post-conflict situations and assist ex-combatants to implement the peace agreements they have signed" by offering "assistance [that] comes in many forms, including confidence-building measures, power-sharing arrangements, electoral support, strengthening the rule of law, and economic and social development").

100. The UN normally negotiates a Status-of-Forces Agreement (SOFA) with the host state

"expected to be neutral rather than adversarial," and are "generally considered to be governed by the privileges and immunities afforded to the United Nations and its agents rather than humanitarian law."[101] Peacekeeping missions operate under a separate legal regime based on the 1994 Convention on the Safety of United Nations and Associated Personnel.[102] Whereas the laws of armed conflict would apply to UN forces deployed as combatants, this instrument was intended to create a new regime to govern and protect UN and associated personnel deployed in traditional peacekeeping capacities "so that UN and associated personnel and those who attack them would be covered under one regime or the other, but not both."[103]

In practice, the distinction between peace enforcement and peacekeeping is often blurry, and it is sometimes difficult to discern whether international humanitarian law or the UN Safety Convention applies. Determining whether a UN operation constitutes "enforcement" requires analysis of the object and purpose of the relevant UN Security Council resolution.[104] Moreover, there is "little agreement" as to how international humanitarian law applies to

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to detail the privileges, immunities, and technical arrangements of the peacekeeping mission. SOFAs are generally based on what is called a "Model Agreement." *See* The Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Model Status-of-Forces Agreement for Peacekeeping Operations*, U.N. GAOR, 45th Sess., Annex, U.N. Doc A/45/594 (Oct. 9, 1990). The UN will apply the Model Agreement and its "customary principles and practices" if there is an interim period before conclusion of a specific SOFA with the host state. The Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Operations*, ¶ 4, U.N. GAOR, 46th Sess., Annex, U.N. Doc. A/46/185 (May 23, 1991) [hereinafter *State Contribution Model Agreement*]; *see also* Lilly Sucharipa-Behrmann, *Peace-Keeping Operations of the United Nations*, *in* THE UNITED NATIONS: LAW AND PRACTICE 100 (Franz Cede & Lilly Sucharipa-Behrmann eds., 2001); Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 AM. J. INT'L L. 621, 628 (1995) (explaining the "policy of the United Nations of entering into status-of-forces agreements with host states prior to deployment or soon thereafter . . . has not always been accomplished, despite numerous requests by the Security Council to host states").

101. Tittemore, *supra* note 97, at 80; *see also* Joseph P. "Dutch" Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F.L. REV. 1, 4 (2001); Cartledge, *supra* note 23, at 128-29 ("[T]he Geneva Conventions themselves cannot be said to apply to a peacekeeping operation unless there is an actual armed conflict applicable to the United Nations forces themselves. Peacekeepers are not normally engaged in armed conflict and the Geneva Conventions, therefore, do not apply to them, however desirable this may be.").

102. Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 59, U.N. GAOR, 49th Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (Dec. 9, 1994), *reprinted in* 34 I.L.M. 482. The Convention entered into force on January 15, 1999.

103. Bloom, *supra* note 100, at 624-25. "One important reason for this was to avoid undermining the Geneva Conventions, which rely in part for their effectiveness on all forces being treated equally." *Id.* at 625. The Convention clearly stipulates that it does not apply to enforcement actions under Chapter VII of the UN Charter. Convention on the Safety of United Nations and Associated Personnel, *supra* note 102, art. 2(2). Likewise, the Convention would not apply to "coalitions of the willing" authorized by the UN but controlled by member states or regional organizations.

104. Bloom, *supra* note 100, at 625.

peacekeeping missions that have robust mandates and expanded definitions of what constitutes "self-defense."[105] As an additional complication, it is now the trend for modern peacekeeping missions to be authorized under Chapter VII of the UN Charter—even missions that might previously have been considered better suited for Chapter VI mandates.[106] Once on the ground, it can be difficult to discern when a peacekeeping mission crosses the threshold and becomes a party to an armed conflict, thereby triggering application of the laws of war.[107] Hybrid mandates and the frequent involvement of UN forces in internal armed conflicts with international components further complicate the matter.[108]

Application of the law of occupation to UN missions is problematical even when the overarching legal regime is clear. The law of occupation would presumably apply to UN peace enforcement missions and peacekeeping missions that have lost their noncombatant status through application of the laws of war.[109] However, there is ambiguity as to the application of the laws of war to UN forces because of the unique legal personality of the UN[110] and the fact

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105. Bialke, *supra* note 101, at 4-5, 22-23.

106. *See* Malone, *supra* note 66, at 620-22; United Nations Department of Peacekeeping Operations, *supra* note 99.

107. The threshold is a factual test derived from Common Article 2 of the Geneva Conventions. "A UN force that limits its use of force strictly to self-defense will not cross the Common Article 2 threshold," but "a military force attacking a UN peacekeeping force, combined with the force used by the peace-keepers in self-defense and subsequent offensive counter-attack, might reach the threshold of international armed conflict that invokes Common Article 2." Bialke, *supra* note 101, at 51-52. However, this threshold is "not a bright line test" and "the UN has so far declined to specify any potential circumstances that would result in its peacekeepers crossing the threshold." *Id.* at 54; *see also* BOUCHET-SAULNIER, *supra* note 19, at 273.

108. Tittemore, *supra* note 97, at 109; *see also* Adam Roberts & Richard Guelff, *Prefatory Note* to DOCUMENTS ON THE LAWS OF WAR 721 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) ("Sometimes in a deteriorating situation, as with the UN Operation in the Congo (ONUC) from 1960 to 1964, and with the UN Protection Force (UNPROFOR) in Bosnia-Herzegovina from 1992 to 1995, the distinction between peacekeeping and enforcement has become blurred, with one force being involved in or associated with both types of action."); Bialke, *supra* note 101, at 30 ("The distinction between peacekeeping and peace-enforcement is, currently, not nearly as clear as many believe or would wish.").

109. It should be noted, however, that certain authors contend that the law of occupation *never* applies to the UN because the motives of the international forces are different than those of occupants. *See generally* Sylvain Vité, *L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales*, 86 I.R.R.C. 9, 19-22 (2004), *available at* http://www.ruig-gian.org/proj/CICR2004.pdf.

110. Certain provisions of the laws of war are "less practicable" when applied to the UN because of the fact that it lacks many of the attributes of a state. Roberts & Guelff, *supra* note 108, at 723. This causes confusion and is especially problematic because it creates difficulties for the opposing party in determining its obligations toward the UN under the laws of war. Judith G. Gardam, *Legal Restraints on Security Council Military Enforcement Action*, 17 MICH. J. INT'L L. 285, 316 (1996). For useful background on the international legal personality of the UN, see generally C. DE ROVER, TO SERVE AND TO PROTECT 43-44 (1998) (explaining public international organizations such as the UN and NATO have international personality "to varying degrees" because they are competent to conclude treaties and are capable of possessing international rights and duties, but their rights and duties are not the same as those of states); Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (April 11) (concluding that the United Nations is "a subject of international law and capable of possessing international rights and duties").

that the UN is not a party to the primary conventions on international humanitarian law.[111] The prevailing view is that customary international law does apply to the UN,[112] but there is ambiguity as to the extent, content, and timing of its application to UN missions.[113] This lack of clarity is exacerbated to the extent that there is some debate over precisely which provisions of the Fourth Geneva Convention constitute customary international law.[114] This debate and ambiguity have little effect on states (most of which are parties to the Geneva Conventions), but create a potentially gaping hole in the law of occupation as applied to the UN.[115]

In general, the law of war applies to national contingents of member states participating in UN missions.[116] However, this is no panacea because different

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111. It is debated whether the UN could or should accede to the Geneva Conventions in one form or another or make some type of declaration regarding the application of the Conventions to UN missions. *See, e.g.*, GREEN, *supra* note 21, at 342-43; KELLY, *supra* note 8, at 174-75; Bialke, *supra* note 101, at 49 (opining that adhering to the Conventions could jeopardize the noncombatant status of peacekeepers and "fatally wound classical peacekeeping operations").

112. *See* Toni Pfanner, *Application of International Humanitarian Law and Military Operations Undertaken Under the United Nations Charter*, *in* INTERNATIONAL COMMITTEE OF THE RED CROSS SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 49, 57-58 (Umesh Palwankar ed., 1994) ("[T]he United Nations, as an international organization, is bound by customary rules and its forces, as subsidiary organs, are bound in particular by the customary rules of international humanitarian law."); Daphna Shraga & Ralph Zacklin, *The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues*, *in* INTERNATIONAL COMMITTEE OF THE RED CROSS SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS, *supra*, 39, 47 ("The Geneva Conventions which have by now been widely recognized as part of customary international law are binding upon all states, and, therefore, also upon the United Nations, irrespective of any formal accession."); KELLY, *supra* note 8, at 175-76, 227. Additionally, the UN has previously stated that it considers the key humanitarian law conventions to be customary international law. The Secretary-General, *Report Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 35, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (May 3, 1993).

113. *See* Tittemore, *supra* note 97, at 113-14 ("The United Nations and its forces . . . are subject to *modified* rights and duties under customary international humanitarian law in relation to the use of offensive military force authorized by the Security Council.") (emphasis added); Gardam, *supra* note 110, at 315, 319 (arguing "the legal basis" for application of customary rules of international humanitarian law to the UN "has always been somewhat unclear," and that "it is by no means 'uncontested' that the rules of customary international law apply to the forces acting in pursuance of Chapter VII Security Council powers"); MCCOUBREY & WHITE, *supra* note 96, at 172-73. Moreover, many relevant writings contending that customary international humanitarian law applies to the UN have a somewhat aspirational undertone. Additionally, as Professor Judith Gardam points out, reliance on the application of the customary law of armed conflict by itself may be insufficient in providing an acceptable and clear legal regime for UN missions because "some of its provisions are not adapted for the United Nations" and because "customary rules inevitably lag behind treaty developments and there is always scope for disagreement as to the exact status of any particular rule at any particular time." Gardam, *supra* note 110, at 319.

114. *See supra* note 21 and accompanying text.

115. *See* Pfanner, *supra* note 112, at 58 ("Despite the universality of the Geneva Conventions, not all details of their provisions have simply become declaratory of customary law," and "not all customary rules may be applicable to operations carried out by UN forces.").

116. *See* Roberts & Guelff, *supra* note 108, at 723 ("National contingents in the service of the UN remain bound, to the same extent and the same degree, by the laws of war which would apply if the same forces were engaged in international armed conflict for their own states; states retain responsibility for their contingents."); *see also* KELLY, *supra* note 8, at 177 ("UN operations

states may be parties to different conventions and may have differing views as to what constitutes customary international law.[117] With specific respect to occupation, "the collective responsibility of States involved in UN-mandated operations represents a complication, since the operations are carried out by a number of national forces acting together, none of them controlling the territory."[118] Even more disturbing, "States have shown a reluctance to recognize the applicability of the law of occupation to a UN-mandated operation."[119] Additionally, civilian components and functions of UN missions steadily increased in importance over the course of the 1990s,[120] and UN staff (who play a key role in the administration of UN-controlled territory) serve not in their national capacities but rather as "international officials responsible only to the Organization."[121]

The water is further muddied by the UN's somewhat ambiguous position regarding application of the law of war (including the law of occupation) to its missions. For many years, the UN has worried that a clear statement on the subject would endanger the neutrality of peacekeepers and cause them to be viewed as combatants (and therefore be targeted) by parties to armed conflict.[122] The Model Agreement used for troop donations states that the peacekeeping mission "shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel."[123] However, the vagueness of the "principles and spirit" language left much to be desired.

In 1999, the UN Secretary-General issued a Bulletin in an attempt to clarify

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have the same status with respect to the provisions of international humanitarian law as a coalition operation: responsibility and application are founded in the individual contingents.").

117. *See supra* note 23 and accompanying text; Tittemore, *supra* note 97, at 92-93 (arguing that widespread ratification of the Geneva Conventions by force contributing UN member states is an insufficient guarantee that UN forces will be protected by, and follow the dictates of, humanitarian law because: (1) the UN has a distinct international legal personality, (2) depending on member states to ensure compliance with international law undercuts the UN's effectiveness and independence, (3) various member states disagree as to what constitutes customary international humanitarian law, and (4) the UN should provide independent guidance as to when its peacekeepers lose their neutral status and become combatants).

118. Marco Sassòli, *Outline of* De jure *and* De facto *Applicability of the Law of Occupation to United Nations-mandated Forces (Transcript from an Oral Presentation), in* EXPERT MEETING ON MULTILATERAL PEACE OPERATIONS *supra* note 55, at 33.

119. Alexandre Fait, *Applicability of the Law of Occupation to United Nations-mandated Forces, in* EXPERT MEETING ON MULTILATERAL PEACE OPERATIONS, *supra* note 55, at 71, 73.

120. *See* Malone, *supra* note 66, at 619. These components consist of both UN staff and "associated personnel." The latter term is defined in the Convention on the Safety of United Nations and Associated Personnel, *supra* note 102, art. 1.

121. U.N. Charter art. 100.

122. For additional background on the history of the UN's "reluctan[ce] to endorse the application of the law of armed conflict to classical peacekeeping operations," see Bialke, *supra* note 101, at 37-40. For examples of the UN's inconsistent application of the law of war to peace enforcement operations, as well as the "dangers of indiscriminate application of humanitarian law to all U.N. forces," see Tittemore, *supra* note 97, at 87-89, 106.

123. *State Contribution Model Agreement*, *supra* note 100, ¶ 28.

the application of the laws of war to UN missions.[124] The Bulletin applies to UN forces engaged in armed hostilities, but not UN-authorized peace enforcement missions. According to the Bulletin, the UN "undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel."[125] However, the Bulletin has been criticized as being too simplistic in its formulation by not separately addressing the various types of UN operations.[126] Furthermore, failure to specifically mention the law of occupation in the Bulletin adds to the "impression" that body of law does not apply to UN missions.[127]

In general, "[t]here have been numerous and resounding demands that the UN should promulgate clear directives regarding the applicability of the international law of armed conflict to UN personnel."[128] Such demands for clarification have primarily centered on defining the threshold of when peacekeepers become combatants; almost no attention has been paid specifically to the law of occupation.[129]

To further complicate the matter, the UN may become an occupying power completely independent of application of the laws of war. A consensual peacekeeping mission operating under the terms of an agreement with the host state may still constitute "occupation by consent" (also sometimes referred to as "occupation by agreement"). Occupation by consent occurs when an agreement with the host sovereign explicitly or implicitly cedes to a force elements of control over territory that would otherwise constitute occupation.[130]

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124. *See* The Secretary-General, *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, ST/SGB/1999/13 (Aug. 6, 1999).

125. *Id.* § 3.

126. *See* Bialke, *supra* note 101, at 58. Additionally, "the guidelines do not appear to apply to UN 'Associated Personnel.'" *Id.*

127. Vité, *supra* note 109, at 22.

128. Bialke, *supra* note 101, at 57; *see also* Gardam, *supra* note 110, at 322; Tittemore, *supra* note 97, at 62, 114; Cartledge, *supra* note 23, at 130 ("With all due respect to the ICRC and the United Nations Secretariat, the information released to date only serves to highlight the confusion in this area.").

129. Few authors have mentioned occupation in the context of application of the laws of war to the UN. Garth Cartledge advocates creation of a code of conduct for UN peacekeeping forces that, "in addition to spelling out armed conflict considerations," also "would need to spell out those humanitarian principles that must be applied when . . . the occupiers . . . are dealing with the occupied . . . ." Cartledge, *supra* note 23, at 136. Sylvain Vité calls for the Security Council to apply (as well as alter) the law of occupation to UN transitional administrations such as those seen in Kosovo and East Timor. Vité, *supra* note 109, at 30-31. Most notably, a meeting of experts from various fields organized by the ICRC in 2003 "agreed on the usefulness of identifying rules that should be respected in all circumstances by UN-mandated troops when they deploy on a territory and exercise *de facto* control over it." EXPERT MEETING ON MULTILATERAL PEACE OPERATIONS, *supra* note 55, at 1.

130. The Fourth Geneva Convention was specifically designed to merge the various preexisting strands of the law of occupation and abstract away from the existence of armed conflict or the circumstances inspiring the occupation. *See supra* note 18 and accompanying text. However, occupation by consent has a "special legal character, not only because of its separate legal basis (the particular agreement), but also because the indigenous authorities may be entrusted with wider

Occupation by consent is determined by the authority and control exerted over the territory.[131] The threshold between peacekeeping and occupation by consent can be murky, but factors that might indicate occupation by consent include whether, under the terms of the agreement, the UN force controls public order, is able to exert the will of the force, or assumes significant administrative and/or public security functions. The UN has engaged in occupation by consent in Cambodia, Bosnia, and other missions in which agreements with the relevant sovereign powers ceded to the UN mission rights and duties approaching elements of sovereignty.[132] Furthermore, a peacekeeping mission may constitute occupation (even if the agreement does not constitute occupation by consent) if: (1) unforeseen or extenuating circumstances such as a collapse of the host state government place the mission in the role of an occupying power;[133] (2) part or all of the agreement with the host state contravenes the protections of the Fourth Geneva Convention and is therefore considered invalid;[134] or (3) there is an increase in the mandate, strength, or actions of the force beyond the scope of the original agreement.

c. UN as Lawmaker

Unlike other occupying powers, the UN has the ability to decree changes in the international law of occupation as it applies to UN missions. UN Security

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powers than in a belligerent occupation." Roberts, *supra* note 8, at 263. The higher degree of trust is warranted because the occupation stems from an agreement rather than armed conflict between the occupant and the sovereign government of the occupied territory. In occupation by consent, the customary law of occupation will fill in the gaps and shed light on any remaining ambiguities in the governing agreement. KELLY, *supra* note 8, at 178.

131. Whether a situation constitutes occupation by consent is a question of fact, just like application of the international law of occupation through international humanitarian law. *See* KELLY, *supra* note 8, at 178 ("The application of both the [Geneva] convention regime and the customary law of non-belligerent occupation are . . . dependent on the fact of the presence of a force on foreign territory where they are the sole or primary effective authority."); *see also supra* note 8 and accompanying text.

132. In Cambodia, the United Nations Transitional Authority in Cambodia (UNTAC) was governed by the Paris Agreement of October 23, 1991, which "constituted the temporary transfer of key areas of sovereignty to the UN." Michael J. Kelly, *Responsibility for Public Security in Peace Operations, in* THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 23, at 141, 158. In Bosnia Herzegovina, the Dayton Accords laid the groundwork for an occupation by consent with respect to the UN-authorized NATO Implementation Force (IFOR) and then Stabilization Force (SFOR). *See id.*

133. Roberts, *supra* note 8, at 289, 291.

134. Fourth Geneva Convention Articles 7 and 47 specifically stipulate that parties cannot make agreements that undercut or undermine the protections afforded to those persons covered by the Convention. Article 7 allows the High Contracting Parties to enter into "special agreements for all matters concerning which they may deem it suitable to make separate provision" but clearly states that "[n]o special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them." Fourth Geneva Convention, *supra* note 16, art. 7. According to Article 47, "[p]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention . . . by any agreement concluded between the authorities of the occupied territories and the Occupying Power." *Id.* art. 47. Furthermore, Article 47 was meant by its authors to have "an absolute character." ICRC COMMENTARY IV, *supra* note 10, at 273.

Council resolutions passed under Chapter VII of the UN Charter bind member states and take precedence over the obligations of member states under other international agreements.[135] This provides the UN with the opportunity to customize the law of occupation that would apply to its missions.[136] Yet there is virtually never any mention of the international law of occupation in UN mandates. Indeed, "there normally is not explicit recognition in UN-authorized operations (peacekeeping or enforcement) that occupation law applies in its totality, or in any substantial respect, to the mission mandated by the Security Council."[137]

5. The New Warfare and Its Implications

Changes in warfare have dramatically altered the nature of modern occupation. Occupations no longer consist of the victor simply leaving local law and institutions intact while temporarily holding the territory hostage for political or territorial concessions. Instead, humanitarian and regime change interventions flip the law of occupation on its head by: (1) making the occupation the end goal rather than a byproduct of the war; (2) undercutting the prime rationale for the creation of the traditional law of occupation; (3) embracing nation-building over the law of occupation; and (4) sometimes reversing the calculus of which power is considered to be "legitimate."

Humanitarian and regime change interventions make occupation *the* end goal of military intervention, thereby explicitly hinging the success of the intervention on the outcome of the occupation. By definition, modern doctrines of humanitarian intervention and regime change warfare place great emphasis on the occupation because they seek to end specific practices of the previous

135. *See* U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."); *id.* art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."). For useful background on the role of the UN Security Council and its resolutions in international law, see generally W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993); Steven R. Ratner, *The Security Council and International Law*, *in* THE UN SECURITY COUNCIL *supra* note 66, at 591.

136. *See, e.g.*, Vité, *supra* note 109, at 26-27 (discussing use of Chapter VII by the Security Council in modifying the legal regimes applicable to UN missions in East Timor and Kosovo); *see also* Joshua L. Dorosin, *Jus in Bello: Occupation Law and the War in Iraq*, 98 AM. SOC'Y INT'L L. PROC. 117, 119 (2004) (explaining UN Security Council Resolution 1483 pertaining to Iraq "provided authorities that supervene any inconsistent limitations that may be contained in other bodies of international law, including occupation law" because it was passed under Chapter VII of the UN Charter).

137. Scheffer, *supra* note 32, at 852-53. The international law of occupation was not "invoked in any meaningful way" in UN-authorized military deployments or the "establishment of varying degrees of UN civilian administration" in Bosnia and Herzegovina in 1995, Kosovo in 1999, East Timor in 1999, or Afghanistan in 2002. *Id.* Missions authorized or conducted by the UN in Somalia, Haiti, Mozambique, Angola, and Western Sahara also "failed to recognize the applicability of the law of occupations, despite their focus on restoring and ensuring public order and civil life." Benvenisti, *supra* note 37, at 35-36. The only exception, UN Security Council Resolution 1483 regarding Iraq, will be addressed below. *See infra* notes 252-265 and accompanying text.

regime or rebuild the entire country in the image of the occupier.[138] It is virtually impossible to claim success or justify the military action without a successful occupation that provides a long-term end to the human rights abuses or threats to national security that prompted the initial intervention.[139] This is also true for interventions carried out under the doctrine of pre-emptive self-defense, for a transparent and successful occupation is vital in order to convincingly substantiate the threat (for example, discovery of weapons of mass destruction (WMD) caches) that was claimed to justify the war.

Oftentimes the legitimacy of the intervention hangs in the balance and depends on successful nation-building during the occupation. The newly created government must gain international legitimacy and end the previously objectionable practices for the intervention itself to be considered legitimate and successful. Absent such results, the stated objectives of the actual intervention (for example, to prevent ethnic cleansing and slaughter in Kosovo or to create a stable democratic Iraq) would not be met. In some cases, a successful outcome to an occupation is seen as a means of curing legitimacy defects of the initial military intervention.[140]

The circumstances of modern warfare undercut the self-interest that formed the basis of the international law of occupation. States sought to protect the interests of ousted governments because they feared becoming one. A prime motive of the law of occupation was to assure governing regimes that they would still be recognized as the rightful sovereigns and that their institutions, laws, and civilians would be protected if *their* territories were occupied.[141]

The self-interest at play in modern occupations is less reciprocal. Modern occupying powers (mainly the U.S. and the UN in humanitarian and regime change interventions) do not fear the prospect of occupation of their own territory (in the case of the former, because of geography and American military might and, in the case of the latter, because the UN has no territory). Regime change and humanitarian interventions occur mainly in weak, destabilized or failed states that lack even the threat of occupying territory belonging to states involved in the military intervention. The focus of modern occupations is on the protection of the occupied population rather than the preservation of rights and

138. *See supra* notes 45, 47 and accompanying text; *see also* Robert D. Tadlock, Comment, *Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations*, 39 U.S.F. L. REV. 227, 229 (2004).

139. The realization that military success can present a Pyrrhic victory if not followed by a successful occupation dates back at least as far as World War II. *See* TAYLOR & BRAIBANTI, *supra* note 11, at 1 (explaining the democratic victors of World War II realized that "[o]ccupied nations could not, if the achievement of victory were to be real, be permitted to stew in their own juices or be open to the offices of non-democratic cooks"); *see also* U.S. DEP'T OF ARMY, *supra* note 30, at 103 ("No nation may expect to gain a lasting victory from modern warfare without taking into account the future activities and orientation of the enemy civil government and population.").

140. In Iraq, some argued the importance of successful nation-building was increased by the relative lack of international support for the military intervention. *See, e.g.*, Thomas L. Friedman, Op-Ed, *Milestones for the War*, N.Y. TIMES, Mar. 26, 2003, at A17.

141. *See* Benvenisti, *supra* note 37, at 22, 26.

privileges of ousted elites. Accordingly, the self-interest of modern occupants lies in increasing the legitimacy of the military intervention, gaining international resources necessary to make the occupation successful, and lessening the cost of occupation borne by the occupying power.

Modern occupation is morphing into nation-building because the creation of a functioning state is the only means to fulfill the goals of humanitarian and regime change intervention in the long-term. Modern occupants are opting for nation-building over compliance with the law of occupation, as seen in occupations in such places as Bosnia,[142] Kosovo,[143] East Timor,[144] Afghanistan,[145] and Iraq.[146] To that end, nation-building is now an accepted—and expected—practice.[147]

The dangers of weak and failed states provide an independent impetus for nation-building, even in occupations not specifically designed to end humanitarian abuses or replace a regime. The creation of a stable state through nation-building represents the only hope of stemming certain security threats (such as the denial of safe haven to terrorist groups and the prevention of bellicose dictatorships) in the long-run that might defeat or overwhelm the advantages to be had from successful military intervention.[148] The attacks on

142. *See* S.C. Res. 1031, pmbl., ¶¶ 26, 27, U.N. SCOR, 3607th mtg., U.N. Doc. S/RES/1031 (Dec. 15, 1995) ("welcoming the signing of . . . the General Framework Agreement for Peace in Bosnia and Herzegovina and the Annexes thereto"); General Framework Agreement for Peace in Bosnia and Herzegovina (Agreement on Civilian Implementation), Annex 10, art. 10, Dec. 14, 1995, 35 I.L.M. 75, 147 (1996) (detailing that the peace settlement will include, inter alia, "rehabilitation of infrastructure and economic reconstruction; the establishment of political and constitutional institutions in Bosnia and Herzegovina; promotion of respect for human rights and the return of displaced persons and refugees; and the holding of free and fair elections . . .").

143. *See* S.C. Res. 1244, ¶ 10, U.N. SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (June 10, 1999) (establishing the UN Mission in Kosovo to "provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo").

144. *See* S.C. Res. 1272, ¶¶ 2, 8, U.N. SCOR, 4057th mtg., U.N. Doc. S/RES/1272 (Oct. 25, 1999) (giving the United Nations Transitional Administration in East Timor (UNTAET) a mandate to "assist in the development of civil and social services," to "support capacity-building for self-government," and to "carry out its mandate effectively with a view to the development of local democratic institutions").

145. *See infra* Section III.D.1.

146. *See infra* Section III.D.2.

147. *See* Michael Ignatieff, *Nation-building Lite*, N.Y. TIMES, July 28, 2002, at F26; The Secretary-General, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, at 5, 12, U.N. Doc. S/1995/1, A/50/60 (Jan. 3,1995) (explaining that the scope of UN missions has changed as "[t]he validity of the concept of post-conflict peace-building has received wide recognition"). In 1999, approximately half of the UN peacekeeping operations in the field engaged in peace-building activities including "helping to forge viable political and civic institutions, strengthening human rights mechanisms, promoting law and order, and supporting the creation of civilian jobs for demobilised combatants." Hédi Annabi, Address at the Fourth Singapore Conference on Peacekeeping (Nov. 22, 1999), *in* THE NEXUS BETWEEN PEACEKEEPING AND PEACE-BUILDING 27 (Nassrine Azimi & Chang Li Lin eds., 2000).

148. *See* ROBERT J. PAULY, JR. & TOM LANSFORD, STRATEGIC PREEMPTION: U.S. FOREIGN POLICY AND THE SECOND IRAQ WAR 131-32, 134 (2005); John Yoo, *Iraqi Reconstruction and the Law of Occupation*, 11 U.C. DAVIS J. INT'L L. & POL'Y 7, 9 (2004).

the United States on September 11, 2001 increased the salience of such concerns and inspired the idea in many states that "reconstruction projects may involve greater national interest than had previously been recognized."[149] Additionally, failed state institutions may cause suffering that may turn a local population against the occupying power.[150] Moreover, "not only weak or failed states unintentionally 'breed' terrorism. Democratically illegitimate states do, too—especially when citizens perceive their regimes to have been imposed by outside forces that can themselves be targeted for terrorist attack."[151]

Changes in international relations make it possible for an intervening and occupying power to be more "legitimate" than the government being ousted. Modern notions of sovereignty and human rights mean a state's governing regime (always viewed as the "legitimate power" under the international law of occupation) can cease being "legitimate" in the eyes of the international community due to human rights abuses and mistreatment of the state's citizens.[152]

The world now commonly makes value judgments as to the legitimacy of control of territory, even though such assessments contradict the international law of occupation. In an age that prohibits colonialism and values human rights over imperial conquests, some states are not considered "legitimate powers" even in occupied territories that had previously been firmly under their control (as seen in the case of Indonesia when displaced from East Timor).[153] In such

149. Chesterman, *supra* note 82, at 231; *see also* Robert I. Rotberg, *Failed States in a World of Terror*, 81 FOREIGN AFF. 127, 137-38 (2002) (explaining that the presence of failed states "endangers world peace"); PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf [hereinafter NATIONAL SECURITY STRATEGY] ("America is now threatened less by conquering states than we are by failing ones.").

150. *See* Yoo, *supra* note 148, at 7.

151. FELDMAN, *supra* note 3, at 14.

152. *See generally* TESÓN, *supra* note 63, at 81-99 (discussing the international legitimacy of governments); *see also* MARTHA FINNEMORE, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE 79 (2003) ("In this struggle between principles, the balance seems to have shifted since the end of the cold war, and humanitarian claims now frequently trump sovereignty claims."); Joanna Weschler, *Human Rights*, *in* THE UN SECURITY COUNCIL, *supra* note 66, at 65-67 (relating the UN Security Council's "gradual abandonment . . . of the absolutist approach to state sovereignty"); Kofi A. Annan, *Peacekeeping, Military Intervention, and National Sovereignty in Internal Armed Conflict*, *in* HARD CHOICES: MORAL DILEMMAS IN HUMANITARIAN INTERVENTION 56-57 (Jonathan Moore ed., 1998) (explaining "the understanding of sovereignty is undergoing a significant transformation"); INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001) (reporting the conclusion of a private group of national and international leaders that "the principle of non-intervention yields to the international responsibility to protect" when a state's population is suffering serious harm and the state is "unwilling or unable" to act); Schermers, *supra* note 79, at 185 ("In a growing number of fields States become bound by universal rules irrespective of any express adherence to these rules.").

153. For additional background, see generally Schermers, *supra* note 79, at 191 (discussing the "prohibition of colonialism"); East Timor (Port. v. Austl.), 1995 I.C.J. 90, 95-97 (June 30) (providing historical context as to Indonesia's previous control over East Timor); BENVENISTI, *supra* note 3, at 211 (discussing "the process of ascertaining the legitimate sovereign of an occupied territory" in the context of Western Sahara and international recognition of Bangladesh).

cases, the ousted states are not accorded the privileges of a deseised power during occupation because their departure is permanent and the territory will now move toward independence.

Sovereignty no longer provides total immunity from international scrutiny to a regime in power, and this applies *a fortiori* to a deseised government (because sovereignty remains with the population, not the ousted government). The point at which a regime is considered to no longer be "legitimate" is admittedly murky, but wars are now often waged to entirely remake part or all of a regime that is perceived to be "illegitimate" and to end practices that violate international human rights norms.

C. The Contours of the de facto Modern Law of Occupation

If the traditional law of occupation is outdated and inapplicable to the new model of occupation, what body of law or process, if any, regulates modern occupations? Are modern occupations "illegitimate" given that they do not comply with positive international law, or are there alternative sources of legitimacy? The predicament of modern occupation is twofold. First, modern occupations face a daunting legitimacy gap left by a body of law that no longer conforms to many of the key principles of the new model of occupation. This disjunction between policy goals leaves modern occupants in the position of seeking legitimacy for their actions from sources outside of positive law. Second, modern occupations operate in a lacuna of applicable international law when facing questions related to nation-building and sovereignty, particularly with respect to how and in what manner sovereignty should be returned to the people of the occupied territory. The focus of the law of occupation on *laissez-faire* and temporary administration makes it irrelevant when applied to modern occupations where no "legitimate power" exists and the goal is to recreate or rebuild fundamental institutions of the state.

International opinion among nations has substantially displaced the formal law of occupation in bestowing legitimacy upon modern occupations and moderating the actions of occupying powers. Multilateralism is the *sine qua non* for achieving two critical types of legitimacy which flow from (1) the fact of international participation in the occupation and (2) a successful outcome of the occupation manifest in the creation of a functioning state. International opinion and negotiation on an ad hoc basis have supplanted the law of occupation as the primary litmus test of what is acceptable practice for an occupying power.

1. The "Invisible Hand"

The new context of international occupation creates an "invisible hand" that pushes occupying powers toward multilateralism.[154] Occupants turn to the

154. The "invisible hand" is a concept created by Adam Smith to explain the efficiency of the free market. Individuals pursue self-interest, thereby causing the efficient use of resources and,

international community for assistance because modern occupations are long-term and costly exercises in nation-building that require international support to be successful. Factors unique to the United States as an occupying power make that country particularly vulnerable to the pressures to seek multilateralism. At the same time, both altruistic and selfish reasons motivate the international community to participate in and support occupations.

a. Pressure to Multilateralize

The backbone of the "invisible hand" consists of the various resource and legitimacy needs inherent in modern occupation. Specifically, modern occupants need the international community for political legitimacy, economic assistance, and security assistance. UN expertise in nation-building and the preexisting relationship between the international community and the occupied territory are additional factors that push for multilateralization.

Political legitimacy is a primary reason to multilateralize an occupation because international political legitimacy of the occupation is, in some cases, the ultimate litmus test of the success of the military intervention. If much of the legitimacy of the intervention depends on the actual result of the occupation, how does one decide if the new power created by the occupation is legitimate? In the very same manner that the intervention itself was or will be commonly viewed as either legitimate or illegitimate: the dominant view of the community of nations. Gaining this international legitimacy requires administering a multilateral occupation in an internationally acceptable manner.

International political legitimacy is a precondition to successful nation-building. An international stamp of approval—often in the form of a UN Security Council blessing—serves as a gatekeeper to resources required to effectively build a nation,[155] and is necessary to give the political cover necessary to engage in the long-term endeavors of nation-building and democratization.[156] More to the point, some scholars suggest an empirical link

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as an unintended byproduct, an increase in public welfare. *See generally*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., 1976) (1776). This concept provides insight into modern occupations. Occupying powers seek to make an occupation successful out of self-interest (to legitimize the military intervention, to reduce threats to national security, to further national and international values, and to prevent international opprobrium for a failed occupation). In pursuit of a successful occupation, occupants are forced to seek international resources and legitimacy, thereby leading to multilateralism as a byproduct. The price of such support, observance of international norms, leads to the additional byproduct of increased public welfare through nation-building and the protection of the human rights of the occupied population.

155. *See supra* Section III.B.4.a; *infra* note 274 and accompanying text; *see also* COUNCIL ON FOREIGN REL., IRAQ: THE DAY AFTER 17 (2003) (encouraging the Bush Administration to internationalize and "hand off" the humanitarian assistance effort in order to demonstrate to Iraqis and neighboring states that the aid effort "is broadly supported" and because "donors may be more likely to fund their operations if overall management is not the responsibility of one government").

156. On the importance and value of multilateralism in buying time for the occupation of Iraq to succeed, see Brown, *supra* note 61, at 45; Grant, *supra* note 77, at 835; Thomas L. Friedman, Op-Ed, *Policy Lobotomy Needed*, N.Y. TIMES, Aug. 31, 2003, at D9.

between multilateralism and successful nation-building.[157] Multilateralism is also held to be a key ingredient in achieving successful transitional justice and advancing the rule of law.[158] Furthermore, the product of occupation (the newly formed or changed state) must pass international muster to receive the necessary political recognition and economic assistance (including United Nations credentials and loans from international financial institutions).[159]

International public opinion[160] and local public opinion in the occupied territory are linked, and the occupying power needs the support of both to have a successful occupation. International public opinion looks to indigenous public opinion in the occupied territory for cues as to the progress and success of the occupation, and local public opinion looks to international public opinion for insight into the motivation of the occupying force. The presence or lack of international forces and assistance in reconstruction efforts directly affects the domestic legitimacy of the occupation within the occupied territory—and sometimes the region—and accordingly raises or lessens doubts about the occupant's motivation.[161] In certain cases, the use of international forces that

157. *See* MINXIN PEI & SARA KASPER, CARNEGIE ENDOWMENT FOR INT'L PEACE, POLICY BRIEF NO. 24, LESSONS FROM THE PAST: THE AMERICAN RECORD IN NATION-BUILDING 7 (2003), *available at* http://www.ceip.org/files/pdf/Policybrief24.pdf (concluding based on sixteen case studies involving U.S. nation-building efforts since 1900 that an important criterion for success was "international legitimacy under multilateral interim administration"); *see also* PAULY & LANSFORD, *supra* note 148, at 135-36 (arguing that involvement and support of international actors, including international institutions and nongovernmental organizations, are prerequisites for successful nation-building); JAMES DOBBINS ET AL., AMERICA'S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ, at xxv (2003) (concluding based on seven case studies that "[m]ultilateral nation-building can produce more thoroughgoing transformations and greater regional reconciliation than can unilateral efforts"); Rotberg, *supra* note 149, at 140.

158. *See* Bali, *supra* note 44, at 470-71; RICHARD O. HATCH, RESTORING THE RULE OF LAW IN POST-WAR IRAQ: STEPS, MISSTEPS AND A CALL TO MAXIMIZE INTERNATIONAL SUPPORT FOR IRAQI-LED PROCESSES, at iii (2004). "Transitional justice refers specifically to accountability mechanisms designed to address human rights abuses committed by a regime once that regime has fallen." Bali, *supra* note 44, at 460.

159. *See, e.g.*, Elizabeth Becker, *A Nation at War: Postwar Financing*, N.Y. TIMES, Apr. 11, 2003, at B8 (explaining that "[f]oreign institutions and foreign governments say they may need approval from the United Nations Security Council before they give or lend money to Iraq while it is under military occupation," and quoting World Bank President James D. Wolfensohn as saying the World Bank is "limited in terms of the provision of funding to deal with recognized governments, and that is a decision for the United Nations to take in principle"); Grant, *supra* note 77, at 835 (opining "the validity that UN involvement may confer on transition organs [in Iraq] may well speed the attainment of broad-based recognition of those organs"); *see also infra* notes 292-293 and accompanying text.

160. The provision of material and moral support to modern occupations occurs primarily at the state level through votes in international institutions and bilateral aid, but such support is closely linked to—and influenced by—broader international public opinion. *See* Perritt, *supra* note 71, at 427 ("[T]he international audience, once consisting solely of heads of state, has broadened to include [non-governmental organizations], opinion leaders, and the general public of different states, particularly those of the [militarily] intervening state or states.").

161. *See, e.g.*, Chesterman, *supra* note 82, at 231 (explaining that "avoiding the appearance of imperialism or colonialism may demand a formal UN umbrella" for reconstruction efforts in transitional administration of territory); PEI & KASPER, *supra* note 157, at 7 (concluding a UN-led reconstruction effort in Iraq "would be viewed as more legitimate, especially in the Middle East" because "[s]uspicions about Washington's ulterior motives in Iraq would be at least partly

share religious, ethnic, or other ties with the occupied population may accrue particular advantages in legitimacy for an occupant by better signaling beneficent intent.[162] A multinational presence may also help to signal the longevity and seriousness of intent of an occupying power, thereby further encouraging segments of the local population—particularly those that might otherwise be wary of the prospect of reprisals for assisting an occupant—to take part in nation-building efforts. Conversely, international opinion of the conduct of the occupying power takes cues from the views held by the occupied population.[163]

There may also be political advantages to multilateralism in terms of domestic popular support within the occupying power. Some domestic audiences more readily support what they perceive as an international effort to contain or solve an international threat.[164] In contrast, unilateralism can be domestically perceived as a result of the particular agenda of individual government leaders, and lack of international support may undercut the persuasiveness of those leaders' strategies and justifications for the war and resultant occupation.

Simple economics is a powerful incentive toward multilateral occupation because international financial support is important to defray the cost of occupation and buttress the newly formed government. The high cost and organizational demands of humanitarian assistance missions (particularly following intervention to stem large-scale human rights violations) provide strong incentives to share the burden—often to the point that occupants will cede control of that aspect of the occupation to international organizations.[165]

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dispelled"); GALLUP ORG., THE GALLUP POLL OF BAGHDAD 29, 33 (2003) (reporting that 83% of Baghdadis surveyed in 2003 favored "internationalizing the reconstruction effort" and also indicating widespread distrust among Baghdadis of U.S. intent to the extent that 43% believed the main objective of the U.S.-British intervention was "to rob Iraq's oil"); RICHARD P. CRONIN, CONG. RES. SERV., AFGHANISTAN: CHALLENGES AND OPTIONS FOR RECONSTRUCTING A STABLE AND MODERATE STATE 32 (2002), *available at* http://fpc.state.gov/documents/organization/10093.pdf (positing that internationalizing the U.S. military role in Afghanistan would increase transparency and possibly "defuse Afghan suspicions that the United States is seeking . . . an indefinite military occupation" because "many ordinary Afghans welcome an international presence and the security it provides, [so] operating under U.N. or other international auspices may provoke less of a backlash"); Bali, *supra* note 44, at 471 (arguing that international administration of Iraq would enjoy greater legitimacy because, inter alia, "an international organization's self-interest is not bound up with the commercial, territorial, or geopolitical strategic objectives of a state actor").

162. The occupation of Afghanistan provides a case in point. Various leaders from Muslim nations called for a Muslim peacekeeping force in Afghanistan after the U.S. military intervention. Dean Calbreath, *Egypt Ambivalent on Peacekeeping Role*, SAN DIEGO UNION-TRIB., Nov. 16, 2001, at A1; *see also* Editorial, *Righting Afghanistan*, PLAIN DEALER, Nov. 14, 2001, at B8. Because of the sensitivities of the occupation of Afghanistan, the U.S. took great pains to recruit Muslim countries to participate in the peacekeeping mission. *See* Kim Sengupta, *Campaign Against Terrorism*, THE INDEPENDENT (U.K.), Nov. 17, 2001, at 3.

163. *See* PEI & KASPER, *supra* note 157, at 7.

164. *See* Malone, *supra* note 66, at 635 (explaining that, in the context of military intervention, "[l]egitimacy is increasingly tied, for the U.S. public (and possibly some others), to the achievement of foreign participation in its military ventures").

165. *See* DOBBINS ET AL., *supra* note 157, at 200-01.

Needless to say, strained purse strings directly affect the level of domestic support for the occupation among the citizens of an occupying power.[166] International financial support can be an important means of mitigating or forestalling taxpayer fatigue and preventing political fallout caused by expensive and long-term financing of an occupation abroad.

Security reasons militate for multilateral occupation because international troop donations can increase the effectiveness—and reduce the necessary timeframe–of occupation by increasing the breadth and quality of control exerted by occupants over occupied territory.[167] Security issues are also directly linked to popular support for occupations domestically within occupying states. The cases of Iraq and Afghanistan demonstrate that occupations can include ongoing hostilities and casualties.[168] International troops can share these burdens and thereby lessen the effect of casualties in reducing domestic popular support within those states acting as occupants.[169] Furthermore, it has been suggested that there is "an inverse correlation between the size of the stabilization force and the level of risk," meaning "the higher the proportion of stabilizing troops, the lower the number of casualties suffered and inflicted."[170] As a result, multilateralism, to the extent it increases the number of forces deployed to conduct an occupation, may decrease casualties overall.

UN expertise in the practice of nation-building and the previous involvement of international actors in the occupied territory also propel occupants toward multilateralism. The UN has built-up vast experience in, among other places, East Timor, Bosnia, and Kosovo, thus providing powerful advantages to being included in nation-building efforts.[171] In many cases,

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166. *See, e.g.*, Jonathan Weisman, *House and Senate Back Iraq Aid Plan: Cost and Duration Among Deep Misgivings*, WASH. POST, Oct. 18, 2003, at A1 (explaining the domestic debate in the United States related to President Bush's request for a supplemental spending bill of $87 billion, part of which would fund reconstruction efforts in Iraq and Afghanistan); Maura Reynolds & Maggie Farley, *Bush Urges Leaders to Unite for Iraq's Sake*, L.A. TIMES, Sept. 24, 2003, at 1 (explaining that an opinion poll by the Pew Research Center for the People and the Press "suggested that Americans are increasingly worried about the costs of the occupation [of Iraq]").

167. For instance, in the case of Afghanistan, international troop donations freed up contingents of U.S. forces to pursue other missions. *See infra* note 214 and accompanying text.

168. *See* DOBBINS ET AL., *supra* note 157, at xxv, 152-53; CNN, Forces: U.S. & Coalition Casualties (2005), http://www.cnn.com/SPECIALS/2003/iraq/forces/casualties/2005.10.html.; *infra* note 270 and accompanying text.

169. *See, e.g.*, Grant, *supra* note 77, at 830 (explaining that incorporating international institutions into the Iraqi transition "might reduce or disperse the attention of hostile groups that would otherwise focus chiefly on the [Coalition Provisional Authority]"); *see also* Douglas Jehl & David E. Sanger, *Occupation Foes: Iraqis' Bitterness is Called Bigger Threat than Terror*, N.Y. TIMES, Sept. 16, 2003, at A12 (explaining that Secretary of Defense Donald H. Rumsfeld and Commander of U.S. Central Command General John P. Abizaid "have publicly acknowledged that the overwhelmingly American flavor of the [occupation of Iraq] poses a military problem because it makes the United States the target of ordinary Iraqis' resentment").

170. DOBBINS ET AL., *supra* note 157, at xxv, 152-53.

171. *See* MCGOLDRICK, *supra* note 94, at 144-45 (explaining that the UN "has a lot of experience in protecting civilians in post conflict situations and addressing crucial thematic issues such as access to vulnerable populations, separation of civilian and armed elements, rule of law, justice and reconciliation, and gender based violence"); PEI & KASPER, *supra* note 157, at 7 ("The

international institutions, individual states, and non-governmental organizations (NGOs) have been previously involved in the occupied territory through such means as weapons inspections regimes, UN-authorized economic sanctions, humanitarian relief efforts, and programs of international financial institutions. Tapping the general experience and local knowledge of these actors can be a savvy strategy for occupying powers. In some cases, the occupant has no choice but to deal with certain preexisting arrangements (for example, the international presence in Bosnia affected the subsequent occupation of Kosovo, and UN Security Council sanctions against the Taliban in Afghanistan and the Saddam Hussein regime in Iraq affected the occupations in those two countries).[172]

b. Pressure Unique to the United States

Phenomena special to the United States create additional incentives for U.S.-led occupations to request (and require) multilateral assistance. These factors appear in the realms of both domestic and foreign policy.

In terms of domestic politics, history reveals that competing priorities often limit the attention span of U.S. policymakers and the general public.[173] There are also limits as to U.S. willingness to "foot the bill" for occupation over the long-term, and there is a general reluctance to take significant casualties in humanitarian interventions.[174] Some members of the general public and certain policymakers believe that regime change is the end in and of itself, and that the replacement of that regime (the long and expensive process of nation-building) is unnecessary or a secondary goal worthy of less money and energy.[175] Multilateralizing an occupation provides a mechanism to spread the costs and casualties as well as to reduce the level and length of attention that must be paid to ensure success. Thus, multilateralism may partly result from the realization that a UN or other form of multilateral occupation is better suited to "stay the course" and achieve success than a unilateral occupation by the U.S.[176]

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long-term prospects for nation-building in Iraq would likely be enhanced if the effort were managed by the United Nations, which has been supervising similar post-conflict reconstruction in many countries, such as Afghanistan, Bosnia, East Timor, and the Kosovo region of the former Yugoslavia.").

172. In the case of Afghanistan, see *infra* note 216 and accompanying text. In the case of Iraq, see *infra* note 287 and accompanying text.

173 For application of this point to nation-building, see CHESTERMAN, *supra* note 57, at 253.

174. For further background as to U.S. reluctance to incur casualties in humanitarian missions, see Thomas G. Weiss, *Collective Spinelessness: U.N. Actions in the Former Yugoslavia, in* THE WORLD AND YUGOSLAVIA'S WARS 59, 71 (Richard H. Ullman ed., 1996).

175. As an example of this view, see generally CATO INST., EXITING IRAQ, REPORT OF A SPECIAL TASK FORCE 37-39 (2004) (arguing against nation-building in Iraq); *see also* Dusko Doder, Op-Ed, *Will America Commit to Democracy in Iraq?* BALT. SUN, Oct. 27, 2002, at 5F ("While the U.S. military knows how to fight wars, U.S. political leaders underestimate the need for the grinding political work that is required to secure ultimate victory.").

176. *See* Brown, *supra* note 61, at 73 (noting that, in the context of Iraq, "the ongoing legal, political, and economic responsibility of the U.S. could persist long after the domestic political consensus to support war and post-war occupation has waned"); DOBBINS ET AL., *supra* note 44, at

The nature of U.S. foreign policy and the country's military, in combination with simple geography, also militate toward multilateralism in U.S.-occupied territory. U.S. geopolitical interests require a military that is not only deployed worldwide, but also that has sufficient capacity to quickly deploy in case of crisis. Committing large numbers of forces to nation-building efforts—particularly in the medium and long-term—is viewed by certain U.S. policymakers as impinging on other U.S. military commitments and capabilities.[177] Additionally, militaries from other nations are cheaper to maintain in peacekeeping and, in some cases, are better trained for specific roles in nation-building.[178] Moreover, the geographical location of U.S.-occupied territory (for example, Afghanistan and Iraq) often makes it particularly expensive to maintain the necessary supply lines from the U.S. to its military forces in the field. At the same time, long stints abroad in circumstances of occupation can drain morale of U.S. troops, overburden reserve forces, and hamper military recruitment and retention.[179]

Finally, a dose of game theory also enters the equation. The U.S. is a repeat player that realizes (at least to some degree) that it will need international support for future interventions and occupations.[180] Thus, the U.S. has all the more reason to abide by community norms during occupation since actions taken now may influence the success not only of the current occupation, but also of those to come.[181]

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xxxv (explaining that "the United Nations has largely avoided the institutional discontinuities that have marred U.S. performance" in nation-building efforts).

177. *See, e.g.*, Sonni Efron, *War With Iraq*, L.A. TIMES, Apr. 3, 2003, at 16 (quoting Representative Jim Kolbe (R-Ariz.), Chairman of the House Subcommittee on Foreign Operations, Export Financing and Related Programs, as saying that "further drawing our armed forces into long-term nation-building . . . would degrade their capacities to fight wars"); David Rieff, *Blueprint for a Mess*, N.Y. TIMES, Nov. 2, 2003 (Magazine), at 28 (discussing the ramifications of "the Bush administration's insistence, upon coming into office, that it would no longer commit American armed forces to nation-building missions"); Mark Matthews, *GOP Seeks More Power Over Military Policies*, BALT. SUN, Feb. 15, 1995, at 5A. Furthermore, peacekeeping is generally held in low regard by the American armed forces: "It is hardly a secret that within the Army, peacekeeping duty is not the road to career advancement." Rieff, *supra* at 28.

178. *See infra* note 273 and accompanying text.

179. For discussion of the burdens on the armed forces imposed by the occupation of Iraq, see, for example, CATO INST., *supra* note 175, at 37-39; Eric Schmitt, *Commander Doesn't Expect More Foreign Troops in Iraq*, N.Y. TIMES, Sept. 26, 2003, at A8; *see also infra* note 269 and accompanying text.

180. The most recent example of this point was seen in U.S. policy changes during the occupation of Afghanistan taken with an eye toward a future military intervention in Iraq. *See infra* notes 210, 232 and accompanying text.

181. Recognizing this same issue, a Committee of Experts convened by the New England Center for International Law and Policy urged the U.S. to recognize that it is "in the United States' interests to ensure it plays a constructive and leading role" in nation-building in Afghanistan because such efforts "will be watched carefully by our allies and future potential coalition partners and will influence their willingness to support American intervention in other states." Scharf & Williams, *supra* note 82, at 713.

c. Pressure on Third Parties to Support Multilateral Occupation

Even those states that did not support the initial military intervention face pressure to assist modern occupations. First, many states have a national security interest in a successful occupation. An unsuccessful occupation can result in a weak or failed state that may breed or incubate transnational threats inimical to other states' interests—an even more salient fear in the post-September 11 world.[182] Weak and failed states can destabilize regions and otherwise impinge on the security of other states and their allies both near and far, including by prompting refugee crises.[183] Second, humanitarian reasons often motivate international assistance in post-conflict reconstruction, particularly from developed countries.[184] Third, there is often a perception that values are "on the line." Western countries have an interest in successful nation-building in occupation because it reflects positively on democracy and Western values as models.[185] This has been seen in such cases as East Timor, the Balkans, and especially in Iraq.[186] These same motives also increase pressure on the UN to participate in occupations.[187] Moreover, in an even more self-interested twist, Western democracies generally view the spread of democracy as contributing to their national security because of the "correlation between democratic governance and nonaggressiveness."[188] Fourth, the tug of alliances (both formal and informal) pull in other states to support an occupation, especially when the U.S. is the principal occupying power and offers "carrots" and "sticks" to encourage participation in an occupation. Fifth, states often have economic incentives to participate in and/or help shape occupation because of past (often in the form of contracts or debt)[189] or potential (such as lucrative possibilities in

182. *See supra* notes 148-149 and accompanying text.

183. *See* Yoo, *supra* note 148, at 11.

184. *See, e.g.*, Editorial, *A Promise is a Promise*, S. CHINA MORNING POST, Nov. 13, 2002, at 17 (describing humanitarian conditions in Afghanistan and proclaiming that "developed countries have an obligation to honour their pledges [for reconstruction efforts] and provide even more assistance").

185. For further background on the practice by Western governments of exporting their values, see W. Michael Reisman, *Aftershocks: Reflections on the Implications of September 11*, 6 YALE H.R. & DEV. L.J. 92-93 (2003).

186. *See infra* note 295 and accompanying text; Grant, *supra* note 77, at 839 n.72.

187. *See, e.g.*, The Secretary-General, *Observations in the Report of the Secretary-General Pursuant to Paragraph 24 of Resolution 1483 (2003) and Paragraph 12 of Resolution 1511 (2003)*, ¶ 114, U.N. Doc. S/2003/1149 (Dec. 5, 2003) (stating that the "process of restoring peace and stability to Iraq cannot be allowed to fail" because "[t]he consequences for Iraqis themselves, the region and the international community as a whole would be disastrous").

188. Franck, *supra* note 65, at 88 (discussing how, based on Immanuel Kant's democratic peace theory that democracies are less prone to go to war with one another, the Council of Security and Cooperation in Europe concluded that "one way to promote universal and perpetual nonaggression—probably the best and, perhaps, the only way—is to make democracy an entitlement of all peoples"); *see also* FELDMAN, *supra* note 3, at 8; *infra* note 315 and accompanying text.

189. Financial stakes in the Iraqi oil industry provided Russia (as well as other countries) an important impetus to try to influence the occupation of Iraq. *See infra* note 261 and accompanying text.

concessions)[190] economic relationships with the occupied state.

2. Elements of the de facto Modern Law of Occupation

A de facto law of occupation is emerging to replace the de jure international law of occupation in conferring legitimacy on and regulating the new model of occupation. Though nascent and inchoate, this de facto modern law of occupation contains the following distinguishable elements:

- Occupying powers comply with international norms and expectations because of the "invisible hand" (their need for international assistance and political legitimacy).

- The international law of occupation does not compel action in any meaningful manner, and its non-humanitarian provisions are generally disregarded.

- The "lawfulness" and "legitimacy" of actions of occupants are judged according to modern day international norms (primarily based in international human rights law but also including other norms and relevant bodies of international law) through ad hoc international negotiation (most often in multilateral fora such as the UN Security Council).

- A UN blessing and broad international involvement in the occupation are prerequisites for international legitimacy.

- The international community expects nation-building and the creation of state structures that provide meaningful services to citizens and protect human rights.

- The occupation should result in an improvement in the quality of life of the occupied population to a generally internationally acceptable level (as determined by context) that usually equates to a substantial increase over pre-war standards.

- Occupants temporarily hold de facto sovereignty. Devolution of sovereignty to the occupied population occurs in a case-by-case manner as a product of international negotiation. Sovereign functions are parsed and returned in a piecemeal manner. Devolution of sovereignty ending in a "puppet government" or colonial relationship, as defined by the general consensus of the international community, would be unacceptable.

- An ousted government, if one exists, can be deemed "illegitimate" by the international community due to prior human rights abuses and/or other transgressions and denied the rights accorded to it under the traditional law of occupation.

- The humanitarian provisions of the international law of occupation continue to have legal force as a baseline of protections, but the

190. A nation's support for an occupation may also aid its companies in gaining access to lucrative contracts for reconstruction of the occupied territory. The U.S. barred states that had opposed the Iraq war from bidding on reconstruction contracts that totaled over $18 billion. Though Canada was initially included in this group, that country's support of the occupation led the Bush Administration to make an exception and allow Canada to bid. *See* G. Robert Hillman, *Bush Says Canada Can Bid on Contracts to Rebuild Iraq*, DALLAS MORNING NEWS, Jan. 14, 2004, at 11A.

importance of that fact is diminishing as the international community increasingly expects application of the international human rights regime writ large to occupations and as the distinction between the laws of war and international human rights law continues to be blurred.

- International norms and expectations extend beyond the timeframe of the de jure law of occupation. The occupant is responsible to some degree for public order and the protection of human rights in the time period *after* the conclusion of the occupation, and occupants cannot escape their responsibilities by simply ending the occupation.[191]

- Measures enacted and institutions developed by the occupant are generally presumed to remain in effect after the end of occupation. In contrast, the traditional law of occupation presumes that actions taken by occupants—other than those taken within very narrowly defined bounds—will lose force or be subject to revision at the occupation's end unless specifically continued by the "legitimate power."[192]

- The international community applies modern norms even to cases of occupation to which all or part of the international law of occupation would not necessarily apply by law. For instance, application of these norms is not dependent on such legal technicalities as whether the conflict is international or internal or whether the occupation is consensual.

3. The "Invisible Hand" and the United Nations

The strong incentives to multilateralize occupation go far in explaining the prominence of the UN as an occupying power. In the first instance, occupants are enticed to "hand off" parts or all of an occupation to the UN because of its international support, central role in international politics, access to resources, and experience in post-conflict reconstruction and nation-building.[193] The UN

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191. Under the traditional international law of occupation, the occupant must only work to restore normal civil life "as far as it is within its capacity for the period during which it is in the territory," and "is free to depart at any time of its own pleasing and all its legal obligations with respect to that territory end with this departure." Kelly, *supra* note 132, at 160; *see also* VON GLAHN, *supra* note 5, at 29. The only exception to this rule under the law of occupation is when a genocide is occurring. Kelly, *supra* note 132, at 155. For additional arguments on why the legal responsibilities of an occupying power may now extend beyond the departure of its forces, see Brown, *supra* note 61, at 45-58.

192. *See generally* MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR 753-54 (1994) ("Authority to bind the indefinite future bears no necessary relation to the securing of the purposes of the law of belligerent occupation."); FEILCHENFELD, *supra* note 26, at 145-50.

193. *See supra* Section III.B.4.a; *supra* note 171 and accompanying text; DOBBINS ET AL., *supra* note 44, at xxxvii ("[T]he United Nations provides the most suitable institutional framework for most nation-building missions, one with a comparatively low cost structure, a comparatively high success rate, and the greatest degree of international legitimacy."). Various calls for greater UN involvement in the occupation of Iraq relied on reasoning such as this. *See, e.g.*, Brown, *supra* note 61, at 71 ("Only the U.N. can bring together the credibility, expertise, and Chapter VII authority, all of which are necessary to wrap together and reconcile the various interests and obligations concerned into a politically palatable, and therefore at least potentially workable, package"); CHESTERMAN, *supra* note 57, at 97 ("[T]he United Nations remains an indispensable framework for the multilateral cooperation necessary to rebuild a country the size of Iraq.").

provides a type of "readymade" occupation apparatus with personnel and organizational infrastructure dedicated to such components as human rights, international development, and humanitarian relief. Moreover, the UN has the ability to alter the rules of the international law of occupation that apply to its missions.[194]

Incentives also exist for would be supporters of an occupation to push for UN control. UN administration can offer political cover to leaders of states where domestic opinion runs against aiding a particular occupation.[195] Also of note, states that have volunteered troops to aid in occupation (or that are contemplating such a move) may have a sizable financial stake in seeing the occupation handed off to the UN. Depending on the circumstances, UN involvement could reduce or eliminate those countries' out of pocket expenses in maintaining their forces (indeed for some countries, participation in UN peacekeeping is a source of profit).

The resource and legitimacy needs of modern occupations may be less sharply felt by the United Nations. The UN maintains a degree of independence from the "invisible hand" because its missions are multilateral by definition, the organization acts with presumptive legitimacy and enjoys mandatory funding requirements (depending on the type of activity), and Chapter VII action by the Security Council can mold the applicable precepts of international law under which its occupations take place.

Nonetheless, the legitimacy and multilateral nature of the UN do not provide total immunity from the pressures of the "invisible hand." A prospective UN mission requires Security Council support (particularly among the permanent five members), as it is the members of that body that determine if, and under what circumstances, a UN mission will take place.[196] Once approved, UN occupations must act with an eye toward gaining and maintaining international support because, notwithstanding the organization's mandatory funding requirements for certain activities, UN nation-building projects are "dependen[t] on voluntary funding to pay for such mission-essential functions as reintegration of combatants and capacity building in local administrations."[197] Herein lies an interesting difference between the UN and the U.S. as occupying powers: the "invisible hand" is stronger in terms of resource needs for UN

194. *See supra* notes 135-136 and accompanying text.

195. In the case of Iraq, see *supra* note 94 and accompanying text; *infra* note 274 and accompanying text.

196. For background on the mechanics of the authorization and funding of UN peacekeeping missions, see generally UNITED NATIONS DEP'T OF PUB. INFO., UNITED NATIONS, AN INTRODUCTION TO UNITED NATIONS PEACEKEEPING (2003), http://www.un.org/Depts/dpko/dpko/intro/index.htm.

197. DOBBINS ET AL., *supra* note 44, at xviii. For additional background on the complexities and difficulties of UN funding mechanisms for peace-building enterprises, see generally DIRK SALOMONS & DENNIS DIJKZEUL, FAFO INST. FOR APPLIED SOC. SCI., REP. NO. 359, THE CONJURERS' HAT: FINANCING UNITED NATIONS PEACE-BUILDING IN OPERATIONS DIRECTED BY SPECIAL REPRESENTATIVES OF THE SECRETARY-GENERAL (2001), *available at* http://www.fafo.no/pub/rapp/359/359.pdf.

missions, whereas legitimacy is perhaps the greater need in U.S. occupations (though resource needs—especially in the longer term—are also important).[198]

UN occupations still boil down to international negotiation and case-by-case decisionmaking to determine the mandate of the mission, the services to be provided and, in some cases, the manner and form of devolution of sovereignty. UN occupations must be sensitive to international opinion and operate consistently with international norms lest they lose support of member states, not receive the logistical and material support required to conduct the occupation (including troop donations, strategic airlift, and funding for humanitarian, development, and human rights activities), or risk having the mission terminated.

In sum, the "invisible hand" and, most importantly, the broader norms of the de facto modern law of occupation, influence and direct the nature and actions of UN occupations. Yet the true test in strength of the de facto modern law of occupation is how much the "invisible hand" pushes state occupying powers toward multilateralism (including by seeking UN participation in occupation), which will be discussed in the next section.

D. The "Invisible Hand" in Afghanistan and Iraq

There is little evidence, if any, to suggest that U.S. actions in the occupations of Afghanistan and Iraq were designed to accord with the international law of occupation, and total disregard for most every precept and policy goal of that body of law would suggest otherwise. Yet both occupations unquestionably demonstrate the powerful effect of the "invisible hand" because key decisions made by the occupying powers were influenced by their need to secure support from other nations, the UN, and international financial institutions.

1. The Occupation of Afghanistan

The United States launched Operation Enduring Freedom in direct response to the terrorist attacks on the World Trade Center and Pentagon on September 11, 2001. The Operation, which began on October 7, 2001, was designed to destroy the presence and infrastructure of al Qaeda in Afghanistan. Backed by the U.S., the Northern Alliance (a coalition of Afghan militias united in their opposition to the Taliban regime) was able to take control of Kabul in mid-November 2001. Throughout the occupation, the "invisible hand" of resource and legitimacy needs proved far more salient to the U.S. (the principal

198. In comparing UN and U.S. nation-building activities, a recent RAND Corporation study led by Ambassador James Dobbins explained that "UN-led operations have tended to be less well supported with international economic assistance than U.S. operations" because of "the greater access of the United States to donor assistance funds, including its own, and those of the international financial institutions to which it belongs." DOBBINS ET AL., *supra* note 44, at xxvii, 238-39.

occupying power) than the international law of occupation.

The U.S. quickly organized a transitional administration rather than continue as the temporary de facto sovereign. The United States handed off sovereignty to an interim government established as a product of UN-brokered meetings of leaders of the Northern Alliance and expatriate groups in Bonn, Germany. The Bonn Agreement, signed on December 5, 2001, designated Hamid Karzai as the Chairman of the Interim Authority and stipulated that the Interim Authority "shall be the repository of Afghan sovereignty."[199] Thus, sovereignty was, at least in theory, returned immediately to this nascent Afghan entity. In actuality, the authority of the interim governing administration was circumscribed, state institutions were virtually nonexistent, and the Interim Authority exercised almost no authority outside of the capital.[200]

The Bonn Agreement laid out a multistage process for creating institutions and reestablishing security and government in Afghanistan. An Emergency *Loya Jirga* (grand assembly) was convened in June 2002 to create a Transitional Authority to govern "until such time as a fully representative government can be elected," which was required to occur within two years.[201] Karzai was selected to head the Transitional Authority. The Bonn Agreement also called for a separate Constitutional *Loya Jirga* to convene within eighteen months of the establishment of the Transitional Authority in order to ratify a new constitution.

The conduct of the occupation and the terms of the Bonn Agreement were inconsistent with the fundamental tenets of the international law of occupation. The breadth of nation-building and political and social engineering in the occupation far surpassed the exceptions of the interstitial law of occupation.[202] The U.S. and the international community came to focus on building the capacity of the Afghan government to create institutions of governance and to expand control to a national level.[203] Indeed, the stated goal of the Bonn Agreement was nothing less than "the establishment of a broad-based, gender-sensitive, multi-ethnic and fully representative government."[204] Also consistent with the new model of occupation, the Bonn Agreement invoked international human rights norms alongside the law of war by calling on the Interim Authority

199. Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001) [hereinafter Bonn Agreement].

200. *See generally* Dennis A. Rondinelli, *International Goals and Strategies for Afghanistan's Development*, *in* BEYOND RECONSTRUCTION IN AFGHANISTAN 11, 26-27 (John D. Montgomery & Dennis A. Rondinelli eds., 2004) (describing how the central government in Afghanistan during the transitional administration was so feeble it was "generally referred to as a failed state"); Milton J. Esman, *Ethnic Diversity and Government Structure*, *in* BEYOND RECONSTRUCTION IN AFGHANISTAN, *supra*, at 156, 158-59 (explaining the central government was entirely dependent on foreign aid with "no structures with the ability to connect the state with society" and noting that Karzai himself was dependent on the protection of an American bodyguard).

201. Bonn Agreement, *supra* note 199.

202. *See supra* Section II.B.

203. DOBBINS ET AL., *supra* note 157, at 133.

204. Bonn Agreement, *supra* note 199; *see also* Wolfowitz Testimony, *supra* note 94 (explaining that instituting democracy in Afghanistan was a key U.S. goal).

and the Emergency *Loya Jirga* to "act in accordance with basic principles and provisions contained in international instruments on human rights and international humanitarian law to which Afghanistan is a party."[205] Though it did not conform with the international law of occupation, the Bonn Agreement was nevertheless considered to be legitimate because it was recognized by the UN and a critical mass of state actors.

The situation in Afghanistan was not conducive to application of the international law of occupation. Following the U.S. military victory, there was no deseised "legitimate power." The Taliban was essentially vanquished and, to the extent it remained in existence, was not considered to be a "legitimate" power due to its previous human rights abuses and methods of governance.[206] The cumulative toll of twenty-three years of war and internal strife had destroyed the infrastructure and institutions of the state and left Afghanistan's approximately twenty-seven million citizens lacking even the most basic of services.[207] Local institutions were almost non-existent, and many of those in place under the Taliban regime were inconsistent with international human rights law. In short, the facts on the ground were fundamentally different than those assumed by the international law of occupation.[208]

From the outset, the massive resource requirements of the Bonn process made multilateralism a necessity. The estimated cost of reconstruction during the first five years following the war ranged from $6.5 billion to $25 billion, which would, in the case of the latter number, amount to 10% of the total amount of money spent worldwide on foreign aid each year.[209] The Bush Administration was unwilling to cover these costs alone and was also anxious to shift its attention to a possible war in Iraq.[210] Moreover, the success (and

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205. Bonn Agreement, *supra* note 199, Final Provision 2.

206. *See generally* Chris Johnson & Jolyon Leslie, *A Reflection on the Recent Experience of Assistance in Afghanistan*, *in* RECONSTRUCTING WAR-TORN SOCIETIES: AFGHANISTAN, *supra* note 82, at 61, 63-64 (discussing the international legitimacy of the Taliban regime); *see also supra* note 152 and accompanying text.

207. *See* Mohammed Haneef Atmar & Jonathan Goodhand, *Afghanistan: The Challenge of "Winning the Peace,"* *in* SEARCHING FOR PEACE IN CENTRAL AND SOUTH ASIA: AN OVERVIEW OF CONFLICT PREVENTION AND PEACEBUILDING ACTIVITIES 109, 109 (Monique Mekenkamp et al. eds., 2002); Amy Waldman & Dexter Filkins, *2 U.S. Fronts: Quick Wars, but Bloody Peace*, N.Y. TIMES, Sept. 19, 2003, at A3; The Secretary-General, *Report of the Secretary-General on the Situation in Afghanistan and its Implications for International Peace and Security*, 20, U.N. Doc A/56/875 (Mar. 18, 2002) [hereinafter *Afghanistan Report*].

208. *See supra* notes 3, 14 and accompanying text.

209. *Afghan Leader Asks U.S. to Do More for His People*, BALT. SUN, Feb. 28, 2003, at 10A; Karen DeYoung & Marc Kaufman, *Afghan Rebuilding Will Be Costly: Billions Needed in a World Already Short of Development Aid*, WASH. POST, Dec. 10, 2001, at A1; *see also* Rondinelli, *supra* note 200, at 11; Robert J. Muscat, *Post-Conflict Aid Experience*, *in* BEYOND RECONSTRUCTION IN AFGHANISTAN, *supra* note 200, at 93, 107-08.

210. *See* John Donnelly, *Aid Officials Criticize Cuts in U.S. Assistance*, BOSTON GLOBE, Sept. 11, 2002, at A9 (explaining the Bush Administration received criticism for cutting money meant for reconstruction of Afghanistan); *Afghan Leader Asks U.S. to Do More for His People*, *supra* note 209, at 10A (recounting how Hamid Karzai implored the Bush Administration to remain engaged in Afghanistan during a visit to Washington, D.C. in early 2003 and quoting him as saying: "Don't forget us if Iraq happens. If you reduce the attention because of Iraq . . . and if you leave the

legitimacy) of the Bonn process depended on adequate financial support to extend security and governmental rule throughout the country.[211]

The international community quickly came to assume a prominent position in the occupation. The Bonn Agreement explicitly stated that the UN, "as the internationally recognized impartial institution, has a particularly important role to play."[212] The Agreement further called for UN assistance in establishing the Interim Authority and other institutions, including the creation of an independent Human Rights Commission.[213] The UN Security Council defined the security role of the international community in Resolution 1386 in December 2001, which authorized a peacekeeping force (the International Stabilization Force for Afghanistan (ISAF)) to provide security in Kabul and also to assist the interim government in its efforts to rebuild governmental institutions and the economy.[214] The ISAF mandate was limited to providing security in Kabul and surrounding areas, and the force numbered approximately 5,500 troops drawn from numerous countries.[215] The support of the international community was also important because of its previous involvement in Afghanistan. Specifically, the U.S. needed the UN Security Council to lift its sanctions regime against the Taliban, which included aviation and financial sanctions as well as an arms embargo.[216]

The United Nations directly assumed an important role in civilian affairs when the Security Council passed Resolution 1401 in March 2002, which created the United Nations Assistance Mission in Afghanistan (UNAMA) to assist with political affairs and reconstruction.[217] The UN made clear that human rights and gender issues would be "central to the purposes and functions

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whole thing to us to fight again, it will be repeating the mistake the United States made during the Soviet occupation.").

211. *See, e.g., United States Policy in Afghanistan: Current Issues in Reconstruction: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 22-23 (2003) (statement of Peter Tomsen, Ambassador, Former Special Envoy to Afghanistan).

212. Bonn Agreement, *supra* note 199. An annex to the Bonn Agreement was dedicated entirely to the UN role during the interim period. The annex called on the UN to "monitor and assist in the implementation of all aspects" of the agreement and also gave the UN "the right to investigate human rights violations and, where necessary, recommend corrective action." *Id.* Annex II.

213. *Id.*

214. *See* S.C. Res. 1386, U.N. SCOR, 4443d mtg., U.N. Doc. S/RES/1386 (Dec. 20, 2001). Operation Enduring Freedom continued to track and engage elements of al Qaeda and the Taliban in the countryside separate from the peacekeeping force, and the U.S. had authority to "deconflict" ISAF and continuing Operation Enduring Freedom activities if necessary. Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland Addressed to the Secretary-General, U.N. Doc S/2001/1217 (Dec. 19, 2001).

215. *See U.S. Military Commitments and Ongoing Military Operations Abroad: Hearing Before the S. Comm. on Armed Servs.*, 108th Cong. (2003) (statement of Marc I. Grossman, Under Secretary for Political Affairs, U.S. Department of State) [hereinafter Grossman Testimony] (explaining that over thirty-four countries contributed forces to ISAF).

216. *See* S.C. Res. 1267, U.N. SCOR, 4051st mtg., U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, U.N. SCOR, 4251st mtg., U.N. Doc. S/RES/1333 (Dec. 21, 2000); S.C. Res. 1363, U.N. SCOR, 4352d mtg., U.N. Doc. S/RES/1363 (July 30, 2001); S.C. Res. 1390, U.N. SCOR, 4452d mtg., U.N. Doc. S/RES/1390 (Mar. 28, 2002).

217. *See* S.C. Res. 1401, U.N. SCOR, 4501st mtg., U.N. Doc. S/RES/1401 (2002).

of the mission."[218] At the same time, the U.S., Saudi Arabia, Japan, and the European Union (EU) established an Afghan Reconstruction Steering Group that also included the World Bank and Asian Development Bank.[219] The U.S., France, and Britain began an extended program to create and train a national army, and Germany (with U.S. assistance) initiated a similar program to establish a police force.[220] In August 2003, NATO assumed command of ISAF; at that time, thirty-one nations were contributing to the security force.[221]

The "invisible hand" of resource needs and the de facto modern law of occupation moderated U.S. actions in Afghanistan more than the international law of occupation. Though the military intervention had consisted primarily of U.S. forces, pressure to gain international support caused the multilateralization of the occupation and, as a result, significant changes in policy on the part of the occupying power. U.S. goals for a postwar Afghanistan quickly evolved from a *de minimus* role to a comprehensive nation-building strategy because nation-building came to be seen as the *quid pro quo* for receipt of international assistance and the only meaningful long-term solution to terrorism. The occupation itself grew in importance in the eyes of the Bush Administration and—largely due to international pressure—shifted from a byproduct to the end game of U.S. involvement in Afghanistan.

The U.S. changed its approach with respect to post-war Afghanistan because of international pressure and two key realizations of (1) its dependency on international resources (even for the limited occupation the Bush Administration initially desired), and (2) the futility of the initial military intervention if Afghanistan remained a weak and unstable state. The story of the occupation of Afghanistan shows a stark change of attitude on the part of the United States. Initially, the Bush Administration opposed nation-building and instead espoused the limited military goals of destroying terrorist bases and infrastructure in Afghanistan. The U.S. gradually warmed to the idea of limited reconstruction based largely in Kabul and ultimately came full-circle to support nation-building and the extension of peacekeeping into the countryside.

As a candidate in the presidential election of 2000, George W. Bush vociferously opposed nation-building as a waste of U.S. military muscle and resources.[222] President Bush maintained that position in the lead up to Operation Enduring Freedom and declared the U.S. goal to be the destruction of terrorist infrastructure in Afghanistan. He stated point blank: "we're not into

218. *Afghanistan Report, supra* note 207, at 17.

219. Robert Oakley, Op-Ed, "*The New Afghanistan: Year 2*," WASH. POST, Jan. 3, 2003, at A19.

220. *Id.*

221. *See* Amy Waldman, *NATO Takes Control of Peace Force in Kabul*, N.Y. TIMES, Aug. 12, 2003, at A9.

222. *See* John Donnelly, *Bush Shifts on Nation-building*, BOSTON GLOBE, June 26, 2002, at A1; Dana Milbank, *From Bush, Some Flexibility on Election Promises*, WASH. POST, Mar. 25, 2002, at A8.

nation-building, we're focused on justice."[223] Indeed, even during the beginning of the military intervention, President Bush reiterated his demand for the Taliban regime to give Osama bin Laden and the al Qaeda network in Afghanistan over to U.S. authorities and indicated that he would stop the intervention—even after the beginning of the military campaign and presumably then with no occupation or any lingering role in Afghanistan for the United States—if the Taliban complied.[224]

However, the U.S. conception of a limited occupation gave way to a more realistic vision due largely to pressure from the international community (including from key ally the United Kingdom)[225] and a newfound appreciation for the fact that only the creation of a functioning state could prevent the resurgence of a terrorist infrastructure in Afghanistan. The effects of international pressure and the seeds of a shift in U.S. policy made themselves apparent shortly after the invasion. At a press conference in mid-October, President Bush reiterated his "focus [on] bringing al Qaeda to justice" and said the U.S. would "reconsider what we're doing to your country" if the Taliban handed over bin Laden.[226] Nonetheless, President Bush also noted his conversations with British Prime Minister Tony Blair as to the future of Afghanistan following the military intervention and conceded the need to stabilize the country after the war.[227] President Bush stated: "It would be a useful function for the United Nations to take over the so-called 'nation-building,'—I would call it the stabilization of a future government—after our military mission is complete. We'll participate; other countries will participate."[228]

The U.S. continued to change its tune but still preferred only a limited occupation that would create limited structures—most importantly, an Afghan army—and leave most of the reconstruction to the Afghans themselves. President Bush admitted that the U.S. commitment to help Afghanistan build a military represented a "significant change of policy."[229] However, even such relatively limited involvement in reconstruction would be a long-term and expensive project that could not be completed without international assistance.

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223. President George W. Bush, Remarks at a Photo Opportunity with Prime Minister Koizumi of Japan (Sept. 25, 2001) (transcript *available at* http://www.whitehouse.gov/news/releases/2001/09/20010925-1.html).

224. *See* Patrick E. Tyler & Elisabeth Bumiller, *Bush Offers Taliban '2nd Chance' to Yield*, N.Y. TIMES, Oct. 12, 2001, at A6.

225. *See* Steven Erlanger, *Britain Presses U.S. for 'Nation-building' in Afghanistan*, N.Y. TIMES, Oct. 12, 2001, at B3; Mark Matthews, *Powell Outlines U.S. Role in Afghanistan*, BALT. SUN, Oct. 11, 2001, at 13A.

226. President George W. Bush, Remarks at News Conference (Oct. 11, 2001) (transcript *available at* http://www.whitehouse.gov/news/releases/2001/10/20011011-7-index.html#Nation-building).

227. *Id.*

228. *Id.*

229. President George W. Bush, Remarks at Joint Press Conference with Afghan Interim Authority Chairman Hamid Karzai (Jan. 28, 2002) (transcript *available at* http://www.whitehouse.gov/news/releases/2002/01/20020128-13.html).

The price of international assistance would once again be compliance with international expectations and a more comprehensive approach.

From that point onward, explanation of the goals of U.S. action in Afghanistan were no longer cast solely in the narrow terms of the hunt for terrorists; U.S. objectives expanded to include multilateral nation-building to protect the human rights of Afghans and to enhance regional security in the long-term. The political winds had changed, and the policy goal of an occupation limited in scope (as a necessary offshoot of intervention) became a much broader initiative in nation-building to ensure the long-term success of the initial military goal (rooting out terrorists) and to appease international allies. As explained in the National Security Strategy of the United States of America issued in September 2002:

> As we pursue the terrorists in Afghanistan, we will continue to work with international organizations such as the United Nations, as well as non-governmental organizations, and other countries to provide the humanitarian, political, economic, and security assistance necessary to rebuild Afghanistan so that it will never again abuse its people, threaten its neighbors, and provide a haven for terrorists.[230]

The issue of providing security beyond Kabul represents a particularly salient reversal of position on the part of the U.S. that further illustrates the strength of the "invisible hand." The U.S. initially opposed proposals to deploy peacekeeping forces outside of Kabul because of its desire to avoid extensive nation-building and because peacekeeping in the countryside posed enormous logistical and resource challenges.[231] An additional rationale was that Operation Enduring Freedom was viewed by the Bush Administration as only the opening salvo in the war on terrorism, and the Administration did not want to "tie down significant numbers of U.S. forces or logistical capabilities in Afghanistan."[232]

Yet U.S. opposition to expanding peacekeeping beyond Kabul was very unpopular with other important international actors, including European allies.[233] The Karzai government, as well as UN Secretary-General Kofi Annan, called for deployment of peacekeepers in the countryside because the lack of security outside of Kabul meant that little or no reconstruction could take place beyond the nation's capital.[234] Indeed, then interim Prime Minister Karzai

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230. NATIONAL SECURITY STRATEGY, *supra* note 149; *see also* President George W. Bush, Remarks at Joint Press Conference with Afghan Interim Authority Chairman Hamid Karzai, *supra* note 229 (quoting President Bush as saying the U.S. was "committed to playing a leading role in the reconstruction of Afghanistan" and pledging money for projects such as the rebuilding of Afghanistan's agricultural sector, health care system, and educational system); James Dao, *Bush Sets Role for U.S. in Afghan Rebuilding*, N.Y. TIMES, Apr. 17, 2002, at A1.

231. *See* DOBBINS ET AL., *supra* note 157, at 133; Oakley, *supra* note 219; *see also* Chesterman, *supra* note 82, at 229.

232. DOBBINS ET AL., *supra* note 157, at 133.

233. *See* Michael R. Gordon, *U.S. and Britain at Odds Over Use and Timing of Peacekeeping Troops*, N.Y. TIMES, Dec. 2, 2001, at B4.

234. *Afghanistan Report*, *supra* note 207, at 9, 21; *see also* Letter from the Minister for Foreign Affairs of Afghanistan Addressed to the Secretary-General, U.N. Doc. S/2003/986 (Oct. 10, 2003).

referred to expansion of forces outside of Kabul as an expression of the "international commitment to security" in Afghanistan.[235] Additionally, senior UN staff maintained that expanding beyond Kabul was necessary for the stability of the Interim Authority.[236]

The Bush Administration eventually reversed its position and said it would support an international peacekeeping effort beyond Kabul on the condition that other nations contribute troops.[237] The result was Security Council Resolution 1510, passed in October 2003 to expand the mandate of ISAF to include areas "outside of Kabul and its environs."[238] This shift to a strategy of nation-building was also clear when NATO assumed control of ISAF and declared the mission's desired end state to be "a self-sustaining, moderate and democratic Afghan government . . . able to exercise its authority and to operate throughout Afghanistan."[239]

The belated embrace of nation-building by the U.S. and the decision to expand peacekeeping into the countryside signaled a major shift in the focus of the occupation. International pressure for meaningful reconstruction and the Bush Administration's desire to preserve international goodwill for its future campaign in Iraq forced the U.S. to reexamine and reverse its position. At each step of the way, a reluctant U.S. yielded to compliance with the international norms of modern occupations. The price of international support and resources was shared control and increased vulnerability to the demands of donor countries that the occupation meet international expectations. The international norm for reconstruction in the form of nation-building had grown too strong for international donors and contributors of troops—on which the U.S. was already dependent—to be content with Kabul-based small-scale programs that were thought to be ineffective in improving the lives and protecting the human rights of most Afghans.

The "invisible hand" became crucial in yet another manner as the U.S. came to realize that the success of its primary goal of the military intervention, denial of safe haven to terrorist groups in Afghanistan, required multilateralism. Afghanistan was anything but a blank slate, and a troubled history (including previous U.S. involvement in the country) taught that premature abandonment and failed states breed security threats.[240] The U.S. realized that the long-term elimination of security threats emanating from Afghanistan would necessitate

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235. James Gerstenzang, *U.S. to Train Afghan Forces, Bush Pledges*, L.A. TIMES, Jan. 29, 2002, at A8.

236. Chesterman, *supra* note 82, at 229.

237. *See* John F. Burns, *The Battlefront: Gratitude and Doubt in New Life of Afghans*, N.Y. TIMES, Sept. 11, 2002, at G32.

238. S.C. Res. 1510, ¶ 1, U.N. SCOR, 4840th mtg., U.N. Doc. S/RES/1510 (Oct. 13, 2003).

239. *See* Letter from the Secretary-General, NATO, to the Secretary-General, Longer-Term Strategy for the North Atlantic Treaty Organization in its International Security Assistance Force Role in Afghanistan, U.N. Doc. S/2003/970 (Oct. 2, 2003).

240. *See* Esman, *supra* note 200, at 159. For additional historical background, see Yuri V. Bossin, *The Afghan Experience with International Assistance*, *in* BEYOND RECONSTRUCTION IN AFGHANISTAN, *supra* note 200, at 75.

the creation of a successful state.[241]

Multilateralism offered the only hope of making Afghanistan a successful state. In the short-term, U.S. goals depended on moderate forces prevailing in the elections foreseen by the Bonn Agreement. For that to occur, U.S.-backed moderate forces (that is, those led by Hamid Karzai) needed to be able to provide security and services along with economic and political advancement to the occupied population—all of which required more money and troops than the U.S. could feasibly provide alone—to win the elections.[242] In the longer term, the occupation needs to produce a stable and moderate government and better economic prospects for the country if it hopes to prevent Afghan territory from once again serving as a haven for terrorist groups. Security and functioning institutions are necessary to exert central authority over regions of the country long ruled as warlord fiefdoms.[243] Furthermore, a massive and steady influx of foreign aid is required to invigorate the Afghan national economy and to lay the groundwork for economic development because significant private foreign investment is unlikely in the near future.[244]

As an example of a modern occupation, U.S. involvement in Afghanistan shows that, in the eyes of the world, a military intervention incurs certain duties to the population of the target country and that human rights, which can only be secured through a functioning state, make nation-building a necessity. Had there not been strong international norms in favor of human rights protection through nation-building and post-conflict reconstruction, the Bush Administration would have suffered little or no repercussions by quickly abandoning the country after token or limited investment in institutions in Kabul.

2. The Occupation of Iraq

The invasion of Iraq by the United States in March 2003 sparked great controversy and debate in the international community. The U.S. was unsuccessful in gaining the support of a broad coalition of international partners and had difficulty in its search for an international blessing for the regime change intervention.[245] Ultimately, the U.S.-British led military intervention to

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241. *See, e.g.*, Bradley Graham, *Pentagon Plans a Redirection in Afghanistan: Troops to be Shifted into Rebuilding Country*, WASH. POST, Nov. 20, 2002, at A1 (quoting an unnamed senior official from the Pentagon as saying, "[s]ince September 11, I think everyone understands that we have a stake in the future of Afghanistan that is not simply nation-building for the sake of the Afghan people, it's security-building to prevent terrorists from returning").

242. *See* Sonni Efron, *Bush Planning to Boost Aid to Afghanistan by $1 Billion*, L.A. TIMES, Sept. 5, 2003, at A8; Editorial, *Rescuing Mr. Karzai*, WASH. POST, Sept. 8, 2002, at B6; Roland Watson, *Relief in America as Karzai Escapes Assassin's Bullet*, TIMES, Sept. 6, 2002, at 18.

243. *See generally* Kamoludin N. Abdullaev, *Warlordism and Development in Afghanistan*, *in* BEYOND RECONSTRUCTION IN AFGHANISTAN, *supra* note 200, at 169 (describing warlordism, "drugism," and the security situation in Afghanistan); Thier & Chopra, *supra* note 82, at 107 ("A de facto divided Afghanistan will not be a stable Afghanistan.").

244. Muscat, *supra* note 209, at 107; *see also* LANSFORD, *supra* note 3, at 182-84.

245. *See generally* PAULY & LANSFORD, *supra* note 148, at 83-101 (recounting U.S. diplomatic efforts and divisive international opinion prior to the Iraq War of 2003); MCGOLDRICK,

unseat Saddam Hussein (Operation Iraqi Freedom) enjoyed relatively limited international military and moral support.[246]

Despite a primarily unilateral intervention, the U.S. was forced to attempt to multilateralize the occupation. The Bush Administration, even despite strong unilateral impulses and the "bad blood" that lingered from the rancorous international debate that preceded the invasion, realized that international support and resources were prerequisites to a successful occupation of Iraq. To that end, the U.S. tailored important policy decisions in an attempt to elicit international assistance. Though the ultimate success of U.S. efforts to multilateralize the occupation is debatable, it is clear that the "invisible hand" guided U.S. actions in Iraq more than the international law of occupation.[247]

True to form of a regime change intervention, the success of the Iraqi occupation was important not just in and of itself, but also as a key determinant of the success (as well as, to some extent, the ex post facto support) of the initial intervention. Much of the legitimacy for the war is, to some extent, yet to be determined and dependent upon the longer term outcomes of the occupation. All of the Bush Administration's central justifications for intervention required a legitimate and successful occupation: the creation of democracy and permanent removal of Saddam Hussein, the discovery of caches of WMD, and an end to human rights abuses.[248] These goals require a successful occupation in both the short-term (the occupation had to pass international muster lest claims of finds of WMD not be believed by the international community) and in the long-term (to establish democracy and a market economy, and to prevent the rise of another Iraqi regime that would threaten its neighbors or other international interests). The success of the occupation and its aftermath will be an incredibly important barometer for gauging international support for the intervention itself, as neatly encapsulated in an editorial in *The Economist*: "How history judges this war will depend largely on whether Iraq's people have been liberated to live a life unambiguously better than that under Saddam Hussein."[249]

It was clear from the outset that the occupation of Iraq was to be conducted in a manner not consistent with the international law of occupation because the goal of the occupation was to entirely reconstruct the Iraqi government and

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supra note 94, at 11-16 (describing the "public and institutional opposition" to the U.S.-led military intervention).

246. *See* PAULY & LANSFORD, *supra* note 148, at 117, 125; MCGOLDRICK, *supra* note 94, at 16.

247. The power of the "invisible hand" is demonstrated by occupants tailoring their actions to meet international norms both in order to solicit, and as a condition of receiving, international support. Its influence is not measured by the success of those efforts or whether an occupation is actually multilateral in practice.

248. For general background on the various U.S. rationales for military action in Iraq, see, for example, The President's State of the Union Address, Office of the Press Secretary (Jan. 28, 2003), http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html; Adam Roberts, *The Use of Force*, *in* THE UN SECURITY COUNCIL, *supra* note 66, at 139-40.

249. Editorial, *Rebuilding Iraq*, ECONOMIST, Apr. 19, 2003, at 9; *see also* PEI & KASPER, *supra* note 157, at 1.

economy. The stated goal of the Coalition Provisional Authority (CPA), the U.S. provisional entity charged with administering the occupation of Iraq, was nothing less than to transform the former dictatorship based on a Stalinistic type economy into "a unified and stable, democratic Iraq that: provides effective and representative government for the Iraqi people; is underpinned by new and protected freedoms for all Iraqis and a growing market economy; [and] is able to defend itself but no longer poses a threat to its neighbors or international security."[250] Nation-building was the obvious prerequisite of this goal. Even more to the point, nation-building became the hinge upon which the fate of Iraq would swing, as the stability of the country was "conditioned largely by the extent to which those who suffered when Saddam was in charge believe their lives have improved since the fall of the Iraqi dictator's regime."[251]

In a seminal moment in the modern history of the international law of occupation, the UN Security Council specifically invoked that body of law when authorizing the American and British occupation of Iraq.[252] Yet in the same breath in which it summoned the law of occupation by name, the Security Council laid out a mandate that contradicts the central underpinnings of that body of law.[253] Of greatest importance, Resolution 1483 invoked relevant principles from international human rights law and, as would subsequent Security Council resolutions pertaining to the occupation of Iraq, consistently stated the importance of establishing representative government. Passed under Chapter VII of the UN Charter, Resolution 1483 set out a mandate that included, inter alia, "reforming" Iraqi institutions, "facilitating the reconstruction of key infrastructure," "working towards . . . the creation of conditions in which the Iraqi people can freely determine their own political future," and "working . . .

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250. COAL. PROVISIONAL AUTH., BAGHDAD, IRAQ, ACHIEVING THE VISION TO RESTORE FULL SOVEREIGNTY TO THE IRAQI PEOPLE (STRATEGIC PLAN) 4 (Working Document, Oct. 1, 2003), http://www.house.gov/hasc/openingstatementsandpressreleases/108thcongress/03-10-08strategicplan.pdf [hereinafter STRATEGIC PLAN]; *see also* MCGOLDRICK, *supra* note 94, at 122; Ottolenghi, *supra* note 3, at 2200, 2204. For additional background on reform of Iraqi institutions by the CPA, see Fox, *supra* note 2, at 208-25.

251. PAULY & LANSFORD, *supra* note 148, at 139.

252. *See* S.C. Res. 1483, *supra* note 67, pmbl., ¶ 5. The preamble of Resolution 1483 "notes" the letter received from the U.S. and UK dated May 8, 2003 and "recogniz[es] the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying Powers under unified command ('the Authority')." *Id.* pmbl. The fifth operative paragraph "[c]alls 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." *Id.* ¶ 5 (emphasis omitted).

253. *See* Thomas D. Grant, *Iraq: How to Reconcile Conflicting Obligations of Occupation and Reform*, ASIL INSIGHTS (2003), www.asil.org/insights/insigh107a1.htm (last visited June 18, 2005) (arguing Resolution 1483 is best viewed as a "'carve out' from the Hague Regulations and Fourth Geneva Convention, leaving other provisions of the treaties in force, but suspending with respect to the Authority those provisions that otherwise would curb its license to change the laws, institutions, and personnel of the occupied state"); Kaiyan Homi Kaikobad, *Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004*, 54 INT'L & COMP. L.Q. 253, 264 (2005) (arguing that Security Council Resolutions 1483 and 1511 created a "hybrid regime" in which the occupation "was governed by the Hague and Geneva laws *as modified*" by those resolutions).

to restore and establish national and local institutions for representative governance."[254]

Resolution 1483's exclusive recognition of the U.S. and UK as occupying powers further contradicted the law of occupation by creating the possibility that other states with armed forces in Iraq (for example, Poland, Spain, and Japan) could act in the capacity of occupants without being considered as such.[255] In contrast, under the law of occupation, that determination is a question of fact.[256] This undermines the basis of the law of occupation and risks dilution of responsibility for international organizations or states that perhaps should be considered occupying powers. A similar tension exists in Security Council Resolution 1546, which declared that the occupation would conclude by June 30, 2004, rather than rely on the standard tenets of the law of occupation to determine when an occupation ends.[257]

Invocation of the law of occupation in Resolution 1483 is best viewed as a strategic act rather than a breath of new life for that moribund doctrine. Initially, the U.S. and UK did not invoke or otherwise rely on the international law of occupation as the legal basis for their actions in Iraq.[258] In seeking a Security Council resolution to legitimize the occupation, however, invocation of the law of occupation presented diplomatic and political advantages.

The draft resolution that would form the basis of Resolution 1483 was introduced by the U.S. (and co-sponsored by Britain and Spain) in early May 2003.[259] At that time, the atmosphere remained politically charged, as division in the Security Council still lingered from the Bush Administration's inability to

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254. S.C. Res. 1483, *supra* note 67, ¶¶ 1, 4, 8(c)-(d), 8(i). *See also* Brown, *supra* note 61, at 61-62 ("Since there was no 'representative government' in Iraq before the invasion, this resolution in effect calls on the occupying powers to promote a radical transition to democratic governance. This goal is reaffirmed in subsequent Security Council resolutions on Iraq.").

255. *See* S.C. Res. 1483, *supra* note 67, pmbl. ("noting . . . that other States that are not occupying powers are working now or in the future may work under the Authority"); Comments made by UK Permanent Representative Sir Jeremy Greenstock after UK-U.S. Presentation of Joint Draft of Security Council Resolution on Iraq, United Nations, New York, May 9, 2003, http://www.ukun.org/articles_show.asp?SarticleType=17&Article_ID=640 [hereinafter Comments by Greenstock] ("Preambular paragraph twelve [of Resolution 1483] . . . makes it clear that others who want to join on needn't be occupying Powers."); Roberts, *supra* note 59, at 33; Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, 36 CORNELL INT'L L.J. 435, 450-51 (2004); *see also* Martin Zwanenburg, *Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation*, 86 I.R.R.C. 745, 765 (2004), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EHY/$File/irrc_856_Zwanenburg.pdf ("State practice indicates that at least certain States contributing troops to [Stabilization Force Iraq] considered that Resolution 1483 prevented them from becoming occupying powers, which they might otherwise have been."); Steven R. Weisman & Felicity Barringer, *U.S. Abandons Idea of Bigger U.N. Role in Iraq Occupation: Seeks Aid by More Allies*, N.Y. TIMES, Aug. 14, 2003, at A1 (listing countries with troops serving in Iraq).

256. *See supra* note 8 and accompanying text.

257. *See* S.C. Res. 1546, *supra* note 57, pmbl., ¶ 2; *infra note* 300 and accompanying text.

258. *See* Benvenisti, *supra* note 56, at 860 (explaining that the U.S. and UK "did not explicitly acknowledge their status as occupying powers, nor did they invoke the Hague Regulations or the Fourth Geneva Convention as applicable to their actions in Iraq").

259. *See infra* note 277 and accompanying text.

obtain a resolution authorizing the military intervention.[260] More importantly, certain Security Council members—and indeed many Iraqis—had misgivings as to U.S. intentions vis-à-vis Iraqi oil wealth (keeping in mind that the UN had long been extensively involved in the sale of Iraqi oil and some countries, such as Russia, had an enormous financial stake in the process).[261] At the same time, many Security Council members wanted to see greater UN involvement in the occupation and to end the organization's comprehensive sanctions regime against Iraq.

This unique political milieu made the nominal application of an international body of law such as the law of occupation attractive, if not inescapable. According to Martin Zwanenburg, a lawyer for the Department of Defence of the Netherlands, "the geopolitical situation at the time Resolution 1483 was adopted" would not permit "explicit derogation" of the law of occupation because "[s]uch a determination could have been regarded as endorsing the armed intervention in Iraq, which was unacceptable to several permanent members of the Council."[262]

Recognition of the law of occupation in the U.S. draft resolution was one of several tactics and compromises designed to allay concerns of Security Council members.[263] The U.S. and Britain summoned a hollow incarnation of the law of occupation as part of a strategy to signal their intent to abide by certain basic principles of international law, including principles pertaining to the use of

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260. *See, e.g.*, Richard Wolffe, *Diplomatic Diary: Remember Diplomacy?*, NEWSWEEK, March 25, 2003, *available at* http://www.msnbc.msn.com/id/3068472/site/newsweek (describing French President Jacques Chirac's opposition to "a new U.N. resolution that would legitimize the occupation of Iraq"); Colum Lynch, *Council Is Willing to Negotiate on Iraq*, WASH. POST, May 10, 2003, at A19 (explaining that Russia had "opposed any council action that would lend legitimacy to a war it claims was conducted without council authorization"); Fox, *supra* note 2, at 259 ("Resolution 1483 was a compromise document that accommodated conflicting views among Council members about whether the United States or the United Nations should lead in post-war Iraq, not to mention sharp conflicts about the legality of the war itself.").

261. *See* Peter Beaumont, *Plan for Iraq Handover Government Scrapped*, THE OBSERVER, May 18, 2003, at 2 (explaining that the status of oil was a key point of concern for France, Germany, Russia, and China); Catherine Belton, *Russia, U.S. Inch Closer on Iraq*, MOSCOW TIMES, May 16, 2003 (describing the financial importance of Iraqi oil contracts to Russia); Shelley Emling, *U.S. Resolution Aims to Lift Iraq Sanctions*, ATLANTA J.-CONST., May 10, 2003, at 5A (describing concerns by certain Security Council members over control of Iraqi oil and the extent of authority of the U.S. military in Iraq); Gary Younge & Ian Black, *Iraq: After the War*, THE GUARDIAN, May 10, 2003, at 4 (discussing concerns of Iraqis as to the fate of Iraq's oil wealth); *infra* note 287 and accompanying text.

262. Zwanenburg, *supra* note 255, at 767-68.

263. Part of this strategy entailed a letter to the Security Council in which the U.S. and UK affirmed that "States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq." Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003); *see also* Lynch, *supra* note 260 ("To broaden support for its resolution, the United States and Britain today presented the Security Council president with a letter that implicitly acknowledges their responsibilities as occupying powers under the Geneva Conventions to shoulder the burden of getting Iraq back on its feet and providing security for international relief workers.").

natural resources and minimum humanitarian standards grounded in the law of occupation.[264] In essence, language invoking the law of occupation served as code for observing the humanitarian provisions of the law of occupation and paying due respect to international desires for transparency in the use of oil resources while disregarding the fundamental policy objectives of that body of law.[265] Thus, the law of occupation served as the path of least resistance (or, put less delicately, a type of legal fiction) in a politically charged atmosphere, even while the Security Council made clear that this body of law would serve as nothing more than a rhetorical base and humanitarian foundation upon which to lay modern norms of human rights, nation-building, and democracy.

The U.S. quickly realized that, for reasons of politics, economics, and security, a unilateral occupation of Iraq would have no hope of success. From the outset, the CPA recognized that international resources would be a *sine qua non* for accomplishing the goals of the intervention. The CPA's Strategic Plan pointedly stated: "Only a co-ordinated international effort can bring prosperity and stability to the Iraqi people, discourage terrorists from using Iraq as a safe haven and contribute to a lasting peace in the Middle East."[266] Indeed, part of

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264. *See* Younge & Black, *supra* note 261, at 4 (explaining concerns about U.S. control over Iraqi oil revenues and stating that the U.S.-UK draft resolution appeared to define themselves as "occupying powers" as "a legal designation apparently aimed at reassuring council members that America will adhere to its obligations under international law"); Jess Bravin & Chip Cummins, *U.S. Offers Concessions to U.N. in Bid to Lift Sanctions in Iraq*, WALL ST. J., May 9, 2003, at A1 (describing how "[m]uch of the language" in the draft Security Council resolution "reflects a U.S. effort to reassure other countries of American adherence to international law" and quoting Morton Halperin of the Council on Foreign Relations as saying that using the term "occupying power" enabled the U.S. to signal to other countries that it "can't decide that all contracts go to Americans, it can't make long term contracts and it can't choose the political leadership of the country").

265. Statements made by U.S. and UK officials—even in the midst of negotiating the draft resolution that would label the U.S. and UK as "occupying powers"—generally paid only lip service to the non-humanitarian provisions of the law of occupation and were qualified by reiterating the principal goal of the occupation: transforming Iraq into a democracy. *See, e.g.*, Comments by Greenstock, *supra* note 255 (explaining "there needs now to be a series of things done on the ground that goes beyond the minimum requirements of occupying Powers and we want the international community to be involved in that endeavour"); Briefing by Assistant Secretary of State for International Organizations, Kim Holmes, Understanding United Nations Resolution 1483 (May 23, 2003), http://fpc.state.gov/20930.htm. Moreover, statements made by the Spanish and U.S. ambassadors to the United Nations immediately following the Security Council's vote on Resolution 1483 indicate that those countries did not see invocation of the law of occupation as restricting the U.S. and UK's freedom of maneuver in the administration of Iraq. Then United States Ambassador to the United Nations John Negroponte described the resolution as "a flexible framework under Chapter VII" to provide for "the administration and reconstruction of Iraq and to assist the Iraqi people in determining their political future, establishing new institutions and restoring economic prosperity to the country." U.N. SCOR, 58th Sess., 4761st mtg., at 3, U.N. Doc. S/PV.4761 (May 22, 2003). Inocencio Arias, Spanish Ambassador to the United Nations at the time, stated that Resolution 1483 "provides an appropriate legal framework for dealing with the special, anomalous and grave situation facing the international community" and set forth "guidelines for the conduct of the authorities that will be managing this transitional period in Iraq—and transparency in economic affairs is not the least relevant of these guidelines." *Id.* at 6. With respect to the Spanish Ambassador's remarks, "this statement implies that the law of occupation was not deemed to be the only legal regime applicable." Zwanenburg, *supra* note 255, at 766.

266. STRATEGIC PLAN, *supra* note 250, at 9 (emphasis omitted).

the CPA's motivation for crafting the Strategic Plan was "to assist in attracting critical resources and capabilities from the international community."[267] It was also immediately clear that, consistent with previous cases of nation-building, the occupation of Iraq was going to be a long-term and expensive endeavor.[268]

U.S. domestic political pressure to internationalize the burdens of occupation began to mount early on in the occupation. American troops became weary from long deployments to Iraq (and at certain points even publicly critical of the Bush Administration),[269] and casualties took their toll on the American public.[270] At the same time, the expense of the occupation reached approximately $3 billion a month,[271] and it was discovered that U.S. planning regarding the state of Iraqi infrastructure and the sale of Iraqi oil had been overly optimistic.[272] Bipartisan congressional pressure to share the burdens of the occupation began to emerge for these reasons and because lighter international forces were seen as having a comparative advantage in some situations in urban peacekeeping.[273]

From the beginning, multilateralism proved to be a critical gatekeeper to international assistance. Lack of a UN blessing for the occupation hampered U.S. efforts to gain international support, particularly in the form of troop contributions. In some cases, UN authorization for the occupation was a prerequisite for receiving support from other countries, either due to constitutional needs or unbending political preference (the latter was shown by the unwillingness of countries such as France, Russia, India, Pakistan, and Turkey to contribute troops to the occupation unless they would compose part of

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267. *Id.* at 3.

268. *See* MCGOLDRICK, *supra* note 94, at 144 (noting it was understood that nation-building in Iraq would require decades of involvement and billions of dollars); Richard A. Oppel, Jr. & Robert F. Worth, *World Bank Says Constitution Must Precede Loans to Iraq*, N.Y. TIMES, July 31, 2003, at A14 (estimating that the long-term costs of the occupation may be greater than $100 billion); *see also* STRATEGIC PLAN, *supra* note 250, at 4 (stating the U.S. will stay in Iraq "as long as necessary").

269. *See, e.g.*, Eric Schmitt, *Up to 30,000 Troops From a Dozen Nations to Replace Some G.I.'s in Iraq*, N.Y. TIMES, June 19, 2003, at A13 ("But perhaps most important, at least for domestic political reasons, bringing in more allied forces would allow most of the First Marine Division and the Army's Third Infantry Division, some of whose troops have been deployed overseas for more than a year, to return home."); Thom Shanker, *U.S. Commander in Iraq Says Yearlong Tours Are Option to Combat 'Guerrilla' War*, N.Y. TIMES, July 17, 2003, at A17 (discussing stress on American combat troops due to Iraqi "guerrilla" resistance and long tours of duty in Iraq).

270. *See* Felicity Barringer & David E. Sanger, *U.S. Drafts Plan for U.N. to Back a Force for Iraq*, N.Y. TIMES, Sept. 4, 2003, at A1 (quoting Senator John Warner, Chair of the Senate Armed Services Committee, as saying that casualties in the occupation of Iraq "are beginning to unnerve Americans"). For statistics on U.S. casualties between March 2003 and March 2004, see ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT'L STUD., ONE YEAR ON: NATION-BUILDING IN IRAQ 8-9 (2004), *available at* http://www.csis.org/features/iraq_oneyearon.pdf.

271. Richard W. Stevenson & Eric Schmitt, *Bush Says Attacks on U.S. Forces Won't Deter Him From the Rebuilding of Iraq*, N.Y. TIMES, July 2, 2003, at A10.

272. *See* Michael Elliott, *So, What Went Wrong?*, TIME, Oct. 6, 2003, at 30, 36; Jeff Gerth, *Oil Experts See Long-Term Risks to Iraq Reserves*, N.Y. TIMES, Nov. 30, 2003, at A1; Edmund L. Andrews, *U.S. Focus In Iraq Is on Repairs, Not Building*, N.Y. TIMES, June 20, 2003, at A1.

273. *See* Stevenson & Schmitt, *supra* note 271, at A10; Schmitt, *supra* note 269, at A13.

a UN-sanctioned force).[274] Furthermore, the European Union informed the U.S. that the EU would only consider providing funds for reconstruction projects if the money were to be administered by an international agency such as the UN or the World Bank rather than the U.S. occupation authority.[275] The World Bank also set forth prerequisites for assistance and demanded that the U.S. occupation lead to a written constitution, the holding of national elections, and the restructuring of certain state-owned businesses in order to receive loans for reconstruction.[276]

The Bush Administration was forced to seek greater multilateralism despite its inherent distrust of ceding control of the occupation to the UN or other international players. The U.S. engaged in several rounds of diplomacy in search of a UN role in and blessing for the occupation,[277] all of which were designed to help multilateralize and legitimize the occupation.[278] The U.S. also consistently

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274. *See* Christopher Marquis, *Powell, in Brussels, Calls for Increased NATO and U.N. Roles in Iraq*, N.Y. TIMES, Dec. 5, 2003, at A22; Felicity Barringer, *U.N. Gives Iraqi Governing Council Qualified Welcome*, N.Y. TIMES, July 23, 2003, at A10; Elaine Sciolino, *France and Germany Consider Possible Roles in Postwar Iraq*, N.Y. TIMES, July 29, 2003, at A10; Barringer & Sanger, *supra* note 270, at A1; MCGOLDRICK, *supra* note 94, at 144 (explaining that European Union Foreign Ministers "insisted on the need for a central UN role in the process of reconstruction" and "[t]here was a strong political argument that a [Security Council] mandate increased the legitimacy and the perceived impartiality of the peacekeeping and humanitarian activities"); *see also* Friedman, *supra* note 156, at 9 (opining that a UN mandate in Iraq would provide the U.S. with much needed legitimacy and quoting UN Secretary-General Kofi Annan as saying "[o]ther nations are prepared to help, but they do not want to join what is perceived as an American 'occupation'"); COUNCIL ON FOREIGN REL., *supra* note 155, at 21; PAULY & LANSFORD, *supra* note 148, at 125 ("The recognition of the U.S. and Great Britain as the occupying powers by the UN, and the subsequent legal status that designation incurred, prompted a range of states to make small contributions to the peace-enforcement effort and the economic plans to rebuild Iraq.").

275. Christopher Marquis, *Europe Weighs Helping Out in Iraq, But Under Its Own Terms*, N.Y. TIMES, July 16, 2003, at A9.

276. Oppel & Worth, *supra* note 268, at A14.

277. The U.S., along with the UK and Spain, introduced a draft Security Council resolution in May 2003 intended to end UN sanctions against Iraq and increase international participation in the occupation. *United States Policy Toward Iraq: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 22-23 (2003) (statement of Alan P. Larson, Under Secretary for Economic, Business, and Agricultural Affairs, U.S. Department of State). Extensive bargaining and horse-trading (the U.S. and UK "accepted more than 90 changes to their original draft from Russia, France, and Germany") resulted in UN Security Council Resolution 1483, which blessed the U.S. and UK occupation. Editorial, *Resolution 1483*, BOSTON GLOBE, May 23, 2003, at A14; *see also* S.C. Res. 1483, *supra* note 67. Additional rounds of bargaining produced UN Security Council Resolution 1500, which welcomed the establishment of the Governing Council of Iraq and created the United Nations Assistance Mission for Iraq. *See* S.C. Res. 1500, ¶¶ 1-2, U.N. SCOR, 4808th mtg., U.N. Doc. S/RES/1500 (Aug. 14, 2003). President Bush announced in September 2003 that the U.S. would seek a Security Council resolution authorizing a U.S.-led coalition of troops in Iraq and increasing the UN role in the occupation. *See* Grossman Testimony, *supra* note 215; Barringer & Sanger, *supra* note 270, at A1. Negotiation resulted in UN Security Council Resolution 1511, which "affirms that the administration of Iraq will be progressively undertaken by the evolving structures of the Iraqi interim administration," "authorizes" a multinational force "to take all necessary measures to contribute to the maintenance of security and stability in Iraq," "encourages" member states "to contribute assistance . . . including military forces" to that force, and "urges" international financial institutions to extend loans and financial assistance to Iraq. *See* S.C. Res. 1511, ¶¶ 5, 13, 14, 20, U.N. SCOR, 4844th mtg., U.N. Doc. S/RES/1511 (Oct. 16, 2003).

278. *See* Grant, *supra* note 77, at 839 ("All three Iraq resolutions [Security Council

tried to increase the involvement of NATO and to solicit troop and financial donations from countries outside of the UN process.[279] On the financial front, the U.S. aggressively sought assistance from other countries to aid in reconstruction efforts.[280]

U.S. policy was influenced by international opinion and the need for international resources and support. In order to secure political support for passage of a UN Security Council resolution, the U.S. was forced to negotiate and compromise on its proposed timeline for the constitutional and electoral processes required for the devolution of sovereignty to the Iraqi population.[281] From early on, "[t]he CPA found itself under immense domestic and international political pressure to speed up the return of power and sovereignty to Iraq."[282] Specifically, these pressures caused the U.S. to make a significant policy change by revamping its entire plan to transfer authority to Iraqis.[283] The U.S. also made policy changes in response to the wishes of potential donors to reconstruction efforts by ceding some control over decisions related to the allocation of funding.[284] Likewise, the U.S. conceded the need to share in some decision-making in an effort to coax other countries into making troop donations.[285] Aside from the hunt for troop donations and financial support, the U.S. sought to prove to the international community that the governing entities it was creating in Iraq were politically legitimate.[286]

Resolutions 1483, 1500, and 1511] appear to have had the aim of increasing material support for the transition, and increasing the diversity of states rendering that support."); EDWARD MCWHINNEY, THE SEPTEMBER 11 TERRORIST ATTACKS AND THE INVASION OF IRAQ IN CONTEMPORARY INTERNATIONAL LAW 77 (2004) (explaining the U.S. made "diplomatic contact, anew, with those states that had not supported the original U.S.-British resort to unilateral military intervention" because of "both the already crushing burden of costs—military-logistical and financial—involved in long-term maintenance of the American military presence in Iraq and, also the already apparent domestic U.S. political reactions to that unexpected burden. . .").

279. *See* Wolfowitz Testimony, *supra* note 94; Christopher Marquis, *As Bush Confers with NATO, U.S. Seen Losing Its Edge*, N.Y. TIMES, June 28, 2004, at A8 (discussing the Bush Administration's attempts "to press NATO allies to play a greater role in Iraq"); Marquis, *supra* note 274, at A22 (explaining that Secretary of State Colin Powell's remarks at a December 2003 NATO meeting "were an indication of the strength of [the] Bush administration's intent to find help in handling the costs and sacrifices of rebuilding Iraq with international partners" and that "American officials also appear eager to increase the international legitimacy of their efforts in Iraq").

280. *See* Steven R. Weisman, *U.S. Seeks Help With Iraq Costs, But Donors Want a Larger Say*, N.Y. TIMES, July 14, 2003, at A6.

281. *See* Robin Wright, *President Plans Drive To Rescue Iraq Policy: Speeches, U.N. Action Will Focus on Future*, WASH. POST, May 23, 2004, at A1; Peter Slevin, *Troop Help In Iraq Tied To Broader U.N. Role*, WASH. POST, Sept. 11, 2003, at A18.

282. MCGOLDRICK, *supra* note 94, at 137; *see also* McCarthy, *supra* note 1, at 58; Fox, *supra* note 2, at 225; Editorial, *The U.N.'s Better Idea on Iraq*, N.Y. TIMES, Oct. 10, 2003, at A30.

283. MCGOLDRICK, *supra* note 94, at 137-38. For additional background on President Bush's previous "refusal to speed the transfer of sovereignty," see Reynolds & Farley, *supra* note 166, at 1.

284. *See* Weisman, *supra* note 280, at A6.

285. Douglas Jehl, *Helpers to Get Seat at Table, Rumsfeld Says*, N.Y. TIMES, Sept. 4, 2003, at A14.

286. The lukewarm welcome received by members of the U.S.-created Iraqi Governing Council during their July 2003 visit to the UN Security Council underscored U.S. efforts to obtain

On some issues, the U.S. was forced to deal with international actors because of their previous involvement in Iraq. The U.S. was dependent on the UN to alter the "Oil-for-Food" program and to lift international sanctions against Iraq.[287] However, the UN made clear that no oil would be sold under the program until a new legal authority was put in place in Iraq and recognized by the Security Council.[288] Furthermore, the U.S. needed to deal with international creditors to negotiate temporary arrangements with respect to Iraq's sovereign debt.[289]

The U.S. was forced to rely on the UN to ensure the political viability of the transitional governing entities in Iraq. On multiple occasions, the U.S. "had no choice" but to rely on the aid and "legitimating effect" of the UN whenever it faced a crisis during the occupation.[290] For instance, necessity compelled the U.S. to turn to the UN and its envoy, Lakhdar Brahimi, to select the interim Iraqi government after it was unable to muster domestic Iraqi support for the American transition plan.[291] Additionally, the U.S. needed the power of a Security Council resolution passed under Chapter VII of the UN Charter to deny safe haven to former members of the Ba'ath regime (as occurred in Resolution 1483).[292] Absent such a result, "[e]scaped Ba'ath leaders, if given safe haven, might well establish a government-in-exile, which, holding itself out as a putative alternative to the coalition-led transition process, could only complicate

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international legitimacy for the Iraqi Governing Council, as well as the lingering difficulties in the U.S.-UN relationship and the importance of the UN's ability to bestow or withhold important forms of legitimacy. *See* Barringer, *supra* note 274 (explaining that the Security Council received the members of the Iraqi Governing Council as "informed citizens" rather than "as representatives of a legitimate government").

287. The "Oil-for-Food" program, begun in 1996, was the UN program established to monitor Iraqi oil sales to ensure that proceeds from such sales were used to fund humanitarian supplies rather than weapons development programs. *See* S.C. Res. 986, U.N. SCOR, 3519th mtg., U.N. Doc. S/RES/986 (April 14, 1995). For additional background on previous UN involvement in Iraq, see generally MARJORIE ANN BROWNE, IRAQ-KUWAIT: UNITED NATIONS SECURITY COUNCIL RESOLUTION TEXTS 1992-2002 (2003); Barbara Slavin, *Rebuilding Iraq to Start Quickly*, USA TODAY, Mar. 20, 2003, at 1A (explaining in early 2003 that "[m]ore than 1,000 expatriates and Iraqis have worked under U.N. auspices for the past seven years, vetting Iraqi oil contracts, purchasing food and medicine and patching up Iraqi infrastructure").

288. *See United Nations Oil for Food Program: Hearing Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 108th Cong. (2003) (statement of Robert E. Ebel, Director, Energy Program, Center for Strategic and International Studies).

289. *See U.S. Policy Toward Iraq: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 16 (2003) (testimony of L. Paul Bremer, III, Ambassador, Presidential Envoy to Iraq); Editorial, *Those Odious Debts*, ECONOMIST, Oct. 18, 2003, at 13.

290. Brown, *supra* note 61, at 60.

291. *See* Rajiv Chandrasekaran, *American-Led Occupation Fails to Fulfill Its Goals*, ASIAN WALL ST. J., June 21, 2004, at A12; *see also* Steven R. Weisman & John H. Cushman Jr., *U.S. Joins Iraqis to Seek U.N. Role in Interim Rule*, N.Y. TIMES, Jan. 16, 2004, at A1; John F. Burns, *Shiite Ayatollah Is Warning U.N. Against Endorsing Charter Sponsored by U.S.*, N.Y. TIMES, Mar. 23, 2004, at A8 ("After nearly a year of discounting the value of a United Nations political role in Iraq, the Bush administration shifted its position recently, saying it strongly favored the United Nations having a part in helping to establish an interim government and organize elections.").

292. S.C. Res. 1483, *supra* note 67, ¶ 3; *see also supra* notes 135-136 and accompanying text.

the process in both its political and legal dimensions."[293]

The occupation of Iraq also exemplified how modern occupations often enmesh even opponents of the military intervention.[294] For instance, France and Germany vociferously opposed the war but nevertheless supported a UN role in the occupation. The most telling example was French and German support for the UN authorization of a multinational force in Iraq—even under terms with which they did not entirely agree—because of their national interests in a successful occupation.[295]

The devolution of sovereignty in Iraq illustrates an ad hoc and piecemeal transition typical of modern occupations. UN Security Council Resolution 1511, passed under Chapter VII, declared that sovereignty was "embodie[d]" during the transitional period in the U.S-picked Iraqi Governing Council and urged creation of a timeline to draft a constitution and to conduct elections.[296] Yet Resolution 1511 also recognized that the administration of Iraq was a "process in which the Iraqi people will *progressively* take control of their own affairs" and "will be *progressively* undertaken by the evolving structures of the Iraqi interim administration."[297] The Security Council "call[ed] upon" the occupying powers "to return governing responsibilities and authorities to the people of Iraq as soon as practicable."[298] Meanwhile, "maintenance of security and stability in Iraq"—a key lynchpin of sovereignty—would be undertaken by a newly authorized multinational force.[299]

The timetable for the devolution of sovereignty was a product of international negotiation that was outlined in Security Council Resolution 1546 (also passed under Chapter VII), which called for the occupation to end and for Iraq to "reassert its full sovereignty" by June 30, 2004.[300] Yet the details paint a less categorical picture. The resolution recognized the Interim Government of Iraq as sovereign but at the same time prevented that entity "from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office" as laid out in a proposed timetable for "Iraq's political transition to democratic governance."[301]

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293. Grant, *supra* note 77, at 828. Such a scenario might have enabled certain Ba'ath leaders to "operationalize" elements of the Hague Regulations and Geneva Conventions and, among other consequences, interfere with U.S. sales of Iraqi petroleum products. *Id.*

294. *See supra* Section III.C.1.c.

295. *See* Felicity Barringer, *Unanimous Vote by U.N.'s Council Adopts Iraq Plan*, N.Y. TIMES, Oct. 17, 2003, at A1 ("The Germans and French had made clear that Western Europe can have no interest in any American—or Western—failure in Iraq"); John Tagliabue, *Europe's Fears Said to Affect Vote on Iraq*, N.Y. TIMES, Oct. 17, 2003, at A12; MCWHINNEY, *supra* note 278, at 76; *see also* Marquis, *supra* note 279, at A1 (quoting Stanley R. Sloan, former Europe specialist at the Congressional Research Service as saying "[t]he Europeans have a bit of a dilemma, they don't want the United States to fail in Iraq because it would hurt their interests as well").

296. S.C. Res. 1511, ¶¶ 4, 7; *see also supra* note 277 and accompanying text.

297. S.C. Res. 1511, ¶¶ 3, 5 (emphasis added).

298. *Id.* ¶ 6.

299. *Id.* ¶ 13.

300. S.C. Res. 1546, *supra* note 57, pmbl., ¶ 2; *supra* notes 281-283 and accompanying text.

301. S.C. Res. 1546, *supra* note 57, ¶¶ 1, 4. The proposed timetable included "convening of

In the meantime, the UN Assistance Mission for Iraq (UNAMI) would, inter alia, assist in election preparations, reconstruction, and development.[302] Resolution 1546 also "reaffirmed" the authorization of the multinational force after recognizing the Interim Government's request that the force remain in Iraq.[303] The UN Security Council later "reaffirm[ed]" Iraq's "independence, sovereignty, unity and territorial integrity" in Resolution 1557 while extending the mandate of UNAMI.[304]

The U.S. declared the end of its occupation on June 28, 2004 after a "formal handover of sovereignty" to the Interim Government of Iraq.[305] Despite the surrounding fanfare, this handover is best viewed as only a milestone on the road toward restoration of full sovereignty.[306] The nascent governing ability of the Interim Government was extremely limited, and the country was still occupied by 160,000 foreign troops.[307] Furthermore, the Interim Government was unable to change CPA regulations.[308] This state of affairs led some legal scholars to suggest that Iraq remained, at least to some extent, under occupation.[309] More important, however, than the precise status of the U.S. under the traditional law of occupation or the terminology used in Security Council resolutions on Iraq, the partial handover of sovereignty in June 2004 did

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a national conference" and then direct democratic elections by December 31, 2004 "if possible, and in no case later than" January 31, 2005. The product of those elections, the Transitional National Assembly, would then form a Transitional Government of Iraq and draft a permanent constitution "leading to a constitutionally elected government" by December 31, 2005. *Id.* ¶ 4.

302. *Id.* ¶ 7.

303. *Id.* ¶ 9.

304. S.C. Res. 1557, pmbl., U.N. SCOR, 5020th mtg., U.N. Doc. S/RES/1557 (Aug. 12, 2004).

305. The term "formal handover of sovereignty" was used by various media outlets. *See, e.g.*, Tarek El-Tablawy, *Surprise Sovereignty Announcement Catches Reporters, World Leaders Off Guard*, ASSOCIATED PRESS, June 28, 2004.

306. Roberts, *supra* note 59, at 46.

307. *See* James Sterngold, *Iraq Braces for Sovereignty Shift: Limited Power: Daily Decisions Must Be Negotiated With U.S.*, S.F. CHRON., June 27, 2004, at A1 (explaining that the interim Iraqi government "will have far from total authority over its security, its airspace, much of the nation's north, at least some of its war prisoners and some aspects of its international financial relations," and that much of the reconstruction funds for Iraq are also outside of the government's control); Jeffrey Gettleman, *"There Is No Way to Turn Back," New Iraqi President Declares*, N.Y. TIMES, June 28, 2004, at A1 ("The new Iraqi government . . . is barred from making long-term policy decisions and will not control the 160,000 foreign troops remaining in the country . . . . The government also cannot reverse any of the laws passed by American administrators during the occupation.").

308. The CPA's efforts to extend its reforms past the end of the occupation is another telltale sign of the new model of occupation. *See supra* note 192 and accompanying text. For more on CPA measures taken "to ensure [its] enactments would remain valid after the occupation ended," see Fox, *supra* note 2, at 227-28.

309. *See* BENVENISTI, *supra* note 3, at xv ("[T]o the extent that the United States and other foreign troops operating in Iraq continue to wield effective control over Iraqis and Iraqi property, they are bound by [the law of occupation]."); *see also* McCarthy, *supra* note 1, at 44 n.2 ("It is arguable that, at least in some respects, the occupation has continued beyond 28 June 2004."); Roberts, *supra* note 59, at 46-48 (concluding that, because occupation is a question of fact, "it is the reality, not the label, that counts," so "[t]here could be numerous circumstances after 28 June . . . [in which] the law on occupations would again be applicable").

not absolve the U.S. of its responsibility and obligations toward Iraq in the eyes of the international community.[310]

IV.
INADEQUACIES IN THE DE FACTO MODERN LAW OF OCCUPATION

In general, the fact that occupations rarely comply with the international law of occupation results in few obvious negative consequences. Yet the era of multilateral occupation is not without its flaws. This portion of the Article examines the implications of the lack of legal status of the de facto modern law of occupation, whether the de jure international law of occupation should be renegotiated, and how the international community might better protect inhabitants of occupied territory.

A. Is This Really "Law?"

The de facto modern law of occupation provides a powerful check on the actions of occupying powers, but it is far from ideal. The simple fact that modern occupations are regulated by a process not based in textual law results in less predictability and fewer means of enforcement of international norms in certain conditions of occupation. Given present trends, some or all of the norms comprising the emerging de facto modern law of occupation may crystallize into customary international law in the future, but that has not occurred to date.

Much of state practice in modern occupation is regulated by policy choices rather than positive law. The de facto modern law of occupation is less "law" and more an "operational code"[311] or mix of state practice and international norms emerging to replace the outdated de jure international law of occupation. Modern occupations demonstrate a move from a positive law framework to a customary framework in which their legitimacy is derived from meeting a general set of international norms and expectations principally derived from international human rights law. These modern norms related to occupation are sometimes amorphous and have not been codified.

The state practice described in this Article does not appear to constitute

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310. *See supra* note 191 and accompanying text. The U.S. would have faced widespread criticism if it were to have abandoned its nation-building efforts in Iraq at that point. A failed occupation and spurned responsibilities would have further tainted the legitimacy of the military intervention, and the international backlash the U.S. would have incurred with such a move would have come at a high political cost in terms of other U.S. interests. Similarly, the international community still believed the U.S. had responsibilities to Afghanistan despite the fact that sovereignty was formally transferred to an interim government shortly after the military intervention. *See supra* note 199 and accompanying text.

311. An "operational code" constitutes actual behavior by elites, which can sometimes diverge substantially from the law's "myth system" (its textual and formal legal principles). *See generally* W. MICHAEL REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS 15-36 (1979). The textual law of occupation is predominantly "mythic," while the practice herein termed the "de facto modern law of occupation" is more properly conceived of as an "operational code" that is at considerable odds with the formal law of occupation.

customary international law. Customary international law springs from "a general and consistent practice of states followed by them from a sense of legal obligation" (*opinio juris*).[312] With particular respect to the law of war, the Nuremberg Tribunal noted that such law "is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition. . . . This law is not static, but by continual adaptation follows the needs of a changing world."[313] At the present time, however, it is questionable whether the state practice exhibiting the norms herein labeled the "de facto modern law of occupation" is of "sufficient density, in terms of uniformity, extent and representativeness"[314] to lay a claim to customary status. Of greatest importance, these budding norms do not constitute *opinio juris* because states generally do not believe them to constitute law and do not conform to them out of a sense of legal obligation.

Occupants follow these modern norms for policy reasons (most of which are self-interested), not because such norms are perceived as carrying legal force. For instance, the Bush Administration's belated embrace of nation-building in Afghanistan was due to a self-interested calculation that multilateral nation-building would allow the U.S. to share the burdens of occupation and would better prevent the resurgence of a safe haven for terrorists. The "invisible hand" worked with similar effect in Iraq, and independent U.S. policy goals (namely democracy promotion in the Middle East[315]) pushed for the same result. In neither case did the U.S. act out of a sense of legal obligation. Nonetheless, these norms of democratic nation-building in occupation are gaining momentum and may one day instill a sense of legal obligation, particularly as modern occupations continue to morph into experiments in nation-building and as the various precepts of international human rights law underpinning these norms (such as the emerging right to democracy) continue to increase in legal force.[316]

The lack of legal status of the de facto modern law of occupation is problematic because it undermines enforcement of those norms. The primary means of enforcement of international will and norms in modern occupation lies in the withholding of political and material support from occupations. History

312. RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); *see generally* Meron, *supra* note 17 (discussing the process by which law becomes customary).

313. The Nurnberg Trial, 6 F.R.D. 69, 109 (Int'l Mil. Trib. 1946).

314. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES, at xxxvi-xxxix (2005).

315. *See, e.g.*, David Jackson, *Skeptics Greet Bush's Hopes for Mideast as He Heralds Strides Toward Democracy, Some Analysts Take Road Less Certain*, DALLAS MORNING NEWS, Mar. 9, 2005, at 1A.

316. A time may come when, even independent of the necessity of an occupying power to multilateralize an occupation, a unilateral occupation may be perceived as illegitimate per se, just as unilateral humanitarian and regime change interventions are viewed by many as illegitimate per se. With respect to humanitarian intervention, see FINNEMORE, *supra* note 152, at 78 ("To be legitimate in contemporary politics, humanitarian intervention must be multilateral.").

and common sense indicate that the risk of international opprobrium will not always be an adequate regulator of state behavior when states perceive national security or other vital interests as hanging in the balance. Though the modern de facto norms of occupation and the free market of international resources may often bring about the desired result in the end, occupants with unilateral national security needs and the ability to withstand international criticism can "go it alone." In such cases, states may trump the power of the "invisible hand" by providing the necessary resources themselves or disregarding international expectations as to the conduct and desired result of the occupation. Skeptics of international law will be quick to note that lack of enforcement is a fate often met even by areas of well-recognized and clearly codified international law (as exemplified by the international law of occupation). Nevertheless, stronger legal status of the norms of modern occupation would at least open the door to more effective international monitoring, including by the UN Security Council and relevant human rights bodies.

The de facto modern law of occupation has only a limited ability to provide ex ante guidelines for what actions may be expected and acceptable in modern occupations. This is the case because much of modern state practice in occupation is contextually negotiated in an ad hoc manner against a backdrop of emerging and changing norms. For those reasons, occupants have no place to look for any definitive answers regarding what constitutes acceptable practice in an occupation and instead must make a case-by-case policy decision based on what is practicable and politically feasible.

B. The Path Ahead

This Article has identified the contours of a new model of occupation and described a set of norms and international interactions that determine the legitimacy of modern occupations in a contextual and ad hoc manner. But what are the normative implications? And what is to be done with this new knowledge?

Few tears should be shed for the forlorn law of occupation. One's assessment need not be starry-eyed to draw this conclusion, for despite the numerous obstacles to successful nation-building in modern occupations, the new model represents greater opportunities to advance human dignity than does the traditional model (and law) of occupation. These new expectations of occupations—mainly the responsibility to reconstruct war-torn societies and create democratic institutions—help create what Professor Thomas Franck has described as "the opportunity for all persons to assume responsibility for shaping the kind of civil society in which they live and work."[317] Moreover, steadfast clinging to the law of occupation would constitute a disservice to occupied populations to the extent that unrepresentative institutions are

317. Franck, *supra* note 65, at 79.

preserved, human rights are not fully protected, and opportunities to lay the groundwork for meaningful economic development are foregone.[318]

The international community should be undeterred by the de facto modern law of occupation's shortcomings because these principles of occupation are more in line with modern norms and policy goals than the traditional law of occupation. The alternative—application of the law of occupation to humanitarian and regime change interventions—is both unrealistic and counterproductive. As Professor Michael Reisman explains, "[o]ne should not seek point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription, and with appropriate regard for the factual constellation in the minds of the drafters."[319] The cause of international law and the goals of the international community (particularly in protecting occupied populations) are not served by fictional or hortatory invocation of the law of occupation in situations for which it was not designed.

In starker terms, the frank realization that modern occupations occur in a partial vacuum of legal guidance is more genuine and constructive than pretending the law of occupation provides relevant guideposts to modern day occupants. The superior approach would be to develop the de facto modern law of occupation so that it may more clearly provide meaningful criteria to guide—as well as gauge the legitimacy and lawfulness of—modern occupations. The pressing question then becomes, as it would in any similar analysis of a new trend in law, how to embrace the positive aspects of these new norms of occupation while mitigating those that are undesirable.

1. The Prospect of Formal Renegotiation

Should the international law of occupation be formally renegotiated to better fit the reality of multilateral occupations? The object and purpose of having a law of occupation has changed from protecting the self-interest of ousted sovereigns and occupying powers to protection of the occupied population.[320] Perhaps a superior approach would be to make this explicit by formally changing and clarifying the applicable law rather than trying to stretch an old shoe to fit a foot of a different size.

Unfortunately, efforts to formally renegotiate and thereby "update" the law of occupation would most likely be counterproductive at this time. First, renegotiation would be a complicated endeavor that could actually weaken existing protections if current humanitarian and human rights provisions were discarded or undermined.[321] The placement of the law of occupation within the

318. For background on the international law of occupation's "failure to adjust to modern economic realities," see generally Tadlock, *supra* note 138.

319. W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 644 (1984).

320. *See supra* Section III.B.5.

321. *See* Yves Sandoz, Int'l Comm. of the Red Cross, Statement on General Problems in Implementing the Fourth Geneva Convention: Statement on Occupied Territories at the Meeting of

broader Geneva framework should give additional pause to supporters of renegotiation. Absent a surgeon's precision, parsing the relevant provisions on occupation from the interwoven and overlapping Geneva tapestry risks undercutting the strength and clarity of unrelated provisions of international humanitarian law.

Second, there would surely be disagreement as to whether, when, and how to draw legal distinctions between the old and new models of occupation given that instances of the "old model" (that is, non-humanitarian or regime change interventions in which more of the interstitial law of occupation might be appropriate) may continue to occur.[322] Many of the issues at the heart of the new model of occupation are potentially (or in some cases inherently) controversial, including the lawfulness of humanitarian intervention,[323] the propriety of regime change warfare, the emerging right to democracy, the definition of sovereignty, and the applicability of international human rights law to armed conflict. These issues could sidetrack and divide countries, just as treatment of non-state actors and other controversial topics sparked serious rifts in negotiation and impeded ratification of Additional Protocol I to the Geneva Conventions.[324]

Third, the context of modern international politics would likely poison the

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Experts in Geneva (1998) (transcript *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/F03787EF09362E78C1256B66005C519D). Yves Sandoz stated it was the ICRC's position "that a general review of the Conventions . . . would do more harm than good." *Id.* Specifically, Sandoz contended it is "far from certain whether a consensus could be reached that would improve the [Fourth Geneva] Convention's provisions," and renegotiation "would be . . . a lengthy period during which the existing standards would be weakened by the fact that they had once again been opened to challenge." *Id.* Sandoz was also careful to remind potential proponents of revision that "we must not forget the sheer length of such a process, involving as it does the deliberations of experts and the various sessions of a diplomatic conference, followed by the long period needed for all States to ratify the resulting treaty." *Id.*

322. *See supra* note 49.

323. Interestingly, there are parallels between the predicament of modern occupation and the state of international law as to humanitarian intervention. As an example, the UN High-Level Panel on Threats, Challenges and Change recently ventured "criteria of legitimacy" by which the Security Council might decide to authorize the use of force on a case-by-case basis. High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, U.N. GAOR, 59th Sess., U.N. Doc. A/59/565 at 85 (2004), *available at* http://www.un.org/secureworld. These principles would look "not to whether force *can* legally be used but whether, as a matter of good conscience and good sense, it *should* be." *Id.* at 57. Under these principles, the international community might view a particular humanitarian intervention as lawful and legitimate even though technically unlawful under the UN Charter. The panel acknowledged that "[t]he effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy." *Id.* Such is also the case for modern occupations, as they may be considered legitimate and lawful (according to the de facto modern law of occupation) even though unlawful as per the international law of occupation.

324. *See supra* note 22 and accompanying text. For readings describing some of the more contentious issues regarding Additional Protocol I, see generally Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 123-56 (1985); George H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. J. INT'L L. 693 (1986).

atmosphere of any negotiation.[325] Preoccupation with Israel and the situation in the West Bank (or other collateral issues) would likely dominate the discussions, as it has on numerous occasions in the United Nations General Assembly and international conferences.[326] Geopolitical undercurrents and anti-U.S. sentiment stemming from such issues as the invasion and occupation of Iraq (including prisoner abuses at Abu Ghraib prison), the practice regarding (and treatment of) detainees in Guantánamo Bay, Cuba, or more general distrust by some states of U.S. motives in the Middle East could also bog down negotiations.[327] Discussion would likely be thrown off course by other substantive issues as well, including debate surrounding provisions in the law of occupation related to the death penalty—an issue in which there is a deep divide between the policy of the U.S. and that of the vast majority of states.[328]

Fourth, the opportunity cost of formally broaching this topic may be too high at this time. To date, the demise of the law of occupation has had a relatively limited negative impact because of the ascendance of the "invisible hand." Therefore, finite diplomatic capital would be better spent on more pressing issues.

In sum, it appears doubtful that the international community has the necessary interest or enthusiasm to formally amend or renegotiate the law of occupation.[329] Hopefully, though, the future will not bring additional instances of half-hearted invocation of the law of occupation (as seen in Security Council discussions pertaining to Iraq) in the search for some meaningful law to govern occupation in the face of uncertainty and in light of dim prospects for agreement on a cohesive set of alternative rules.

2. Clarification of UN Duties

The ambiguity in application of the law of occupation to the UN means there is no readily apparent minimum baseline of protections afforded to

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325. It should be noted that some authors blame a "politicized atmosphere" for the failures of the Additional Protocols of 1977. Alfred P. Rubin, *Is the Law of War Really Law?*, 17 MICH. J. INT'L L. 643, 661 (1996) (book review).

326. *See, e.g.*, Editorial, *Twisted Racism*, BOSTON GLOBE, Sept. 5, 2001, at A18 (describing how the U.S. and Canada withdrew from the World Conference Against Racism in 2001 "because Arab countries and Iran persisted in presenting the Israeli-Palestinian struggle over land and national rights as a racial conflict").

327. For additional background on the "international uproar" following revelations of prisoner abuse at Abu Ghraib prison, see, for example, David Enders, *U.S. Torture Nothing New, Say Iraqis: Pictures of Troops and their Prisoners Shocked the World, But Many in the Country Are Not Surprised*, S. CHINA MORNING POST, May 5, 2004, at 11. For background on international displeasure with U.S. refusal to label detainees at Guantánamo Bay as prisoners of war, see, for example, Tony Allen-Mills, *Most POWs "Will Be Sent Home,"* THE AUSTRALIAN, Jan. 21, 2002, at 6.

328. For background on international disagreement over the death penalty, see generally Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002).

329. KELLY, *supra* note 8, at 96.

inhabitants of UN-occupied territory.[330] Therefore, the United Nations should clarify its duties and obligations toward the inhabitants of territory under its control.[331] In doing so, the UN should blend the relevant components of the international law of occupation, international human rights law, the UN Charter, the de facto modern law of occupation, and any other apposite bodies of law.

Clear articulation of UN duties as an occupying power would strengthen the protection of people in UN-occupied territory. Clarity would reduce the possibility of violations of human rights by UN forces and civilian personnel,[332] and perhaps lessen the likelihood of rights violations in UN-declared "safe havens."[333]

The broader interests of the UN and international community would also be served by a clarification of UN responsibilities in occupied territory. The UN risks advocating a double standard in criticizing the administration of occupations by third parties when UN-occupied territory is not administered

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330. *See supra* Section III.B.4.b.

331. Articulating the minimum humanitarian baseline and other standards applicable to UN-controlled territory should be comprehensive rather than clarified piecemeal through ad hoc Security Council resolutions limited in application to individual missions. First, ambiguities would remain as to the application of the law of occupation when the UN finds itself to be an occupying power in a mission acting under Chapter VI of the UN Charter or through occupation by consent. Second, a more comprehensive articulation of the law applicable to UN occupation might better avoid the political nuances of particular occupations (as seen in the UN Security Council's inconsistent application of the law of occupation to the U.S.-UK occupation of Iraq) and would, by definition, apply to a broader swath of UN occupations. Third, overarching guidelines would better identify the threshold of application (when the UN's responsibilities toward an occupied population are incurred), which would provide greater predictability for both international forces and inhabitants of UN-controlled territory.

332. Clearer delineation of responsibilities of UN forces and personnel across the board would eliminate any gaps that may exist as to the obligations of UN civilian personnel and associated personnel. *See supra* notes 120-121 and accompanying text. Clarified duties in occupation would also add much needed certainty to, inter alia, issues of arrest and detention of persons in UN-controlled territory. *See generally* EXPERT MEETING ON MULTILATERAL PEACE OPERATIONS, *supra* note 55, at 3, 16. Additionally, such an initiative would dovetail current efforts to prevent and provide accountability for sexual abuse and other misconduct by peacekeeping forces in UN-controlled territory. *See generally* The Secretary-General, *Comprehensive Review of the Whole Question of Peace-keeping Operations in All Their Aspects, A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, U.N. GAOR, 59th Sess., U.N. Doc. A/59/710 (Mar. 24, 2005). Clearer UN duties may also contribute to the resolution of certain issues regarding the immunity of UN personnel. *See generally* Frederick Rawski, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103 (2002).

333. For relevant background on the application of the law of occupation to UN "safe havens," see KELLY, *supra* note 8, at 155-56. Kelly argues that the Fourth Geneva Convention applies to "most" safe havens in which there is "no consent or formal agreement with the State in which the action is taken," such as in Northern Iraq during Operation Provide Comfort following the Persian Gulf War, and Southwest Rwanda in Operation Turquoise in 1994. *Id.* He contends that by acknowledging application of the Fourth Geneva Convention, "solutions would have been available to perplexed commanders and the international community regarding the regimes and relationships that should have applied within these areas." *Id.* A clear statement of UN duties would end ambiguity as to UN obligations in these non-consensual safe areas as well as the equally, if not more disturbing, ambiguity as to what responsibilities the UN has in safe havens and similar operations that are consensual or by agreement with the state.

according to any clearly prescribed parameters.[334] Moreover, the perception that the UN does not abide by the laws of war undercuts the UN's legitimacy and can endanger UN peacekeepers; the articulation of standards of occupation may help mitigate this view.[335] There may also be a "spillover effect," for "if we accept that UN forces are not bound by the law of occupation, then other regional organizations, intervening in similar contexts, will also be considered not to be bound by international humanitarian law."[336]

Clarification of norms of occupation applicable to the UN is consistent with the UN's purposes of developing and upholding international law[337] and "promoting and encouraging respect for human rights."[338] To borrow an argument from those who would ask the UN to clarify application of the laws of war across the board, clearer duties in occupation "would be consistent with the fundamental purposes underlying humanitarian law, namely, to mitigate the suffering caused by armed conflict, regardless of the legal character of the entities engaged in hostilities."[339] Indeed, UN discussion and adoption of a clear humanitarian baseline in UN-occupied territory might advance the observance and internalization of relevant norms by UN member states.[340]

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334. It is interesting to note that, though the UN has not clarified the applicability of the law of occupation to its forces and personnel, the organization does expect (as per the terms of the Convention on the Safety of United Nations and Associated Personnel) that captured or detained UN and associated personnel "shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949." Convention on the Safety of United Nations and Associated Personnel, *supra* note 102, art. 8.

335. *See generally* Tittemore, *supra* note 97, at 103, 105 (arguing that "less than strict adherence" to humanitarian law by UN forces could undermine the UN's legitimacy, "jeopardize the effectiveness of future efforts to maintain or restore international peace and security," and could even "encourage other parties to armed conflicts to disregard humanitarian law vis-à-vis U.N. forces").

336. Sassòli, *supra* note 118, at 34.

337. *See* U.N. Charter pmbl., art. 1 (stating that a primary purpose of the UN is to settle international disputes "by peaceful means, and in conformity with the principles of justice and international law"), art. 13 (calling on the UN General Assembly to "encourag[e] the progressive development of international law and its codification"); *see also* G.A. Res. 59, *supra* note 102 (noting that the UN General Assembly "[c]onsider[s] that the codification and progressive development of international law contributes to the implementation of the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations"); Ratner, *supra* note 135, at 592-93 (explaining the manners in which the "text or context" of the UN Charter recognize the UN Security Council's role in the "promotion of international law"). UN bodies and organizations have called on various parties to armed conflict to respect humanitarian law, and UN bodies have also called on the UN to take an active role in ensuring respect for that body of law. *See, e.g.*, World Conference on Human Rights, *Vienna Declaration and Programme of Action*, June 14-25, 1993, ¶ 96, U.N. Doc. A/CONF/157/24 (pt. 1) (1993), *reprinted in* 32 I.L.M. 1661, 1687.

338. U.N. Charter art. 1.

339. Tittemore, *supra* note 97, at 103.

340. Implementation of the norms of modern occupation through participation in UN operations and related practices (e.g., in Status-of-Forces Agreements and field manuals) could aid in the internalization of those norms by individual peacekeepers and their national contingents. For background on the importance of norm internalization in the context of the advancement of human rights, see generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602 (1997) (book review); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998). The phenomenon of norm internalization

Finally, there is no foreseeable downside that might outweigh the benefits of clarification.[341] In short, the UN depends to a great extent on international law for its relevance and importance and, therefore, should not risk endangering the rights of inhabitants of occupied territory—or the perception of acting above international law—by occupying territory in a poorly defined legal environment.

3. Regulation of State Occupants

The more difficult question is how to encourage the development and embrace of the desirable norms of the new model of occupation among state occupying powers. To that end, there are at least two starting points, both of which offer the opportunity to make incremental headway in clarifying and bolstering the emerging norms of the de facto modern law of occupation.[342]

First, the UN Security Council should use its ability under Chapter VII of the UN Charter to clarify the applicable norms and international expectations for each occupation it blesses.[343] This approach builds on the case of the occupation of Iraq but requires a more forthright and explicit evaluation of what norms shall apply to the new model of occupation. Invoking the law of occupation as the path of least resistance while simultaneously mandating inconsistent goals is disingenuous. The Security Council should instead clarify and enshrine in its resolutions the relevant international expectations of modern occupations. Over time, this process would promote and strengthen the de facto modern law of occupation and could speed the process by which some or all of such norms harden into customary international law or are codified.

This tactic also has severe limitations. The case of Iraq indicates that agreement on sufficiently precise legal duties for politically contentious

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with respect to humanitarian law has been previously witnessed on a national level, as evidenced in didactic texts. *See, e.g.*, U.S. ARMY, THE LAW OF LAND WARFARE: A SELF-INSTRUCTIONAL TEXT (year unknown) ("The United States, like almost all other countries, has signed the Hague and Geneva Conventions. We have solemnly pledged to observe all the provisions of these treaties. As a matter of honor and self-respect, we must fulfill that pledge.").

341. The UN has argued in response to general calls for clarification of the application of the laws of war that hard and fast rules applying the laws of war to the UN would negatively affect the protected noncombatant status of UN peacekeepers. *See supra* note 122 and accompanying text. Clarifying a baseline of humanitarian protections for inhabitants of UN-controlled territory would have no effect on the noncombatant status of UN peacekeepers.

342. Though discussed in the context of state occupants, these tactics could also be applied in part or in full to UN-controlled territory.

343. Other authors have been similarly attracted to the Security Council's power of fiat when acting under Chapter VII, and some have also recommended a more active Council role in occupation. *See* Vité, *supra* note 109, at 30-31 (proposing that Chapter VII should be used to apply and adapt the law of occupation to UN transitional administration of territory); Scheffer, *supra* note 32, at 851 (arguing that the law of occupation should be retained to "discipline aggressor armies and hold them accountable for their actions on foreign territory," yet "liberating armies that operate with international authority, advance democracy, and save civilian populations from atrocities should be regulated by a modern occupation regime that can be created under the UN Charter"); Brown, *supra* note 61, at 60 (arguing that action by the Security Council under Chapter VII "provides the best path towards reconciling" humanitarian law and international human rights law in occupation).

occupations may be problematic.[344] Absent precision of mandate, ambiguity will persist as to how Security Council directives interrelate with provisions of the law of occupation not expressly addressed in the resolution. Additionally, states may still act and occupy territory outside of a UN framework (though such an approach would limit their ability to get international assistance), and ad hoc Security Council resolutions would not provide an overarching legal framework or ex ante guidance for future occupying powers and occupied populations.

Despite its potentially awesome lawmaking authority, the Security Council is at heart a political body that often reverts to the lowest common denominator of international opinion.[345] Therefore, member states may still get sidetracked by the same issues and roadblocks that make formal renegotiation of the law of occupation unpalatable.

Nevertheless, even gradual advancement of select norms from the de facto modern law of occupation would be a step in the right direction, as it would progressively crystallize, enlarge, and advance international expectations as to the conduct of occupants.[346] Moreover, this proposed exercise would often require nothing more than channeling norms that have been consistently embraced in previous Security Council resolutions (such as the need for representative government and protection of human rights) to more specific application to occupation.[347]

Second, relevant elements of the international human rights monitoring apparatus should be selectively applied to modern occupations. As discussed above, international human rights law is being increasingly applied to situations of occupation.[348] In accordance with that trend, it would be appropriate to allow for greater monitoring of certain components of occupations by relevant human rights treaty bodies. Alternatively, unique human rights monitoring mechanisms could be created in an ad hoc manner (as seen in the Bonn Agreement in Afghanistan[349] and in Security Council Resolution 1483 in Iraq[350]). Either approach could be effected through Security Council resolutions, or more informally through *quid pro quo* negotiations between occupants and would be

344. *See supra* notes 260-262 and accompanying text; *see also* Brown, *supra* note 61, at 65-66 (criticizing Resolution 1483 for not identifying specific duties or providing for accountability of the occupying powers in Iraq).

345. *See* Ratner, *supra* note 135, at 591 (describing the Security Council as "alternatively robust and paralyzed").

346. *See id.* at 593 ("[W]hen a body as politically significant as the Security Council—one in which the most (or most of the most) powerful states must agree in order for it to decide a matter—addresses, even indirectly, the legal issues underlying many international disputes, it cannot but influence how states regard the contours of the relevant norms.").

347. *See supra* notes 57, 66-67 and accompanying text.

348. *See supra* notes 56-58 and accompanying text.

349. *See supra* notes 212-213 and accompanying text.

350. Security Council Resolution 1483 created a "Special Representative for Iraq" as separate from the UN-blessed occupation and charged the position with, among other duties, "promoting the protection of human rights." S.C. Res. 1483, *supra* note 67, ¶ 8; *see also* Benvenisti, *supra* note 37, at 36-37.

supporters of the occupation.

V.
CONCLUSION

The era of multilateral occupation largely disregards the tenets and goals of the international law of occupation. The new model of occupation is opting instead for an inchoate set of state practices based on nation-building and the coaxing of international support through the observance of international norms. Rather than mourn the irrelevance of the international law of occupation or attempt a formal renegotiation, the best way forward is to accept the general de facto framework of modern occupations and to take measures to ensure that those human rights and other provisions of the law of occupation that remain relevant are indeed applied. Only by recognizing these international developments and understanding the policy goals and legitimacy needs driving modern occupations can we better understand and shape the conduct of occupation.